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August 27, 1997

Sally Katzen, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Room 350
Old Executive Office Building
Washington, D.C. 20503

Dear Ms. Katzen:

The Environmental Protection Agency (EPA) is currently preparing its proposed rulemaking to determine whether the Waste Isolation Pilot Plant (WIPP), a facility of the Department of Energy (DOE), will comply with the Radioactive Waste Disposal Regulations, 40 CFR Part 191. I write to request that the State of New Mexico, through its governmental offices, including the Attorney General's Office, be permitted to participate in any forthcoming meetings or discussions to be held pursuant to Executive Order 12866 between the EPA, the DOE, contractors of EPA or DOE, and the Office of Management and Budget (OMB) concerning EPA's forthcoming determination by rulemaking.

WIPP is a unique facility and is uniquely important to New Mexico and the world. WIPP, if authorized to operate, would be the world's first underground radioactive waste disposal repository. WIPP has been designed to receive all of the transuranic radioactive waste generated by defense nuclear facilities since 1970 and for 35 years into the future. Disposal at WIPP would involve the removal from storage and shipment of such wastes over the roads of several states in thousands of shipments over a period of approximately 35 years. It would involve the emplacement of several tons of extremely dangerous substances, such as Plutonium, contained in such wastes, in a supposedly permanent underground disposal site, which is located in an area now undergoing intense resource development.

EPA's certification of WIPP is carried out pursuant to the Waste Isolation Pilot Plant Land Withdrawal Act of 1992, Pub. L. 102-579 (the WIPP Act). Under that law EPA shall make its determination by public rulemaking under the Administrative Procedure Act (see WIPP Act §8(d)). EPA is currently formulating its draft of a

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proposed determination. EPA has stated that it will forward its final draft to OMB, whereupon DOE will obtain the draft and will initiate a series of meetings, probably seeking modifications in EPA's determination. Previous such meetings concerning related rulemakings have been closed to the State of New Mexico and the public. I am requesting that the State be admitted to such meetings.

Because of the extreme and long-lasting safety risks posed by WIPP, the facility is regarded with deep concern by most New Mexicans and many of our neighbors. Further, there is concern that EPA's certification process may be subject to pressures from Congress and from other agencies which would prevent EPA from giving appropriate weight to safety issues. It is essential to public confidence in the decision that the entire EPA certification be carried out by a public process that is beyond reproach.

A principal purpose of the WIPP Act was to bring the determination of WIPP's compliance into the public eye. My office was deeply involved in the legislative process that gave rise to the WIPP Act. During the legislative process none of the participants suggested that EPA's rulemaking action would be subject to final modification in sessions among DOE and EPA, from which the public would be excluded.

However, EPA recently adopted certain regulations (40 CFR Part 194) governing its compliance determination, and in that process several nonpublic meetings between EPA and DOE and DOE contractors led to relaxation of the regulations in DOE's favor. More recently EPA and DOE have held several meetings and conference calls regarding DOE's certification application from which the public has been excluded. This series of events has raised serious concerns about the prospect that similar nonpublic processes may govern the outcome of the compliance determination rulemaking.

In connection with this request you should bear in mind that the WIPP Act gives the State particular responsibilities in overseeing the compliance process. The State is to be provided with access to data and preliminary reports about health, safety, and environmental concerns at WIPP (WIPP Act §17(a)). The State is specifically authorized to comment on DOE's plans for WIPP, including the performance assessment of WIPP and whether WIPP complies with the EPA waste disposal regulations (WIPP Act §17(b)). Pursuant to these responsibilities our office has regularly submitted extensive comments on DOE's projections of WIPP's performance and on EPA's proposed regulatory actions.

My office has sought at every opportunity to make the WIPP compliance process open, so that public concerns could be heard and the result could be accepted by everyone affected by it. Further, one of the purposes of Executive Order 12866 is to make the regulatory process more open and accessible to the public (58 Fed. Reg. 51735 (Oct. 4, 1993)). To allow the State to participate in the WIPP compliance determination by

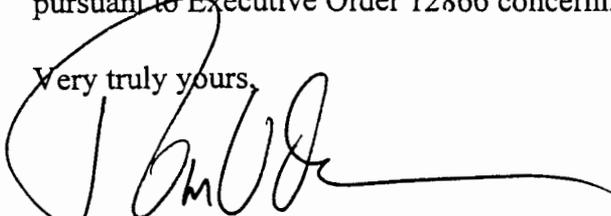
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attending the meetings between DOE and EPA pursuant to E.O. 12866 would fulfill that important purpose.

I have asked EPA to admit our office to the forthcoming DOE-EPA meetings in connection with the compliance determination. My letter dated July 3, 1997 to EPA's Deputy Administrator, Fred Hansen, is attached. Mr. Hansen's response dated August 6, 1997, also attached, refers me to yourself as the appropriate person to consider it. Therefore I am asking you to grant access pursuant to my request.

Accordingly, I request that the State of New Mexico be allowed to attend and participate in meetings and discussions among EPA, DOE, and their contractors held pursuant to Executive Order 12866 concerning the WIPP compliance certification.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Tom Udall', with a long horizontal flourish extending to the right.

TOM UDALL
Attorney General

TSU:LAL:mh

cc: Vice President Albert Gore
Charles Burson, Counsel to the Vice President
Kathleen A. McGinty, CEQ
Fred Hansen, EPA