

January 1992

NUCLEAR WASTE

DOE Assistance in Funding Route Improvements to Waste Isolation Plant



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**Resources, Community, and
Economic Development Division**

B-246306

January 14, 1992

**The Honorable James H. Bilbray
House of Representatives**

Dear Mr. Bilbray:

In response to your August 13, 1991, request and subsequent discussions with your office, we obtained information on the Department of Energy's (DOE) fulfillment of agreements with New Mexico to assist the state in obtaining federal funds to improve roads in connection with DOE's Waste Isolation Pilot Plant (WIPP). Located near Carlsbad, New Mexico, WIPP is intended to be an underground repository for the permanent disposal of transuranic waste, which is any material contaminated with radioactive elements that have atomic numbers greater than uranium. DOE produces the waste at various facilities in its nuclear weapons complex. Construction of WIPP has been completed, and DOE is preparing to store nuclear waste in it for several years as part of a test phase to determine whether the facility can be used for permanent disposal of nuclear waste.

In summary, we found that since 1981 DOE has agreed to support the state in obtaining about \$100 million in federal funds for improving certain existing state roads to WIPP and \$190 million for constructing new relief routes so that nuclear waste transported to the facility would bypass population centers. So far New Mexico has received \$54.4 million in federal funds from the Department of Transportation for improvements to existing roads. In addition, DOE reprogrammed about \$43 million of its appropriated funds for improvements to existing roads, but the Secretary of Energy has been directed not to release these funds until nuclear waste is placed in WIPP. The state has not received any of the \$190 million for constructing new relief routes. In April 1990 the Secretary testified that he would support whatever the Congress determined was necessary to get the facility open, but he believed the funds should not come out of DOE's budget.

More recently DOE proposed providing New Mexico with up to \$605 million over a period of approximately 32 years—the time needed for testing, operating, and decommissioning WIPP. DOE said the funding would be in lieu of the \$190 million in 1987 dollars for new relief routes, and it would also provide funding for mitigating the facility's other impacts on the state, such as its effect on the environment, public health, and safety. DOE included the first \$15 million for this purpose in its 1992 budget request.

The Congress appropriated \$20 million for the state to mitigate economic impacts—including construction on new or existing roads—in fiscal year 1992, contingent on DOE's starting WIPP's test phase. DOE's current position is that it will provide the \$20 million to the state when the first shipment of waste is received at the facility.

The WIPP site is located on federal land that is under the jurisdiction of the Department of the Interior, which has the authority to withdraw federal land from settlement, sale, or entry for periods up to 20 years. In 1982 Interior granted the first withdrawal of public land at the site so that DOE could use it for research and development. A 1983 land withdrawal order authorized DOE to construct WIPP but did not authorize storage or burial of radioactive materials at the facility. In 1991 Interior granted DOE's application to extend and modify the 1983 withdrawal order. The modification authorized DOE, among other things, to place retrievable transuranic waste at the site during a test phase. However, New Mexico's position is that radioactive waste should not be transported and stored at WIPP until federal legislation is enacted to permanently withdraw land at the site from public use and authorize storage of transuranic waste at the facility. As a result of a suit by New Mexico and others, on November 26, 1991, the United States District Court for the District of Columbia ordered Interior not to implement the 1991 land withdrawal insofar as that action authorized the introduction of transuranic waste into WIPP.

On November 5, 1991, the Senate passed S. 1671, a bill that would permanently withdraw the land and allow radioactive waste at the site. The bill, which DOE and New Mexico supported, would also authorize \$20 million annually to the state during the testing and operating phases and \$13 million annually during the decommissioning of WIPP. The bill would include authority to make payments equivalent to taxes and to provide funds for environmental monitoring. The Senate bill does not state that any of its funding provisions are for roads or are in lieu of the \$190 million in the prior agreement. Similar legislation has not passed in the House of Representatives. The press secretary for the Governor of New Mexico said that, from the Governor's perspective, the funding process in the Senate bill would fulfill DOE's 1987 agreement to assist the state in obtaining \$190 million for relief routes.

Further information concerning DOE's assistance to New Mexico is contained in section 1 of this fact sheet.

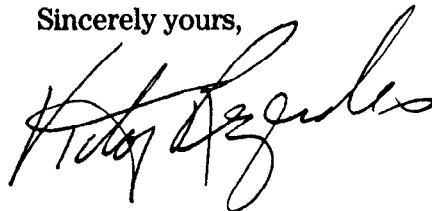
To identify DOE's agreements regarding financial assistance to New Mexico for roads to WIPP, we reviewed agreements between DOE and New Mexico from July 1, 1981, through November 1991. To determine how DOE fulfilled the agreements—including how much federal financial assistance had been requested, considered, and provided to date—we reviewed documents obtained from DOE, DOT, and the state on this issue.

We discussed the information presented in this fact sheet with DOE and New Mexico officials, and they agreed with the accuracy of the facts presented. However, as requested, we did not obtain written agency comments. Our review was performed from September through November 1991 in accordance with generally accepted government auditing standards.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this fact sheet until 10 days from the date of this letter. At that time we will send copies of this fact sheet to the appropriate congressional committees, the Secretary of Energy, appropriate New Mexico officials, and the Director, Office of Management and Budget. Copies will also be made available to others on request.

If you have any questions, please call me at (202) 275-1441. Major contributors to this fact sheet are listed in appendix I.

Sincerely yours,



Victor S. Rezendes
Director, Energy Issues

Contents

Letter		1
Section 1		6
DOE Agreements and Assistance	Status of Funding for Road Improvements	6
	No Funds Have Been Provided for New Relief Routes	7
	New Funding Proposals	9
Appendix I		14
Major Contributors to This Fact Sheet	Resources, Community, and Economic Development Division, Washington, D.C.	14
	Office of General Counsel, Washington, D.C.	14
Related GAO Products		16

Abbreviations

DOE	Department of Energy
DOT	Department of Transportation
GAO	General Accounting Office
WIPP	Waste Isolation Pilot Plant

Contents

DOE Agreements and Assistance

On December 29, 1979, the President approved P.L. 96-164, which defined the mission of the Waste Isolation Pilot Plant (WIPP) and required the Secretary of Energy to consult and cooperate with New Mexico regarding the state's public health and safety concerns about the project. The law also required that the Department of Energy (DOE) enter into a written agreement with New Mexico to set forth procedures for the required consultation and cooperation. Because of objections to certain provisions in the draft agreement and concerns about both WIPP's safety and its own role in making decisions about the project, the state filed a lawsuit against DOE in the U.S. District Court for the District of New Mexico in 1981.

In a partial settlement of the lawsuit on July 1, 1981, DOE and the state entered into a stipulated agreement which accompanied the statutorily directed "Agreement for Consultation and Cooperation". The court approved the stipulated agreement, which committed DOE to assist New Mexico in obtaining, among other things, federal funding for road upgrading.

Status of Funding for Road Improvements

In December 1982 DOE and New Mexico entered into a "Supplemental Stipulated Agreement Resolving Certain State Off-site Concerns Over WIPP." DOE agreed, among other things, to support the state and its congressional delegation in seeking about \$57.9 million (1982 dollars) from the Congress during a 4-year period. This special appropriation would assist the state in the timely completion of 21 projects to upgrade and repair 206 miles of New Mexico highways leading to WIPP. The amount requested was to be adjusted for inflation at the time of payment. From fiscal years 1984 to 1988 the Department of Transportation (DOT) received a series of line-item appropriations amounting to \$54.4 million—less than the amount the state had requested—for upgrading roads to the plant. All of the \$54.4 million has been obligated to the state. Funds made available were sufficient for the preliminary engineering of all 21 projects and the completion of 13 projects.

In 1987 New Mexico recognized that additional funds would be required to complete the remaining eight road upgrading projects. The state, therefore, requested additional assistance from DOE. On that basis, DOE sought and obtained congressional permission to reprogram \$43 million in unobligated balances from its prior-year defense-program appropriations to fund New Mexico's request. The reprogramming authority was included in DOE's appropriation, the Energy and Water Development Appropriations

Act of 1989 (P.L. 100-371). However, the House and Senate Armed Services Committees directed, in a conference report on the National Defense Authorization Act for fiscal year 1989, that the funds not be disbursed until WIPP land was withdrawn, thereby lifting legal barriers to the placement of nuclear waste there. In June 1989 DOE's Acting Director of the Office of Defense Waste and Transportation Management said the Program Manager of WIPP was not authorized to obligate the funds until Congress passed land withdrawal legislation for the site. Legislation to permanently withdraw the land has not been enacted; DOE has not shipped any transuranic waste to the plant; and the money has not been released.

No Funds Have Been Provided for New Relief Routes

In 1987 New Mexico approached DOE to secure the agency's commitment to help the state obtain another \$200 million in funds for new relief routes around or between six New Mexico communities. Some of these relief routes or bypasses had been planned for many years but had not been funded. According to state officials, however, the roads were needed to route vehicles transporting nuclear waste around the six municipalities.

In August 1987 DOE and the state amended the 1982 supplemental stipulated agreement. Specifically, DOE agreed that, with the support of the New Mexico congressional delegation, it would make a good faith effort to support the state in seeking a special appropriation from the Congress for an amount not to exceed \$190 million (1987 dollars) to help the state construct relief routes around the communities of Artesia, Carlsbad, Hobbs, Roswell, and Santa Fe, and between Los Alamos and Santa Fe.

The 1987 agreement did not establish a time frame for these appropriations nor did it specify whether DOT or DOE funds were expected to be used. While the agreement said the funding may be appropriated over a number of years, it also noted that, given DOE's plans at the time to start placing waste at WIPP in October 1988, funds were needed immediately to construct relief routes before DOE began to transport a substantial portion of the waste on New Mexico highways. To make a good faith effort, DOE specifically committed itself to

- submitting written testimony and testifying, if possible, in support of the requested funds before the appropriate congressional committees;
- submitting written statements in favor of the requested funds to all members of the New Mexico delegation for their use;

- coordinating and cooperating with the Federal Highway Administration to enlist its support in favor of the requested funds; and
- responding favorably in support of the requested funds to inquiries from the press, the public, and others.

In October 1987 DOE officials met with and then wrote to officials of the Federal Highway Administration to seek assistance in identifying federal highway money for the six proposed relief routes. According to DOE, however, officials of the Federal Highway Administration said no highway funds were available. The Director of DOE's Waste Management Projects Division said no other efforts were made to seek the funds.

In April 1990 DOE's legislative proposal to withdraw WIPP land from public use was introduced in the Senate (S. 2420, 101st Congress), but it was not enacted into law. The bill included economic assistance provisions encouraging business and employment opportunities related to WIPP, authorization for payments equivalent to state and local taxes, and acquisition by DOE of a specific mineral tract within the area to be covered by the land withdrawal. The bill did not include provisions authorizing funds for the six relief routes or other monetary compensation to the state.

On April 3, 1990, the Secretary of Energy testified on DOE's land withdrawal bill for WIPP before the Senate Committee on Energy and Natural Resources. Regarding possible appropriations of additional federal funds for the six proposed relief routes, the Secretary stated that he would "... support whatever the Congress feels is necessary to get WIPP open." He also said he did not believe that the money should come out of DOE's appropriations. In addition, the Secretary stated that the Office of Management and Budget would be unlikely to approve an additional \$190 million in the DOE budget for road funding related to WIPP.

In response to a Committee question on road funding after the hearing, the DOE stated

"DOE's position is that the shipment of transuranic waste does not require special or new bypasses for the safe transportation of radioactive waste to WIPP. Nevertheless DOE has agreed to provide information on proposed WIPP shipments in support of the State of New Mexico's request for funds to support highway infrastructure construction."

DOE said the number of shipments to WIPP during the test phase—approximately the first five years—would be significantly lower than it was anticipated when the agreement to support road funding was signed in 1987. Also, DOE said the agreement was made with full-scale operations in mind, not a test period.

New Funding Proposals

In December 1990, DOE proposed to provide New Mexico with a total of up to \$605 million over 32 years. The funding plan was based on the assumption that WIPP would be fully operational and then decommissioned in 32 years. In March 1991 DOE made another proposal in a draft modification to the original 1981 consultation and cooperation agreement. The draft modification said that, subject to appropriations, DOE would provide \$20 million per year to New Mexico during the test phase and operating life of the facility and \$13 million per year during the decommissioning. Also, the draft modification said that the payments would satisfy the DOE's 1987 agreement to aid the state in obtaining \$190 million in federal funds for relief routes. The draft agreement did not specify, however, that the state must use the funds for road construction or improvements. DOE also said in the proposal that the funds would mitigate other impacts on the state, such as the effect on the economy, environment, public health, and law enforcement. According to the Director of DOE's Waste Management Projects Division, expenditures would be at the state's discretion.

The Director also said the March proposal was based in part on discussions with Federal Highway Administration and New Mexico officials in which the state provided scenarios for receiving the \$190 million for relief routes over several years. He said the proposals were also based on the funding precedent set by the Congress in the Nuclear Waste Policy Amendments Act of 1987 (P.L. 100-203). That act authorized \$20 million per year in benefit payments to Nevada for receipt of civilian high-level radioactive waste at a permanent repository at Yucca Mountain and \$10 million per year in annual payments prior to receipt of the waste.

New Mexico did not accept the modifications to the agreement that DOE proposed in March 1991. According to the Governor's press secretary, the Governor believed that if the proposal was included in legislation, DOE would make a greater effort to comply. Nevertheless, DOE included the first \$15 million to assist the state in mitigating the environmental, social, economic, and other impacts resulting from the test phase of WIPP in its

1992 budget request. The Congress appropriated \$20 million for the state to mitigate economic impacts, including road construction, in fiscal year 1992. The appropriation was contingent on DOE starting the test phase at WIPP. DOE intends to release the funds when the first shipment of waste is received at the plant.

A funding provision similar to the one in the draft agreement was included in DOE's land withdrawal bill introduced in the Congress on April 11, 1991 (H.R. 1834, 102nd Congress, 1st session). The House adjourned on November 27, 1991, without passing land withdrawal legislation. DOE and the state support a land withdrawal bill (S. 1671, 102nd Congress, 1st session) that the Senate passed on November 5, 1991. The bill contained annual funding of \$20 million during operations—beginning with the first fiscal year in which transuranic waste is shipped to WIPP—and annual funding of \$13 million during decommissioning. The bill states that previous agreements between DOE and New Mexico will remain in force, unless specifically changed by the legislation. The bill does not state that any funding it authorizes is for roads or is in lieu of funds described in prior agreements. The bill does state, however, that no transuranic waste may be transported from the Los Alamos National Laboratory in New Mexico to WIPP until (1) the funds necessary for constructing the Santa Fe bypass—one of the relief routes in the DOE agreement with New Mexico—have been made available to the state,¹ (2) the bypass has been completed, or (3) the Administrator of EPA certifies that DOE has complied with environmental regulations that will be promulgated for WIPP.

The Director of DOE's Waste Management Projects Division said that, in his view, the funding process in S.1671 would fulfill DOE's 1987 agreement to assist the state in obtaining \$190 million in federal funds for WIPP relief routes. Also, the press secretary for the Governor of New Mexico said that the Governor agreed with this view. The Governor's press secretary added, however, that the uncertainty of receiving appropriations from the Congress during the next 30 years would require the state to assume a greater risk by issuing bonds. DOE's Director of the Waste Management Projects Division said that although DOE had agreed in 1987 to assist New Mexico in obtaining funds without specifically stating that it would provide its own funds, the recent administrative and legislative proposals would use DOE appropriations for the state.

¹In September 1991 the New Mexico State Highway and Transportation Department estimated that the Santa Fe bypass will cost up to \$81.1 million. State funds and federal funds from DOT are available for a portion of the project, but \$51.2 million remains unfunded.

While legislative land withdrawal proposals were considered in 1991, DOE made a parallel effort to obtain authorization, through administrative land withdrawal, to transport and store radioactive waste at WIPP during the facility's test phase. The plant site is on federal land under the jurisdiction of the Department of the Interior, which has authority to withdraw federal land from settlement, sale, or entry for a period of generally up to 20 years. In 1982 Interior granted the first withdrawal of public land at the site, pending a legislative withdrawal, so DOE could use it for research and development. In 1983 DOE sought a new withdrawal to begin the construction phase and Interior withdrew the requested acreage—including 640 acres that would be reserved exclusively for DOE's use. Interior did not, however, authorize DOE to store or dispose of radioactive waste at the WIPP site. On January 22, 1991, Interior granted a modification that DOE sought to the 1983 order. The modification expanded the purpose of the order to include conducting the test phase of the project using retrievable transuranic waste. The modified order states that Interior would issue a notice to proceed with the test phase when DOE certifies its compliance with all applicable environmental laws and regulations. On October 3, 1991, the Secretary of Energy certified that all environmental permitting requirements had been met and Interior issued a notice to proceed with the test phase.

In an October 4, 1991 letter to the Governor of New Mexico, the Secretary of Energy said that in future budget requests, and in the absence of land withdrawal legislation, he would ask the Congress for authority and funding to continue payments to the state to help offset any financial burdens caused by WIPP. He said that he would continue to work closely with the Congress toward enactment of a land withdrawal bill that would permanently address the situation and ensure appropriate assistance to the state, which could not be done under administrative procedures.

On October 9, 1991, New Mexico and others sought to restrain waste shipments by DOE in the U.S. District Court for the District of Columbia. The state believed that federal legislation was required to withdraw the land permanently and allow the shipment and storage of waste at WIPP. On November 26, 1991 the court ordered Interior to cease all activities to implement the administrative land withdrawal of January 1991 that authorized the introduction of transuranic waste into WIPP. In part, the court's order was based on its finding that extensions of administrative land withdrawals may only be made for the purpose that the original withdrawal was made; contrary to this requirement, the January 1991

Section 1
DOE Agreements and Assistance

amended land withdrawal materially altered the purpose of the 1983 withdrawal.

Major Contributors to This Fact Sheet

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Related GAO Products

Nuclear Waste: Delays in Addressing Environmental Requirements and New Safety Concerns Affect DOE's Waste Isolation Pilot Plant
(GAO/T-RCED-91-67, June 13, 1991).

Nuclear Waste: Issues Affecting Land Withdrawal of DOE's Waste Isolation Pilot Project (GAO/T-RCED-91-38, Apr. 16, 1991).

Nuclear Waste: Storage Issues at DOE's Waste Isolation Pilot Plant in New Mexico (GAO/RCED-90-1, Dec. 8, 1989).

Status of the Department of Energy's Waste Isolation Pilot Plant
(GAO/T-RCED-89-50, June 12, 1989).

Status of the Department of Energy's Waste Isolation Pilot Plant
(GAO/T-RCED-88-63, Sept. 13, 1988).

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