

WIPP A6  
5/25/95

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW MEXICO, ex rel. )  
 TOM UDALL, Attorney General, )  
 P. O. Drawer 1508 )  
 Santa Fe, NM 87504-1508 )  
 (505) 827-6000 )  
 Petitioner, )  
 )  
 - against - )  
 )  
 U. S. ENVIRONMENTAL PROTECTION AGENCY )  
 401 M Street, S.W. )  
 Washington, D.C. 20460, )  
 )  
 and )  
 )  
 CAROL M. BROWNER, ADMINISTRATOR )  
 U. S. ENVIRONMENTAL PROTECTION AGENCY )  
 401 M Street, S.W. )  
 Washington, D.C. 20460, )  
 Respondents. )

No. \_\_\_\_\_

PETITION FOR A SPECIAL WRIT  
GRANTING RELIEF FROM UNREASONABLE DELAY

Preliminary statement

PETITIONER, the State of New Mexico (the "State"), seeks issuance of this Court's writ directed to the Respondents, U. S. Environmental Protection Agency ("EPA") and its Administrator, to protect the Court's jurisdiction to conduct timely review of the result of a public notice-and-comment rulemaking action under the doctrine of Telecommunications Research & Action Center v. F.C.C., 750 F.2d 70 (D.C. Cir. 1984), and In re GTE Service Corp., 762 F.2d 1024 (D.C. Cir. 1985).

EPA was mandated by Congress in the Waste Isolation Pilot Plant Land Withdrawal Act of 1992, Pub. L. 102-579 (106 Stat. 1477) (the "WIPP Act"), §8(c)(2), to issue "compliance criteria"

regulations by October 30, 1994, setting standards for EPA's later determination whether the Waste Isolation Pilot Plant ("WIPP"), a radioactive waste repository, will comply with limits on long-term releases of radioactivity. EPA has not met the congressional deadline. Nor is EPA working diligently to issue the final rule. Instead, EPA has allowed the regulated party, the U.S. Department of Energy ("DOE"), to divert it into a series of nonpublic exchanges, whereby DOE has exercised its influence on EPA to weaken and delay the compliance criteria. EPA needs a court order to tell it to get back to the business that Congress assigned to it and issue a final rule by a date certain.

This proceeding is precipitated by (a) the submission by DOE to EPA on March 31, 1995, and EPA's acceptance, of the first nine volumes of a draft application for EPA's certification that the WIPP will comply with radioactive waste disposal regulations, and (b) EPA's agreement to issue "detailed comments" in response to the draft application (ex. 10). Even though the compliance criteria are overdue, EPA has agreed at DOE's urging that it will first complete its review of DOE's voluminous draft application and issue a detailed statement, without public notice and comment, identifying any deficiencies therein. Such review and EPA's position statement will both delay and prejudice the pending compliance criteria rulemaking, as well as the subsequent compliance certification rulemaking.

EPA has also undertaken improperly to announce other decisions material to the compliance determination in a "guidance" document, which likewise will not be exposed to notice and comment rulemaking. In a draft of the guidance, such decisions are notably favorable to DOE. The unexplained removal of such issues from the public compliance criteria rulemaking is unlawful and will further prejudice the outcome of that and later rulemakings.

EPA also plans to offer the final compliance criteria to the Office of Management and Budget ("OMB") for further review and amendment at the instance of DOE before the regulation is issued. The OMB process is not required by the applicable executive order and would cause further delays.

Petitioner therefore seeks relief from unreasonable delay in EPA's compliance criteria rulemaking and from the manifestly inappropriate removal of EPA's decisionmaking from the public rulemaking to nonpublic processes designed by DOE to serve its own purposes. The Court should direct EPA to complete the public rulemaking promptly and before undertaking any actions which will prejudice the result of such rulemaking.

#### **JURISDICTION AND VENUE**

1. This case arises under the WIPP Act, §18; the Hobbs Act, 28 U.S.C. §2342(4); the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§701-06; and the All Writs Act, 28 U.S.C. §1651.

#### **PARTIES**

2. Petitioner is the State of New Mexico, represented by its Attorney General, Tom Udall. The Attorney General is charged by §8-5-2(B) NMSA 1978 with the duty of prosecuting any action in which the State may be a party or interested when, in his judgment, the interest of the State requires such action.

3. Respondent EPA is an executive agency of the United States. Respondent Carol M. Browner is the Administrator of the EPA. Pursuant to §8(c) of the WIPP Act the Administrator of the EPA is charged with the responsibility of issuing criteria for the determination of compliance by the WIPP with radioactive waste disposal regulations.

#### STANDING

4. The State and its citizens have vital interests in the determination of WIPP's compliance with waste disposal regulations and, therefore, in the prompt issuance of effective compliance criteria by public rulemaking. Under EPA's present plans and processes, which are in violation of the WIPP Act, EPA will ultimately issue compliance criteria that are invalid, ineffective, and incomplete. As a result, EPA may certify that WIPP complies with radioactive waste disposal regulations when it would not otherwise do so at all, or may certify compliance without protective terms and conditions which it would otherwise impose. In either case:

(a) The WIPP site would continue to be withdrawn from public use pursuant to §§3 and 8(d)(2)(B) of the WIPP Act.

The withdrawn land contains large reserves of natural gas, oil, potash, and other minerals. The State has an interest in royalties derived from mineral production under 30 U.S.C. §191 and 43 U.S.C. § 391 and to tax payments under State law. If the withdrawal continues, the State will not receive any such payments, the present value of which is at least \$50 million. (ex. 1, 2).

(b) The operation of WIPP may result in the escape of non-natural radiation; reductions in property values; reductions in tax revenues to the State; reasonable fear and apprehension by citizens and visitors as to the effects of increased radioactivity upon such persons and their descendants; and reasonable fear and apprehension by citizens and visitors of an accident resulting in uncontrolled release of radioactive or hazardous materials within the State.

5. Interests of the State are within the zone of interests of the statute involved here. Congress intended to ensure the State's participation in all phases of EPA rulemaking concerning WIPP. See WIPP Act §§8, 17. Such participation would be rendered ineffective if compliance is determined without valid and effective compliance criteria.

6. The agency inaction complained of herein has no other adequate remedy in any court. Such agency inaction is reviewable in this Court. The State has suffered legal wrong and is adversely affected and aggrieved by the action complained of herein.

## FACTUAL BACKGROUND

### A. EPA's failure to meet statutory deadlines

7. WIPP is a proposed underground repository excavated by DOE in salt beds 2150 feet below the surface in southeastern New Mexico. WIPP is designed to receive dangerous transuranic waste generated in DOE weapons programs. Transuranic waste contains more than 100 nanocuries per gram of alpha-emitting radionuclides of heavier-than-uranium elements (WIPP Act §2(20)).

8. Until 1992 there was no independent regulation of the long-term safety of radioactive waste disposal at WIPP. DOE's effort in 1991 to bypass Congress and "open" WIPP by unilaterally introducing radioactive waste ignited a controversy, which this Court resolved in favor of Congress's power to decide when WIPP might receive radioactive waste. New Mexico v. Watkins, 969 F.2d 1122 (D.C. Cir. 1992).

9. Congress thereafter enacted legislation, replacing DOE self-regulation with EPA oversight and control. The WIPP Act, enacted on October 30, 1992, places EPA as independent regulator over DOE at WIPP. The Act prescribes a sequence of public processes leading to EPA's independent determination whether WIPP shall receive waste for permanent disposal. Specifically, the Act calls for three separate and sequential public rulemakings by EPA, comprising three phases of the decisional process, with full public scrutiny and participation and the opportunity for judicial review:

(a) The first rulemaking is EPA's issuance of final radioactive waste disposal regulations (40 C.F.R. Part 191), setting limits upon future releases of radioactivity by a nuclear waste repository. Such regulations are to be made final within six months after the enactment of the WIPP Act. (WIPP Act §8(b))

(b) The second rulemaking is EPA's issuance of "criteria for the Administrator's certification of compliance with the final disposal regulations" (40 C.F.R. Part 194) to create a WIPP-specific regulatory framework for EPA's decision whether WIPP will comply with the disposal regulations. Such regulations are to be proposed within one year and made final within two years after the enactment of the WIPP Act. (WIPP Act §8(c))

(c) The third rulemaking is EPA's certification, based on an application filed by DOE, whether WIPP complies with the disposal regulations. EPA's certification is to be made within one year after the submission of DOE's application for certification. (WIPP Act §8(d))

10. EPA's regulatory actions have fallen behind the statutory schedule. Disposal regulations, directed to be issued by April 30, 1993, were only made final on December 3, 1993 (58 Fed. Reg. 66398) (Dec. 20, 1993). Compliance criteria, required to be proposed by October 30, 1993, were not published until January 11, 1995 (60 Fed. Reg. 5766) (Jan. 30, 1995). Final

compliance criteria, directed to be issued by October 30, 1994, have not yet been issued.

11. DOE's program to overwhelm EPA's independence and weaken the compliance criteria is a principal cause of the delays. EPA had prepared draft compliance criteria by the Fall of 1994 and submitted them to the OMB pursuant to Executive Order No. 12866 (58 Fed. Reg. 51735) (Oct. 4, 1993). DOE obtained the draft and insisted, in lengthy nonpublic exchanges, that the draft be weakened before it was published. Among other things, DOE demanded changes in the test for WIPP's future performance in case of human intrusion (i.e., drilling or mining in the site area). EPA's draft required that the projected rate of future human intrusion be the same as the historical rate in the Delaware Basin, where WIPP is located. However, DOE demanded that an arbitrary limit be placed on the rate of projected future borehole drilling. (ex. 3, at 52-66, 130-33) DOE also required that future mining (i.e., construction of shafts and tunnels) be entirely ignored, even though the WIPP area is rich in oil, gas and potash. (ex. 3, at 57) In addition, DOE insisted on a new provision, requiring EPA to allow further reductions in the projected rate of future drilling if DOE "experts" forecasted that site markers would deter intruders throughout the 10,000 year regulatory period (ex. 3, at 138-39). EPA agreed to all of these revisions before issuing its draft compliance criteria for public comment (ex. 4).

12. Simultaneously, DOE has hamstrung EPA's rulemaking by withholding data. DOE committed to EPA in early 1994 to prepare a detailed study of the improvements in WIPP's waste containment attainable with "engineered barriers," such as more stable waste containers. (ex. 5, at 17) DOE has not performed the study, depriving EPA of data needed to draft regulations. DOE has also failed to provide the data needed to draft regulations requiring waste characterization to guard against destabilizing processes, such as gas generation. (ex. 4, at 3, ex. 6, at 4, ex. 7, at 7-8)

B. EPA's commitment to comment on DOE's draft application

13. DOE's WIPP Disposal Decision Plan (ex. 8) sets the DOE goal of bringing waste to WIPP in mid-1998. Pursuant to that plan, DOE submitted the first nine volumes of its draft compliance application to EPA on March 31, 1995, and DOE plans to submit the remainder in June or July 1995 (ex. 9, at 6, ex. 10). DOE has procured EPA's agreement to review DOE's draft application and to deliver detailed written comments to DOE, identifying any problems presented by the application, in September 1995 and January 1996 (ex. 10). EPA does not plan to issue final compliance criteria until February 1996 or later (ex. 11, at 13).

14. DOE's draft application will contain a complex probabilistic risk assessment of the future performance of the WIPP over 10,000 years (see 40 C.F.R. Part 191). The March 31 partial draft comprises nine volumes. Obviously, review of such

document will occupy a large part of EPA's scarce technical resources. At the same time, the draft application is not required by any statute or rule. EPA has not even proposed rules to govern such pre-application submissions.

15. Thus, the regulated party, DOE, has reordered EPA's priorities and has excluded the public from EPA's regulatory process. DOE can now argue privately to EPA's management and other Administration figures that EPA should approve the showing in DOE's draft application. EPA's forthcoming detailed statements on the draft will constitute effective "criteria for the Administrator's certification of compliance" (WIPP Act §8(c)). However, EPA will not publish such statements for public comment and EPA response before issuing them. Thus, the public will have no role in EPA's decisions as to the effective compliance criteria. Moreover, EPA will issue its statements before the compliance criteria regulations are made final. Thus, EPA's statements will predetermine the outcome of the second and third rulemakings mandated by the WIPP Act by controlling the content of the compliance criteria and committing the Agency to a specified outcome in reviewing DOE's application. Such process is directly contrary to the WIPP Act plan of independent regulation and public decisionmaking.

C. EPA's decision to issue criteria in a "guidance" document

16. EPA is planning other compliance-determinative decisions outside the statutory rulemakings. EPA plans to issue

a "Compliance Application Guidance," which exists now in preliminary draft (the "CAG"), and which will not be subject to rulemaking (ex. 12; cover letter). The CAG contains several provisions which contradict or undermine proposals contained in the draft compliance criteria and which constitute "criteria for the Administrator's certification of compliance with the final disposal regulations" (WIPP Act §8(c)(1)), which legally must be issued by public rulemaking:

(a) EPA has stated that the final CAG will be "a checklist in determining if the Department of Energy (DOE) has submitted a complete compliance certification application" and that the CAG describes "what is to be included in a complete application" (ex. 12, at 5). Thus, the CAG enumerates the elements of a compliance application (e.g., §§194.14 (compliance certification application contents), 194.15 (compliance determination application contents), 194.22 (quality assurance information), 194.23 (models and computer codes), 194.24 (waste characterization), 194.25 (future states assumptions), 194.26 (expert judgment), 194.27 (peer review), 194.31 (application of release limits), 194.32 (scope of performance assessments), 194.33 (consideration of human-initiated processes and events), 194.34 (results of performance assessments), 194.44 (engineered barriers)).

(b) In a decision which appears highly favorable to DOE, the CAG defines the land area for examination of the historical rate of human intrusions as the Delaware Basin,

excluding the area overlying the Capitan Reef (ex. 12, at 51). In contrast, the publicly proposed compliance criteria contain no such definition and instead ask for public comment on the (60 Fed. Reg. at 5774). In this respect, EPA is establishing less restrictive compliance standards in the CAG and circumventing the mandated public process. Petitioner's office obtained from EPA a draft of a study prepared for EPA concerning drilling rates in the vicinity of WIPP. The draft study understates actual drilling, but, even so, shows that drilling in the Capitan Reef area has proceeded at a rate of 115 boreholes per square kilometer per 10,000 years, while the rate in the Delaware Basin excluding the reef has been only 41 boreholes per square kilometer per 10,000 years (ex. 13, at 4-8, 4-13).

(c) In another decision highly favorable to DOE, the CAG provision on waste characterization omits any requirement of actual waste characterization data (ex. 12, at 34-40). In contrast, the publicly proposed compliance criteria require DOE to "identify, in detail, the chemical, radiological, and physical characteristics of all waste proposed for disposal ..." (§194.24(a)(1), at 60 Fed. Reg. 5786).

(d) Also favorably to DOE, the CAG description of a critical engineered barrier study omits to define the standard that a barrier "prevent or substantially delay" releases of radioactivity (ex. 12, at 66). If the CAG, which is supposed to contain the most specific description of the contents of a

compliance application, contains no standard, DOE can generate a study showing that engineered barriers will have no effect.

18. EPA has segregated the CAG process from the compliance criteria process. Persons commenting on the CAG are cautioned "that under no circumstances should reviewers use this opportunity to provide comments on the proposed Part 194 [compliance criteria] ..." (ex. 12, cover letter, at 2).

D. EPA's plan for a second OMB review

19. EPA has advised that it plans a second submission of the compliance criteria to the OMB for intra-Executive review--an action which is bound to generate additional efforts by DOE to weaken the rule and will certainly cause further delay.

20. However, Executive Order No. 12866, which applies here, does not require submission of the final rule to OMB. The order expressly excepts from the OMB review requirement any regulatory action which is mandated by a statutory deadline. Thus, "when an agency is obligated by law to act more quickly than normal review procedures allow," OMB review is only called for "to the extent practicable" (§6(a)(3)(D), 58 Fed. Reg. at 51741), and publication of a final rule without OMB review is permitted where it is "required by law" (§8, 58 Fed. Reg. at 51743).

21. Since final compliance criteria were required by law to have been issued by October 30, 1994 (WIPP Act §8(c)(2)), and that date has passed, EPA should not be permitted to

Post Office Drawer 1508  
Santa Fe, N.M. 87504-1508  
(505) 827-6000

Attorneys for the State of  
New Mexico

May 25, 1995

Certificate of Service

I, Lindsay A. Lovejoy, Jr., a member of the bar of this Court, do hereby certify that on this 25<sup>th</sup> day of May, 1995, I caused a copy of the foregoing Petition to be served by first class mail on:

U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Carol M. Browner, Administrator  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Such service conforms to the requirements of Circuit Rule 27(a)(1) and Appellate Rule 25.

  
\_\_\_\_\_  
Lindsay A. Lovejoy, Jr.