



STATE OF NEVADA

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Ms. Jessie H. Roberson
Assistant Secretary for Environmental Management
U.S. Department of Energy
EM-1, Room 5A-014
1000 Independence Ave. S.W.
Washington, D.C. 20585

Re: Planned Shipment of Wastes from Fernald to Nevada Test Site

Dear Ms. Roberson:

The State of Nevada has been advised that DOE's Environmental Management Division is intending imminently to ship some 7,000 containers of radioactive waste from DOE's Fernald, Ohio site to the Nevada Test Site ("NTS") for disposal. DOE's effort to bring this dangerous waste into Nevada is a flagrant violation of applicable federal and state laws and, indeed, of DOE's own rules. Even worse, the consequence of this unlawful action will be to create an extraordinary public health and environmental hazard in our state. Accordingly, Nevada hereby notifies DOE that we intend to seek prompt judicial redress to prevent the transport to and disposal of the Fernald wastes at NTS unless DOE takes immediate action to stop the shipments.

It is Nevada's understanding that the waste destined for disposal at NTS may amount to as much as 153.6 million pounds of material from Silos 1 and 2 and Silo 3 at Fernald, with a volume of at least 14,000 cubic yards, or 378,000 cubic feet. When stabilization is complete, volumes will be substantially greater. We also understand that hazardous constituents in this waste exceed standards established by the Resource Conservation and Recovery Act ("RCRA") for lead and probably other hazardous substances (such as selenium), and thus the waste would normally constitute "mixed waste" under Nevada's federally approved RCRA program.

However, according to DOE documents, this waste has been classified by DOE and EPA as Atomic Energy Act ("AEA") section 11(e)(2) waste, ostensibly providing for an exemption from safe and environmentally sound disposal requirements of RCRA.

Moreover, this material is evidently of such a high radioactivity concentration that it cannot be sent for disposal to Envirocare's commercial radioactive waste disposal facility in Utah, a facility properly licensed by the NRC for safe and effective management of radioactive waste and the chosen disposal location for most of Fernald's other radioactive wastes, including mixed wastes.

As discussed in detail below, DOE's designation of this waste as 11(e)(2) material not subject to Nuclear Regulatory Commission ("NRC") or Agreement State regulation blatantly misapplies that section of the AEA. If DOE chooses to classify the waste as 11(e)(2) waste pursuant to the AEA, then DOE must also comply with the waste management requirements established through the AEA in conjunction with the 11(e)(2) waste designation and dispose of the wastes at a facility appropriately licensed by the NRC or an Agreement State for 11(e)(2) waste disposal. The NTS disposal facility is clearly not such a facility.

As a fundamental legal matter, it must be recognized by DOE that the status of waste as "11(e)(2) waste" is not simply a matter of nomenclature, but explicitly entails an array of regulatory treatments including, to be sure, an exemption from RCRA requirements under the 1978 Uranium Mill Tailings Radiation Control Act ("UMTRCA)," but also affirmative obligations to comply with the other requirements of UMTRCA. After all, section 11(e)(2) was added to the AEA by UMTRCA. These attributes of section 11(e)(2) byproduct waste reflect UMTRCA's twofold purpose:

[F]irst, to close the gap in NRC regulatory jurisdiction over the nuclear fuel cycle by subjecting uranium and thorium mill tailings to the NRC's licensing authority; and second, *to provide a comprehensive regulatory regime for the safe disposal and stabilization of the tailings.*

Kerr-McGee Chemical Corp. v. NRC, 903 F.2d 1, 3 (D.C. Cir. 1990) (emphasis added).

UMTRCA established regulatory regimes for historical uranium sites (Title I), as well as for those that would continue operating (Title II), and conferred regulatory jurisdiction on EPA and NRC to regulate their activities. DOE's own uranium processing wastes have never been subject to NRC jurisdiction. Section 11(e)(2) was created by UMTRCA to deal with uranium mining and processing hazards not within the DOE complex, authorizing regulation of those hazards by EPA and NRC. DOE cannot now call Fernald wastes section 11(e)(2) wastes, a classification created by UMTRCA, without also complying with all the attributes of such a classification that Congress both required in UMTRCA and, as discussed below, explicitly reaffirmed in the Energy and Water Development Appropriations Act of 2004.

For DOE to avail itself of the benefits of the status of section 11(e)(2) waste but

absolve itself of any duty to comply with the other requirements of that status—requirements designed by Congress to assure the safe disposal of radiological and non-radiological materials associated with uranium mining and processing—is a transparently unlawful usurpation of prerogatives belonging only to Congress. Such a maneuver would also violate the safety requirements of the Atomic Energy Act applicable to DOE even when it self-regulates, and would fly in the face of requirements in CERCLA at 42 U.S.C. Section 9621(d)(3) that wastes shall be transferred only to a disposal facility operating in full compliance with applicable federal law and all applicable State requirements.

Indeed, escaping from applicable Nevada RCRA disposal safety requirements appears to be the only reason for DOE's strange classification of the Fernald materials as 11(e)(2) waste somehow exempt from NRC or Agreement State regulation, with the perverse result that wastes which were too dangerous to go to a permitted, lined, and adequately monitored facility at Envirocare are now slated for NTS's unpermitted, unlined, and inadequately monitored disposal site. As you are aware, waste reclassification of precisely this convenient sort was soundly overruled in DOE's dispute last summer with the Natural Resources Defense Council in federal court in Idaho.

In any event, even if the Fernald waste is 11(e)(2) waste, it very likely predates the 1978 UMTRCA and thus would not be eligible for that statute's RCRA exemption. If, on the other hand, the waste does not predate that statute and is in fact 11(e)(2) waste, federal law clearly contemplates its disposal *only* at an authorized 11(e)(2) disposal site, and not at a low-level radioactive waste disposal site without such authorization.

The reason for this requirement is obvious. Uranium processing wastes are not merely low-level wastes. Regulations at 40 C.F.R. Part 192 were designed to deal with the fact that uranium processing wastes also contain certain quantities of hazardous constituents. This is evident in that regulation's establishment of maximum concentration requirements for hazardous elements such as lead and selenium (see 40 C.F.R. 192, Subpart A, Table 1, and Appendix I. See *also* NRC's parallel regulations at 10 C.F.R. Part 40, Appendix A). Thus, 11(e)(2) disposal-site licensing contemplates the performance assessment of accompanying quantities of non-radiological hazardous elements typically associated with uranium processing. (See, e.g., NRC's 10 C.F.R. Part 40, Appendix A Introduction, referring to protection against "nonradiological hazards" as well as radiological hazards.) The same is not true for low-level radioactive waste disposal licensing, even under DOE's self-regulatory regime as reflected in DOE Order 435.1-1, which addresses only radiological hazards.

DOE has no authority to refashion the legal attributes of section 11(e)(2) waste by simply calling the Fernald material post-1978 11(e)(2) waste that is magically

exempt from all federal and state hazardous waste regulations and otherwise applicable 11(e)(2) disposal licensing requirements. Indeed, it is Nevada's understanding that DOE has no plans even to test whether the Fernald wastes, after stabilization, meet the universal treatment standards under the land disposal requirements of RCRA. DOE thereby avoids all appropriate scientific inquiry as to the long-term impacts of hazardous constituents it would dispose of at NTS—the precise assessment required for every other 11(e)(2) and RCRA disposal facility in this country.

Any conceivable doubt about DOE's lack of authority to dump the Fernald 11(e)(2) wastes at NTS was put to rest by Congress in the Energy and Water Development Appropriations Act of 2004 (Public Law 108-137, December 1, 2003), which in Section 312 specifically referred to the Fernald silo wastes at issue and required that “[t]he Nuclear Regulatory Commission or an Agreement State, as appropriate, shall regulate the material as ‘11e.(2) by-product material’ for the purpose of disposition of the material in an NRC-regulated or Agreement State-regulated facility.” (Emphasis added.) NTS, of course, is not such a facility.

As if that were not enough, DOE's plan to send the Fernald silo wastes to NTS is also in direct conflict with DOE's *Record of Decision (ROD) for the Department of Energy's Waste Management Program: Treatment and Disposal of Low-Level Waste and Mixed Low-Level Waste; Amendment of the Record of Decision for the Nevada Test Site* (DOE 6450-01-P). The ROD defines “Low-Level Waste” as “all radioactive waste not classified as high-level waste, transuranic waste, spent nuclear fuel, or by-product tailings containing uranium or thorium from processed ore (as defined in Section 11(e)2 of the Atomic Energy Act of 1954.” (Emphasis added.) While the Record of Decision for the NEPA documentation completed for the Fernald site identified “NTS or an appropriately-permitted commercial disposal facility” for disposition of wastes, we believe any such designation could not summarily override the Waste Management ROD as it applies to NTS. Moreover, we submit that the Fernald decision was based on DOE's intent to apply for and obtain a RCRA permit for disposal of hazardous waste at NTS. We do not believe the Fernald decision anticipated disposal of these disputed wastes as merely low-level waste.

Finally, DOE's own governing manual of regulations for radioactive waste disposal at NTS, Order M-435.1-1, clearly prohibits the disposal of *over 14,000 cubic yards*—by any measure hardly a “small quantity”—of 11(e)(2) waste at the NTS low-level waste disposal site. That manual, at Section IV.B(4), provides that “[s]mall quantities of 11e.2 byproduct material and naturally occurring radioactive material may be managed as low-level waste provided they can be managed to meet the requirements for low-level waste disposal in Section IV.P [performance requirements] of this Manual.” (Emphasis added.) DOE's Implementation Guide for M-435.1-1 refers to the legislative intent of the UMRCA in further defining “small quantities” of 11(e)(2) materials that are otherwise “managed by the Department according to the

Ms. Jessie H. Roberson
April 15, 2004
Page 5

requirements of 40 CFR Part 192 and disposed at specially designed tailings disposal sites established under the UMTCA.” DOE G-435.1-1 at IV-12 (emphasis added). Two specific examples given by DOE of “small quantities” were “a few vials” and “100 cubic meters” of non-eligible wastes. Id. at IV-13.

In short, there appears to be no legal, regulatory, or scientific justification whatsoever for DOE’s plan to dispose of massive quantities of Fernald’s most hazardous and radioactive wastes at NTS. DOE’s plan is reckless and unsafe, and it flagrantly violates the law. Please confirm by April 30, 2004, that this waste will not be coming to Nevada. If DOE cannot so certify by that time, Nevada intends to seek prompt judicial redress. I am confident Nevada’s federal court will look no more favorably on DOE’s expedient actions here than did the court in Idaho last summer.

Sincere regards,

BRIAN SANDOVAL
Attorney General

c: Honorable Mike Leavitt, Administrator
U.S. Environmental Protection Agency

Honorable Nils J. Diaz, Chairman
U.S. Nuclear Regulatory Commission