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March 5, 1999

Via Facsimile and U.S. Mail

Mr. Gary Falle  
Chief of Staff  
United States Department of Energy  
1000 Independence Avenue, SW  
Washington, D.C. 20585

Dear Mr. Falle:

As you know, the New Mexico Environment Department is currently in the second week of a public hearing in Santa Fe concerned with issuance of a final Hazardous Waste Act permit for the Waste Isolation Pilot Plant (WIPP) near Carlsbad, New Mexico. At the same time, two lawsuits concerning WIPP are pending in separate federal courts in Washington, D.C. One lawsuit is captioned State of New Mexico, ex rel. Patricia A. Madrid, Attorney General, et al. versus Bill Richardson, Secretary of the Department of Energy, et al., Civil Action Nos. 91-2527 & 91-2929 (Consolidated). This case is assigned to Judge John Garrett Penn. The lawsuit was first filed by Tom Udall, Attorney General of New Mexico, joined by several other plaintiffs including then-Congressman Bill Richardson, now a defendant because of his role as Secretary of the Department of Energy (DOE). Neither the Environment Department nor the Governor of New Mexico has ever been a party to this lawsuit.

Currently, pending before Judge Penn, and set for hearing on March 12, 1999, is a motion seeking to enjoin the shipment of slightly over one-hundred barrels of a waste-stream called TA-55-43, Lot No. 1 from Los Alamos National Laboratory to WIPP. The DOE has expressed its intent to ship this waste stream, characterized as non-mixed waste, prior to the issuance of a Hazardous Waste Act permit from the Environment Department. In part, the plaintiffs seek to stop this shipment based on their interpretation of an existing injunction issued by Judge Penn, and also in part based on certain representations made in the DOE's application for the New Mexico Hazardous Waste Act permit. Contrary to the proposed pre-permit shipment, historically DOE has stated that no waste would be shipped to WIPP until it received a Hazardous Waste Act



permit. DOE's permit application asserts that all waste placed in WIPP would be managed as though it were mixed waste subject to the Hazardous Waste Act permit.

Against this background, the DOE and New Mexico's Attorney General invited the Environment Department to explore with them, ways that the dispute between them could be resolved. A resolution between these two parties would not preclude Judge Penn's ruling on the motion for an injunction, because there are several plaintiffs in the case. Other plaintiffs advance the same arguments for injunctive relief as does the Attorney General. The issues will be heard regardless of any settlement between the DOE and the Attorney General. Of course as a non-party, the Environment Department cannot stand in the way of a legal resolution of the dispute between the Attorney General and DOE. They are free to engage in whatever settlement talks they wish and to enter into whatever legal settlement they may craft. However, the Environment Department does object to any attempt to incorporate the Department's regulatory authority into the terms of a settlement agreement between the Attorney General and DOE.

When it was involved in settlement discussions, the Environment Department, in its opinion, was never shown a settlement proposal from DOE that appeared to be in the best interests of the State of New Mexico, however beneficial the proposal might be for the DOE. Without going into detail, all of DOE's proposals show an unwillingness on the part of DOE to provide for any meaningful regulatory oversight by the state. The Attorney General's office may disagree with the opinion of the Environment Department and may believe that settlement is in the best interest of that office. If the case is settled with the Attorney General, and if Judge Penn rules in DOE's favor and against the remaining plaintiffs, then DOE will have the option of shipping slightly more than one hundred barrels of waste from Los Alamos National Laboratory to WIPP.

All DOE settlement proposals would authorize the shipment of waste to WIPP prior to the issuance of a Hazardous Waste Act permit. However, any shipments prior to permit issuance may present complications concerning the pending permit. The Environment Department has concluded it is unwilling to be involved in a scheme that has this type of downside risk.

By way of further explanation, the Environment Department's proposed draft permit is premised on the accuracy and completeness of DOE's permit application. Shortly after issuance of the draft permit, DOE first made known its intent to ship waste prior to issuance of a final permit. These efforts to undercut commitments made in the application may jeopardize both the time of issuance and even the viability of the permit. These problems have been explained in detail to your legal staff. They may advise DOE that the benefits of shipping one hundred or more barrels before permit issuance is worth the risk. However, DOE should be aware that two of the parties in the ongoing permit hearing have filed a motion seeking summary denial of the permit application on the grounds that the application is inconsistent with DOE's announced intention to ship to WIPP. Perhaps they will not prevail on the motion, but there is every likelihood that this issue could become a point of appeal by these parties before the New Mexico Court of Appeals. If DOE actually ships waste to WIPP, the legal consequences are unpredictable but potentially very serious.

In summary, the Environment Department does not believe that it is productive for the

Department to spend any more time discussing a matter that the Department believes may harm the permit process and is bad for New Mexico. The Department's resources are better used in doing the best possible job with the ongoing permit hearing. We do wish the Attorney General and DOE well in resolving their differences. We also hope that they will keep the best interests of New Mexico foremost in their thinking.

On another matter, when we visited in your office last Monday, you expressed concern that the Environment Department has acted in the permit hearing in ways that may cause unreasonable delays. DOE moreover is apparently a source of other inaccurate rumors and reports concerning permit delays. On investigation, we found that DOE and not the Environment Department has proposed extra and unnecessary procedural steps that could have the effect of delaying permit issuance for as many as sixty days. More specifically, DOE has asked the hearing officer to allow for the filing of objections to the parties proposed findings of fact and conclusions of law, a step not included in the procedural rules which govern the hearing.

DOE has estimated that fifteen days is needed for such an exercise. The hearing officer apparently recognized that even if the extra step was added, fifteen days would be inadequate. Such an added procedure, in order to satisfy the legal requirements of procedural due process, might require up to sixty days. To allow otherwise could create another point of appeal for some of the parties. Perhaps from DOE's point of view, fifteen days is adequate because it has, at a minimum, lawyers from Washington, Carlsbad, and Chicago attending the hearing. We respectfully submit that the issue is not how quickly DOE claims that it can do something, but how quickly something can be done consistent with fairness to all the parties. The Environment Department's goal, which should be DOE's goal, is to have a fair hearing for all of the many parties. Only in that way, will the proceedings withstand the scrutiny of the New Mexico Court of Appeals. With so many lawyers, there is bound to be more mischief if DOE does not guide its legal team away from suggesting unnecessary procedural steps through dilatory motions.

We also recently discussed DOE's predicament that it move certain wastes from the State of Idaho by this Spring pursuant to a consent decree between Idaho and DOE. We are troubled by recent DOE claims in the press that an insurmountable problem with Idaho waste is reason for switching DOE funding from New Mexico. This seems inconsistent with the Environment Department's commitment to work with DOE on this issue. Apparently Idaho is unwilling to leave these stored wastes in place until WIPP is permitted. DOE believes that by shipping about fifty barrels of waste out of Idaho, it can meet its commitment to Idaho. We discussed the possibility of the Environment Department working with DOE to help it meet its commitment to Idaho by seeing whether storage of about fifty barrels of Idaho non-mixed waste at Los Alamos National Laboratory is legally viable. We remain committed to investigating this option and are concerned that DOE is letting time pass without acting on this matter. If such an option proves viable, we understand that DOE will not subsequently ship this waste to WIPP until after there is a Hazardous Waste Act permit and all of its terms have been met.

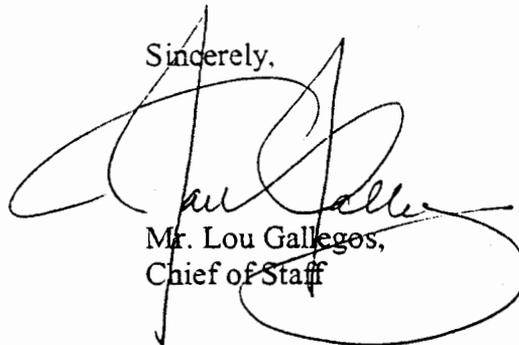
Prior to permit issuance, the Environment Department is also committed to working with DOE to resolve issues that might stand in the way of a quick opening after a permit is issued. One area

DOE could begin working on now is the characterization of waste at various facilities around the country.

In closing, we note recent press reports about the withdrawal of DOE funds from New Mexico because WIPP has not opened. Before any such action is taken we hope that DOE will take into account the unique sacrifices New Mexico will be making in the national interest by accepting DOE's wastes from around the country. We also hope that such a decision would not be taken based on the wildly incorrect time estimates for permit issuance that DOE has bandied about in the press. The permit hearing appears to be going well, and barring further dilatory tactics or unanticipated delays in the process, we expect that a permit will be issued consistent with the time line that the Environment Department issued in October 1998.

We hope that this letter clears up issues that have been the subject of recent rumor and misunderstanding. As always, please call at any time if you have questions or concerns about matters here in New Mexico.

Sincerely,

A handwritten signature in black ink, appearing to read "Lou Gallegos", is written over a large, stylized circular flourish.

Mr. Lou Gallegos,  
Chief of Staff

cc: Senator Jeff Bingaman  
Senator Pete V. Domenici  
Attorney General Patricia Madrid  
Representative Joseph R. Skeen  
Representative Tom Udall  
Representative Heather Wilson