



DEPARTMENT OF ENERGY
Washington, DC 20585

ENTERED

OFFICE OF THE SECRETARY

March 12, 1999

Mr. Lou Gallegos
Chief of Staff
Office of the Governor
State Capitol
Santa Fe, New Mexico 87503

Dear Mr. Gallegos:

I was disappointed to receive your letter of March 5, 1999. I appreciated the role you played in our recent discussions and your previous willingness to review options for resolving the current impasse on opening the Waste Isolation Pilot Plant (WIPP). Your letter, however, contains many assertions with which the Department of Energy disagrees, and I think it is important to correct the record. More fundamentally, I think the letter reflects a most unfortunate opposition by the New Mexico Environment Department (NMED) to commencement of disposal operations at WIPP until NMED completes its long-pending permitting process, notwithstanding the direction of the United States Congress to begin disposal operations by November 1997 and notwithstanding the State's previous acknowledgment that the waste DOE proposes to dispose of at WIPP in the near-term is not regulated by RCRA or the State's Hazardous Waste Act.

The principal effect of your letter was to undermine the efforts of the Attorney General to achieve a settlement that would have benefitted both New Mexico and DOE. Based on where those discussions stood when we received your letter, if the settlement had been successfully concluded, it would have ensured that, from the very beginning of operations at WIPP, the State would have had an oversight role not provided by law. It would also have committed DOE to promptly halt shipments to WIPP at any time NMED concluded there was a risk of irreparable harm to human health or the environment or a violation of key commitments in the agreement. In the absence of a settlement, the State has no such rights with respect to the disposal of non-hazardous waste, which DOE plans to undertake if the court rules in its favor, and given that fact, it is difficult to understand your apparent conclusion that such a settlement was not in the interest of the State.

I note with particular dismay the suggestion in your letter that any effort by DOE to ship non-hazardous waste from the Los Alamos National Laboratory to WIPP prior to the issuance of a final RCRA permit could adversely affect the permit proceedings. From May through December 1998, DOE engaged in extensive and expensive

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sampling and analysis to confirm to the satisfaction of the Environment Department that the Los Alamos waste stream was in fact non-hazardous waste, and therefore not subject to RCRA and the New Mexico Hazardous Waste Act. DOE's explicit objective in spending the one-half million dollars this effort required was to establish that the waste could be shipped to WIPP before the permitting process was concluded. The Environment Department ultimately agreed with DOE on its determination that the waste is not regulated by RCRA. There was absolutely no reason to engage in that effort if New Mexico was going to oppose shipment of this waste stream.

The Environment Department should have clearly informed DOE before that effort was commenced of its view that shipping the waste could have legal consequences for the permitting process. Instead, during that process, NMED personnel volunteered their views that another Los Alamos waste stream might qualify for disposal at WIPP before the permit was issued, and stated in a letter dated September 9, 1998, (which is attached) that if a waste stream does not contain hazardous waste, "then it falls outside the jurisdictional scope of the HWA." NMED's first assertion that there might be legal consequences for permitting if DOE shipped non-hazardous waste prior to the permit came in an October 9, 1998, letter, and even then NMED proceeded with its review of the Los Alamos hazardous waste determination. It should come as no surprise to you that DOE feels that it was seriously misled by the State's handling of this issue, and we still do not understand the supposed legal basis for the State's assertion that the permitting process may be adversely affected by the shipment of waste that requires no RCRA permit. Despite repeated requests by DOE, the State has provided no convincing explanation of the basis for this assertion.

DOE also sharply disputes the assertion in your letter that there is some inconsistency between DOE's Part B permit application and DOE's intention to ship the Los Alamos waste to WIPP prior to the issuance of the permit. DOE reasonably anticipated when it filed its latest RCRA permit application with NMED in May 1995 that there would be a permit in place by mid-1998, and that expectation was reflected in its permit application. However, that expectation was not an essential premise of the application. By virtue of the prolonged nature of the permitting process, circumstances have changed with respect to that expectation. DOE provided written notice in May 1998 that it intended to begin disposal of non-hazardous waste at WIPP. There are no provisions in the New Mexico Hazardous Waste Act that preclude a permit applicant from modifying its plans concerning unregulated activities at a facility (i.e., the disposal of wastes not regulated by RCRA), and we are unaware of any other legal constraints that limit DOE's ability to address changed circumstances that arose during the pendency of the permit application. More fundamentally, however, the non-hazardous waste stream in question is waste that the

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permit application fully anticipated would be disposed of at WIPP. Thus, DOE will be able to operate WIPP within all final permit requirements, and NMED will be able to confirm that compliance, notwithstanding the disposal of non-hazardous waste prior to the issuance of the permit. The Environment Department has never documented or explained to DOE in any way we can understand the basis for its apparently contrary view.

As to your suggestion that it is DOE's recent procedural motion that is responsible for the delays in the permitting process, I have to point out that DOE's latest permit application had been pending more than three years (since May 1995) before NMED ever announced a "timeline" for completing the process in October 1998. While we applaud Secretary Maggiore for getting the process moving in 1998, the delays that occurred prior to his arrival are the primary cause for the problem we face today. And there is no basis for the claim that DOE is responsible for the extension of the schedule NMED proposed in October 1998. Rather, as we have explained to NMED on several occasions, the proposals it made in its filing on February 16, 1999, would delay issuance of a permit if the Hearing Officer were to adopt them.

NMED now predicts that the hearing will not end until March 26. Normally, it would take about two weeks for the court reporter to finish the transcript of the proceedings; at considerable additional expense to DOE, we have asked the reporter to expedite the process. Assuming that the reporter will take no more than one week to finish the transcript, it could be filed on April 2. NMED has stated that it will require "sixty (60) days or more" after the filing of the transcript for it to prepare its responses to comments, findings of facts and conclusions of law - until June 1 at the earliest. DOE's motion proposed that Hearing Officer allot 30 days to this process, which would allow this step to be completed by May 2.

DOE proposed that the parties be allowed to file objections to each other's findings of facts and conclusions of law within 15 days after these findings and conclusions had been submitted. Under DOE's proposal, this step would take until May 17. In response, NMED stated that it "recognizes the benefits of objections in a complex proceeding. However, [DOE's] proposed time frame is not realistic. . . . Sixty (60) days after the filing of proposed findings of facts and conclusions of law would be more appropriate." This would take NMED's proposed schedule to at least July 31. Given the numerous opportunities each party will have had at that point to express its views about the permit, a 60-day period is not necessary to ensure fairness.

The remaining steps in the process are under the exclusive control of the Secretary of NMED. On February 5, he gave the Hearing Officer 60 days to prepare his report and recommendations, which would make them due on September 29 under NMED's

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proposed schedule. NMED has proposed that the parties then have 60 days to comment on the report and recommendations, which would take NMED's schedule to November 28. The next step is for the Secretary of NMED to issue his decision on the permit. The Secretary has stated that this will require 30 days, which means that he would not act before December 28. Under New Mexico law, the permit would not be effective until 30 days later on January 27, 2000.

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This schedule assumes: (1) that the hearing will end no later than March 26; (2) that NMED will require no more than 60 days to file its responses to comments, findings of facts and conclusions of law; (3) that the Secretary of NMED will take no more than 30 days to issue his decision on the permit; and (4) that no one seeks to stay the effectiveness of the permit as part of court challenge to its issuance. In short, given NMED's position on how much time it will require for each of the remaining steps in the permitting process, DOE can have no confidence that WIPP will have a RCRA permit by September 30, 1999, the end of the "timeline" issued by NMED in October 1998. Rather, even if NMED works diligently with DOE now "to resolve issues that might stand in the way of a quick opening after a permit is issued," as you suggest in your letter, DOE cannot expect to begin operations under a permit until January 2000 at the earliest, and that assumes optimistically that NMED meets each of the deadlines it has proposed.

Finally, I want to confirm that Secretary Richardson has directed that \$10 million earmarked for WIPP technical studies be diverted immediately to meet the ongoing waste-storage needs of other DOE sites occasioned by the delays in opening WIPP, that another \$7 million be diverted if there are additional delays in the near-term, and that the award of a \$20 million WIPP transportation contract be put on hold until a path for opening WIPP is clear and we have some reliable information as to when regular shipments to WIPP can be made. Although we regret having had to take these steps, they are prudent and necessary under the current circumstances.

We do want to continue to work with you on possible means to meet our commitment to Idaho to begin shipping transuranic waste out of Idaho by April 30, 1999. As you know, that deadline is tied to the continued success of one of the Department's important nuclear non-proliferation programs, which retrieves spent fuel containing weapons usable, highly enriched uranium from research reactors around the world. As you should also be aware, DOE's general counsel had followed up on the discussions you and I had with the general counsel and staff of the Environment Department, and we were continuing to work the issue when your letter arrived.

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Mr. Lou Gallegos

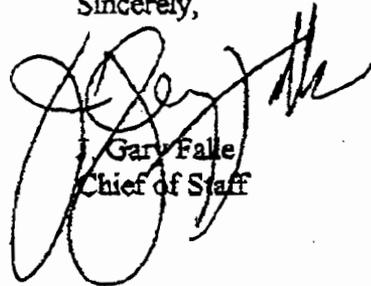
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Commencing disposal operations at WIPP with the Los Alamos waste stream is not merely a symbolic gesture. The 102 waste boxes that make up the NMED-approved portion of this waste stream constitute approximately four months of shipments at the phased ramp-up rate that we believe is appropriate for any new operation of this type. Given the severe backlog of transuranic waste building up around the DOE complex as a result of the RCRA permitting delays, and our regulatory and other commitments to meet certain milestones for disposal of transuranic waste at WIPP over the next several years, beginning shipment of Los Alamos waste is vitally important. We had hoped and have been working for nearly a year to have the State's cooperation in this undertaking.

I hope we can move forward on a more constructive path, but the Department must pursue its need to open WIPP as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gary Fale', written over a printed name and title.Gary Fale
Chief of Staff