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Can Bambi Ride Herd over Godzilla - The Role of Executive Oversight in EPA's Rulemaking for the Waste Isolation Pilot Plant

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COMMENT

Can Bambi Ride Herd over Godzilla?[1] The Role of Executive Oversight in EPA's Rulemaking for the Waste Isolation Pilot Plant

> In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.
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> We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.[2]

INTRODUCTION

On July 16, 1945, the United States exploded the first atomic bomb at Alamogordo, New Mexico.[3] The test marked the success of the highly secret Manhattan Project at Los Alamos, New Mexico.[4] Since 1943, scientists had worked at a feverish pace to give the United States a national defense against a presumed German nuclear threat.[5] After World War II American knowledge that the Germans were far from actually developing an atom bomb did not slow efforts by the American

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1. 125 CONG. REC. H6298, 6310 (daily ed. July 21, 1992) ("[A]sking EPA to oversee DOE is like asking Bambi to ride herd over Godzilla. To date, EPA has been unable to hold DOE accountable for even the most blatant violations of environmental laws. So we really believe that it will be able to keep DOE in line on this project?")(statement of Rep. Wolpe). *See also* BAMBI MEETS GODZILLA (Pyramid Film and Video 1969).

2. President Dwight D. Eisenhower, Farewell Radio and Television Address to the American People, January 17, 1961, *reprinted in* PUB. PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER 1960-1961, 1365, 1368 (1961).

3. GREGG HERKEN, COUNSELS OF WAR 3 (Oxford Univ. Press 1987) (Alfred A. Knopf 1985).

4. PETER PRINGLE & JAMES SPIGELMAN, THE NUCLEAR BARONS 30-32 (1981).

5. Nuclear scientists, fearing that Nazi Germany would develop and use a nuclear weapon against allied forces, recommended to President Roosevelt that the United States develop its own atomic bomb. RICHARD RHODES, THE MAKING OF THE ATOMIC BOMB 303, 312-17 (1986).

government to develop nuclear weapons.[6] The United States continued to develop and build nuclear weapons despite its knowledge that no other power had developed nuclear weapons capabilities.[7] Later the policy of nuclear weapons development continued during times of peace. The policy was based upon a national security theory that the United States nuclear weapons arsenal would deter other nuclear nations from launching a nuclear attack against the United States.[8]

The end result of a 50 year policy of nuclear weapons deterrence, however, is a military-industrial complex of staggering proportions.[9] The Brookings Institute[10] estimates that the United States has spent $4 trillion on "most, but by no means all of the direct, indirect and overhead costs required to develop, produce, deploy, operate, support and control dedicated U.S. nuclear forces over the last 50 years."[11] Despite the end of United States nuclear weapons production,[12] approximately 25 nuclear weapons facilities continue to employ an estimated 135,500 people.[13] In 1995 alone, the price tag for nuclear weapons and weapons-related activities was at least $25 billion.[14]

The byproduct of nuclear deterrence is nuclear waste. Today huge quantities of radioactive waste have accumulated and are contaminating nuclear weapons facilities located throughout the country.[15] The pollution from poorly stored waste may be irreparable.[16] Indeed, Dan

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6. HERKIN, *see generally supra* note 3.

7. *Id.*

8. *Id.* at 9-10.

9. BROOKINGS INSTITUTE, ACTIVE UNITED STATES NUCLEAR WEAPONS PRODUCTION AND NAVAL NUCLEAR PROPULSION FACILITIES 1-14 (Stephen I. Schwartz ed., 1995) [hereinafter BROOKINGS].

10. The Brookings Institute is a non-profit organization devoted to public service through research and education in social sciences particularly in economics, government and foreign policy. The Encyclopedia Britannica, vol. II 300 (15th ed. 1983).

11. BROOKINGS INSTITUTE, ATOMIC AUDIT: WHAT THE U.S. NUCLEAR ARSENAL REALLY COST: A PRELIMINARY REPORT BY THE U.S. NUCLEAR WEAPONS COST STUDY PROJECT 1 (Stephen I. Schwartz ed., 1995) [hereinafter ATOMIC AUDIT].

12. "All of the major facilities in the U.S. nuclear weapons production complex were shut down in the late 1980s. For several reasons, the end of production was quite sudden and largely unexpected." OFFICE OF ENVIRONMENTAL MANAGEMENT, DEPARTMENT OF ENERGY, CLOSING THE CIRCLE ON THE SPLITTING OF THE ATOM: THE ENVIRONMENTAL LEGACY OF NUCLEAR WEAPONS PRODUCTION IN THE UNITED STATES AND WHAT THE DEPARTMENT OF ENERGY IS DOING ABOUT IT 79 (1995).

13. Schwartz, BROOKINGS, *supra* note 9.

14. Schwartz, ATOMIC AUDIT, *supra* note 11.

15. *See, e.g.*, OFFICE OF ENVIRONMENTAL MANAGEMENT, DEPARTMENT OF ENERGY, INTEGRATED DATA BASE REPORT-1993: U.S. SPENT NUCLEAR FUEL AND RADIOACTIVE WASTE INVENTORIES, PROJECTIONS, AND CHARACTERISTICS (1994) [hereinafter IDB] (DOE/RW-0006, Rev. 10).

16. U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, COMPLEX CLEANUP: THE

Reicher, former counsel for the Natural Resources Defense Council, believes that the prohibitive cost of cleanup would force the government to declare some sites to be "national sacrifice zones."[17] The problem of nuclear waste is made more acute because radioactive wastes from nuclear weapons production can be very dangerous and very long-lived.[18]

After over a decade of inattention to the waste problems from nuclear weapons production, the federal government finally began to address the dangers posed by radioactive waste. The National Atomic Energy Commission (AEC) in 1955 requested that the National Academy of Sciences (NAS) examine the issue of permanent disposal of radioactive waste.[19] By 1957, after studying the issue, NAS concluded that "[d]isposal in salt is the most promising method [of disposal of high-level liquid waste] for the near future."[20]

Implementation of the NAS report, however, proved difficult.[21] The Department of Energy (DOE)[22] took 24 years to formulate and propose a specific site for underground burial of nuclear waste.[23] In 1979,[24] however, DOE finally requested and received congressional approval to begin construction of a permanent waste disposal site. DOE selected the salt beds of the Permian Basin located in southeastern New

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ENVIRONMENTAL LEGACY OF NUCLEAR WEAPONS PRODUCTION 6 (1991) [hereinafter COMPLEX CLEANUP].

17. Dick Russell, *In the Shadow of the Bomb*, 12 THE AMICUS JOURNAL 18 (1990).

18. ARJUN MAKHIJANI & SCOTT SALESKA, INSTITUTE FOR ENERGY AND ENVIRONMENTAL RESEARCH, HIGH-LEVEL DOLLARS, LOW-LEVEL SENSE: A CRITIQUE OF PRESENT POLICY FOR THE MANAGEMENT OF LONG-LIVED WASTES AND DISCUSSION OF AN ALTERNATIVE APPROACH 17-19 (1992).

19. ENVIRONMENTAL PROTECTION AGENCY, HIGH-LEVEL AND TRANSURANIC RADIOACTIVE WASTES: BACKGROUND INFORMATION DOCUMENT FOR PROPOSED AMENDMENTS 1-2 (1993) [hereinafter EPA] (EPA 402-R-93-007).

20. HARRY H. HESS ET AL., REPORT OF THE COMMITTEE ON WASTE DISPOSAL OF THE DIVISION OF EARTH SCIENCES, NATIONAL ACADEMY OF SCIENCES-NATIONAL RESEARCH COUNCIL, THE DISPOSAL OF RADIOACTIVE WASTE ON LAND 6 (1970).

21. EPA, *supra* note 19, at 1-2 through 1-7.

22. The Atomic Energy Commission (AEC) began the investigation. AEC's eventual successor, DOE, continued the process.

23. In that period of time, DOE generalized the NAS report to include not just liquid high-level wastes, but also transuranic waste. *See supra* note 18.

24. Congress was aware of the growing awareness among states about the increasing public concern over health and safety of nuclear waste. In 1979, the California Superior Court considered the validity of the California legislature's attempt to forbid the licensing of any new nuclear power plants until a permanent waste solution was secured. *See Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n*, 472 F. Supp. 191 (S.D.Ca. 1979). The law was upheld by the Supreme Court in 1983. *Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983). *See also* DEPARTMENT OF ENERGY, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, WASTE ISOLATION PILOT PLANT (January 1990) [hereinafter 1990 FEIS] (DOE/EIS-0026-FS).

Mexico about 30 miles east of Carlsbad,[25] and called the proposed facility the Waste Isolation Pilot Plant (WIPP).[26]

The original purpose of WIPP was to demonstrate that the underground burial of nuclear waste would offer a permanent solution to above-ground contamination. To carry out its congressional mandate, DOE designed and built WIPP between 1979 and 1991.[27] However, the WIPP site remained under Department of Interior authority until 1992, when Congress passed the WIPP Land Withdrawal Act (the WIPP Act).[28] The Act dedicated the site to the single purpose of nuclear weapons waste disposal by authorizing the permanent withdrawal from public use 10,240 acres of southeastern New Mexico land. DOE's mandate was to demonstrate the feasibility of burying nuclear waste underground as a permanent disposal solution.[29]

Despite 35 years of activity, little verification existed in 1992 for the 1957 NAS hypothesis that underground burial in salt was the most promising disposal method.[30] Recognizing this, Congress placed conditions on its authorization to transport radioactive waste to WIPP. Before WIPP could open, Congress required DOE to demonstrate through a probabalistic risk assessment process the likelihood that WIPP would isolate nuclear waste from the accessible environment for 10,000 years. In addition, before DOE could bring nuclear waste to WIPP for underground experiments, EPA would have to approve the validity of DOE's test[31] and retrieval[32] plans.

Moreover, congressional concern over DOE's dismal record in nuclear safety[33] prompted the designation of the Environmental Protec-

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25. Dep't of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980, Pub. L. No. 96-164, § 213, 93 Stat. 1259, 1265 (1979).

26. *Id.*

27. *See* 41 Fed. Reg. 54,994-95 (1976); 43 Fed. Reg. 53,063 (1978); 45 Fed. Reg. 75,768-69 (1980); 48 Fed. Reg. 3878-79 (1983); 48 Fed. Reg. 31,038-39 (1983); 54 Fed. Reg. 15,814-15 (1989).

28. Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579, 106 Stat. 4777-96 (1992).

29. *Id.*

30. Even today the issue of whether geological burial is a safe, reliable, and permanent solution remains highly controversial. *See, e.g.*, K.S. SHRADER-FRECHETTE, BURYING UNCERTAINTY: RISK AND THE CASE AGAINST GEOLOGICAL DISPOSAL OF NUCLEAR WASTE (1993).

31. Pub. L. No. 102-579 § 5(d)(2)(A), 106 Stat. at 4782 (1992) ("[I]f the Administrator determines that the experiments will provide data that are directly relevant to a certification of compliance with the final disposal regulations . . . .").

32. *Id.* ("[I]f the Administrator determines that it [the retrieval plan] will provide for satisfactory retrieval of all transuranic waste emplaced during the test phase . . . .").

33. *See generally* DANA COYLE ET AL., DEADLY DEFENSE: MILITARY RADIOACTIVE LANDFILLS (1988); *see* COMPLEX CLEANUP *supra* note 16; *see also* OFFICE OF ENVIRONMENTAL RESTORATION AND WASTE MANAGEMENT, DEPARTMENT OF ENERGY, FINAL SUPPLEMENT ENVI-

tion Agency (EPA) as an independent body responsible for evaluating and certifying DOE's probable risk assessment as reported in its compliance certification application.[34] Furthermore, Congress included language in the WIPP Act which directed EPA to develop nuclear waste standards and objective criteria for applying the standards to WIPP in order to promote accountability and certainty in the regulatory review.[35]

EPA developed standards[36] and criteria pursuant to the WIPP Act. Unfortunately, the criteria appear to be invalid. EPA's rulemaking process failed in at least three respects. First EPA did not preserve an independent regulatory stance pursuant to the WIPP Act. Second, EPA neglected to provide adequate public notice and comment pursuant to the Administrative Procedure Act (APA). Third, EPA failed to implement congressionally legislated policy pursuant to the constitutional doctrine of separation of powers.

EPA's process was deficient because executive branch policy thwarted congressional intent at two levels. First, the Office of Management and Budget (OMB) regulatory review interfered with EPA's rulemaking autonomy. OMB's mandate to resolve differences between executive agency decisions prior to publication of a rulemaking enabled DOE to pressure EPA into changing the compliance criteria after the public review process had ended. Second, EPA's own lack of statutory and fiscal autonomy contributed to its inability to conduct an independent review. Presidential oversight and control of EPA's budget, regulatory policies, and leadership, places the agency under direct presidential control. This dynamic precludes the autonomy which is necessary to ensure effective regulation of a cabinet level department.

The WIPP project demonstrates that unless some basic executive branch organizational changes occur, present administrative infrastructure will frustrate effective regulation of future WIPP decisions and perhaps other future military nuclear waste disposal facilities.

A solution to this problem exists. Congress could redress EPA's lack of regulatory accountability by creating an independent regulatory agency which parallels NRC. The mandate of the new agency would be

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RONMENTAL IMPACT STATEMENT, WASTE ISOLATION PILOT PLANT (Jan. 1990) [hereinafter 1990 FEIS] (DOE/EIS-0026-FS). DOE nuclear weapons production, unlike nuclear waste disposal, is classified under the Atomic Energy Act. *See* Atomic Energy Act of 1954, 42 U.S.C. 2121-2122 (1994).

34. 125 CONG. REC. H6298, 6303 (daily ed. July 21, 1992) (statement of Rep. Synar).

35. Pub. L. No. 102-579, 106 Stat. at 4786-87 (1992).

36. Original EPA standards were vacated by the 1st Cir. in 1987. *See Natural Resources Defense Council v. U.S.E.P.A.*, 824 F.2d 1258 (1st Cir. 1987). EPA published final standards in 1993. *See* Environmental Radiation Protection Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes, 58 Fed. Reg. 66,398-416 (1993) (40 C.F.R. § 191.15).

to regulate environmental safety in military nuclear disposal operations. Congress could safeguard the integrity of such an agency through statutorily prescribed guarantees of independence from presidential control.[37]

BACKGROUND

WIPP is a pioneer in the field of permanent nuclear waste disposal. The development of the WIPP site has been complicated by the fact that the program lacks an overall blueprint. Earlier studies for general mining techniques, nuclear production, and storage of radioactive and hazardous waste do provide guidance for WIPP's design and operational procedures.[38] However, without proven technologies which directly relate to permanent nuclear waste disposal, questions remain about whether the facility can successfully isolate waste for 10,000 years.

Understandably, progress on WIPP is marked by compromise among competing legal, scientific and political ideas. Conflicting goals of quick certification, protection of health and safety, economic efficiency, and scientific accountability struggled for supremacy in the debate which preceded the 1992 WIPP Act. Not surprisingly, the final version of the WIPP Act became a compromise among these conflicting interests, making implementation of the Act an equally controversial matter.[39]

Legal requirements for WIPP

Early in WIPP's history, controversy[40] over the plan to include both commercial and military nuclear waste in the facility authorized by

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37. This paper does not deal with the obstacles posed by congressional budgetary constraints which could undercut proposals for an independent regulatory agency.

38. *See generally* PRELIMINARY COMPARISON WITH 40 CFR 191 SUBPART B FOR THE WASTE ISOLATION PILOT PLANT (1991) [hereinafter SANDIA PA] (SAND91-0893/1.UC-721).

39. *See* Pub. L. No. 102-579, 106 Stat. 4777-96 (1992).

40. Citizens and officials in New Mexico opposed congressional approval of WIPP's construction without some state control over the project. *See Waste Isolation Pilot Plant: Hearing on [House or Senate Bill No.] Comm. on Armed Services*, 96th Cong., 1st Sess. 41 (1979) [hereinafter *Procurement Hearing*]. To satisfy New Mexico concerns, Congress authorized DOE to enter into a written agreement with New Mexico to set forth procedures for the State to consult and cooperate with DOE over "public health and safety aspects of such project [WIPP] before the occurrence of certain key events identified in the agreement." 93 Stat. at 1266.

However, in 1981 New Mexico Attorney General Jeff Bingaman, dissatisfied with DOE's initial offers for negotiation procedures, sued DOE and the United States Department of Interior. Civil Action No. 81-0363 JB (D.N.M. 1981). Eventually New Mexico Governor Bruce King signed the federal court ordered *Stipulated Agreement* which approved the *Consultation and Cooperation Agreement*. *Id.* (The Court Order contains the final Consultation and

Congress almost defeated WIPP.[41] Under the Atomic Energy Act (AEA), DOE had exclusive regulatory authority over its nuclear weapons operations.[42] In contrast, civilian nuclear activities took place under the independent regulatory eye of the Nuclear Regulatory Commission (NRC).[43] NRC regulations require all commercial nuclear waste facilities to obtain an NRC license before construction.[44] Presumably if WIPP were a site that contained commercial waste, NRC would play a regulatory role. Members of the House Armed Services Committee balked at giving a non-military agency control over any military operation and threatened to cut off funds.[45] In response to this threat, supporters of the project agreed to restrict WIPP to military waste.[46]

NRC oversight, then, was avoided by restricting the scope of WIPP's role. WIPP would be an unlicensed, research and development facility which would contain only defense transuranic (TRU) wastes and the byproducts from some limited high-level radioactive waste experiments.[47] Thus the "DOE National Security and Military Applications of

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Cooperation agreement.) This agreement, along with later amendments, guaranteed New Mexico an advisory role in such key areas as health and safety, transportation, and assured the State that WIPP would comply with federal and state laws. *Stipulated Agreement* and *Consultation and Cooperation Agreement* (July 1, 1981) [hereinafter *C and C Agreement*] appendix (agrees to timely and open exchange of information about WIPP-creates a mechanism for conflict resolution on matters ". . . relating to the public health, safety or welfare of the citizens of the State"); *See Supplemental Stipulated Agreement Resolving Certain State Off-Site Concerns over WIPP* (Dec. 28, 1982) (commits DOE to seeking congressional appropriation for upgrading selected WIPP routes in New Mexico-clarifies that DOE is liable for WIPP-related accidents at or en route to the site); "First Modification" of the *C and C Agreement* (Nov. 1984) (requires DOE to comply with ". . . all applicable state, federal and local standards, regulations and laws, including any applicable regulations or standards promulgated by EPA); "Second Modification" of the *C and C Agreement* (Aug. 1987) (requires DOE to comply ". . . with all applicable regulations of the United States Department of Transportation and any applicable corresponding regulations of the NRC); Separate Agreement which amends the 1982 *Supplemental Stipulated Agreement* (Aug. 1987) (relating to funding for WIPP relief routes and bypasses in New Mexico).

41. *See Procurement Hearing, supra* note 40, at 41.

42. Atomic Energy Act of 1954, 42 U.S.C. §§ 2010, 2011, 2014, 2273, 2282 (1994).

43. Energy Reorganization Act of 1974, 42 U.S.C. 1501 (1994).

44. Section 202(3) of the Energy Reorganization Act of 1974 stipulates that the Nuclear Regulatory Commission shall have licensing and related regulatory authority as to facilities used primarily for the receipt and storage of high-level radioactive wastes. Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 202(a), 88 Stat. 1244 (1974).

45. *Procurement Hearing, supra* note 40 (statement of Rep. Dan Daniel).

46. *Id.*

47. Transuranic (TRU) waste literally means heavier than uranium. Transuranics are man-made elements in that they are byproducts of fission and fusion reactions in nuclear reactors and nuclear testing. MAKHIJANI, *supra* note 18, at 17-19. Plutonium 239, the main transuranic component of defense radioactive wastes, has a half-life of 24,000 years. In practical terms, this half-life means that Plutonium remains radioactive for over 240,000

Nuclear Energy Authorization Act of 1980" authorized WIPP "for the express purpose of providing a research and development facility to demonstrate the safe disposal of radioactive wastes resulting from defense activities and programs of the United States exempted from regulation by the Nuclear Regulatory Commission."[48]

WIPP was the first DOE nuclear weapons site to be authorized and constructed in over 25 years.[49] During that period of time, Congress changed the legal background against which such sites could be constructed. Congressional enactment of several general laws provided a structure for regulating environmental pollution and degradation.[50]

Until WIPP, DOE's nuclear activities had been clothed in the secret privilege of the Atomic Energy Act.[51] WIPP was different. Congress expedited WIPP for national security reasons.[52] The facility, however, was not a classified operation.[53] Although Congress authorized WIPP's construction without an NRC license, Congress did not expressly exempt WIPP from environmental laws either in WIPP's mandate[54] or in those laws.[55]

Therefore, DOE would have to comply with federal environmental laws if the facility were ever to accept nuclear waste.[56] Essentially, the WIPP certification process resulted in a clash between established national security practices, which excluded public access to nuclear activities, and environmental legislation, which expressly invited public involvement.

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years. Plutonium emits alpha particles which have weak penetrating capabilities. However, if ingested or inhaled, even very small amounts have been proven to cause cancer.

Nuclear waste classification for high-level and low-level depends on the process which produced the waste. Transuranic isotopes in spent fuel rods from commercial nuclear reactors are considered high-level. However, nuclear weapons production has classified transuranic waste as a separate category called "TRU" waste. MAKHIJANI, *supra* note 18, at 9-11. In fact, transuranic isotopes are also found in so-called low-level waste. *Id.* at 22.

48. DOE National Security and Military Applications of Nuclear Energy Authorization Act of 1980, Pub. L. No. 96-164, § 213(a), 93 Stat. 1265 (1979).

49. Portsmouth Uranium Enrichment Complex in Ohio was the last congressionally authorized DOE nuclear weapons site approved by Congress. Portsmouth began operations in 1956. COYLE, *supra* note 33, at 12.

50. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70d (1994); Clean Air Act of 1970, 42 U.S.C. §§ 7401-7671 (1994); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-17 (1994); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1994); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (1994); Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1994).

51. Atomic Energy Act of 1954, 42 U.S.C. §§ 2161-2163 (1994).

52. *Procurement Hearing, supra* note 40, at 42 (letter from Melvin Price to Hon. Tom Bevill, July 18, 1979).

53. § 213(a), 93 Stat. at 1265 (1979).

54. *See* § 213, 93 Stat. 1259 (1979).

55. *See supra* note 50.

56. § 213, 93 Stat. at 1264.

The Federal Land Policy Management Act (FLPMA) was the first general federal environmental law hurdle for the WIPP site.[57] FLPMA's temporary administrative land withdrawal provision allows the Secretary of Interior, at the request of another agency, to withdraw federal land from public use if the land is not withdrawn for more than 20 years.[58] By using a patchwork of these administrative land withdrawals to establish jurisdiction over the WIPP site, DOE surveyed, designed, excavated and constructed the WIPP underground storage area. The land withdrawals were also used for the above ground receiving and administrative buildings.[59]

The National Environmental Policy Act (NEPA) required that DOE show that WIPP's irretrievable commitment of resources would not cause environmental and cultural harm. DOE started the process of compliance with NEPA by preparing an Environmental Impact Statement in 1980 and a Supplemental Environmental Impact Statement in 1990.[60] A third Environmental Impact Statement is planned for late 1996.

For several years, some uncertainty existed about whether WIPP, as a disposal facility for radioactive materials, must also comply with Resource Conservation and Recovery Act (RCRA) hazardous waste restrictions. In July, 1986, EPA issued a notice which clarified the status of hazardous constituents of radioactive mixed wastes.[61] The notice declared that these wastes would be subject to regulation under Subtitle C of RCRA of 1976.[62] Since most of the wastes designated for disposal

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57. 43 U.S.C. §§ 1701-1717 (1994).

58. 43 U.S.C. § 1714 (1994).

59. WIPP includes disposal areas located 2150 feet underground as well as above ground waste handling buildings. 41 Fed. Reg. 54,994-95 (1976) (application for withdrawal of 17,200 acres of land in Eddy County for two years); 43 Fed. Reg. 53,063 (1978) (two year extension of the 1976 land withdrawal); 45 Fed. Reg. 75,768-69 (1980) (two year extension of 1978 withdrawal of 8,960 acres of federal land for the purpose of conducting a Site and Preliminary Design Validation (SPVD) program at WIPP); 48 Fed. Reg. 3878-79 (1983) (two year withdrawal of 8,960 acres of federal land and 1,280 acres of state land, if acquired by the federal government, for the purpose of constructing WIPP: "no radioactive waste will be stored or disposed of under terms of this withdrawal. . . "); 48 Fed. Reg. 31,038-39 (1983) (eight year withdrawal of 8,960 acres of federal land and 1,280 acres of state land, if acquired by the federal government, for the construction of full facilities at the WIPP site: "no transportation, storage, or burial of any radioactive materials. . . "); 54 Fed. Reg. 15,814-15 (1989) (partial termination of 1983 withdrawal (PLO 6403) and "modification to change the purpose. . . [to authorize] conducting of a test program by DOE using retrievable radioactive waste at the site").

60. DEPARTMENT OF ENERGY, FINAL ENVIRONMENTAL IMPACT STATEMENT, WASTE ISOLATION PILOT PLANT (Oct. 1980) [hereinafter 1980 FEIS] (DOE/EIS-0026); DEPARTMENT OF ENERGY, SUPPLEMENTAL FINAL ENVIRONMENTAL IMPACT STATEMENT, WASTE ISOLATION PILOT PLANT (1990) [hereinafter 1990 SEIS].

61. 51 Fed. Reg. 24,504-05 (1986).

62. *Id.*

at WIPP would be "mixed," because they contained hazardous chemical as well as radioactive components, EPA's interpretive notice meant that WIPP also had to comply with RCRA regulations.[63]

RCRA compliance would require parallel state[64] and federal[65] obligations. The State of New Mexico was responsible for issuing the permit for operational activities at the site. EPA retained authority under RCRA to determine whether WIPP could isolate the mixed wastes from the accessible environment "for as long as they remain hazardous."[66] Thus, before it could transport any hazardous waste to WIPP, DOE was required to obtain a state hazardous waste permit to show that the wastes would not constitute a hazard during operations, and EPA approval for a federal RCRA No-Migration determination after demonstrating that the waste would not migrate to the environment beyond the RCRA control unit.[67]

In March, 1989, DOE applied to EPA for a regulatory exemption which would result in a temporarily waiver of the RCRA land ban provision.[68] In its application, DOE explained that mixed waste must be tested at the facility in order to provide scientific evidence that the facility would contain the wastes for the required regulatory period.[69] In April, 1990, EPA issued its proposed regulation granting a 10 year conditional "no-migration variance."[70] The waiver allowed wastes to be brought for a "Test Phase," but required that the wastes be retrievable.[71] The waiver also

63. 52 Fed. Reg. 15,937, 15,941 (1987) (DOE confirms that "all DOE radioactive waste which is hazardous under RCRA will be subject to regulation under both RCRA and AEA [Atomic Energy Act of 1954].").

64. 40 C.F.R. § 264.600 (1996). The New Mexico Legislature, by incorporating regulatory requirements which are as strict as the federal RCRA requirements into its Hazardous Waste Act, ensured that the State would have permitting authority over the hazardous wastes destined for WIPP during WIPP's operational phase. New Mexico Hazardous Waste Act, N.M. STAT. ANN. §§ 74-4-1 to 74-4-13 (Michie 1978 and 1993 Repl. Pamp.). On July 25, 1990, the New Mexico Environmental Improvement Division gained RCRA permitting authority over the transuranic mixed wastes destined for WIPP. 55 Fed. Reg. 28,397, 28,397-98 (1990).

65. 40 C.F.R. § 268 (1995).

66. 42 U.S.C. § 6924(d)(1)(C) 1994.

67. N.M. STAT. ANN. §§ 74-4-1 to 74-4-13 (Michie 1978 and 1993 Repl. Pamp.); 42 U.S.C. §§ 6901-6987 (1994). Congress removed EPA's RCRA authority over WIPP in an amendment to the Defense Authorization Act. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No.104-201 (1996). The State of New Mexico retains RCRA authority to regulate WIPP during the operational phase.

68. 55 Fed. Reg. 13,068-94 (1990). RCRA bans land disposal of specific toxic materials which may not be buried underground without a No-Migration variance. EPA will issue a no-migration variance on a showing that the wastes will not move "for as long as [they] remain hazardous." *See also* 42 U.S.C. § 6924(d)(1)(C) (1994).

69. 55 Fed. Reg. 13,068-94.

70. *Id.*

71. *Id.* at 13,077.

reserved final determination of WIPP's ability to permanently contain RCRA land ban wastes.[72]

A key problem with building WIPP was the lack of standards and criteria for evaluating WIPP's design and construction. Congress addressed this oversight by passing the Nuclear Waste Policy Act of 1982 (NWPA).[73] NWPA established, for the first time, a national policy for the safe storage and permanent disposal of spent nuclear fuel and high-level radioactive wastes.[74] EPA promulgated "Environmental Radiation Protection Standards for Management and Disposal of Spent Nuclear Fuel, High-Level, and Transuranic Radioactive Wastes pursuant to NWPA."[75]

As soon as EPA published the standards, however, environmental groups filed a lawsuit to challenge their validity.[76] The United States Court of Appeals for the First District vacated and remanded Subpart B of the standards to EPA.[77] In the absence of any other guide, however, DOE continued to rely on the original standards to define safety parameters for its scientific inquiry into the potential performance of WIPP as a permanent underground facility.[78]

As DOE confronted one regulatory hurdle after another, New Mexico focused its concern on transportation issues. Using the United States Department of Transportation guidelines, the New Mexico Environmental Improvement Board held hearings and designated alternate routes for WIPP trucks.[79] Including transportation concerns in its Consultation and Cooperation Agreements,[80] New Mexico negotiated for federal liability for WIPP-related transportation accidents.[81] New Mexico also demanded that NRC approve the containers which would transport transuranic waste to WIPP across New Mexico roads.[82]

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72. 55 Fed. Reg. 47,700, 47,701 (1990).

73. Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10270 (1994).

74. *Id.*

75. *See* 50 Fed. Reg. 38,066 (1985).

76. *See supra* note 36.

77. *Id.* at 1293. The court held that EPA was arbitrary and capricious in promulgating nuclear waste standards which were not as stringent as Part C of the Safe Water Drinking Act, 42 U.S.C. § 300h (1994), safe drinking water standards.

78. *See C and C Agreement, supra* note 40, at 5.

79. *See, e.g.*, RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, GUIDELINES FOR SELECTING PREFERRED HIGHWAY ROUTES FOR HIGHWAY ROUTE CONTROLLED QUANTITY SHIPMENTS OF RADIOACTIVE MATERIALS (Aug. 1992) (DOT/RSPA/HMS/92-02).

80. *See C and C Agreement, supra* note 40.

81. In 1988, Congress established federal liability for extraordinary nuclear occurrences. Price Anderson Amendments Act of 1988, 42 U.S.C. §§ 2011(j)-2210 (1994). *See also C and C Agreement, supra* note 40.

82. *See C and C Agreement, supra* note 40. *See also* ROBERT H. NEILL & JAMES K. CHANNEL, POTENTIAL PROBLEMS FROM SHIPMENT OF HIGH-CURIE CONTENT CONTACT-

Scientific proof of WIPP's ability to meet legal requirements

Meanwhile scientists at Sandia National Laboratory, closely watched by the Environmental Evaluation Group (EEG),[83] strove to demonstrate that permanent, underground disposal of mixed transuranic waste was scientifically sound.[84] The original National Academy of Sciences proposal, which noted the plastic properties of salt, had hypothesized that the salt in ancient geologic formations would creep or close in around the decaying waste barrels, forming an airtight tomb which would naturally isolate the waste for thousands of centuries.[85] The plan assumed that no additional active, institutional controls would be required to keep the waste safely isolated from human activity, since the salt would be self-sealing and located thousands of feet underground.[86]

Sandia scientists discovered almost immediately that some of the basic assumptions of the National Academy of Sciences plan were not true at WIPP. First, the site was not dry.[87] In 1975 an exploratory bore-hole at the northwest corner of the originally selected site struck a pressurized brine reservoir which forced DOE to abandon the site.[88] Next, EEG discovered that the potential for gas generation from decomposing organics in the mixed waste might produce an explosion.[89] Scientists found that gas

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HANDLED TRANSURANIC (CH-TRU)WASTE TO WIPP (1983) (EEG-24).

83. DOE originally funded EEG in 1978 in a contract between DOE and the New Mexico Environmental Improvement Division to provide New Mexico with independent scientific evaluation of DOE's activities at WIPP. NEILL & CHANNELL, *supra* note 82, at I. The National Defense Authorization Act of 1989 assigned EEG to the New Mexico Institute of Mining and Technology. 102 Stat. 1918, 2073 (1988) (The shift in authority was an attempt to make EEG more independent of political influence.). The contract was continued through 2004 by The National Defense Authorization Act of 1994. Pub. L. No. 103-100, 107 Stat. 1547 et seq. (1993).

84. SANDIA PA, *supra* note 38.

85. HESS, *supra* note 20, at 4.

86. *Id.*

87. John D. Bredehoeft, *Will Salt Repositories Be Dry?* 69 TRANSACTION AM GEOPHYSICAL UNION 121 (1988). ("The idea that salt was uniformly 'dry' was revised when exploratory drilling in the vicinity of the Waste Isolation Pilot Plant (WIPP) in New Mexico encountered brines within the Castile formation. . . .").

88. LOKESH CHATURVEDI, *WIPP-RELATED GEOLOGICAL ISSUES, in* NEW MEXICO GEOLOGICAL SOCIETY GUIDEBOOK, 44TH FIELD CONFERENCE 331, 336 (1993). (Borehole WIPP-12 hit brine at a depth of 3016 ft. Brine started flowing out of the well at a rate of 35 gallons per minute and more than 1.14 million gallons of brine flowed out before the well was controlled. Reservoirs at WIPP-12 and AWARDEE-6 boreholes were estimated to contain 17 million and 630,000 barrels respectively.).

89. *See generally* MATTHEW SILVA, AN ASSESSMENT OF THE FLAMMABILITY AND EXPLOSION POTENTIAL OF TRANSURANIC WASTE (1991) (EEG-48).

pressure could change the closure predictions for the salt.[90] Furthermore, although generally termed a salt bed formation, the Permian Basin salt deposits possess unique characteristics which needed to be understood.[91] The relationship between clay layers and salt posed another unanswered question about WIPP's permeability.[92] The presence of unmined oil and gas reserves at the site[93] raised the problem of inadvertent human intrusion from exploratory boreholes of future mineral explorations.[94] Finally, the deformation behavior of bedded[95] salt deposits was not anticipated. Instead of gently caving in, salt at WIPP fractured in large chunks.[96]

Scientists at Sandia and other DOE facilities took a can-do attitude toward these unexpected discoveries, developing improved computer modeling, proposing to develop improved sealing designs, and designing experiments in gas generation, room closure and plutonium solubility in brine.[97] DOE hoped the investigations would answer the questions posed by the unexpected information revealed by the excavation and scientific analysis. In addition, DOE convened expert panels to analyze the likelihood of inadvertent human intrusion and to develop warning systems for future generations.[98]

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90. Lokesh Chaturvedi & Matthew Silva, *An Evaluation of the Proposed Tests with Radioactive Waste at WIPP* 600-09 (1992).

91. KENNETH S. JOHNSON & SERGE GONZALES, SALT DEPOSITS IN THE UNITED STATES AND REGIONAL GEOLOGIC CHARACTERISTICS IMPORTANT FOR STORAGE OF RADIOACTIVE WASTE 1-2 (1978) (Y/DWI/SUB-7414/1).

92. SANDIA PA, *supra* note 38, at 5-14. (Clay is an impermeable boundary. However, clay posed questions about stability.).

93. The WIPP Final Environmental Impact Statement of 1980 estimated that crude oil reserves at WIPP were nonexistent, 1980 FEIS, *supra* note 60, at tbl. 9-14, overlooking available information which showed that the resource was present in abundant quantities. ROBERT H. NEILL ET AL., REVIEW OF THE WIPP DRAFT APPLICATION TO SHOW COMPLIANCE WITH EPA TRANSURANIC WASTE DISPOSAL STANDARDS xvi (1996) (EEG-61).

94. *See, e.g.*, SANDIA PA, *supra* note 38, at 4-34 to 4-36; *See also* NEW MEXICO BUREAU OF MINES AND MINERAL RESOURCES, FINAL REPORT: EVALUATION OF MINERAL RESOURCES AT THE WASTE ISOLATION PILOT PLANT (WIPP) SITE (1995).

95. Bedded salt is salt layered with clay deposits.

96. In 1991, DOE recorded the fall of a 1,500 ton slab measuring 150 feet long, 33 feet wide and 8 feet thick in a test room. The slab was the second recorded in a year. Peter Eichstadt, *Giant Rock Slabs Fall from WIPP Ceiling Causes Concern*, THE NEW MEXICAN, Feb. 6, 1991, at B1. Mining engineers have devised a supplementary roof support which gives some stability to the roof and some warning for a fall. WASTE ISOLATION PILOT PLANT SUPPLEMENTARY ROOF SUPPORT SYSTEM UNDERGROUND STORAGE AREA PANEL 1, ROOM 1, 1-1 to 2-1 (1991) (DOE/WIPP 91-057, Revision O).

97. SANDIA PA, *supra* note 38.

98. *See generally* STEVEN C. HORA ET AL., EXPERT JUDGMENT ON INADVERTENT HUMAN INTRUSION INTO THE WASTE ISOLATION PILOT PLANT (1991) (SAND90-3063); *See also* KATHLEEN M. TRAUTH ET AL., EXPERT JUDGMENT ON MARKERS TO DETER INADVERTENT HUMAN INTRUSION INTO THE WASTE ISOLATION PILOT PLANT (1993) (SAND92-1382).

Public concern about WIPP's safety

Despite reassurances by DOE, public concern about WIPP grew.[99] Reports about problems with another nuclear waste disposal site, Maxey Flats, generally may have produced public suspicion about the safety of nuclear waste disposal and the credibility of nuclear waste experts.[100] Maxey Flats was a shallow land burial dump located in Kentucky which was used for the disposal of plutonium and other low-level radioactive wastes[101] which were generated by commercial nuclear power and medical research.[102] Prior to its opening, testimony before Congress praised the proposed facility and promised that it would be so safe that "the possibility of subsurface migration offsite is nonexistent."[103] Ten years after Maxey Flats opened, however, plutonium and other radionuclides were discovered two miles offsite.[104] As a result of this toxic migration, Maxey Flats had to be closed.[105]

DOE's credibility with respect to nuclear waste storage was not helped by its troubled record of environmental problems.[106] For instance, in 1988, a federal district court approved civil penalties against DOE because the State of Ohio proved that DOE's actions at the Fernald Feed Materials Plant had violated state law pursuant to the Clean Water Act.[107]

Scientific studies which reported the health risks of radiation exposure, however, proved to be the most damaging to public trust. For example, in 1988, the National Academy of Sciences (NAS) published its newest study on ionizing radiation, which focused on the effects of alpha-emitters like plutonium.[108] NAS statistics indicated that inhalation of less

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99. By 1990, 2,200 people from all over the United States submitted written and oral testimony on the WIPP Supplemental Environmental Impact Statement public hearings. 1990 SEIS, *see supra* note 60, at vol 3, 2.

100. SHRADER-FRECHETTE, *supra* note 30.

101. MAKHIJANI, *supra* note 18, at 22.

102. SHRADER-FRECHETTE, *supra* note 30, at 4.

103. K.S. SHRADER-FRECHETTE, RISK AND RATIONALITY 53 (1991) (quoting *Low-Level Radioactive Waste Disposal: Hearing on H.R. Maxey Flats Radioactive Waste Burial Site Before Subcommittee of the Committee on Government Operations, House of Representatives*, 94th Cong., 2d Sess. 258 (1976) (statement of J. Neel)).

104. G. MEYER, ADVANCED SCIENCE AND TECHNOLOGY BRANCH, U.S. ENVIRONMENTAL PROTECTION AGENCY, MAXEY FLATS RADIOACTIVE WASTE BURIAL SITE: STATUS REPORT 9 (1975).

105. *Id.* at 53.

106. *See generally* COYLE, *supra* note 33.

107. *Ohio v. Department of Energy*, 689 F. Supp. 760 (S.D. Ohio 1988), *aff'd* 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 503 U.S. 607 (1992).

108. COMM. ON THE BIOLOGICAL EFFECTS OF IONIZING RADIATION, NAT'L RESEARCH COUNCIL, HEALTH RISKS OF RADON AND OTHER INTERNALLY DEPOSITED ALPHA-EMITTERS: BEIR IV 1-23 (1988).

than one-millionth of a gram of plutonium could result in lung cancer.[109]

Not everyone opposed WIPP.[110] Some factions were anxious to open WIPP because they saw the facility as an opportunity to dispose of the radioactive waste in their communities. Senator Frank Church of Idaho, who voted for the initial construction funds, cited two reasons for putting WIPP on a fast track. First he argued that existing wastes were leaking into soil and water where they were currently being stored. Second, he concluded a disposal solution was essential to support future nuclear weapons production.[111]

WIPP opponents countered Senator Church's concern about the safety of "temporary" storage facilities[112] by asserting that WIPP's capacity was insufficient for the total quantity of current and projected radioactive waste.[113] Opponents reasoned that the need to store nuclear waste would continue and WIPP would not end the contamination caused by poorly constructed dumping grounds located around the country. Opponents also argued that money spent on WIPP would be better spent on a national effort to stabilize nuclear storage in facilities which would be safe for at least 100 years. They reasoned that during this time the nation could either

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109. BEIR IV cautions: "As in earlier reports from the Committee on the Biological Effects of Ionizing Radiations, the so-called BEIR reports, the committee cautions that the risk estimates derived from epidemiological and experimental animal data should not be considered precise." *Id.* at 4. Although scientists differ about how the data should be interpreted, subsequent studies on animals have refuted previously held assurances that exposure to so-called low-levels of radiation is safe. COMM. ON THE BIOLOGICAL EFFECTS OF IONIZING RADIATION, NAT'L RESEARCH COUNCIL, HEALTH EFFECTS OF EXPOSURE TO LOW LEVELS OF IONIZING RADIATION: BEIR V 2-4 (1990). *See also* JOHN W. GOFMAN, M.D., PH.D., RADIATION-INDUCED CANCER FROM LOW-DOSE EXPOSURE: AN INDEPENDENT ANALYSIS 1-4 (1990).

110. New Mexico Governors Jerry Apodaca, Bruce King and Gary Carruthers supported WIPP.

111. "[I]n Idaho, we have stored vast amounts of transuranic waste from the nuclear weapons program over the largest aquifer in the State. . . . For more than 10 years, the Atomic Energy Commission, the Energy Research and Development Administration, and now the Department of Energy have made promises to the people of the State of Idaho that these wastes would be removed. It is crucial to fulfilling this promise that nuclear waste activities for defense programs be maintained at an adequate level. There are also activities at the Hanford Reservation in the State of Washington and at the Savannah River Reservation in South Carolina . . . ." 125 CONG. REC. S15,187 (daily ed. June 18, 1979) (statemcnt of Sen. Church).

112. For almost a half a century Idahoans have been promised that the nuclear waste brought to Idaho Engineering Laboratory from weapons facilities around the nation and from the Three Mile Island accident was a temporary solution. *Id.*; COMPLEX CLEANUP, *supra* note 16, at 151-53.

113. Existing Contact-Handled (CH) and RH-TRU wastes total 3,698,340 ft.^{3} New CH-TRU and RH-TRU are projected to total 5,524,132 ft.^{3}. Therefore, existing and projected transuranic waste totals 9,122,472 ft.^{3}. IDB, *supra* note 15, at tbls. 3.1, 3.8, 3.13, 3.15. The legal capacity of WIPP is 6.2 million ft.^{3}. Pub. L. No. 102-579, 106 Stat. at 4785 (1992).

improve the science and safety of permanent, underground nuclear waste disposal or, in the alternative, find a better solution for nuclear waste disposal.[114]

Congress passes the WIPP Land Withdrawal Act of 1992

Despite the continued public debate about the validity and safety of permanent underground nuclear waste disposal, DOE proceeded with construction and development of the WIPP site.[115] By 1991, WIPP was essentially constructed. Scientists, however, were still five to ten years away from showing that this design, in this location, would safely isolate wastes for 10,000 years.[116] DOE developed a test phase plan[117] to bring radioactive mixed waste to the facility for tests which DOE hoped would confirm WIPP's compliance with environmental standards.[118] WIPP opponents contended that the test phase was a public relations move designed to compensate for the "lack of return on that enormous expenditure of funds."[119] Supporters of WIPP believed that since WIPP was built and being maintained at a cost of $14 million per month, it would be inefficient not to use the facility.[120]

DOE's test plan, however, faced a legal obstacle. Radioactive waste could not come to WIPP under the specified conditions of DOE's administrative land withdrawal order.[121]

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114. Other countries are considering this approach. GENERAL ACCOUNTING OFFICE, NUCLEAR WASTE: FOREIGN COUNTRIES' APPROACHES TO HIGH-LEVEL WASTE STORAGE AND DISPOSAL 12-13 (1994) [hereinafter GAO REPORT] (GAO/RCED-94-172).

115. *See supra* references and text accompanying note 59.

116. *Waste Isolation Pilot Plant Land Withdrawal Act: Hearings on H.R.2637 Before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. 52-70 (1991) (statement of Leo Duffy, Acting Assistant Secretary for Environmental Restoration and Waste Management, U.S. Dep't of Energy).

117. Because DOE was not able to defend figures for the amount of waste necessary for different versions of the test plan, successive plans for experiments were repeatedly proposed and rejected. LOKESH CHATURVEDI, EVALUATION OF THE DOE PLANS FOR RADIOACTIVE EXPERIMENTS AND OPERATIONAL DEMONSTRATION AT WIPP 2-6 (1989) (EEG-42).

118. *Id.*

119. *Proposals Relating to the Operation of the Waste Isolation Pilot Plant (WIPP) in New Mexico: Oversight Hearing before the Subcomm. on Energy and the Environment of the Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. 9 (1991) (statement of Rep. Synar) [hereinafter *WIPP in New Mexico*].

120. "The facility is standing idle, at a cost of $14 million per month to the taxpayer . . . ." 125 CONG. REC. H6305 (daily ed. July 21, 1992) (statement of Rep. Kyl).

121. An administrative land withdrawal is necessarily temporary. To bring radioactive waste to WIPP, even for a test phase, required a permanent withdrawal of the land, an action only Congress can perform. *See supra* note 59; *see also* 43 U.S.C. § 1714(c)(1) (1994).

Under FLPMA, a permanent withdrawal of more than 5,000 acres of public land for more than 20 years requires congressional action.[122] Congress, however, had not passed a Land Withdrawal bill for the WIPP site.[123] The number of contradictory opinions about the future of WIPP and its development took its toll on congressional attempts to pass a WIPP land withdrawal bill.[124] Prospects for congressional legislation seemed dim.

Faced with congressional inaction and anxious to open the facility, Secretary of Energy Admiral James Watkins took matters into his own hands. He asked for and obtained a modification of the existing WIPP administrative land withdrawal from the Secretary of Interior.[125] The modification authorized DOE to begin testing mixed radioactive wastes at the WIPP facility immediately.[126] On October 3, 1991, after notifying Secretary of Interior Manuel Lujan that "all environmental permitting requirements have been met....", Secretary Watkins received authorization from the Department of Interior (DOI) to proceed with the test phase.[127]

New Mexico Attorney General Udall filed suit on October 9, 1991 in United States District Court in Washington, D.C., to prevent what he considered an illegal action. He asked for, among other things, a Temporary Restraining Order and Preliminary Injunction to stop DOE from bringing nuclear waste to New Mexico under an administrative land withdrawal.[128] Udall's motion for a Temporary Restraining Order was granted on November 26, 1991.[129]

The confrontation between DOE and the State of New Mexico finally pressured Congress into action.[130] On October 30, 1992, Congress

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122. 43 U.S.C. § 1714 (1994). Since the WIPP site is 10,240 acres and the nuclear waste had the potential to contaminate the site for 240,000 years, WIPP opponents argued that the test phase was a violation of FLPMA's administrative land withdrawal limitations.

123. Land withdrawal bills were introduced and failed to pass in the 100th and the 101st Congress. *See, e.g.*, 100th Cong., 1st Sess. S1272 (1988) and 101st Cong., 1st Sess. H.R.991 (1989).

124. *See supra* notes 1, 34, 111, 120; *see infra* notes 133, 139, 141, 148.

125. 56 Fed. Reg. 3038, 3039 (1991); 56 Fed. Reg. 5731 (1991) (DOI issues Public Land Order No. 6826, which modifies the 1983 WIPP administrative land withdrawal, Public Land Order No. 6403 to: 1) allow DOE to conduct a Test Phase at WIPP using retrievable transuranic waste, 2) provide for a six year extension of the administrative land withdrawal through June 29, 1997, and 3) allow DOE to expand its exclusive use area from 640 acres to 1,453.90 acres.).

126. *Id.*

127. 56 Fed. Reg. 50,923, 50,924 (1991).

128. *New Mexico v. Watkins*, 783 F. Supp. 633, 635 (D.D.C. 1992).

129. *New Mexico ex rel., Udall, v. Watkins*, Nos. Civ. A. 91-2527, Civ. A. 91-2929 (D.D.C. 1992).

130. Subcomm. on Energy and the Environment, *supra* note 130, at 4 (statement of Rep. Kostmayer).

approved the Waste Isolation Pilot Plant Land Withdrawal Act of 1992.[131] As Senator Bennett Johnston, a Democrat from Louisiana, euphemistically explained, "both DOE and the State of New Mexico have indicated a preference to withdraw the land permanently through legislation" rather than through an administrative action.[132]

The WIPP Act mandates independent regulatory review of DOE

To placate critics who questioned the safety of permanent underground nuclear waste disposal in general, and DOE's accountability in particular,[133] Congress mandated that DOE's test and retrieval plans be subject to independent regulation.[134] In addition, Congress made WIPP's opening dependent upon independent approval by EPA.[135] To promote this independent review, the 1992 WIPP Act required EPA to develop objective standards[136] and criteria[137] for reviewing DOE's eventual application to open WIPP.[138]

Legislative history for the WIPP Act indicates that Congress intended EPA to operate independently from DOE. Congress advanced three reasons for its inclusion of this regulatory requirement. First, DOE's history of self-regulation so far was an "environmental disaster."[139] Second, the public would have no confidence in a process which involved self-regulation by DOE.[140] Third, without external regulation, DOE would manipulate the system to further its own vested interests.[141] As Congressman Spratt, Chairman of the House Armed Services Committee

131. Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579 §§ 1-23, 106 Stat. 4777 (1992).

132. 137 CONG. REC. S15,989 (daily ed. Nov. 5, 1991) (statement of Sen. Johnston).

133. "[T]he public will not have confidence in DOE's waste programs so long as DOE self-regulates in the area of environmental compliance." 125 CONG. REC. H6308 (daily ed. July 21, 1992) (statement of Rep. Sharp).

134. Pub. L. No. 102-579 § 6(b)(3), 106 Stat. at 4783 (1992).

135. Pub. L. No. 102-579 § 8(d)(1)(B), 106 Stat. at 4787-88 (1992).

136. 40 C.F.R. § 191 (1995).

137. 61 Fed. Reg. 5224, 5224-45 (1996).

138. Pub. L. No. 102-579 §§ 1-23, 106 Stat. at 4786 (1992).

139. "Essentially, DOE would prefer to self-regulate the WIPP project. We cannot allow this. If there is anything that we can learn from the environmental nightmare that has been created over the past decades at the DOE weapons complex, it is that self-regulation is a prescription for environmental disaster." 125 CONG. REC. H6305 (daily ed. July 21, 1992) (statement of Rep. Miller).

140. *See supra* note 133.

141. "Without removing DOE's ability to regulate itself, I am convinced that DOE will continue to cut corners and manipulate the system to further its own institutional objectives to the detriment of taxpayers, scientific integrity, and the need to find a permanent solution to the nuclear waste problem." 125 CONG. REC. H6303 (daily ed. July 21, 1992) (statement of Rep. Synar).

explained, the final bill "firmly seats the Environmental Protection Agency in place as the primary regulator and overseer of [WIPP]."[142]

In addition to legislative history, both the language and structure of the WIPP Act mandate that EPA conduct an independent WIPP regulatory review.[143] For example, in order to promote objectivity and independence, the WIPP Act dictated an exact schedule which required that standards and criteria be in place prior to DOE's submittal of the WIPP application.[144] Interestingly, the WIPP Act's exact deadline for DOE to submit its application to EPA was seven years *after "the date of the first receipt of transuranic waste at WIPP."*[145]

Congress intentionally tied DOE's deadline to the date upon which WIPP first received transuranic waste. Congress expected DOE to gain EPA's approval for a pre-application limited test phase at WIPP.[146] Since the test phase was expected to last a minimum of five to ten years,[147] the WIPP Act required final EPA standards and criteria to be in place well before DOE submitted its WIPP compliance application.

The withdrawal of DOE's proposed test plans, however, interfered with the WIPP Act's sequential structure and undermined the independence of EPA's rulemaking process.[148] Following the test phase withdrawal, DOE conducted a continuous and intrusive campaign designed to influence development of EPA's compliance criteria. The results of this DOE effort proved fatal to the WIPP Act's mandate for independent regulation. For example, although DOE commented at length about proposed compliance criteria during public debate,[149] DOE's input did not end with public debate. DOE's influence over draft compliance criteria continued during the first Office of Management and Budget (OMB)

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142. 125 CONG. REC. H6305, *supra* note 139.

143. *See generally* Pub. L. No. 102-579 §§ 1-23, 106 Stat. 4777 (1992).

144. Section 8(b)(1) mandates that EPA issue final disposal regulations not later than six months after enactment of the Act. Section 88 mandates that EPA publish proposed criteria within one year and final criteria within two years of enactment of the Act. Pub. L. No. 102-579 §§ 8(b)(1), 8(c), 106 Stat. 4777, 4787 (1992).

145. Pub. L. No. 102-579, 106 Stat. 4777, 4786 (1992).

146. Pub. L. No. 102-579, 106 Stat. 4777, 4782 (1992).

147. *WIPP in New Mexico, supra* note 119, at 34 ("DOE has already announced that it is going to take until 1997, or 10 years into the intended 25-year lifespan to show compliance."). *Id.*

148. "I have concluded that the previously proposed bin and alcove transuranic waste tests at the Waste Isolation Pilot Plant (WIPP) should not be conducted." Letter from Tom Grumbly, DOE Assistant Secretary for Environmental Restoration and Waste Management to Robert Sussman, EPA Deputy Administrator (Oct. 21, 1993).

149. ENVIRONMENTAL PROTECTION AGENCY, CRITERIA FOR CERTIFICATION AND RECERTIFICATION OF THE WASTE ISOLATION PILOT PLANT'S COMPLIANCE WITH THE 40 CFR PART 191 DISPOSAL REGULATIONS: RESPONSE TO COMMENTS DOCUMENT FOR 40 CFR 194 (1996) [hereinafter RESPONSE TO COMMENTS] (EPA 402-R-906-001).

review.[150] This DOE intrusion negated the impact of public participation in the development of criteria.[151] As a result of these factors, EPA's original draft compliance criteria contained significantly reduced requirements for waste characterization and engineered barriers.[152]

Furthermore, "tampering"[153] by DOE continued as EPA moved toward a final rule. Once again, DOE and OMB had ex parte negotiations during the final review of compliance criteria.[154] During these sessions, EPA relied on technical information which had not been presented during the public review stage, as support for changes in the final rule.[155]

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150. ENVIRONMENTAL PROTECTION AGENCY, REDLINE/STRIKE-OUT VERSION 7/1/94 OMB SUBMISSION: CRITERIA FOR THE CERTIFICATION AND DETERMINATION OF THE WASTE ISOLATION PILOT PLANT'S COMPLIANCE WITH ENVIRONMENTAL STANDARDS FOR THE MANAGEMENT AND DISPOSAL OF SPENT NUCLEAR FUEL, HIGH-LEVEL AND TRANSURANIC RADIOACTIVE WASTES 40 C.F.R. 194, [hereinafter REDLINE/STRIKE-OUT] (RIN 2060-AE30). (The final rule is published at 61 Fed. Reg. 5224-45 (1996)). Several provisions hotly debated during public comment, were resolved in favor of DOE. *Id.* at 22. EPA eliminated specific mention of waste characterization inspections. *Id.* at 37-38. EPA eliminated specific mention of the need for waste characterization in order to evaluate engineered barriers [examples of man-made barriers are waste containers or repository seals] and reduced requirements for certainty in evaluating containment, individual [release limits calculated for individual human beings] and groundwater requirements. *Id.* at 88. EPA eliminated the statement that repository design and engineering barriers are critical to evaluating removal of waste without compromising compliance with disposal standards; EPA removed mining as a scenario. *Id.* at 130-33. EPA gave quantitative credit for passive institutional controls. *Id.* at 138-39.

151. Congress worried about this situation but hoped the WIPP Act's careful structure would prevent DOE manipulation. "While I am concerned with the potential for DOE to tamper with independent scientific reviews of WIPP, I am confident that EPA's role under this bill-and the opportunity provided for public comment and judicial review-will ensure that safety is not compromised and money is not wasted." 125 CONG. REC. H6308 (statement of Rep. Sharp).

Criticism of the appropriateness of OMB's role in executive agency rulemaking is not new. Earlier administrations gave OMB direct control over executive agency rulemaking with no requirement for disclosure. Executive Order No. 12,291, 3 C.F.R. 127 (1981); Executive Order 12,498 3 C.F.R. 323 (1985). President Clinton repealed both Executive Order No. 12,291 and Executive Order No. 12,498, substituting Executive Order 12,866, 3 C.F.R. 638 (1993). Executive Order No. 12,866 established public disclosure requirements for discussions with the private sector, but retained the discretion to hold privileged discussions about rulemaking between and among executive branch agencies. *Id.*

152. REDLINE/STRIKE-OUT, *see supra* note 150.

153. 125 CONG. REC., *supra* note 133.

154. WEEKLY HIGHLIGHTS (Carlsbad Area Office), week ending Dec. 15, 1995 [hereinafter HIGHLIGHTS].

155. For example, the final rule contains directives for considering influences from mining activities based on information that EPA never submitted to the public for comment. 61 Fed. Reg. 5224, 5233-34 (1996); Memorandum from Mary Kruger to Air Docket No. A-92-56 (Feb. 1, 1996) (on file with NAT. RESOURCES J.).

ANALYSIS

Challenging DOE's influence on EPA through judicial attack on EPA's final compliance criteria

Congress had anticipated the aforementioned scenario.[156] To prevent DOE from corrupting the review process, Congress included an express provision in the WIPP Act which provided for judicial review of EPA's regulatory decisions.[157] Congress thereby provided an enforcement mechanism which enabled citizens to challenge any violation of the WIPP Act's plain meaning and legislative intent to prevent DOE self-regulation at WIPP.[158]

In addition, the WIPP Act, which expressly[159] required[160] that EPA rulemaking follow Administrative Procedure Act (APA) procedures,[161] provided a cause of action based on due process.[162] The due process requirement for public notice and comment is central to APA rulemaking.[163] The notice requirement mandates that the agency make available to the public all documents significant to its final rulemaking so

156. 125 CONG. REC., *supra* note 133.

157. Pub. L. No. 102-579, 106 Stat. at 4795 (1992).

158. Restrictions on judicial review, however, severely limit actions in this case. The WIPP Act specifically restricts judicial review to EPA's final action and designates all civil suits to be brought "only in the United States Court of Appeals for the Tenth Circuit or for the District of Columbia." A court of appeals reviews evidence on the record. Thus, new evidence could not be introduced at this stage. The action must be brought not later than 60 days after the Administrator's final decision. *See* Pub. L. No. 102-579, 106 Stat. at 4794 (1992).

EPA published the final Compliance Criteria February 9, 1996. 61 Fed. Reg. 5224-45 (1996). The New Mexico Attorney General, the Texas Attorney General, Concerned Citizens for Nuclear Safety and Southwest Research and Information Center all filed suit against EPA within the statutory 60 day period.

159. By expressly invoking APA, the WIPP Act establishes that EPA's compliance criteria is a substantive and not an interpretive rule. *Fertilizer Institute v. U.S.E.P.A.*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (citing *United Technologies Corp. v. Environmental Protection Agency*, 821 F.2d 714, 719 (D.C. Cir. 1987) ("To determine if the preamble is interpretive, the true emphasis must be on the 'legal base upon which the rule rests'."). The distinction is important because a substantive rule creates laws, rights, and duties, whereas an interpretive rule does not. *National Wildlife Fed'n v. Babbitt*, 835 F. Supp. 654, 665 (D.D.C. 1993).

160. Pub. L. No. 102-579, 106 Stat. at 4789 (1992).

161. 5 U.S.C. § 706 (1994).

162. *Id.*

163. *Id.*

that the public may offer informed review and comment on the proposed final rule.[164]

In its final rule, EPA relied on technical data which it had not previously presented to the public for comment.[165] This practice is a blatant violation of the APA standard.[166] The test for violating the notice rule is whether the public reasonably could have anticipated rule modifications or changes made by the agency based on the limited public record.[167] Courts have allowed changes if the modification is a logical outgrowth of the draft rule.[168] However, in this case EPA removed mining conditions from the rule proposed for public comment and then included mining conditions in the final public rule.[169] Evidence to support this rule was relied on by EPA but never placed in the public record. Courts could reasonably conclude from this arbitrary procedure that failure to convene a new round of proceedings to allow public comment on all data significant to the issue of mining was reversible error.[170]

Challenging EPA's decision under APA would be very difficult. Under the APA, the standard of review is strict. An agency action must be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" to warrant reversal.[171] Furthermore, the burden of proof is particularly high because courts have stretched the logical outgrowth test[172] to affirm a final rule even if only a "germ" of the final rule was disclosed in the proposed rule.[173]

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164. *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) (citing *Engine Manufacturers Ass'n v. Environmental Protection Agency*, 20 F.3d 1177 (D.C. Cir. 1994) ("The Administrative Procedure Act requires the Agency to make available to the public, in a form that allows for meaningful comment, the data used to develop the proposed rule."); *Conference of State Bank Supervisors v. Office of Thrift Supervision*, 792 F. Supp. 837, 843 (D.D.C. 1992) ("[T]he scientific material which is believed to support this rule should be exposed to the review of interested parties for their comment.").

165. Kruger, *supra* note 155.

166. Exceptions to the APA notice rule are narrow, but do include "good cause" when the passage of a complex and extraordinary statute justifies the agency's failure to provide public notice on all documents. *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994).

167. *Kooritzky v. Reich*, 17 F.3d 1509, 1512-13 (D.C. Cir. 1994) (Rationales and conclusions contained in the final rule are not a logical extension of the proposed rule.); *Aeronautical Radio, Inc. v. Federal Communication Comm'n*, 928 F.2d 428, 446 (D.C. Cir. 1991) (Final rule was a logical outgrowth of proposed rule and could therefore be reasonably anticipated.).

168. *Aeronautical Radio*, 928 F.2d at 446.

169. REDLINE/STRIKE-OUT, *supra* note 150, at 130-33.

170. *Kennecott Corp. v. Environmental Protection Agency*, 684 F.2d 1007, 1019-20 (D.C. Cir. 1982).

171. 5 U.S.C. § 706(2)(A) (1994).

172. *Aeronautical Radio*, 928 F.2d at 446.

173. *Natural Resources Defense Council, Inc. v. Thomas*, 838 F.2d 1224, 1242-43 (D.C. Cir. 1988).

Nevertheless, EPA's reliance on technical data unavailable to the public[174] could be seen as an abuse of agency discretion.[175] Given congressional history on the need for an independent, objective review of DOE's WIPP application,[176] EPA's failure to conduct its evaluation within the clear parameters established by the APA[177] and the WIPP Act[178] could be viewed as a fatal defect which ultimately prejudiced the final criteria.[179] Evidence of undue influence by DOE exists within the reviewable record made through hearings, advisory panels and invited comments.[180] Although abuse of discretion is a difficult standard to meet, courts have held that when agencies act in an arbitrary and capricious manner, agency decisions may be vacated.[181]

EPA's rulemaking raises constitutional questions about separation of powers

EPA's failure to implement a direct congressional mandate raises separation of powers issues. The WIPP process is analogous to the classic separation of powers hypothetical in which the executive office of the president substitutes a contradictory executive policy for an express congressional policy. By granting OMB power to mediate DOE/EPA conversations about the rulemaking,[182] and by restricting EPA's authority to act as an independent regulating agency, OMB arguably imposed

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174. Kruger, *supra* note 155, at 130-33.

175. 5 U.S.C. § 706(2)(A) (1994).

176. *See supra* note 133.

177. 5 U.S.C. § 706(2)(A) (1994).

178. Pub. L. No. 102-579 § 8(c)(1), 106 Stat. 4786 (1992).

179. "[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706 (1994).

180. RESPONSE TO COMMENTS, *supra* note 149.

181. *See, e.g., Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 966 F.2d 1292 (9th Cir. 1992) (EPA's failure to include deadlines for permit approval was arbitrary and capricious); *Delaney v. Environmental Protection Agency*, 898 F.2d 687 (9th Cir. 1990) (EPA's waiver of contingency and conformance requirements for county plan was arbitrary and capricious); *Environmental Defense Fund v. Environmental Protection Agency*, 852 F.2d 1316 (D.C. Cir. 1988) (EPA's suspension of certain mining wastes from regulation was arbitrary and capricious.).

182. Unlike the public, DOE's access to EPA's developing criteria was not restricted to Administrative Procedure Act formal comments. The following statement reporting on the OMB process shows that DOE played an active role in lobbying EPA for changes to the final rule during the non public OMB review. "Preliminary evaluation of the final rule 40 CFR 194 criteria for certification and recertification of the WIPP compliance with 40 CFR 191 disposal regulations is underway. *Several provisions in the rule, as written, could have a dramatic impact on the WIPP program.*" George Dials, CARLSBAD AREA OFFICE WKLY HIGHLIGHTS, *supra* note 154 (emphasis added).

an executive policy on EPA which directly contradicted an express congressional mandate.

Conflict between the role of OMB and EPA's regulatory mandate

OMB's role in facilitating EPA/DOE interaction, instead of supporting EPA's objectivity, actually undermined EPA's ability to maintain its independence from DOE. The problem stemmed from contradictory mandates. In general, OMB has authority to review individual agency rulemaking in order to prevent contradictions between agencies.[183] In theory OMB acts as a mediator between agencies to promote agency cooperation and project unified public policy.[184] In the case of WIPP, however, this basic OMB function actually operated in direct contradiction to the WIPP Act mandate for independent regulation.[185] Ex parte negotiations which were integral to OMB operations[186] provided a means to circumvent EPA's decisions and allowed DOE to lobby EPA for substantive changes in the compliance criteria.[187]

Theories of Executive Oversight

The fact that OMB could play a role in modifying direct congressional mandates was controversial before WIPP.[188] Whether OMB's role in the rulemaking was beneficial or obstructive, however,

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183. "[T]he Office of Information and Regulatory Affairs ("OIRA") is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency. . . ." Executive Order 12,866 directs OIRA, an office within OMB, to review significant regulatory actions which "[C]reate a serious inconsistency or otherwise interfere with an action taken . . . by another agency. . . . " Executive Order No. 12,866, 3 C.F.R. 638 (1993).

184. Reorg. Plan No. 1 of 1939, 3 C.F.R. 1288 (1968), *reprinted in* 5 U.S.C.A. app. " 209-219 (1996); Reorg. Plan No. 2 of 1970, 3 C.F.R. 1070-71 (1971), *reprinted in* 5 U.S.C.A. app. §§ 101-301 (1996); Reorg. Plan No. 1 of 1977, 3 C.F.R. 197 (1978), *reprinted in* 5 U.S.C.A. app. § 2 (1996).

185. Pub. L. No. 102-579, 106 Stat. at 4786-88 (1992).

186. Executive Order No. 12,866 § 6; *supra* note 183.

187. Kruger, *supra* note 155; *See also* REDLINE/STRIKE-OUT, *supra* note 150.

188. *See, e.g.*, Erik D. Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking under Executive Order 12,191*, 4 VA. J. NAT. RESOURCES L. 1 (1984) (Order may give OMB unwarranted authority to infringe on discretion delegated by Congress), Executive Order 12,498, 3 C.F.R. 235 (1985) (OMB has more discretion to review EPA actions for consistency with administration policies). *See also* The Honorable Patricia M. Wald, *The Cinematic Supreme Court: 1991-2 Term*," 7 ADMIN. L. J. AM. U. 238 (1993) ("[S]eparation of powers, especially executive power, is still the hottest ticket in town. Whether the issue is standing, enforceability of Congressional intent, legislative history to inform construction, *Chevron* expansion, or sovereign immunity, most decisions this term did work in the executive branch's favor.").

depends on what theory of executive power one endorses. Two contradictory theories about the extent of the President's constitutional authority over the activities of the executive branch exist.

The Unitary Executive Theory

One theory supports a unitary executive, vesting the President with both the removal power and policy control over executive branch officials, subject to whatever restrictions, conditions, and caveats Congress places within the statute.[189] Advocates of this theory contend that the vesting clause[190] of the Constitution places the "totality of executive power in the President."[191] They also contend that the take care clause[192] suggests that presidential control is necessary to resolve conflicts and overlapping jurisdictions among agencies. Under the unitary executive theory, OMB's role is to prevent agencies from usurping the President's constitutional executive power.

The unitary executive theory endorses OMB's administrative intrusion into EPA's WIPP rulemaking process. Under the unitary executive theory, the Constitution would bar any congressional mandate which intruded into internal executive branch functions. The theory would interpret the WIPP Act regulatory provisions as direction for DOE to be regulated not just by EPA, but by the executive branch as a whole.

Practical arguments support adoption of the unitary executive theory in order to shield EPA's final criteria from attack. First, the cost of maintaining WIPP during the evaluation period has been significant.[193] Close consultation with DOE could help EPA process the compliance criteria application more efficiently. If EPA finds the application deficient, EPA could directly inform DOE of potential problems. DOE could begin immediately to work on remedying the deficiencies. If the problems proved unsolvable, both DOE and EPA would share an understanding of why WIPP could not open.

Second, allowing fluid conversations between EPA and DOE promotes informed evaluation and arguably informed criteria. Since DOE

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189. David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L. J. AM. U. 309, 310 (1993); *see also* Stephen G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

190. U.S. CONST. art. II, § 1.

191. Rivkin, *supra* note 189, at 318.

192. U.S. CONST. art. II, § 3.

193. In 1980, the projected total cost of WIPP including design, construction and operation was $1 billion. 1980 FEIS, *supra* note 60, at 1-6. A recent estimate projects that WIPP will cost $9.2 billion. Mike Taugher, *Feds Up WIPP Cost Projection By $1.4 Billion*, ALBUQUERQUE J., NOV. 10, 1995, at A1, A2. In 1992, the cost of maintaining WIPP with no waste operations was $14 million per month. 125 CONG. REC., *supra* note 120.

constructed WIPP and directs the scientific inquiries into WIPP, DOE is the agency with the most knowledge about the WIPP facility. No matter how independent EPA tries to be, DOE contractors have more expertise about WIPP and it's capabilities than EPA consultants. An informed judgment about WIPP necessarily involves a complete understanding of the reasons why DOE contractors made the choices and conclusions contained in the application.

Third, WIPP involves decisionmaking about complex scientific issues. A presumption exists that if any question arises about congressional intent, agency interpretations are correct. This presumption is particularly strong when a decision involves complex technical evaluations.[194] When questions arise about agency decisions in implementing congressional mandate, courts defer to the agency's interpretation when the situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.[195]

Under this canon of construction, the WIPP application triggers three tiers of deference. First, deference should be accorded EPA's decision to accept DOE's application while EPA continued to work on its compliance criteria. Second, deference should be given to DOE's decision that sufficient proof of WIPP's viability exists to support fast tracking its compliance application. Finally, deference should be accorded OMB's interest in unifying public policy. All of these arguments, however, depend on an interpretation of the WIPP Act which allows EPA discretion to adapt compliance criteria in response to DOE concerns.[196] If a court were to adopt the shared executive theory, less deference would be accorded executive agencies. The shared executive theory would likely cast a critical eye at EPA's failure to separate its rulemaking from DOE influence.

The Shared Executive Theory

The shared executive theory envisions that the President is *primus inter pares*[197] with no constitutional authority to impose control over the policy decisions of other executive branch leaders.[198] Advocates of this

194. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The *Chevron* principle of deference to agency discretion only arises after courts determine that some ambiguity exists within the statute. If the statute is clear, the court will evaluate whether agency decisions correctly implemented the plain language of the statute.

195. *Id.*

196. *Id.*

197. *Primus inter pares* is Latin for first among equals.

198. Sunstein, *Executive Oversight of Regulatory Procedure*, 7 ADMIN. J. L. AM. U. 297-307 (1993); *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 54 (1994).

theory argue that the opinions clause[199] of the Constitution implies that presidential deference be accorded to decisions made by executive agencies.[200] In addition proponents note that the necessary and proper clause[201] of the Constitution further limits presidential power because it vests Congress with considerable control over the organization of the judicial and executive branches.[202] Under this shared executive theory, OMB's mediator role inappropriately intrudes into the right of executive branch agencies to autonomously implement congressional policy.

The shared executive idea provides a theoretical framework which supports arguments against DOE's intrusion into EPA's independent compliance criteria process. One argument is that since EPA's probabilities for WIPP's success are value laden[203] the agency should take an objective judicial role in evaluating contradictory evidence.[204] The need for objectivity in EPA's evaluation of DOE's process would seem to be particularly important because methodological value judgments are inherent in DOE's probable risk assessment task.[205] The consequences of DOE's manipulation of EPA's review could at best result in approval of an inadequate disposal facility, and could at worst generate false information to other projects.[206]

Other arguments which support regulatory autonomy are not based on science or efficiency. These concerns stem from a basic distrust of WIPP's safety and a consequent concern for careful review of DOE's science. For example, without some objectivity, it will be impossible to ascertain whether WIPP opened because of political pressure, or because

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199. U.S. CONST. art. II, § 2.

200. Sunstein, *supra* note 198, at 297.

201. U.S. CONST. art. I, § 18.

202. Sunstein, *supra* note 198, at 297.

203. EPA standards only require DOE to show a probability that no more than a certain fraction of radioactivity will reach the accessible environment. Because of the length of the 10,000 year regulatory period (twice as long as human beings have recorded history), large uncertainties are inherent in the scope and task of predicting changes in geological and hydrological movements, climatic changes and particularly human factors such as population numbers and migrations or even what people will eat or drink.

204. ROBERT H. NEILL ET AL., REVIEW OF THE WIPP DRAFT APPLICATION TO SHOW COMPLIANCE WITH EPA TRANSURANIC WASTE DISPOSAL STANDARDS, xii-xvii (1996) [hereinafter EEG-61] (EEG-61). To reduce the amount of uncertainty inherent within the regulatory process, EPA included assurance requirements as part of the standard. 40 C.F.R. 191.14 (1995) (for example, institutional controls and monitoring, engineered barriers, and mitigation against the effects of the presence of valuable minerals at the site). To date, DOE has not adequately addressed any of EPA's assurance requirements. *See* EEG-61 at xv.

205. 40 C.F.R. 191 (1995).

206. *See* GENERAL ACCOUNTING OFFICE, NUCLEAR WASTE: FOREIGN COUNTRIES' APPROACHES TO HIGH-LEVEL WASTE STORAGE AND DISPOSAL (1994) [hereinafter GAO FOREIGN WASTE] (GAO/RCED-94-172).

DOE truly demonstrated the reliability of the facility. Political pressure to open WIPP is very real. Since its authorization in 1979, Congress has invested $2.5 billion in WIPP.[207] As noted above,[208] nuclear weapons production is a huge national investment. Political pressure from within DOE to open WIPP, despite the uncertainty of its science, is enormous.

Indeed, political pressure on DOE to open WIPP extends beyond military concerns to a larger commercial nuclear industry. A failure at WIPP undoubtedly would affect ongoing plans to bury commercial nuclear waste at Yucca Mountain.[209] The expectations of a wide range of educational, political and economic interests would be disappointed.[210] Therefore, having promised to demonstrate the validity of permanent underground nuclear waste disposal,[211] the Department is under enormous pressure from diverse constituencies to deliver.

Another factor which supports the argument for EPA autonomy is caution. Any decision to open WIPP is for all practical purposes irreversible.[212] The compliance application does require DOE to develop

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207. In 1992 WIPP had cost $2.2 billion and was estimated to continue at a cost of $14 million per month. 125 CONG. REC. H6302 (daily ed. July 21, 1992) (statement of Rep. Rhodes). However, the cost may be somewhat higher. At $14 million per month WIPP should cost $168 million per year. Nevertheless, 1995 appropriations for WIPP were $174,323,000. DEPARTMENT OF ENERGY, ENVIRONMENTAL MANAGEMENT 1995: PROGRESS AND PLANS OF THE ENVIRONMENTAL MANAGEMENT PROGRAM 74 (1995) (DOE/EM-0228).

208. Schwartz, *supra* note 11.

209. In 1987, Yucca Mountain became the only high-level waste site to be considered for permanent disposal of spent fuel rods from largely commercial nuclear power plants. 42 U.S.C. § 160(a) (1987). Located in southern Nevada, the facility has been repeatedly delayed by scientific concerns about its viability. The most recent (1990) total-system life cycle cost estimates for Yucca Mountain and possible other repositories range from $25.6 billion to $34.6 billion (in constant 1988 dollars). DEPARTMENT OF ENERGY, FISCAL YEAR 1994 ANNUAL REPORT TO CONGRESS 62 (1995) (DOE/RW-0464). Yucca Mountain will not be ready to open until 2015 at the earliest. GAO FOREIGN WASTE, *supra* note 206, at Appendix I, 18.

210. The U.S. Council for Energy Awareness [hereinafter USCEA] is an organization which publicly supports nuclear energy, and underground disposal of nuclear waste. USCEA's 1991 Annual Report shows that members embrace a wide variety of economic, geographic and political interests: 177 businesses including General Electric, Bechtel, Westinghouse, Merrill Lynch, Siemens Power Corp., Squibb Diagnostics, and Teledyne, among others; 45 colleges and universities in over 30 states including Harvard, University of New Mexico, Stanford, MIT, and Texas A & M; 59 public utility companies; and 4 labor unions, including AFL-CIO's Building, Construction and Trades and the International Brotherhood of Electrical Workers.

211. CARLSBAD AREA OFFICE, DEPARTMENT OF ENERGY, STRATEGIC PLAN (1995) [hereinafter CAO STRATEGIC PLAN] (DOE/WIPP-95-1149).

212. Despite the requirement for a retrieval plan, 40 C.F.R. 191.14(f) requires retrievability, but does not require that retrievability be easy. DOE's application side-steps retrieval. DEPARTMENT OF ENERGY, DRAFT TITLE 40 CFR 191 COMPLIANCE CERTIFICATION APPLICATION FOR THE WASTE ISOLATION PILOT PLANT (1995) (DOE/CAO-2056). Because the salt deposits will cave in around the barrels and crush them, the waste to be buried at WIPP will eventually mix with the salt. After the barrels lose their integrity the waste mixes with

a retrieval plan if necessity demands it.[213] However, DOE maintains that cost and worker safety considerations dictate that retrieval would only be practical in extraordinary circumstances.[214] This reality indicates that waste burial is for all practical purposes irreversible. The irreversible nature of EPA's approval, then, would argue for front-end caution and insistence upon independent review.

The debate between advocates of the unitary executive and the shared executive theories has far-reaching implications for OMB's role in controlling executive agency rulemaking that has been authorized by Congress. Advocates for the unitary executive theory say that integrated regulatory decisionmaking, accountability, and the benefit of policy insights beyond the individual agency all argue for presidential oversight.[215] However, advocates of the shared executive role counter that "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. . . ."[216]

As this discussion shows, the debate is unresolved. Congress has been concerned about OMB's imposition of delay on executive agencies,[217] but has not raised the issue of OMB's role as a violation of separation of powers. Similarly, courts have used separation of powers doctrines to justify judicial restraint in questioning executive branch decisionmaking.[218] Courts will evaluate whether the agency's decision complies with statutory obligations not whether OMB has intruded into the decisionmaking process.[219] The general rule for executive agencies like EPA is that unless an agency has violated an express congressional

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the salt and the waste becomes hard to safely or economically retrieve. Relying on EPA's assurance that "it only need be technologically feasible . . . to mine the sealed repository," DOE states: "The WIPP is a mined repository. No additional actions to meet this requirement are necessary, and none are planned." CARLSBAD AREA OFFICE, DEPARTMENT OF ENERGY, COMPLIANCE STATUS REPORT FOR THE WASTE ISOLATION PILOT PLANT (1994) (DOE/WIPP 94-019, Revision O).

213. *Id.*

214. *Id.*

215. Rivkin, *supra* note 189, at 309.

216. *Myers v. United States*, 272 U.S. 52, 135 (1926) (Justice McReynolds *dissenting*).

217. *See generally Office of Management and Budget Influence on Agency Regulation, Subcommittee on Legislation and National Security, Senate Com. on Environment and Public Works*, 99th Cong., 2d Sess. (1986).

218. *Allen v. Wright*, 468 U.S. 737 (1984) (Separation of powers counsels against seeking to restructure the apparatus established by the Executive Branch to fulfill its legal duties.).

219. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

mandate, courts must defer to executive agency interpretation of the statute.[220]

As a result of judicial deference to executive agencies, a court probably would not reach the doctrine of separation of powers unless the court first determined that EPA had violated an express mandate of the WIPP Act. If a court concluded that Congress was unclear in its requirement that EPA conduct an autonomous review of WIPP, then the *Chevron* principle of deference would apply[221] and a court probably would not reach the question of whether EPA, DOE, and OMB negotiations were within executive branch discretion by the terms of the WIPP Act. If, however, a court concluded that the WIPP Act clearly limits presidential control,[222] then a court could question the scope and constitutional authority of OMB's actions.[223]

Statutory limits sharply restrict EPA's autonomy as an independent regulating agency

The importance of analyzing EPA's ability to regulate DOE extends beyond compliance with rulemaking criteria. Arguably EPA's final determination of WIPP certification based on DOE's compliance application also constitutes a rulemaking. EPA's ultimate decision about whether WIPP could open would trigger another OMB review. Therefore, EPA's ability to thwart DOE influence is not limited to the compliance criteria rulemaking. EPA's independence from DOE will arguably be a factor in any future OMB review of EPA's final authorization for opening WIPP.

The question of EPA's functional independence involves the nature of EPA's statutory autonomy within the executive branch. Despite clear congressional intent to designate EPA as an independent regulatory agency over DOE, EPA does not have enough statutory independence within the executive branch to maintain an independent regulatory stance. EPA is a presidentially created agency established to advocate for and coordinate environmental concerns.[224] The President retains power to appoint and remove the EPA Administrator.[225] Furthermore, since

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220. *Id.*

221. *Id.*

222. *See, e.g., Governors of U.S.P.S. v. U.S.P.S.*, 654 F.2d 108, 114-15 (D.C. Cir. 1981) (Postal Rate Commission may not change decision of Board of Governors.); *Leonard v. U.S.P.S.*, 489 F.2d 814, 817-18 (1st Cir. 1974) (USPS decisions are not subject to Department of Justice veto.).

223. Rivkin, *see supra* note 189; *see also* Sunstein, *supra* note 200.

224. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072-75 (1971) *reprinted in* 5 U.S.C.A. app. 881-7 (1996).

225. Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461 (1994). *See also Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that

EPA performs regulatory functions which are vital to the nation's economy, OMB reviews, alters and approves EPA's budget before sending it to Congress.[226] The presidential powers to fire the administrator and to alter appropriation requests for specific regulatory programs diminish the regulatory independence of EPA within the executive branch. The President's need for cost efficiency and unified public policy may compromise EPA's ability to regulate.[227]

EPA's status contrasts with other independent regulatory agencies which enjoy more extensive regulatory autonomy.[228] In the hierarchy of independent agencies, NRC enjoys more independence from executive control than does EPA.[229] The President only can fire NRC commissioners for inefficiency, neglect of duty, or malfeasance in office.[230] In addition, a provision which stipulates that no more than three out of five NRC members can be from the same political party limits the President's ability to appoint commissioners sympathetic to executive policy.[231] Furthermore, NRC submits proposed agency rules to the "Regulatory Analysis Review Group" on a voluntary rather than a mandatory basis.[232]

Although independent regulatory agencies like NRC retain various degrees of autonomous control over several critical administrative functions, the President does retain critical authority to control even independent regulatory agencies.[233] Among these presidential controls are, first, the requirement that agencies submit legislative recommenda-

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congressional authority to fire the director of the Office of the Comptroller General constituted sufficient power over the comptroller general to find improper retention of congressional power).

226. Moreno, *supra* note 225, at 479, 500.

227. *See, e.g., N.R.D.C. v. U.S.E.P.A.*, 824 F.2d 1146.

228. For a discussion of the difference between EPA's status as an "independent agency" and the status of "independent regulatory agencies" within the executive branch, Moreno, *see supra* note 225, at 474 (Moreno identifies the eleven most important agencies as enjoying the more autonomous status of "independent regulatory agency": the Interstate Commerce Commission, the Federal Reserve Board, the Federal Trade Commission, the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, the Consumer Product Safety Commission, the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, the United States International Trade Commission, and the Nuclear Regulatory Commission).

229. Moreno, *supra* note 225, at 511.

230. *Id.* at 477.

231. R.H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 40-41 (1995) (Public trust varies among other factors according to the nature of the actor, e.g. industry or physician, and the location or nature of the community.). This restriction in practice seems to have little real effect in reducing commission support of presidential policy. *Id.* at 29 n.108.

232. Moreno, *supra* note 225, at 489-90.

233. Moreno, *supra* note 225, at 498-500.

tions to the president before offering them to Congress;[234] second, the control of resources and operational aspects of day to day administration;[235] third, the power to appoint or remove commissioners;[236] fourth, the ability to appoint or remove chairs or administrative directors;[237] fifth, presidential authority to reorganize the executive branch;[238] sixth, the power to submit budget requests to Congress,[239] and; seventh, the power to decide when and how to litigate enforcement of regulatory programs.[240]

Suggestions for more autonomous regulation of WIPP certification

With the designation of EPA as regulator over WIPP, it would seem that history passed beyond previous congressional concerns about a civilian agency regulation of military nuclear waste disposal.[241] Arguably NRC is in a better position to independently regulate DOE than is EPA.

One solution to the problem of EPA's lack of autonomy in compliance criteria rulemaking, then, would be for Congress to redesignate NRC as the WIPP regulator. Several factors, however, indicate that this development is unlikely. Beyond the obvious problems of consistency for the WIPP review process, the problem of placing NRC as a regulator over DOE remains problematic. Congress continues to separate regulation of military and commercial nuclear activities.[242]

Given congressional reluctance to merge the authority over military and commercial nuclear facilities, an alternative plan would be

234. *Id.* at 500 (some independent agencies "enjoy statutory or traditional bypass provisions").

235. *Id.* (General Accounting Services Administration and the Office of Personnel Management maintain control over facilities and personnel of most independent agencies.).

236. *Id.*

237. *Id.*

238. *Id.* (This power is also subject to congressional authorization. Without some statutory independence an independent regulatory agency can be created or terminated by presidential reorganization of the executive branch.).

239. *Id.* (The President's authority to establish budget estimates of the federal government for the fiscal year squarely places budgetary discretion over executive agencies within presidential power.).

240. *Id.* (Power to control litigation implicates policy as well as control over prolonging rulemaking. In general the U.S. Attorney General retains this authority with respect to independent regulatory agencies. However, some agencies retain limited enforcement and appeal powers.).

241. Pub. L. No. 102-579, 106 Stat. 4777 (1992) (giving EPA regulatory authority over WIPP); *see Procurement Hearing, supra* note 41.

242. Congress bifurcated high-level nuclear waste standards, giving EPA authority over WIPP, but authorizing separate standards for Yucca Mountain. 10 C.F.R. 52.97 (1992).

for Congress to establish an independent regulatory agency within the executive branch and parallel to NRC with limited presidential control over its authority to conduct rulemaking, adjudication and approval of future military nuclear waste repositories.[243] One advantage of this proposal includes a strong message to DOE and the executive branch that Congress requires watchful regulation of these dangerous nuclear waste facilities. The disadvantages include increased bureaucracy, its inevitable cost, and the time lost while the new agency masters the regulatory task.

The shared executive model promotes public accountability in rulemaking

The most persuasive argument for endorsing the shared executive model and limiting presidential oversight of agency rulemaking[244] is the critical need for accountability in the regulatory arena.[245] As Peter Shane, Dean of the Pittsburgh School of Law explains, "if the President were to enjoy more and more complete control over content of domestic policy, then the weaker the identifiable link would become between legislator effectiveness and government performance."[246] Courts have recognized the importance of preserving political accountability within our majoritarium government.[247] EPA's lack of statutory independence obscures political accountability for congressional nuclear waste policy.

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243. EPA's environmental advocacy mandate is philosophically consistent with the idea of keeping this independent agency within EPA. However, before such a decision is made, serious consideration should be given to limiting the president's ability to control the agency's regulatory independence through the above-mentioned conditions. Moreno, *supra* note 225, at 500-04.

244. Limiting the President's control over an independent regulatory agency raises the unitary executive theory policy concern about the cost associated with inefficiency in bureaucratic management. However, recent criticism of "control and command" environmental regulation suggests that hierarchical control over governmental agencies is only one factor in reducing costs. Other devices could be more effective. For example, implementing feedback systems into regulatory programs, identifying and distinguishing between long-term and short-term risks, and developing incentives for behavior changes (including incentives not to litigate) may also significantly reduce regulatory costs and compensate for any loss of management efficiency. Pildes, *supra* note 231, at 96-99. *See also* E. Donald Elliott, *TQM-ing OMB: or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & COMTEMP. PROBS. 167-84 (1994).

245. *See generally* Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161-214 (1995).

246. *Id.* at 209.

247. *New York v. United States*, 505 U.S. 144, 169 (1992) ("[w]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished[.]").

Political accountability is further threatened when OMB's activities blur the relationship between congressional authorization and executive implementation of environmental regulation.[248]

Although the framers of the Constitution could not have anticipated the nuclear age, they were very concerned about fairness and accountability in public decisionmaking. As James Madison explained:

> Complaints are everywhere heard from our most considerate and virtuous citizen, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.[249]

These words foreshadow current problems posed by the vested interests of the military-industrial complex. In 1787 the framers counted on an equal tension between vested "landed" interests to temper the interests of the "mercantile" class.[250] Furthermore, the power of the states to restrict a powerful federal government was assumed.[251] The framers believed that federal government power was unlikely to be unchecked. As Alexander Hamilton notes:

> It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.[252]

Therefore, despite a concern that powerful private interests might control government decisions, the framers did not provide for checks within the

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248. Giving a non-elected independent regulatory agency autonomy from an elected president may seem ironically nonmajoritarian. However, the goal is to clarify implementation of congressionally mandated policy. The layered veils of presidential oversight in environmental rulemaking obscure accountability about how the agency has taken public input into account. Therefore, the shared executive model, depends on a direct accountability from the agency to the public. In this model courts might apply a more critical review of agency abuse of discretion. Presidential checks for inefficiency, neglect of duty or malfeasance in office could be retained. Moreno, *supra* note 225, at 513.

249. THE FEDERALIST No. 10, at 77 (James Madison) (Penguin 1961).

250. THE FEDERALIST No. 60, at 369 (Alexander Hamilton) (Penguin 1961).

251. THE FEDERALIST No. 17, at 119 (Alexander Hamilton) (Penquin 1961). ("It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities."). *Id.*

252. *Id.*

executive branch. If the framers had imagined the unified power of today's military-industrial complex, the aforementioned references suggest that they might have taken steps to check the superior force of this interested and overbearing majority. In any case, the framers clearly intended to ensure federal governmental accountability.

Today the public is just as concerned about political accountability as were the framers. Frustration over the current lack of political accountability in EPA's regulatory role[253] fosters widespread distrust and public opposition to WIPP. In the past, opponents were vocal, insistent, persistent, and effective.[254] Public outcry was particularly effective in delaying WIPP's opening[255] and in insisting that no radioactive materials be brought to WIPP without a congressional land withdrawal.[256] Because of the widespread concern about WIPP's safety, EPA's failure to provide objective evaluation of DOE's WIPP compliance application will not go unnoticed. EPA's lack of accountability could generate widespread public resistance to future attempts at resolving nuclear waste problems.[257]

One reason for public distrust is the nascent status of nuclear waste technology. To penetrate the shadow of concern about the validity of underground nuclear waste disposal, government decisions must involve the public in periodic reviews. Nuclear waste disposal facilities are cost intensive, long-term projects.[258] The length of time that passes

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253. *See generally* Pildes, *supra* note 231, at 41.

254. In a 1992 poll conducted by the New Mexico Environmental Law Center, 40% of those polled responded "WIPP" when asked to name the environmental issue which most concerned them. The next highest concern was "water," mentioned by only 26% of respondents. RESEARCH & POLLING, INC., NEW MEXICO ENVIRONMENTAL LAW CENTER, ATTITUDES OF NEW MEXICANS TOWARD FEDERAL AND STATE MINING LAWS AND RECLAMATION, INCLUDING REFORM OF THE 1872 MINING LAW (1992).

255. DOE first promised to open WIPP in 1988. 1980 FEIS, *supra* note 60, at 1-6. Public insistence on DOE accountability, particularly with respect to complying with existing state and federal laws, prevented DOE from bypassing Congressional action on a WIPP land withdrawal. 56 Fed. Reg. 3038, 3039 (1991); 56 Fed. Reg. 5731 (1991); *see supra*, note 125.

256. For example, the October 1993 withdrawal of DOE's test phase before EPA's decision about its direct relevance to compliance presumably was based in part on a response to the July 1993 DOE forum which included representatives from Indian tribes, concerned citizens, governors, congressional members, the National Academy of Science, and Westinghouse. *See Meeting Summary Waste Isolation Pilot Plant Program Review* (July 30, 1993) (held at the J.W. Marriott Hotel, Wash. D.C.).

257. *See* DEPARTMENT OF ENERGY NATIONAL TRANSURANIC PROGRAM PLAN 1-1 (1994) [hereinafter NATIONAL TRU] (DOE/NTP-94-1040).

258. The history of other long-term, cost intensive military projects does little to boost confidence in cursory WIPP oversight. See *eg., Safeguard Antiballistic Missile System,* ($25 billion from 1969-76) canceled because high operational costs eclipsed limited defensive benefits; *XB-70/RS-70 Valkyrie Bomber* ($9 billion from 1957-60) canceled by President Eisenhower due to concerns over interservice rivalry and lack of a clear mission-revived as

between the original congressional authorization and the eventual operational implementation, means that Congress's original authorization cannot possibly take into account the information obtained during the compliance review. Therefore, before construction and operation, an independent regulatory agency should conduct a public review of all scientific and technical conclusions which argue for implementation. The independent agency should be given additional authority to include in its review a final evaluation of the necessity of each new repository.

A precedent for such a review exists in the public service area in the form of Certificates of Convenience and Necessity (CCN).[259] Public utilities must have an approved CCN before they can construct a new facility.[260] Important factors for granting a CCN are, first, an inquiry into whether there is a public need for expanding services, and second, an evaluation of whether expanding services is a significant improvement over existing services.[261]

Since the federal government retains control over nuclear waste repositories, the CCN review for military nuclear waste repositories appropriately would be within the authority of the federal independent regulatory agency.[262] Moreover, such a review would be considered adjudication requiring a trial type hearing.[263]

Currently the National Environmental Policy Act (NEPA) requires public review of major actions contemplated by federal agencies.[264] The NEPA process ensures that, before irreversibly committing national resources, an agency take a hard look at all reasonable alternatives to the

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a political maneuver to help Richard Nixon in California in the 1960 election left to languish and die under President Kennedy; *Aircraft Nuclear Propulsion (ANP)* ($6 billion from 1946-61) canceled due to poor management, technical problems and lack of a clear mission; *Safeguard C atmospheric nuclear testing readiness capability* ($1.6 billion from 1964-1993) canceled when Congress was made aware of its continued existence; *Proposed restart of the Savannah River Site production reactors* ($2 billion from 1988-1992) canceled when DOE and DOD re-evaluated their need for new tritium; *MX rail garrison basing plan* ($2 billion from 1988-1991) canceled after heavy and sustained public and congressional opposition; *Skybolt air-launched missile* ($2.1 billion from 1955-1962) canceled due to poor test results; *Nuclear Engine for Rocket Vehicle Applications (NERVA)* ($2.7 billion from 1961-1972) canceled due to lack of a clearly defined mission; *Aircraft Nuclear Propulsion* ($6 billion from 1946-1961) canceled due to poor management, technical problems and the lack of a clear mission. *See* Schwartz, ATOMIC AUDIT, *supra* note 11.

259. *See, e.g.*, W. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426 (1979).

260. Since WIPP has already been built, requiring a CCN may be moot. However, the CCN process would be useful in resolving public polarization of opinion about future nuclear waste repositories.

261. Jones, *supra* note 259, at 427.

262. Traditionally CCN's are issued at the state level. Jones, *supra* note 259, at 430.

263. Federal Administrative Procedure Act, 5 U.S.C.A. § 551, 554 (1946).

264. 42 U.S.C. 4331 (1994), 83 Stat. 852 (1970).

proposed action before recommending in a record of decision which alternative to implement.[265] At the heart of NEPA is the insistence on public accountability for government action.[266] NEPA, however, only enforces procedural accountability.[267] A CCN review would not substitute for NEPA. Rather the CCN process would take place subsequent to the agency's NEPA record of decision, putting enforcement teeth into evaluating the merits of the NEPA decision.[268]

The shared executive model is particularly important when one government agency regulates another government agency. EPA's WIPP Act mandate carries a heavy burden, requiring EPA to regulate a cabinet-level government department.[269] Furthermore, the specificity of the WIPP Act in delineating EPA's WIPP regulatory responsibilities would indicate that EPA's duties are peculiarly and specifically committed to the agency.[270] For these reasons, EPA's mandate requires more political accountability[271] and administrative independence.[272] Therefore any proposed independent regulatory agency which would shoulder EPA's present mandate should have relative autonomy within the executive office of the president.

CONCLUSION

Although the prospects for correcting the perceived or actual damage caused by DOE's influence over EPA's compliance criteria are dim, courts should nevertheless review this question. The WIPP project is a contemporary illustration of the problems pose by government

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265. *See generally id.*

266. *Id.*

267. Furthermore, as seen above, the APA substantive review will only question agency decisions if they are arbitrary and capricious. Arguably the irretrievable nature of permanent underground disposal of nuclear waste requires a stricter standard of review. Rather than disturbing general laws like NEPA and APA which apply to many retrievable actions, this paper recommends the CCN process to strengthen the NEPA and APA process with respect to permanent nuclear waste disposal decisions.

268. *See generally* NEPA, 42 U.S.C. 4321-4370d (1994).

269. Independent agencies traditionally regulate private, industrial or public service companies. The more closely the independent regulatory agency comes to regulating government, the more independence it seems to have. Therefore, the Federal Reserve Board, regulating government chartered banks, has more independence than, for instance, EPA. *See generally* Moreno, *supra* note 225; Jones, *supra* note 259.

270. *Myers*, 272 U.S. at 135.

271. *See generally* Peter Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161-214 (1995).

272. *See generally* Moreno, *supra* note 225.

projects which typically take a long time and involve large sums of money.[273]

The enormous cost of WIPP, like other long-term nuclear projects, has worked to undermine original intentions in two ways. First, as the project progressed, the demand for cost efficiency began to eclipse the original concerns for health and safety.[274] Second, the nature and enormity of the research, so necessary to verify the scientific validity of the NAS premise, eventually produced vested interests which now lobby for its continuance. Political pressure from vested interests, both governmental[275] and private [276] also may prejudice intermediate decisions to proceed with implementation even when very little scientific evidence exists for continuing the project.[277] The enormous political and economic power vested in the military-industrial complex and the irretrievable nature of the decision to emplace nuclear waste at WIPP, caution against unquestioning acceptance of such governmental inertia. Failure to insist on political accountability in this developing nuclear waste field could allow undue influence to overrule objective decisonmaking. The result could mean the erosion of governmental checks and balances which ensure our health and safety, and even our fundamental liberties.[278]

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273. *See* text and accompanying citations *supra* note 258.

274. *See generally* Donald E. Elliott, *TQM-ING OMB: or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167-84 (1994).

275. 125 Cong. Rec., *see supra* note 139 (statement of Rep. Miller).

276. DOE's nuclear weapons complex is operated by hundreds of private contractors including Westinghouse Electric Corp., General Electric Corp., Bechtel Corp., EG&G, Reynolds Electrical & Engineering Corp., Martin Marietta Corp., Mason and Hanger-Silas Mason Co. Inc., Fluor Daniel, and Morrison-Knudson Corp. *See* Schwartz, BROOKINGS *supra* note 9. In addition, the enormous involvement of corporations, universities, public utilities, and labor unions in other government-supported nuclear activities inevitably has political impact. *See* USCEA, *supra* note 210.

277. *See* Schwartz, ATOMIC AUDIT, *supra* note 11.

278. Eisenhower, *supra* note 2.