



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

ENTERED

JUN 17 1997

OFFICE OF  
AIR AND RADIATION

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

Dear Mr. Lovejoy:

This letter responds to your June 3, 1997 letter regarding the U.S. Department of Energy's (DOE) Compliance Certification Application (CCA) for the Waste Isolation Pilot Plant (WIPP) and the U.S. Environmental Protection Agency's (EPA) certification rulemaking process. I appreciate your interest in EPA's WIPP program, and would like to clarify for you the Agency's approach to the WIPP certification rulemaking process as it determines whether WIPP meets the radioactive waste disposal regulations at 40 CFR Part 191, in accordance with the provisions of the WIPP compliance criteria at 40 CFR Part 194, pursuant to the WIPP Land Withdrawal Act, as amended (LWA), and the Administrative Procedure Act (APA).

EPA has provided, and will continue to provide, ample opportunities for public comment on its WIPP-related rulemakings. EPA received the CCA on October 29, 1996, and has taken all necessary steps to fully comply with the APA and the public participation requirements of the WIPP compliance criteria at 40 CFR § 194.61. EPA published in the *Federal Register* an advance notice of proposed rulemaking (ANPRM) on November 15, 1996, provided a 120-day public comment period on the CCA, and held public hearings in Carlsbad, Albuquerque, and Santa Fe, New Mexico. In addition, EPA held three days of stakeholder meetings, in which you participated, during the comment period. Finally, in response to public concerns expressed by your office and others, EPA agreed to accept comments submitted after the end of the comment period on the ANPRM. Comments concerning both completeness and technical adequacy of the CCA will be considered in EPA's regulatory process.



Many public comments submitted in response to the ANPRM were considered prior to suggesting alternative values for certain parameters (e.g., the probability of hitting a brine pocket). The bases for all decisions leading to a proposed certification decision, including the bases for the parameter values and fluid injection direction provided in the March 19, April 17, and April 25, 1997 letters to DOE, will be fully documented in the public docket when the proposed rule is published. This policy is consistent with the APA requirement you mention, that EPA must "make public the rationale and technical basis for the rule it proposes to adopt." Public comments on the parameter values, including those listed in your letter of June 3, will be considered as the Agency develops its certification decision. Under the policy you advocate, EPA would not have been able to send letters to DOE stating that the CCA was incomplete or pointing out potential technical insufficiencies.

Since receipt of the CCA, the Agency has engaged in necessary communication with DOE to discuss and clarify various aspects of the CCA. EPA has not hidden the fact of these interactions, many of which have been attended by the Environmental Evaluation Group (EEG). The Agency's policy on such inter-Agency WIPP discussions was clarified at the June 5, 1997 meeting among Attorney General Udall, Bob Neill of EEG, and Deputy Administrator Hansen. At that meeting, EPA committed to inform EEG on a regular basis of upcoming technical meetings between EPA and DOE staff. EPA also stated that it would continue to meet, as necessary, with DOE management to resolve procedural (though not technical) issues. The Agency agreed to better reflect the nature of these meetings in the notes it docketed. Attorney General Udall concurred with the Deputy Administrator that this is an appropriate approach to this issue.

EPA recognizes that, under the APA, the Agency must withhold its final judgment on compliance until it has provided the opportunity for public comment. Under no circumstances has EPA made, nor will EPA make, any binding decisions outside of the public process. No staff decisions are binding until promulgation of a final rule signed by the Administrator. A final rule on EPA's WIPP compliance certification decision will be published subsequent to EPA's consideration of public comments on the ANPRM, development of a proposed certification decision, publication of a notice of proposed rulemaking (NPRM), and

3

consideration of significant public comments on the NPRM received during the 120-day public comment period that follows issuance of NPRM in the *Federal Register*.

As EPA has consistently demonstrated in the past, we are willing to meet with your office and other interested parties to discuss issues related to the WIPP certification determination. Please feel free to submit any additional comments you may have concerning the comments EPA has made in any of the letters we have sent to DOE regarding the CCA. If you have further questions or require clarification regarding EPA's public participation practices, please contact Mary Kruger at (202) 233-9310.

Sincerely,



Frank Marcinowski, Acting Director  
Radiation Protection Division

cc: Debby Gentry