

**Attorney General of New Mexico**

TOM UDALL  
Attorney General

PO Drawer 1508  
Santa Fe, New Mexico 87504-1508

505/827-6000  
Fax 505/827-5826

MANUEL TIJERINA  
Deputy Attorney General

Via Facsimile and U.S. Mail

February 6, 1996

Cooper H. Wayman, Esq.  
U.S. Department of Energy  
Carlsbad Area Office  
P.O. Box 3090  
Carlsbad, New Mexico 88221

Dear Cooper:

There was discussion of the subject of backfill at the recent quarterly meeting on January 25, 1996. As you know, the agreement between DOE and the State of New Mexico provides that "DOE shall use both engineered and natural barriers to isolate the radioactive waste after disposal in compliance with the EPA Standards. The barriers shall include, as a minimum, properly designed backfill, plugs and seals in the drifts and at the entries to the panels, and plugs and seals in the shafts and drillholes." (Second Modification to Agreement for Consultation and Cooperation, Aug. 4, 1987, at §3).

Thus, prima facie, DOE is obligated to use "properly designed backfill."

The Land Withdrawal Act, Pub.L. 102-579, provides concerning the Consultation and Cooperation Agreement as follows: "Nothing in this Act shall affect the [Consultation and Cooperation] Agreement or the Supplemental Stipulated Agreement between the State and the United States Department of Energy except as explicitly stated herein." (§21).

Nothing in the Land Withdrawal Act purports to relieve the DOE of its obligation to use backfill, etc., as stated in the C&C Agreement. The Act recognizes, to the contrary, that backfill will be used, when it directs the Secretary to dispose of such salt tailings as "are not needed for backfill at WIPP." (§4(b)(4)). There is no explicit amendment of the C&C Agreement in any provision of the Act. Consequently, in our view, the C&C Agreement requires DOE to use "properly designed backfill" in carrying out waste disposal WIPP.

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I would be interested in any analysis that you have which might lead to a different result. Further, I think it is important for DOE and the State to confer on this point to communicate our respective positions and avoid a dispute, if possible.

Why don't you set down your views in writing so that we can look at them, and after we receive them, we can talk about next steps.

Best regards,



LINDSAY A. LOVEJOY, JR.  
Assistant Attorney General

LAL:mh

ATTORNEY GENERAL OF NEW MEXICO

TOM UDALL  
Attorney General

P.O. Drawer 1508  
Santa Fe, NM 87504-1508  
(505) 827-6000

FACSIMILE NO.  
(505) 827-4440

DATE: 2/7/96

TO: Steve Zagge

TELEPHONE NO. \_\_\_\_\_

FACSIMILE NO. 827-1544

FROM: Lindsay Lovejoy

TELEPHONE NO. 827-6695

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