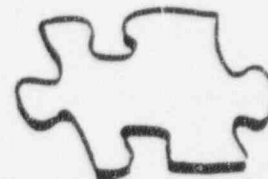


F.A.C.T.S.

(For A Clean Tonawanda Site)

"PUTTING THE PIECES TOGETHER"



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Jeffrey L. Bartlett
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

September 30, 1996

Dear Mr. Bartlett:

On March 26, 1996, we sent a letter to Dennis Sollenberger in NRC's Office of State Programs to determine which regulatory agency, NRC or the NYS Department of Environmental Conservation, is responsible for the control of environmental releases of Department of Energy 11(e)2 wastes at the Tonawanda, N.Y. FUSRAP Site. To date this letter has not been answered, although I confirmed in a telephone conversation with Mr. Sollenberger that it was received.

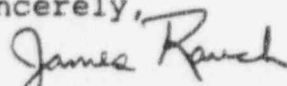
In that letter we requested that NRC immediately license the owner of the landfill and regulate the environmental release of the wastes, if, as Mr. Sollenberger said, the agreement with New York does not grant authority to NYSDEC to apply 6 NYCRR Part 380. We do not understand why NRC has not exercised its authority over these materials before now. We request that NRC immediately provide us the specific documentation (regulation or order) requested by NYSDEC and referred to in Craig Gordon's April 23, 1996 reply to Paul Merges' letter to NRC dated February 29, 1996.

Since then, DOE has announced a final sitewide cleanup plan that does not address the wastes in the Niagara Landfill (Seaway property) and that might not meet NRC decontamination and decommissioning regulations were these materials licensed by NRC. If this plan, as we understand it, is adopted, will not NRC be obligated to exercise its authority to license the owner of the Seaway property, Benderson Development Company?

We have enclosed our letter to DOE which details problems with the continuing "interim" actions at the Linde/Praxair property and the announced final cleanup plan in relation to both DOE's stakeholder participation process and the NEPA/CERCLA EIS review prescribed for the Tonawanda Site.

We look forward to a timely response.

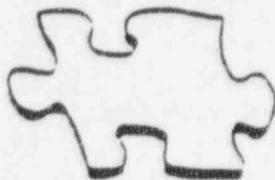
Sincerely,


James Rauch

Enc.

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PDR STPRG ESGGEN
PDR

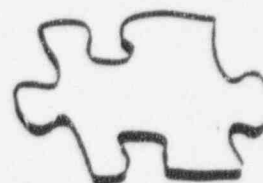
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Mr. James Owendoff
Deputy Assistant Secretary for
Environmental Restoration
U.S. Department of Energy
1000 Independence Ave
Washington, D.C. 20585

September 28, 1996

Dear Mr. Owendoff:

As you know, FACTS is a community coalition of stakeholders participating in the environmental review process that is required to support a final remediation plan decision for the Tonawanda, NY FUSRAP Site. We are composed of and represent health, environmental, labor, and academic interests in the Tonawanda community.

Since the "suspension" in April 1994 of the integrated NEPA/CERCLA environmental impact statement (EIS) review process (specified by the February 22, 1988 Notice of Intent), completion of said process with a Record of Decision (ROD) being required by law before any "final" remediation of the Tonawanda Site can occur, officials of the Department of Energy (DOE) have made, and frequently reaffirmed, two commitments to all Tonawanda stakeholders:

1) "that the new decision process will be open and that the Department will give every opportunity to those who wish to participate." (Richard Guimond, Principal Deputy Assistant Secretary for Environmental Management, December 7, 1994), and

2) that the final cleanup plan (i.e. ROD) implemented by DOE must have the approval of the Tonawanda stakeholder community (Guimond, former Assistant Secretary for Environmental Management Thomas Grumbly, Site Manager Ronald Kirk, and others, on numerous occasions).

The purposes of this letter are:

- 1) to identify the major unresolved remediation issues,
- 2) to document the occurrence of a serious violation of the first commitment,
- 3) to determine the current status of the soil pile and material from the demolition of Building 38 as a result of the Linde/Praxair "interim" actions, and

4) to clearly outline those actions which will violate the second commitment and the prescribed NEPA/CERCLA EIS review process.

Background

In August 1995 Congressman John LaFalce announced that DOE would perform "interim" cleanup actions at the Linde/Praxair property. Prior to this announcement, DOE had not held any public meetings of all interested Tonawanda stakeholders where the appropriate order for cleanup of the several properties making up the Tonawanda Site was discussed and agreed upon.

We questioned the wisdom and legality of these "interim" actions since agreement between the Tonawanda stakeholder community and DOE on major remediation issues (see below) has not been reached. Agreement on these issues is required, not only by DOE's commitments to the Tonawanda stakeholder community, but also by the NEPA/CERCLA EIS review process which must culminate in a ROD prescribing the selected final cleanup plan before any final remediation actions can be implemented. We pointed this out in an August 7, 1995 press release (a copy was sent to Thomas Grumbly) and at an October 23, 1995 meeting with Thomas Grumbly arranged by Congressman LaFalce (see FACTS October 24, 1995 letter to Thomas Grumbly). At that meeting we also questioned the selection of the Linde/Praxair property for "interim" cleanup, in view of an expected increase in FUSRAP radon gas release from the contaminated Niagara Landfill (Seaway property) following the upcoming start-up of a Browning Ferris Industries active gas extraction/cogenerator project at that property (which is now operating despite intense community opposition). We later pointed out that an April 1994 DOE planning document called for cleanup of the most heavily contaminated Ashland 1 property first, by the end of fiscal year (FY) 1995, with Ashland 2 to follow in FY 1996 and the Seaway and Linde properties scheduled last, for FY 1997 through FY 2000 (see pp 5-6, January 1996 FACTS Newsletter).

The major unresolved remediation issues are:

1) the validity of DOE assumptions that severe restrictions on land use (e.g., limited-exposure industrial and open space uses) can be placed in the deeds to these private properties* and that

* Placement of deed restrictions in effect gives legal substance to a taking of property value that, a) started when the Haist property (Ashland 1) was improperly sold, i.e. without disclosing the presence of 8,000 tons of 11(e)2 nuclear wastes, to Ashland Oil Company at full market value (\$56,000) in 1960 after DOE's predecessor agency, the Atomic Energy Commission (AEC) had determined that the cost of decontaminating the property exceeded its market value (Appendix A, "Radiological Survey of the Seaway Industrial Park, Tonawanda, New York, Final Report" May 1978, DOE/EV-0005/6), and b) continued in subsequent years, as both federal and state regulatory authorities allowed these nuclear wastes to be spread to at least 3 other properties, even as recently as 1982, two years after the Linde property had been designated for cleanup by DOE.

these restrictions can be expected to be upheld indefinitely (see 10 CFR Part 61.59), thereby keeping the level of radiation doses received by future site users below a yet-to-be-agreed-upon limit;

2) the determination of this limit on residual radiation doses following cleanup which may be delivered to future users of the site properties, i.e. whether the "to be considered" (TBC) New York State Department of Environmental Conservation (NYSDEC) TAGM-4003 radiation dose limit (10 millirems per year above background) or the ten-times less protective (100 millirems per year above background) federal guideline (DOE Order 5400.5) will be used to derive the contaminant cleanup levels; and

3) selection of the best long-term storage site for the removed waste (see FACTS' June 2, 1996 letter to Vice President Gore and FACTS' Comments on Colonie Site EE/CA, October 20, 1995).

First Commitment Broken

On August 6, 1996 you and other DOE officials announced a final cleanup plan for the Tonawanda Site during a meeting held by Congressman John LaFalce (de facto leader of CANiT [Coalition Against Nuclear materials in Tonawanda], a small group of area politicians) at his Buffalo office. CANiT and FACTS are the two community stakeholder groups identified by DOE (see Table 1.2, "Stakeholders at the Tonawanda Site", in "Management Action Process Document for the Tonawanda, New York FUSRAP Site", May 1996). FACTS was not informed of this meeting and, therefore, had no representation at the meeting. In addition, other stakeholders identified in this table have told us they were not notified of this meeting. However, a few members of CANiT were present.

Significantly, this announcement follows a long period of time during which DOE has not convened any public meetings of all recognized stakeholders for the purpose of discussing the outstanding issues and developing a final remediation plan that is mutually acceptable to DOE and all participating Tonawanda stakeholders. In fact, there have been no such inclusive public meetings since the last working session was held by DOE on February 28, 1994. Since then, we and other participating stakeholders have repeatedly expressed displeasure with DOE's evident unwillingness to respond to information requests and to engage in meaningful, direct dialog (see July 19, 1996 letter [the latest of several] to Congressman John LaFalce from George B. Melrose, Chair Tonawanda Commission for Conservation of the Environment; FACTS' October 24, 1995 letter to Thomas Grumbly; FACTS' September 27, 1995 letter to Cynthia Kelly, Director of DOE's Office of Public Accountability; FACTS' September 10, 1995 letter to DOE Secretary O'Leary; and FACTS' June 2, 1996 letter to Vice President Albert Gore; among others).

Why did DOE not inform all stakeholders of the August 6 meeting? The coalition of community stakeholder interests we represent views this latest development as a serious violation of DOE's commitment to involve all stakeholders in the remedy selection process.

In addition, any action taken to advance the announced plan, as we currently understand it*, without first resolving, in an open fashion with the participation of all interested stakeholders including FACTS, the outstanding remediation issues identified above, will be viewed as a violation of both DOE's second commitment and the prescribed NEPA/CERCLA EIS review process.

The August 6 joint announcement by DOE/CANiT leadership strongly suggests that secret meetings are taking place between the DOE and the few active members of CANiT. Is DOE looking for a political solution or does DOE intend to restore the promised open discussion process that includes all interested stakeholders who wish to contribute to a reasoned resolution of the remaining major remediation issues?

Status of Linde/Praxair EE/CA "interim" actions?

Site Manager Ron Kirk was present at the June 18, 1996 public meeting of CANiT. He described recent developments in continued "interim" actions at the Linde/Praxair property. He indicated that Building 38 was being demolished and the soil pile was being radiologically sampled; that [contrary to information presented in the EE/CA] results of that sampling showed most of the soil to have contaminant concentrations below the contaminant cleanup levels proposed by DOE for final remediation; that this pile would be removed in sections to Building 30 and separated into portions that are above the DOE-proposed contaminant cleanup levels, to be held for shipment to the Envirocare of Utah, Inc. disposal facility, and so-called "clean" portions, to be used as backfill on the property.

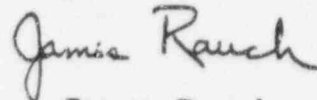
Activities such as backfilling, grading and re-grading are actions that will dilute the concentration of contaminants in so-called "clean" materials if mixing of more concentrated onsite materials with lower concentration onsite materials or with truly clean imported materials occurs. Since agreement with the stakeholder community has not been reached regarding appropriate final contaminant cleanup levels and such agreement recorded in the form of a ROD, any disposition of so-called "clean" material that results in a dilution of contaminant concentrations (which we will view as irreversible) will be a violation of the prescribed NEPA/CERCLA EIS review process.

* According to the Buffalo News, the plan calls for removal of only 115,200 cubic yards of the 371,000 cubic yards of waste previously identified in the FS/PP-EIS documents as being above the DOE-proposed cleanup levels for unrestricted re-use of these private properties. This reduced cleanup volume is apparently based on:
1) cleaning up only three of the four properties; the 117,000 cubic yards of waste improperly dumped in the Niagara Landfill property are to be left there, and
2) limited cleanup of the remaining three properties to allow only specified restricted re-uses of these private properties, and then, only under a federal residual radiation exposure guideline that is ten-times less protective than New York's radiation cleanup guideline, NYSDEC's TAGM-4003.

Has any such disposition yet been made of any so-called "clean" material, either from the soil pile or the demolition of Building 38? Does DOE intend to hold so-called "clean" materials segregated in the course of any "interim" actions pending resolution of the major outstanding remediation issues identified by us above, and by NYSDEC in its February 23, 1996 comments on the EE/CA (page A-14 of the corresponding DOE Responsiveness Summary, May 1996)?

We look forward to a prompt response from DOE to our questions. We need to see both DOE's promised stakeholder participation process and the Tonawanda Site NEPA/CERCLA EIS review process move forward properly, but without undue delay.

Sincerely,



James Rauch

cc: C. Borgstrom, DOE
J. Bartlett, NRC
R. Hargrove, EPA
N. Nosenchuck, NYSDEC
W. Helmer, NYS AGO
J. LaFalce, U.S. House of Rep.
D. Moynihan, U.S. Senate
A. D'Amato, U.S. Senate