

**Before the Director, Office of Hearings and Appeals
Department of Energy
HG-1/L Enfant Plaza Building
1000 Independence Avenue, SW, Washington, DC 20585-1615**

**FREEDOM OF INFORMATION APPEAL OF FOIA OFFICER DECISION FOR
HQ-2017-00262-F**

Sent by Email to: OHA.filings@hq.doe.gov on 12/22/2016

Citizen Action New Mexico (“CANM”) and Concerned Citizens for Nuclear Safety (“CCNS”) hereby appeal the December 16, 2016 decision of Department of Energy (“DOE”) Freedom of Information Act (“FOIA”) Officer Alexander C. Morris to deny the request for expedited provision of documents related to the Waste Isolation Pilot Plant (“WIPP”). CANM and CCNS meet both prongs necessary to establish a compelling need for an expedited FOIA.

Two prongs exist for establishing a compelling need for an expedited FOIA, according to the DOE Management Office:

A compelling need is established when one of the following two criteria are met: (1) by establishing that your failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or (2) if you are primarily engaged in disseminating information and can demonstrate an urgency to inform the public concerning actual or alleged Federal Government activities exists. You must certify the reasons for expedited processing by articulating with specific examples of either criterion, which both must be true and correct.

Source: <https://www.energy.gov/management/office-management/operational-management/freedom-information-act/foia-frequently-asked#Question6>

The FOIA Officer decision is both arbitrary and capricious and ignores the extreme and imminent endangerment that is present for workers and the public shown by an ongoing history of gross negligence, waste mischaracterization, accidents and radiation exposure in WIPP operations and ongoing secrecy about safety issues.

CANM and CCNS are Non-governmental Organizations (“NGOs”) primarily engaged in the occupation of information gathering and dissemination about radioactive waste generation and disposal at Federal Government facilities in the United States.

The consequences of delay in furnishing the requested information compromise the ability of CANM and CCNS to provide information to the public, workers and regulatory agencies about the extreme dangers of the planned premature reopening WIPP for emplacement of radioactive waste. CANM and CCNS have a particular urgency to inform the public about the

information sought by the FOIA Request prior to the planned reopening of the WIPP that poses unique danger and threat from government activity of the DOE proceeding in the face of uncorrected safety issues that are hidden from the workers and the public.

For 28 years, CCNS has provided a weekly broadcast of the latest nuclear news. Our recent stories have focused on WIPP and the proposed reopening. *See generally*, “WIPP Requests Temporary Authorization to Install Bulkheads and Proposed Above Ground Storage Public Comment Extended to February 3rd,” at <http://nuclearactive.org/wipp-requests-temporary-authorization-to-install-bulkheads-and-proposed-above-ground-storage-public-comment-extended-to-february-3rd/>; “SRIC and NRDC Address NEPA Requirements for Reopening WIPP,” at <http://nuclearactive.org/sric-and-nrdc-address-nepa-requirements-for-reopening-wipp/>; and “In Rush to Reopen WIPP, DOE Ignores the Safer “Clean Salt” Option,” at <http://nuclearactive.org/in-rush-to-reopen-wipp-doe-ignores-the-safer-clean-salt-option/>. CCNS disseminates the broadcast weekly by email and posts it to <http://www.nuclearactive.org>, Facebook and Twitter.

DOE is in a rush to re-open WIPP even though the facility cannot meet the previous operational and safety standards, let alone more stringent requirements that are necessary to prevent future accidents. That the safe reopening of WIPP is of national public concern as well as to CANM, CCNS and other NGOs is irrefutable as demonstrated by thousands of articles published in the local and national news media regarding the Federal Government nuclear waste disposal operations at WIPP. Examples are set forth below. WIPP is the only Federal repository for the shipment and disposal of radioactive Transuranic (TRU) and hazardous waste from numerous Federal facilities in the U.S. that include for example, Hanford, WA, Idaho National Laboratory, ID, Oak Ridge, TN, Savannah River Site, SC, Los Alamos National Laboratory, NM.

No bounding exists for DOE FOIA Office intransigence. The FOIA Office has misinterpreted the first prong of the standard for an expedited FOIA for the meaning of imminent threat to life or physical safety. The continuing history of radioactive waste disposal at WIPP demonstrates ongoing threats to life and physical safety: DOE miscalculations; diesel truck fire caused by lack of maintenance, an explosion of a radioactive waste drum(s); radioactive breach of WIPP facility filter containment to the environment; worker and public exposures to radionuclides; radioactive contamination of the facility; four roof collapses; lack of trained personnel; absence of protective safety equipment; ignorance about air flow and worker ventilation; lack of emergency medical teams; absence of adequate fire protection; inability to provide the appropriate level of radiological personnel response. All this demonstrates the fact that FOIA personnel are unwilling to recognize any imminent danger that could recommend and result in the expeditious release of FOIA documents.

The standard for obtaining an expedited FOIA is imminent threat to life or physical safety of an individual, not that “someone will die tomorrow” as was stated during a teleconference between FOIA staff and CANM, CCNS and the Southwest Research Information Center

("SRIC") on 12/21/2016. The threats to worker and public health and safety are legion at WIPP.

Worker and public exposure to the release of plutonium and americium from the WIPP facility and ½ mile into the atmosphere resulted from the explosion of a drum of waste that contained organic kitty litter on February 14, 2014. The improper use of organic kitty litter occurred despite DOE knowledge that organic matter cannot be combined with radioactive waste. Six hundred such drums improperly containing organic kitty litter remain in the WIPP at present and have the potential to explode creating an imminent threat to the lives or health of workers at WIPP.

DOE is on the record that it intends to reopen WIPP for the emplacement of radioactive waste by the end of December 2016. The reopening of WIPP in less than ten (10) days is of urgent consideration to CANM and CCNS to inform the public regarding Federal Government nuclear waste operations which are unsafe given reports by the Defense Nuclear Facility Safety Board, the Mine Safety and Health Administration ("MSHA"), and the DOE Office of Enterprise Assessments that strongly indicate that WIPP is not ready to reopen, as well as a December 15, 2016 town hall meeting that admitted 21 prestart and 15 post-start safety issues still remain. The Government Accountability Office ("GAO") harshly criticized DOE cost and schedule estimates for restart in their August 4, 2016 report entitled, "[Nuclear Waste: Waste Isolation Pilot Plant Recovery Demonstrates Cost and Schedule Requirements Needed for DOE Cleanup Operations,](http://www.gao.gov/products/GAO-16-608)" at GAO-16-608 at <http://www.gao.gov/products/GAO-16-608>

The failure to complete and issue the Operational Readiness Report (ORR) for public review is a major concern for CANM, CCNS and is also demonstrated by numerous media outlets that have sought to obtain detailed information about the WIPP reopening but have been unable to receive the documentation in a timely fashion. The person or persons having responsibility for the decision to reopen WIPP is undisclosed. The DOE is withholding the ORR documentation to maintain secrecy about WIPP operations and conditions that make it unsafe to proceed with radioactive waste emplacement operations that continue to threaten the lives or the physical safety of both the public and workers, especially given the rush to reopen in the face of numerous identified safety issues:

- Inadequate ventilation exists for workers. WIPP was conceived of and permitted by the New Mexico Environment Department as a clean work environment. Future work at WIPP will require work in radiologically controlled areas in personnel protective suits. Two major findings of the December 16, 2016 DOE Office of Enterprise Assessment were – The WIPP Ventilation Plan does not adequately reflect the mine ventilation system as currently configured or the conditions and assumptions under the Recovery Plan – NWP does not have a sound engineering approach for determining the minimum ventilation rates for diesel equipment. "Assessment of Work Planning and Control at the Waste Isolation Pilot Plant – December 2016," at

<https://www.energy.gov/ea/downloads/office-enterprise-assessments-assessment-work-planning-and-control-waste-isolation>

- In September 2016, DNFSB found weak Radiological Control practices observed during the Bison 2 Emergency Response exercise. Contractor (NWP) management reviews of equipment logbooks in the underground were not being consistently performed and NWP lacked a consistent process for verifying that operators possess the latest revision of an underground vehicle's preoperational check procedures which indicated operators may be using outdated procedures.
http://www.dnfsb.gov/sites/default/files/Board%20Activities/Reports/Site%20Rep%20Monthly%20Reports/Waste%20Isolation%20Pilot%20Plant/2016/mr_20160831_122.pdf
- As recently as December 13, 2016, DNFSB asked for briefing by DOE on the safety of operations at WIPP and verification of readiness to start based on findings from the Operational Readiness Review.
http://www.dnfsb.gov/sites/default/files/Board%20Activities/Letters/2016/ltr_20161213_32216.pdf
- [R]adioactive materials should not be mixed with organic chemicals because the radiation generates explosive gases. It raises questions about the Energy Department's ability to apply what it has learned over decades of painstaking, mistake-ridden stewardship of the leftovers of nuclear bomb manufacture.
<https://www.nytimes.com/2014/10/30/us/in-us-cleanup-efforts-accident-at-nuclear-site-points-to-cost-of-lapses.html? r=0>
- Six WIPP personnel were evaluated for smoke inhalation and released from a local hospital the day of an underground diesel truck fire. In fact, one employee was permanently disabled and has received compensation through litigation. As a result of an explosion of a waste drum, bioassay tests showed that 22 workers received internal contamination as a result of February fire and release.
<http://www.wipp.energy.gov/wipprecovery/faq.html>
- Continuing roof collapses are certainly "imminent" events capable of killing workers. Roof collapses could occur on top of drums that are potentially explosive. Four roof collapses have occurred since October 2016 - any worker present during a roof collapse while handling waste in such an area would be crushed to death. The Mine Safety and Health Administration found a massive area of the ceiling in Room 4 of Panel 7 had crashed: a rock fall two-thirds the length of a football field, eight feet thick. Workers had to be evacuated.
<https://www.apnews.com/497c0f6bf9844f348eb9ce09a37a351f>
- "Presumably all we have left in Panel 7 is Rooms 1, 2 and 3," said John Heaton, chairman of the Carlsbad Mayor's Nuclear Task Force. "They have to get the roof bolting done before they can do anything else with those three rooms. You almost have to assume that it's been willfully ignored. MSHA has been in almost monthly, criticizing the maintenance of the "back," or ceiling.

“In view of that,” he said, “it’s difficult to understand how you can come to any other conclusion than that it has not been a priority of the contractor. Of course, DOE has some responsibility in oversight of that.”

<https://www.abqjournal.com/902842/new-safety-questions-come-up-at-wipp.html>

- Recent roof collapses inside WIPP ... call into question the facility’s ability to handle ground control in a contaminated mine. <https://www.abqjournal.com/902842/new-safety-questions-come-up-at-wipp.html>
- Mining Safety and Health citations have doubled during 2016, including citations from February, May, and subsequently that are not yet resolved. <http://arlweb.msha.gov/drs/ASP/InspectionViolations.asp>
- Potential hazards associated with the operation of the diesel-powered roof bolters from the accumulation of toxic atmospheres, especially since the airflow available underground at WIPP is limited at this time. Problems with mine stabilization of the roof. <https://energy.gov/sites/prod/files/2015/10/f27/Review%20of%20Mine%20Safety,%20Stabilization,%20and%20Habitability%20at%20WIPP%20-%20October%202015.pdf>
- [T]he explosion ranks among the costliest nuclear accidents in U.S. history, according to a *Los Angeles Times* analysis. The long-term cost of the mishap could top \$2 billion, an amount roughly in the range of the cleanup after the 1979 partial meltdown at the Three Mile Island nuclear power plant in Pennsylvania. <http://www.latimes.com/nation/la-na-new-mexico-nuclear-dump-20160819-snap-story.html>
- DOE failure to follow best practices, especially with regard to the ventilation system, caused 9 month delay and \$61.6 M increased costs for WIPP operation in 2016. <http://www.gao.gov/products/GAO-16-608>
- The WIPP Ventilation Plan does not meet U.S. Mine Safety and Health Administration requirements. In particular, the contractor had been using non-approved diesel engines that were banned in 2001. The review states, “[t]he identified deficiencies are significant and need to be addressed before WIPP begins to use diesel engines underground.” https://www.energy.gov/sites/prod/files/2014/12/f19/2014_WIPP_Recovery_Plan_for_Diesel_Equipment_-_December_2014.pdf
- The WIPP contractor did not conduct basic equipment maintenance and inspections as required by DOE orders and the management contract. https://www.energy.gov/sites/prod/files/2014/12/f19/2014_-_WIPP_Conduct_of_Maintenance_Recovery_Plan_-_December_2014.pdf

CONCLUSION

CANM and CCNS have met both the requirements for provision of documents related to their FOIA request. The decision of the FOIA Officer should be reversed and the requested documents provided prior to the proposed reopening of WIPP. We hereby certify the

reasons for expedited processing as described above, with reference to specific examples.
We certify that the above is true and correct.

Respectfully submitted,

Dated: December 22, 2016

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Attachment: December 16, 2016 response of the Department of Energy to Citizen Action
New Mexico denying expedited processing

Mr. David B. McCoy
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Via e-mail: dave@radfreenm.org

Department of Energy
Washington, DC 20585

December 16, 2016
Re: HQ-2017-00262-F

Re:

Operational readiness review (ORR) for the reopening of the Waste Isolation Pilot Plant (WIPP), Unanswered Safety Questions (USQs); corrective action plans for the issues needed to be resolved prior to reopening; issues that will be resolved after the reopening after waste emplacement gets underway; and bonus amounts that would be awarded to Nuclear Waste Partnership for emplacement of the first drum of waste.

Dear Mr. McCoy:

Thank you for the request for information that you made to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in this office on December 12, 2016, and has been assigned a controlled number, HQ-2017-00262-F. Since we receive several hundred requests a year, please use this number in any correspondence with the DOE regarding your request.

We are reviewing your request to determine if it addresses all of the criteria of a proper request under the FOIA and the DOE regulation that implements the FOIA at Title 10, Code of Federal Regulations, Part 1004. We will send you a subsequent letter to inform you if we need additional information or to state where the request has been assigned to conduct a search for responsive documents.

In your request, you asked for expedited processing of the request. You stated that the information requested is urgently needed because "the health and safety of individual workers, the public and the environment are placed at imminent and extreme risk by the carelessly planned and hasty reopening of the WIPP facility by the end of December 2016 without complete resolution of safety issues."

The FOIA permits agencies to expedite the processing of requests if requesters demonstrate a "compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I). A "compelling need" is established when one of two criteria are met. 5 U.S.C. § 552(a)(6)(E)(v)(II). The criteria are met when (1) failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," or (2) if the "requester is primarily engaged in disseminating information" and can demonstrate that there is an "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.*

The reasons you have provided do not adequately address the basis for which a request may be expedited. You have not provided material that establishes that there is any threat to the life or safety of an individual that would justify expeditious processing of the request.

You also have not identified an actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner. In order to determine whether a requester has

demonstrated an "urgency to inform," and hence a "compelling need," courts consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.J.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001); *Associated Press v. DOE*, Case No. TFA-0273 (September 11, 2008). Your request does not sufficiently address factors one or two.

For these reasons, I am denying your request for expeditious processing. The request will be processed in accordance with provisions of the FOIA.

You may challenge the denial of your request for expedited processing by submitting a written appeal to the Director, Office of Hearings and Appeals, at HG-1/L'Enfant Plaza Building, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1615. You may also submit your appeal by e-mail to OHA.filings@hq.doe.gov, including the phrase "Freedom of Information Appeal" in the subject line. You should submit the appeal within 90 calendar days of receipt of this determination. The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. The appeal must contain elements required by 10 CFR § 1004.8, including a copy of this letter. Judicial review will thereafter be available in the Federal District Court either (1) in the district where you reside; (2) in the district where you have your principal place of business; (3) in the district where the DOE's records are located; or (4) in the District of Columbia.

You may contact DOE's FOIA Public Liaison, Alexander MmTis, FOIA Officer, Office of Public Information, at 202-586-5955 or by mail at MA-46/Forrestal Building 1000 Independence Avenue, S.W. Washington, D.C. 20585 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Please refer to the above referenced number in any communications with the DOE about the request. If you have any questions about the processing of the request or this letter, you may contact Ms. Camille Aponte-Rossini at MA-46/ Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, or at 202-586-7504.

I appreciate the opportunity to assist you.
Office of Public Information