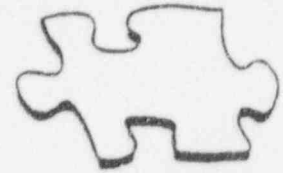


F.A.C.T.S.

(For A Clean Tonawanda Site)

"PUTTING THE PIECES TOGETHER"



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OSP

John E. Sweeney
Commissioner
NYS Department of Labor
State Office Building Campus
Albany, NY 12240

March 23, 1997

Dear Mr. Sweeney:

We have received your March 17, 1997 response to our March 4, 1997 letter in which we identify mistakes which we believe were made by the NYS Department of Labor (NYSDOL) in its regulation of licensee Linde/Praxair, Tonawanda, NY.

Your response is not helpful in that it provides no new information regarding NYSDOL's historic role as the Agreement State regulator responsible for controlling the licensable Manhattan Engineer District (MED) radioactive materials (initially as "source material" and, after passage of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), as "byproduct material") which contaminate soils and buildings at the Linde facility.

To briefly recap our letter in part, we made the following points:

1) Under the terms of the October 15, 1962 State Agreement between NYS and the federal government, NYSDOL, not the NRC, had the authority and responsibility: a) to license the MED materials found by the 1976 ORNL survey to be present in Linde facility soils and buildings at levels above both the license-exempt quantities and the concentration limits for unrestricted use areas, and b) to apply the provisions of State Industrial Code Rule 38 (12 NYCRR Part 38), the purpose of which Rule is to control human exposure to these materials.

2) This responsibility was exercised in the form of Amendment No. 4, issued June 9, 1978, to Linde's DOL License No. 1983-0143. This action (taken almost two years after the survey results were known) followed a July 27, 1977 meeting of representatives of USERDA, NYSDOL, and Linde; the output of this meeting, summarized by USERDA's Wm. Thornton, called for "State Actions: Department of Labor will amend [Linde] license to control contaminated areas pending final remedial action decisions."

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3) Because NYS failed to meet the additional Agreement State radiation control program requirements prescribed by UMTRCA and listed at 10 CFR 150.31, on November 8, 1981, NYSDOL lost its authority over and responsibility to regulate Linde's MED contamination.

We ask NYSDOL either to confirm the accuracy of these three statements or to identify specifically any disagreement that it might have with these three statements and to explain thoroughly the reason(s) for such disagreement.

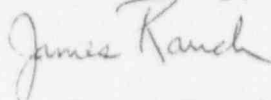
Please understand that we do not necessarily disagree with NYSDOL's statement that it now does not have "jurisdiction" over the MED materials. However, UMTRCA was clear in requiring that no regulatory gap occur in the control of these materials: Section 204 provides for the transfer back to NRC of any Agreement State's authority over these materials should the state not meet the new regulatory program requirements set down by UMTRCA. Therefore, we request that NYSDOL provide us with a copy of the documentation which effected the discontinuance of New York State's Agreement State authority over these MED materials after November 8, 1981.

Also, in your letter you say that you have been advised that the U.S. Department of Energy (DOE) "has both the responsibility for and authority over the contaminants at the site as it does for eight other similar sites in New York State." Was it DOE that provided this advice to you, or Department of Labor counsel?

It should interest you to know that DOE has told the stakeholders at its FUSRAP sites essentially just the opposite: "issues dealing with releases of material and monitoring of the properties are the responsibility of owners of the properties and/or the applicable state regulators." (see 3-8-95 DOE memo from James Wagoner to L. Price, enclosed.)

We look forward to a prompt reply to our requests and question.

Sincerely,



James Rauch

cc: w/enc.: G. Pataki
R. Bangart, USNRC
J. Owendoff, USDOE
J. Cahill, NYSDEC

To: <i>Dr. French</i>	From: <i>C. L. KU</i>
Cc: <i>FRTS</i>	Co: <i>DOE</i>
Dept:	Phone #
Fax #	Fax #

DOE F 1225
(08 93)

127437

United States Government

Department of Energy

memorandum

DATE: MAR 8 1995

MAR 15 4 25 PM '95

REPLY TO: EM-421 (J. Wagoner, 427-1721)
ATTN OF:

SUBJECT: Ownership of 11(e)2 Byproduct Material

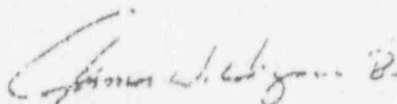
1. Price, OR

I have reviewed your memorandum dated October 12, 1994, requesting clarification of the policy of the Formerly Utilized Sites Remedial Action Program (FUSRAP) regarding ownership of 11(e)2 byproduct material. This memorandum is intended to provide that clarification.

In general, it is FUSRAP's policy that ownership of 11e(2) byproducts material at FUSRAP sites remains with the property owner until custody has been transferred to the Department of Energy (DOE). Normally, transfer of custody occurs at the time DOE undertakes the physical removal of 11(e)2 byproduct material from a site during remediation. Therefore, until or unless physical removal is undertaken by DOE, issues dealing with releases of material and monitoring of the properties are the responsibility of owners of the properties and/or the applicable state regulators.

FUSRAP sites are remediated on a schedule based on the health risk from the radioactive materials on the site, and the availability of funds to accomplish removal and disposal of such materials. Priority for remediation is given to sites where the radiation risks are greatest and interim actions are frequently conducted to reduce risks at sites without immediately incurring the greater cost of complete remediation.

Under certain circumstances FUSRAP may accelerate site remediation and thus, indirectly, the transfer of custody. An example is where a change in the use of a site causes a significant increase in radiological risk. Under such circumstances, FUSRAP will make every reasonable effort within funding limitations to reduce the radiological risk, including assuming ownership of the 11e(2) materials as necessary. Likewise, FUSRAP reserves the right to perform other actions, such as capping, that would reduce the radiological risk, but not involve immediate transfer of ownership of the 11e(2) materials. In any case, the Department will work with the property owner to assure that the 11e(2) materials are safely managed until funding becomes available.



James W. Wagoner II
Director
Off-Site/Savannah River Program Division
Office of Eastern Area Programs
Office of Environmental Restoration