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To Capel.Susan@epamail.epa.gov,
Brock.Martha@epamail.epa.gov
cc Wade Whitaker/DOE/Srs@Srs, Brian
Hennessey/DOE/Srs@Srs, Helen Belencan/DOE/Srs@Srs,
Howard Pope/DOE/Srs@Srs
bcc Thomas England/WSRC/Srs
Subject The Department of Energy, Savannah River Operations
Office Major Comments to the Environmental Protection
Agency Region 4 February 16, 2007 Notice of
Unacceptability for All CERCLA Off-Site Rule Units

Susan and Martha,

As counsel for the Department of Energy Savannah River Operations Office (DOE or Department) I am, by this email, providing the DOE's written comments by the 30th day after issuance of the subject notice in addition to requesting an informal conference, which is scheduled for March 22, 2007 (40 CFR 300.440(d)(4)). DOE considers each of these comments to constitute a major comment for which a reply from EPA is requested (See 58 FR 49213).

The Environmental Protection Agency's Region 4 (EPA) notice letter alleges a release relevant only to the E Area slit trenches and does not allege any identifiable problem with respect to the fifteen other units listed in your letter. Therefore, the Department requests EPA to immediately determine that disposition of CERCLA wastes in these other 15 units remains acceptable or do so as soon as possible after the March 22nd conference when DOE will provide information to demonstrate that no identifiable problem exists with regard to these 15 units.

EPA's notice letter determines the E Area slit trenches to be immediately unacceptable for the receipt of CERCLA wastes. The notice letter does not provide any facts to support a finding that the alleged "release" represents an extraordinary situation such as, but not limited to, emergencies at the facility or egregious violations; these being criteria established by EPA and set forth in 40 CFR 440(b)(9). Therefore, I am requesting EPA provide this information. In addition, this information is important to my ability to provide sound legal advice to DOE regarding the propriety of continuing to dispose of CERCLA wastes in the slit trenches pending the expiration of the 60 period of time established in the Code of Federal Regulations.

EPA's letter alleges a release from the E Area Slit Trench Low Level Waste Disposal Facility that is based on reading various documents as well as oral communications with the Department of Energy. So that the Department of Energy may be afforded appropriate notice, I specifically request that you identify which documents and what oral communications EPA is relying on when reference is made to these in the notice letter. Moreover, I specifically request identification of any information or authority EPA is relying on to define the boundaries of the E Area Slit Trench Low Level Waste Disposal Facility when concluding there is a release to the vadose zone below the facility. DOE is unaware of any "release" beyond the DOE defined boundary of the facility and is unaware of any

authority EPA has to redefine the boundaries of Atomic Energy Act regulated low level waste disposal facilities.

EPA's notice letter alleges a release under Section 101(22) of CERCLA, §42 USC 9601(22), and 40 CFR 300.5. Thereafter, the letter refers to 40 CFR 300.440(b)(2)(ii)(D) for the proposition that CERCLA wastes should not be transferred to any unit at an other-than-RCRA Subtitle C facility if the EPA Regional Office has information indicating that an environmentally significant release has occurred at that facility. So that I can ensure the Department of Energy is afforded appropriate notice during these proceedings, I specifically request that you identify any information EPA is relying on to support the conclusion that an environmentally significant release has occurred. Moreover, your letter does not address the section in EPA's regulation entitled "Releases" which states, in pertinent part:

(2) *Releases* . (i) Release is defined in §300.5 of this part. Releases under that section do not include:

* * *

(B) Releases permitted under Federal programs or under Federal programs delegated to the States (Federally permitted releases are defined in §300.5), except to the extent that such releases are found to pose a threat to human health and the environment; . . .

(40 CFR 300.440(b)(2)). In this regard I note that EPA Region 4, by signing the Federal Facility Agreement for the Savannah River Site, has already agreed that:

SRS releases of source, special nuclear, and byproduct materials in compliance with legally enforceable DOE regulations or orders issued pursuant to the AEA are "federally permitted releases" as defined in Section 101(10) of CERCLA, 42 U.S.C. § 9601(10).

(Federal Facility Agreement for the Savannah River Site, Section VI.E.).

Therefore, so that the Department of Energy is afforded proper notice and opportunity to respond to the allegations in the notice letter, I specifically request that EPA identify the evidence EPA is relying on to conclude that the alleged release is not a Federally permitted release or that such release is found to pose a threat to human health and the environment. I ask that EPA provide information that addresses whether EPA has investigated and determined the extent the action it is proposing in regard to DOE is consistent with its application of these same rules to NRC facilities. I further request EPA to provide its basis for determining that DOE's use of unlined basins is insufficient for the disposal of low level waste.

It is imperative to my representation of the Department that adequate due process be afforded. To accomplish this, I request that the bases for this EPA notice be more clearly articulated, that the bases for any subsequent written decision be likewise clearly articulated, and written responses to the major comments set forth in this letter be provided.

Thank you for your attention to these comments. I look forward to meeting with you next week.

Brenda Hays, Attorney