

Freedom Of Information Act Request for Expedited Emergency Release for Information for the Waste Isolation Pilot Plant (WIPP)

December 10, 2016

Ms. Ingrid A. Kolb, Chief FOIA Officer

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FOIA Requester Service Center

US Department of Energy

1000 Independence Avenue, SW

Washington, DC 20585

Via e-mail to <ingrid.kolb@hq.doe.gov> and <Alexander.Morris@hq.doe.gov>

Dear FOIA Officers,

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, (a)(6)(E)(ii)(I), as amended for the expedited processing and immediate emergency release of information regarding the Waste Isolation Pilot Plant (WIPP) located in Carlsbad, NM . *Citizen Action New Mexico* requests the following:

DOE internal and external documents, including emails, dealing with:

- Operational readiness review (ORR) for the reopening of the Waste Isolation Pilot Plant (WIPP).
- Unanswered Safety Questions (USQs).
- Corrective action plans for the issues that need to be resolved prior to reopening.
- Issues that will be resolved after the reopening after waste emplacement gets underway.
- Bonus amount that would be awarded to Nuclear Waste Partnership for emplacement of the first drum of waste.
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The compelling need for the emergency release request are that 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. Nondisclosure of the information imminently and substantially endangers the public and workers. The national and local public interest in the integrity of the investigation for the handling of safety matters for the WIPP reopening dictate the immediate release of the above information. Certainly, under the “balancing of interests approach,” the public interest in this matter outweighs any possible concerns of DOE not to immediately release the requested information. The requested information is electronically held by the DOE and can and should be made available immediately.

The circumstances surrounding reopening WIPP need to be considered fully by the public prior to the reopening of WIPP that has already injured and contaminated workers with a February 2014 truck fire and explosion of container waste with radionuclides of Plutonium and Americium. Unsafe conditions remain and continue to proliferate:

- Ceiling collapses are increasing during 2016.

- The ventilation system remains inadequate to protect workers and to accomplish the emplacement of wastes and remediate existing contamination in the facility.
- Mismanagement of the clean-up has involved poor safety practices, according to the DOE's Independent Office of Enterprise Assessments that points to "*serious issues in conduct of operations, job hazard analysis, and safety basis.*" http://www.wipp.energy.gov/Special/EA_memo_10152015.pdf.

A plume of radioactive contamination swept across New Mexico, Texas, Oklahoma, and Kansas due to the explosion of a container and release of radionuclides from the WIPP site. It was among the costliest accidents in U.S. history that could total \$2 billion, rivaling the 1979 Three Mile Island accident. The public is entitled to the immediate release of the information regarding reopening of the WIPP site due to the imminent and substantial endangerment from circumstances that are presented by a history of disregard of safety in WIPP operations. http://www.theecologist.org/News/news_analysis/2988145/wipp_nuclear_waste_accident_will_cost_us_taxpayers_2_billion.html

The pressure to reopen WIPP despite the existent unresolved safety issues may be a contributing industry factor to premature reopening, similar to the rush that LANS was working under when 600 drums of waste were shipped to WIPP with explosive organic kitty litter. These drums remain as a continuing threat within the WIPP facility. Complete closure of the contaminated areas must be accomplished prior to any reopening of the WIPP facility. Failure to disclose the information immediately places a severe burden on national taxpayers who must ultimately pay for any further shutdowns of WIPP and the loss of the only licensed deep geological nuclear waste repository in the United States.

As a reminder President Obama's Freedom of Information Act Memorandum For The Heads Of Executive Departments And Agencies states, "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." (http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/)

We request an unlocked electronic format (e.g. PDF or Word) of this document, as provided for by 5 U.S.C. § 552, (a)(3), which states:

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

In the event that an electronic version(s) is not available, we then request paper copy(ies) of this document(s). However, we consider that event unlikely since a document will almost always first be created electronically to begin with..

If you regard this information as exempt from required disclosure under the Act, *Citizen Action New Mexico* requests that you exercise your discretion to disclose them nevertheless. If the document(s) includes classified or otherwise restricted information and the volume of this material makes a lengthy declassification review necessary, *Citizen Action New Mexico* requests the prompt release of all elements of the document portions marked 'Unclassified,' 'For Official Use Only,' or 'Declassified.' Additionally, *Citizen Action New Mexico* requests that the remaining classified portions undergo a careful review for the purpose of declassification, in whole or in part, and that you release to *Citizen Action New Mexico* all reasonably segregated portions of the classified record, except those portions which damage national security.

Citizen Action New Mexico further requests that you disclose these materials as they become available to you without waiting until all the documents have been assembled.

As you know, an agency cannot rely simply on the markings of a document to deny its release. In order that a document be withheld under Exemption 1 of FOIA, it must be reviewed and found to be properly classified pursuant to both procedural and substantive criteria found in the governing Executive Order, E.O. 12356. See Conf. Rep., H.R. Rep. No. 1380 (Freedom of Information Act Amendments), 93rd Cong., 2d Sess. 6 (1974); see also Lesar v. Department of Justice, 636 F. 2d 472, 483 (D.C. Cir. 1980); Allen v. CIA, 636 F. 2d 1287, 1291 (D.C. Cir. 1980). This requires an actual, substantive review of the materials and their classification markings. E.O. 12356, Section 3.4, Mandatory Review for Declassification.

Should you elect to invoke an exemption to the FOIA, *Citizen Action New Mexico* will require in your full or partial denial letter sufficient information to appeal the denial. In accordance with the minimum requirements for administrative due process, this information should include:

1. Basic factual material, including the originator, date, length, and addresses of the withheld items.
2. Explanations and justifications for denial, including the identification of the procedural category of E.O. 12356 under which the withheld document or portions of the document was found to be subject to classification, at what level the entire document was ultimately classified and the nature and variety of the document's portion-marking and, most importantly, explanations of how each exemption fits the withheld material.

Citizen Action New Mexico is a non-profit, tax-exempt, public policy research and information environmental organization. *Citizen Action New Mexico* makes information available to citizens by means of publications, educational programs, and its website. The information disclosed pursuant to the request will be made directly available to the public and others engaged in policy analysis and research, including historians, policy makers, area specialists, and journalists.

In the recent past, the Department of Energy has, as a matter of course, sent a letter asking for clarification of the following:

1. Whether the subject of the requested record(s) concerns "the operations or activities of the government;"
2. Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
3. The contribution to an understanding by the general public of the subject likely to result from disclosure, taking into account one's ability and intent to disseminate the information to the public in a form that can further understanding of the subject matter;
4. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities;
5. Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so
6. The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in the disclosure, that disclosure is "primarily in the commercial interest of the requester."

In order to save time and help expedite our request, *Citizen Action New Mexico* herein responds to the above questions in sequential order. This will also help your office clarify any questions you may have regarding *Citizen Action New Mexico* eligibility for FOIA fee waivers or reductions under 10 CFR 1004.9(a)(8). Furthermore, it should assist your office in speedy compliance and consideration of this FOIA request, as required by 5 U.S.C. Section 552, as amended.

Our answers are as follows:

1) All information requested in this FOIA is for information directly related to federal Department of Energy (DOE) activities. Therefore, our request indisputably concerns "the operations or activities of the government." Further, documents generated by DOE management contractors are "owned" by the federal government and therefore fall under this request (e.g., see LANL management contract #W-7405-ENG-36/Mod M440/M507, §I.067 and NM CIVIL NO. 97-1412 DJS/WWD "Los Alamos Study Group vs. Dept. of Energy"). Additionally, the fact that a requested document may have been generated by a contractor, rather than the federal government itself, does not excuse any delay to the fulfillment of our request.

2) DOE activities in New Mexico are of concern to many citizens, yet it is an area where public information is often lacking or inadequate. This FOIA request will enable the public and their advocates to better understand DOE activities.

3) *Citizen Action New Mexico* is in an excellent position to aid the public in its understanding of government activities, particularly with respect to the clean-up of DOE facilities and public participation in clean-up and public health activities around DOE facilities. We publish research articles, maintain a website, and participate in conferences and committees. The information received under this FOIA will be reviewed and presented to the public through any or all of these means.

4) The requested material in this FOIA is likely to contribute "significantly" to public understanding of government operations or activities because it will provide *Citizen Action New Mexico* with important information that will help clarify DOE activities. In turn, *Citizen Action New Mexico* will convey the information to the public so that the general citizenry can be better informed.

5) *Citizen Action New Mexico* has no commercial interest in this FOIA request. *Citizen Action New Mexico* operates as a 501(c)3 non-profit organization. As a result, *Citizen Action New Mexico* cannot in any way make a profit from its activities, whether from this FOIA request, or any other endeavor.

6) The response to question 5 satisfies question 6.

As per 10 CFR 1004.4 (e), *Citizen Action New Mexico* assures our willingness to pay fees, unless a waiver is granted. The FOIA provides that you may waive fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." (5 U.S.C. Section 552(a)(4)(A)(iii) and 10 CFR 1004.9(a)(8)) This request clearly meets these requirements. Therefore, I request that you waive all fees in connection with this request. I further ask, in the event that fees are not waived, that you inform me of the specific basis for such a decision.

We appreciate your help in obtaining this information. Should you need further information concerning *Citizen Action New Mexico* or this expedited request, we would appreciate your immediate attempts to contact us in order to expedite this request. We expect a definitive determination of DOE's intent to release the Expedited Response within 10 working days, as 5 U.S.C. Section 552, (a)(6)(E)(ii)(I) stipulates:

(E)

(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure— that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

In your determination, we also expect a stated date when this document will be released to us, or, alternatively, any reason for denial.

I hereby certify that the information contained above is true and correct to the best of my knowledge and belief.

Sincerely,

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