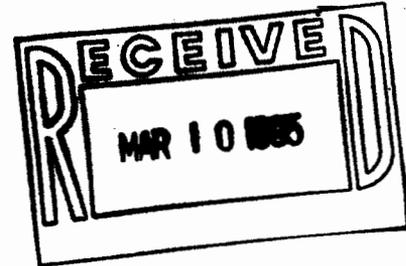




Department of Energy  
Carlsbad Area Office  
P. O. Box 3090  
Carlsbad, New Mexico 88221

*Barbara*  
*file WIPP*  
ENTERED

JAN 9 1995



The Honorable Gary Johnson, Governor  
State of New Mexico  
Office of the Governor  
State Capitol  
Santa Fe, New Mexico 87503

Dear Governor Johnson:

I have recently received several letters from the Assistant Attorney General for the State of New Mexico that assert, or imply, that the Attorney General's Office (AGO) is the state agency responsible for independent technical review of the Waste Isolation Pilot Plant (WIPP). The Department of Energy, Carlsbad Area Office (DOE-CAO) currently funds several state agencies to conduct independent technical reviews and monitoring: the New Mexico Energy, Minerals, and Natural Resources Department; the New Mexico Environment Department; and the Environmental Evaluation Group, as well as New Mexico's share of the Western Governors' Association and the Carlsbad Environmental Monitoring and Research Center. The enclosed table outlines the level of funding and scope of review for these groups for FY94 and FY95.

A number of letters expressing conflict over the technical review of WIPP have been exchanged between the AGO and other state agencies. Enclosed for your information is a copy of a letter from me to Mr. Lindsay Lovejoy, New Mexico Assistant Attorney General, which denies his latest request for funding for the AGO to implement additional technical review of the WIPP. While the DOE-CAO remains supportive of and committed to the State's strong, active involvement in the independent regulatory and technical review and monitoring activities requisite to exercise the State's public health and safety protection responsibilities, I do not see how creating another duplicative state-level technical review entity furthers the State's objectives. Rather, it could serve to limit the State's objectives by spreading the expenditure of scarce resources such that definitive, in-depth and truly independent technical reviews are not accomplished. Additional reviews certainly would not be considered sound financial management from the perspective of the DOE-CAO.

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JAN 9 1985

The Honorable Gary Johnson

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The DOE-CAO wishes to continue its close, cooperative working relationship with the State on all issues related to the WIPP and to meet those legislative and regulatory mandates which call for DOE funding of relevant state activities. It would be most helpful to the DOE-CAO if you would provide us with your view as to how the necessary independent technical review activities could be most cost-effectively performed on behalf of the State. Please clarify for me which state agency speaks for your administration on this important matter.

I will be happy to meet with you at your convenience to discuss this issue. Please contact me at (505) 234-7300 if you have questions or would like to schedule a meeting to discuss this further.

Very truly yours,

  
George E. Dials  
Manager

Enclosures

cc:

Tom Udall, Attorney General  
Tom Grumbly, EM-1



Department of Energy  
Carlsbad Area Office  
P. O. Box 3090  
Carlsbad, New Mexico 88221

JAN 9 1995

Mr. Lindsay A. Lovejoy, Jr.  
Assistant Attorney General  
State of New Mexico  
P. O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

Dear Mr. Lovejoy:

This letter is a response to your request for support from the Department of Energy, Carlsbad Area Office (DOE-CAO) per your letter of November 23, 1994.

As previously discussed with you, the DOE-CAO continues to believe it is inappropriate for this office to fund another State of New Mexico entity for technical reviews. We agree that the DOE-CAO has certain responsibilities under both the WIPP Land Withdrawal Act, Pub.L.102-579 (WIPP LWA), and under paragraph III (D) (2) (f) of the 1982 Supplemental Stipulated Agreement (SSA). However, as described in Attachment A, the DOE-CAO is complying with the requirements stipulated in these documents.

Previously (as well as in the attachments), the DOE-CAO has clarified its responsibilities and has demonstrated its compliance with the SSA and the WIPP LWA through funding of other State entities for independent technical reviews (see Attachments A-C). Your November 23 letter, stated that the New Mexico Environment Department and the Energy, Minerals, and Natural Resources Department, and the Environmental Evaluation Group (EEG) "cannot provide the needed technical assistance" and are not conducting the necessary technical reviews. You also stated that none of those agencies has agreed to provide your office with technical support; yet the EEG has reiterated on a number of occasions including three letters from Dr. Robert Neill to you dated October 31, November 2, and December 22, its desire to continue to provide your office with unbiased, independent technical review of the WIPP project. The DOE has provided funding to the State through the agencies listed in Attachment C. These activities comply with requirements of the SSA and LWA. Further, it is our understanding that technical review work conducted and reports/comments prepared by one state agency are readily available to other state agencies. Therefore, these results should be readily available to the AGO.



Mr. Lindsay A. Lovejoy, Jr.

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Therefore, the DOE-CAO will not provide funds to the AGO for unique technical reviews in addition to those already provided to other agencies of the State. Your request for funding for the AGO in the amount of \$700,000 cannot be supported; the DOE-CAO must exercise sound judgment in its expenditure of limited public funds while fulfilling its responsibilities to all its stakeholders.

If you wish to discuss this further, please contact my Deputy Manager, Mr. Vernon Daub at (505) 234-7337.

Sincerely,

  
George E. Dials  
Manager

CC:  
Tom Udall, Attorney General  
Tom Grumbly, EM-1

1/6/95

## Attachment A

### 1. The WIPP Land Withdrawal Act (Pub.L.102-579)

The decision of the DOE-CAO not to fund the requested level of \$700,000 for the AGO will not impair the State of New Mexico ("State") from effectively participating as a stakeholder in critical EPA rulemakings concerning the WIPP. The DOE-CAO analysis of the WIPP LWA indicates that there are ten sections concerning cooperation or impacts with the "State", (See Attachment B). The DOE-CAO is currently in compliance with these provisions or will comply with any provision becoming operational in the future. Examination of any of these provisions does not reveal that the DOE-CAO is required to fund another technical review group in the "State". Had Congress intended to secure funding for additional independent review in the "State", it would have made such an appropriation expressly in the WIPP LWA similar to what was accomplished for the U.S.E.P.A. (See Attachment B, §23). It is my view that the "State" is eminently represented to conduct technical reviews of WIPP activities through the Environmental Evaluation Group (EEG).

The EEG is supported by the DOE through a contract between DOE and the New Mexico Institute of Mining and Technology (NMIMT). The EEG reports directly to the President of the NMIMT. The disciplines represented by the EEG staff include, but are not limited to, geology, hydrology, health physics, environmental engineering, probability risk analysis, mining engineering, and radiation chemistry. The staff members created pursuant to Pub.L.100-456 (102 stat.2073) are employed at Federal Government grades of GS-13 through GS-16 and are highly qualified and recognized in their fields. The DOE-CAO has funded the EEG in the aggregate amount of \$3,274,000 for FY94 and FY95. The total amount of funding for the "State" for FY94 and FY95 amounts to \$10,255,000 and \$8,090,000, respectively. (See Attachment C). To fund the AGO for the creation of another independent technical review group cannot be justified in the exercise of sound judgment within the scope of the DOE-CAO budgetary limitations.

### 2. The 1982 Supplemental Stipulated Agreement

You further assert in the above referenced letter that the DOE-CAO will be noncompliant with paragraph III (D)(2)(f) of the 1982 Supplemental Stipulated Agreement (SSA) for failure to negotiate for an appropriate state review capability independent of DOE. The discussion below will point out that your statement is not supported in fact. The paragraph cited above

provides that:

The DOE agrees and stipulates that, at a minimum, DOE will continue to fund the activities of the State's Environmental Evaluation Group through September 30, 1985 in its present organizational structure in the approximate amount of \$500,000 annually.

The DOE recognizes the State's desire to continue the State review capability and further agrees to negotiate for appropriate state review capability independent of the DOE beyond 1985 for the full operational life of WIPP through and including the decontamination and decommissioning stages and post-operational stages of WIPP. However, because of the difficulty in accurately predicting the full nature and scope of future operational activities of WIPP beyond 1985 the parties agree that the extent of funding and organizational structure of such an independent State review capability will be the subject of annual or other periodic negotiation between the State of New Mexico and DOE. The first of such negotiations will commence no later than 60 days prior to October 1, 1985.

The SSA concerns addressed, *inter alia*, emergency response preparedness, transportation monitoring of the WIPP facility waste, the WIPP facility environmental monitoring by the "State", etc. The monies DOE-CAO have expended in support of the SSA clearly demonstrate that there has been full compliance with the SSA. (See Attachment C).

The language of the referenced paragraph of the SSA makes quite clear the fact that independent "State" review prior to September 30, 1985, was being performed by the EEG. Because of the difficulty, at the time the SSA was negotiated, to precisely predict the full nature of operational activities of the WIPP beyond September 1985, the DOE agreed to negotiate the continued independent review by the "State".

To fortify this position of EEG as the independent technical reviewer for the "State", in 1989 the United States Congress effectively codified paragraph III (D)(2)(f) of the SSA into Pub.L.100-456, the National Defense Authorization Act, Section 1433. To amplify previous paragraphs, it is instructive to indicate that Section 1433 required the Secretary to enter into a contract with NMIMT to conduct independent reviews and evaluations of the design, construction, and operations of the WIPP as they relate to the protection of public health and safety and the environment. This codification purports to indicate that the Congressional mandate preempts, any additional technical review by the "State" as independent of DOE. Congressional intent to sustain EEG as the "State" technical reviewer for WIPP was provided through amendment of §1433(a) for support to 1998 (See Pub.L.103-160, Nov. 30, 1993, 107 Stat. 1950). Therefore, I cannot agree with your statement that "if

DOE fails to grant the full amount of the funding request, \$700,000, there will be no technical review on behalf of the "State".

## Attachment B

The following are sections of the WIPP Land Withdrawal Act (WIPP LWA), Pub. L. 102-579, 106 Stat. 4790, which specifically mention interactions between the Department of Energy (DOE) and the State of New Mexico (State). Some sections which would meet the above criterion have been omitted because they relate specifically to test phase activities associated with the emplacement of waste underground at the WIPP, i.e., the requirement of retrievability under section 10. Specific words used to describe the requirements of each section have the same meaning as provided in the WIPP LWA.

### § 4 Establishment of Management Responsibilities.

Pursuant to this section the Secretary (DOE) must establish a plan for the management of the withdrawal, in accordance with the Federal Land Policy and Management Act. In so doing, the Secretary must consult with the Secretary of Interior, and the State of New Mexico. Additionally, if the plan is subsequently amended, amendments must be provided to the State.

### § 6 Test Phase Activities.

§ 6 (d) Performance Assessment Report. This section requires the Secretary, during the test phase, to produce a Biennial Performance Assessment Report. This report must be submitted to a number of groups, including the State and EEG for review and comment. If written comments are received the DOE must provide written responses.

### § 8 Environmental Protection Agency Disposal Regulations.

This section addresses the EPA's promulgation of final disposal regulations. In this section Congress required the Administrator to promulgate disposal regulations in accordance with the procedures set forth in the Administrative Procedure Act. The APA allows all interested persons to provide written comments on the proposed rule. No additional requirements are made in this section with regard to the provision of funds to New Mexico to enable it to comment on said rule.

Additionally, this section requires the EPA to promulgate criteria for the demonstration of compliance with the final disposal standards. Again, these regulations must be promulgated pursuant to the APA, and although the APA allows all interested persons to submit comments, no mention is made regarding the provision of funding to enable such interested persons to hire consultants.

Finally, section 8 requires the Secretary to submit documentation of continued compliance with the final disposal regulations every five (5) years. The

section requires the EPA, not the State, to determine whether WIPP remains in compliance.

§ 9 Compliance with Environmental Laws and Regulations.

Pursuant to this section the DOE is required to comply with Subpart A of 40 CFR 191, the Clean Air Act, the Solid Waste Disposal Act, the Safe Drinking Water Act, the TSCA, CERCLA and all other federal laws pertaining to public health and safety or the environment. This section requires the Secretary to submit to the EPA, biennially, documentation of continued compliance with said laws and regulations. Also, the Secretary must submit documentation of continued compliance with the SWDA to the State. The Administrator is allowed to take action if a finding is made that DOE is not in compliance with any of the above mentioned laws. The State can only take action if the DOE is out of compliance with the SWDA, the CAA, or other State law.

§ 13 Decommissioning of WIPP.

By October 1997 the DOE must prepare and submit a plan for decommissioning of the WIPP, which plan must comply with the final disposal regulations (40 CFR 191) and the applicable provisions of the C & C agreement. In addition, the Secretary must develop a plan for management of the withdrawal subsequent to decommissioning. The DOE must consult with the State and the EPA in developing the plans.

§ 14 Savings Provisions.

No provision of the WIPP LWA may be construed to supersede or modify the provisions of the Clean Air Act (CAA) or the Solid Waste Disposal Act (SWDA). Nor shall any section be construed to limit, or in any manner affect, the Administrator's or the State's authority, or the Secretary's obligation to comply with the CAA, or the SWDA.

§ 15 Economic Assistance and Miscellaneous Payments.

Congress has authorized 20 million dollars over 15 years to be paid to the State beginning in the fiscal year in which transport of transuranic waste is initiated. A portion of this sum is to be provided to the local governments of Eddy and Lea counties. Additionally, a portion of this sum may be provided for independent environmental assessment and economic studies associated with WIPP.

§ 16 Transportation.

This section provides that in addition to activities required by the

Supplemental Stipulated Agreement, the Secretary is required, to the extent provided in appropriation acts, to provide technical assistance and funds for the purpose of training public safety officials, and other emergency responders. Additionally, the Secretary must enter into an agreement to assist states through monetary grants or contributions in kind, to the extent provided by appropriation acts, in acquiring equipment for response to an incident involving TRU waste transported to or from WIPP.

Finally, the Secretary shall enter into agreements to assist States through monetary grants or contributions in kind, to the extent provided in appropriation acts, provide in kind, financial, technical, and other appropriate assistance to any State or Indian tribe through whose jurisdiction the Secretary plans to transport transuranic waste to or from WIPP, for the purpose of WIPP specific transportation safety programs not otherwise addressed in this section. These programs shall be developed with, and monitored by, the Secretary.

§ 17 Access to Information.

This section requires the Secretary to provide the State, National Academy of Sciences, and the EEG with free and timely access to data relating to health, safety and environmental issues at WIPP. The Secretary must also provide the State and EEG preliminary reports relating to health, safety, and environmental issues at WIPP. Finally, to the extent practicable, permit the State and the EEG to attend meetings relating to health, safety, and environmental issues, with expert panels and peer review groups.

The State, NAS, and EEG may evaluate and publish analyses of the Secretary's plans for monitoring...transportation, operations, decontamination, performance assessment, compliance with EPA regulations, safety analyses, and other activities relating to the WIPP.

§ 21 Consultation and Cooperation Agreement.

Nothing in the LWA shall affect the C & C Agreement or the supplemental Stipulated Agreement between the State and the DOE.

§ 23 Authorizations of Appropriations.

Funds have been appropriated to the EPA for the purpose of fulfilling its obligations under the WIPP LWA. No funding has been appropriated to the State for similar purposes.

**ATTACHMENT C**

**NEW MEXICO ORGANIZATIONS RECEIVING FUNDS FROM DOE  
FOR OVERSIGHT, TECHNICAL REVIEWS, AND ANALYSES OF THE WIPP PROGRAM**

<b>ORGANIZATION</b>	<b>SCOPE</b>	<b>FUNDS</b>
Environmental Evaluation Group	Technical Review	\$1,590,000 in FY94 \$1,684,000 budgeted FY95
New Mexico Energy, Minerals and Natural Resources Department	Emergency Response	\$ 672,000 in FY92-94 \$ 671,000 budgeted for FY95
New Mexico Environment Department		
Agreement in Principle (AIP)	Environmental Monitoring and Technical Review	Approximately \$3,000,000 each FY
Resource Conservation and Recovery Act (RCRA) B Permit	Technical and Regulatory Review	\$ 915,709 in FY92 and FY93 \$ 310,320 budgeted FY95
Western Governors' Association (New Mexico's share) <sup>1</sup>	Transportation, Safety, and Emergency Preparedness	+/- \$235,000 in FY94 +/- \$235,000 budgeted for FY95
Carlsbad Environmental Monitoring and Research Center (CEMRC)	Environmental Monitoring and Technical Review	\$5,430,000 in FY94 \$2,500,000 budgeted for FY95
	Total Funding --	FY94: \$10,255,000 FY95: \$ 8,400,320

<sup>1</sup>Estimated based on \$1.2 million in both FY94 and FY95 for all WGA members.