



NEW MEXICO ENERGY, MINERALS
& NATURAL RESOURCES DEPARTMENT

OFFICE OF THE SECRETARY
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-5950

Jennifer A. Salisbury
CABINET SECRETARY

May 3, 1996

The Honorable Pete V. Domenici
United States Senator
328 Senate Hart Office Building
Washington, D.C. 20510

The Honorable Jeff Bingaman
United States Senator
703 Senate Hart Office Building
Washington, D.C. 20510

The Honorable Joseph R. Skeen
United States Representative
2367 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bill Richardson
United States Representative
2349 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Steven Schiff
United States Representative
1009 Longworth House Office Building
Washington, D.C. 20515

RE: H.R. 1663, AS AMENDED (WIPP LAND WITHDRAWAL AMENDMENT ACT)

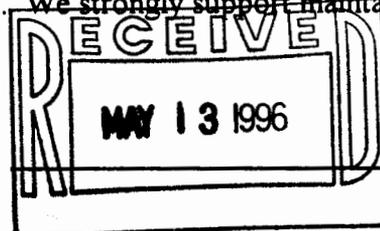
Dear Members of the New Mexico Congressional Delegation:

This is in regard to H.R. 1663, entitled the *WIPP Land Withdrawal Amendment Act*, as amended by the House Commerce Committee on March 13, 1996. The referenced legislation was introduced by Representative Skeen, and is a companion to Senator Larry Craig's (R-Idaho) WIPP bill, S. 1402. On behalf of Governor Johnson and the statutory New Mexico Radioactive Waste Consultation Task Force, following are our comments on the recently amended version of H.R. 1663.

In general, the amended version of H.R. 1663 is an improvement over the bill as originally introduced. One of our primary concerns with the original bill--modification of the U.S. Environmental Protection Agency's (EPA) existing regulatory authority over WIPP--has largely been addressed to our satisfaction in the Schaefer amendment. Nevertheless, we would still like to see several provisions in that amendment revised. These provisions are identified below, along with our respective comments and recommendations. With some fine-tuning, the legislation can be made acceptable to us from a public health and safety perspective and still expedite the opening of WIPP for commencement of disposal operations.

- **EPA Regulatory Authority.** The Schaefer amendment essentially leaves unchanged the current EPA role as independent regulator in certifying WIPP's compliance with the applicable disposal standards in 40 CFR Part 191. We strongly support maintaining the status quo in this area.

960507



- Incremental Submission of WIPP Disposal Application. The Schaefer amendment provides for the incremental submission to EPA of chapters of DOE's Compliance Certification Application (CCA) under 40 CFR Part 191 and 40 CFR Part 194. All chapters must be submitted by no later than October 31, 1996. And as each chapter of the CCA is submitted, EPA must review it and request additional information from DOE, as may be needed for completeness of the application, within 45 days of receipt.

It is our understanding that both DOE and EPA have agreed to the incremental submission and review provisions of the amendment. If this is indeed the case and EPA believes 45 days provides sufficient time to perform a completeness review of each chapter, we have no major problems with the proposal. One issue that we urge you to consider, however, is the interrelatedness of chapters (*i.e.*, how a single chapter may be dependent upon one or more other chapters of the application to be considered complete). Specifically, EPA should be provided a mechanism to ensure it can determine the completeness of the application as a whole--not solely on the basis of a series of incremental reviews.

- WIPP Exemption from RCRA Land Disposal Restrictions. Similar to S. 1402, the Schaefer amendment exempts WIPP from the land disposal restrictions (LDR) in 40 CFR Part 268. When this exemption was first proposed, we questioned whether it would result in a regulatory gap concerning the potential migration of *RCRA (Resource Conservation and Recovery Act)* hazardous constituents of the WIPP wastes over the long term. This question still persists, albeit from a slightly different perspective. Under the broad range of permit authority delegated to the State by EPA, the N.M. Environment Department (NMED) may be able to require DOE to submit the substantial equivalent of a no-migration petition. NMED's authority in this area is uncertain, however. Yet even if the State was so authorized and deemed it necessary, such a requirement would necessitate a major revision to DOE's existing *RCRA* Part B permit application--an application already pending before NMED. This, in turn, could extend the length of the permitting process beyond that which would have been the case under current law.

Our reluctance to support the proposed exemption also stems from: 1) the potential precedent-setting nature of such Congressional action; and 2) its subsequent impact on public trust and confidence in the WIPP regulatory process. Granting a *RCRA* LDR exemption to a selected facility such as WIPP could establish a precedent of unknown consequences regarding New Mexico's own *RCRA* regulatory authority. It may also create significant problems concerning DOE compliance with the *Federal Facility Compliance Act* and related consent orders or agreements in other states. In addition, an exemption of this nature for such a highly visible project could have the ancillary effect of undermining the integrity of the existing process for determining WIPP's suitability as a permanent repository for defense transuranic waste. Such prospective adverse impacts compel us to oppose a *RCRA* LDR exemption for WIPP at this time. This position is bolstered by the fact that DOE has essentially completed preparation of its final No-

Migration Variance Petition and intends to submit it to EPA next month, expressing confidence in their ability to demonstrate no migration of hazardous constituents. As an alternative, however, Section 8(a) of the Schaefer amendment (p. 5, line 4) could be revised to read: "...compliance with the environmental radiation protection standards published at parts 191 and 264 of 40 C.F.R. renders compliance with the land disposal restrictions unnecessary to achieve desired environmental protection of public health and the environment..."

- Disposal of Non-Defense Waste at WIPP. Both H.R. 1663 and S. 1402 would allow WIPP to receive transuranic (TRU) radioactive waste that did not result from a defense activity. The State is opposed to this amendment as currently written for two primary reasons. First, allowing the disposal of non-defense waste at WIPP will displace capacity in the repository for defense TRU waste that may be generated as a result of environmental restoration, stockpile stewardship, and other ongoing activities at DOE sites such as Los Alamos National Laboratory. Second, no volume limit is specified for disposal of such non-defense TRU waste at WIPP. It is recommended the amendment be revised to: 1) stipulate that defense TRU waste has priority in the queue for emplacement at WIPP; and 2) restrict the total volume of non-defense TRU waste to be disposed at WIPP to no more than the projected amount of excess repository capacity remaining after all estimated quantities of current and future defense TRU has been taken care of.
- Survey and Recommendations regarding Disposal. Under existing law, two prerequisites that must be met by DOE for WIPP to open as a disposal facility are: 1) submittal of comprehensive recommendations for disposal of all transuranic (TRU) waste under its control; and 2) completion of a survey identifying all TRU waste types at all sites from which wastes are to be shipped to WIPP. H.R. 1663, as amended, deletes these prerequisites in their entirety. S. 1402 imposes these requirements on DOE, but removes them as prerequisites to opening WIPP for disposal. We believe the recommendations and survey are of paramount importance to the planning, development, and implementation of the fledgling National TRU Waste Program and should therefore be required of DOE. However, as long as DOE is required to develop the TRU waste disposal recommendations and complete the survey, we see no compelling reason why these items must be included as prerequisites to commencement of WIPP disposal operations. Hence, we support the language in S. 1402 concerning the two requirements.
- Decommissioning and Post-Decommissioning Management Plans. Both H.R. 1663, as amended, and S. 1402 delete the requirement that DOE prepare a WIPP "Decommissioning Plan." Existing law requires DOE to complete such a plan by October 30, 1997. The bills also eliminate this same existing deadline for DOE to complete a "Post-Decommissioning Management Plan" for the WIPP withdrawal area. We continue

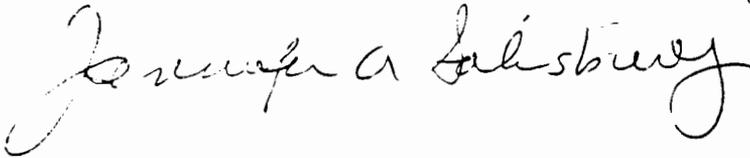
to believe DOE should be required to develop both plans--and to do so in consultation with the State of New Mexico. However, because such plans will almost assuredly have to undergo many revisions prior to their implementation 35 years hence, it is not critical they be developed anytime soon. Therefore, it is recommended that the legislation be amended to require DOE to develop each plan "...in consultation with the State [of New Mexico], the Administrator [of the U.S. Environmental Protection Agency], and the Secretary of the [U.S. Department of the] Interior at least three years prior to the commencement of the decommissioning phase at WIPP."

- Acquisition of Existing Oil/Gas Leases at WIPP. The Schaefer amendment to H.R. 1663 retains this existing prerequisite for opening WIPP for disposal operations. However, S. 1402 deletes the provision in its entirety. We support retention of this prerequisite because, under current law, the leases must be acquired by DOE **only if** the EPA determines such acquisitions are necessary to comply with the final disposal regulations (40 CFR Part 191) or with the Solid Waste Disposal Act (42 U.S.C. 6901 *et seq.*). Hence, unless the existing oil/gas leases pose a threat to WIPP's long-term integrity, they would not have to be acquired. This makes eminent sense in light of the fact that potential human intrusion activities pose the greatest risk to the repository over the long term.
- Natural and Engineered Barriers. The Schaefer amendment modifies Section 8(g) of the *WIPP Land Withdrawal Act* by deleting a specific reference to "waste form modifications" and substituting broader, more generic language pertaining to natural and engineered barriers. The Craig bill, S. 1402, similarly amends this same section of the *Act* but authorizes DOE--instead of EPA--to determine whether such engineered and natural barriers are required for WIPP's compliance with the disposal standards. We strongly believe EPA should make this important determination since they are the agency charged with administering and enforcing the applicable disposal regulations. Hence, we favor the language in the Schaefer amendment to H.R. 1663 over that contained in S. 1402.
- Biennial Environmental Compliance Report. H.R. 1663, as amended, leaves intact Sections 9(a)(2) & (3) of the 1992 *Act*. These existing sections require DOE to submit to EPA and the State of New Mexico every two years documentation of WIPP's continued compliance with certain specified laws, regulations, and permit requirements. DOE provided the first such documentation in its *WIPP Biennial Environmental Compliance Report (BECR)*, DOE/WIPP 94-021, October 1994. S. 1402 repeals these provisions in their entirety. The State has found the *BECR* to be a comprehensive, well-documented record of WIPP's compliance with applicable statutes and regulations. It also serves to demonstrate to the public the extensive regulatory framework imposed on WIPP for their protection. For these reasons, we support the Schaefer amendment to H.R. 1663 concerning this important documentation.

All other provisions of the Schaefer amendment to H.R. 1663, such as removal of the 180-day "waiting" period, are acceptable to the State.

Thank you for taking the time to consider our comments and recommendations on proposed amendments to Public Law 102-579, the *WIPP Land Withdrawal Act of 1992*. We continue to believe that potential impacts on both current and future generations of New Mexicans must be considered in your deliberations on these bills. Please don't hesitate to contact me or Chris Wentz of my staff at 505/827-5950 should you have any questions about these comments. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer A. Salisbury".

JENNIFER A. SALISBURY
Cabinet Secretary and Chair
N.M. Radioactive Waste Consultation Task Force

c: Governor Gary E. Johnson
George Dials, DOE/CAO Manager