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May 23, 1989

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RECEIVED
MAY 24 1989
HAZARDOUS WASTE SECTION

Re: Docket No. 880801
Docket No. 880801-A

Dear Ms. Laeser & Mr. Mitchell:

This letter responds to Ms. Laeser's letter to me dated May 3, 1989.

As you indicate, DOE and the University requested a hearing on Docket Nos. 880801 and 880801-A "under protest," alleging due process violations. DOE and the University allege due process is violated if they are required to elect whether to request a hearing on the compliance orders without knowing the final procedures to be used at such a hearing. I know of no basis in law for that position. First, my understanding is that due process requirements, per se, do not apply to state or federal governmental entities. A standard of fairness undoubtedly applies. Assuming arguendo due process standards do apply, due process only requires notice of the opportunity to a full and fair hearing on the affected interest. It does not guarantee the affected party's concurrence in the procedures to be used to provide that hearing. Nor can the party anticipate that the hearing will not be full and fair. DOE and the University have no bases in fact or law to assume the hearing will violate due process (or fairness). If a hearing is not full and fair, the

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aggrieved party's remedy is to challenge the hearing. The remedy is not to challenge the notice of the opportunity for the hearing.

If you have any law to the contrary and supporting DOE's and the University's positions, however, I would be glad to consider it. In the absence of any support for the positions, EID will be proceeding to hearing on Docket Nos. 880801 and 880801-A.

Regardless, I find it astounding that DOE and the University can argue procedural prejudice when EID offered and in fact extensively negotiated with DOE and the University the procedures for the hearing. DOE and the University have substantial actual knowledge of and input into what the procedures are likely to be. Additionally, I would like to point out the extensive delays in negotiations that occurred due to DOE's and the University's Christmas and New Year's holiday schedules.

As additional clarification, § 74-4-10 gives the Director the authority and obligation to hold a public hearing if one is requested following issuance of a compliance order. § 74-4-10 further provides that the Director appoint a hearing officer. It is inherent in a hearing officer's powers to approve the procedures to be followed, if none are provided by rule or regulation, in order to go forward with the hearing.

Thus, the statute authorizes appointment of a hearing officer and the hearing officer's approval of procedures to be followed. The statute is self-effectuating. It provides that the Director shall hold the hearings. It does not require that the Director first promulgate regulations providing for such hearings. The rules currently being developed by EID will only explain a procedure for hearings; they will not be the grant of authority to hold hearings. Further, the rules will only govern prospectively.

DOE and the University did elect to request a hearing. EID has contracted with William R. Hendley to be the hearing officer in the hearing for Docket Nos. 88081 and 880801-A. Mr. Hendley's contract was made final and effective on April 28, 1989. DOE and the University earlier indicated they have no objections with Mr. Hendley. DOE and the University can expect formal notification of Mr. Hendley's appointment in the very near future.

You state that DOE and the University "will not proceed to a hearing until final rules are promulgated" by EID. I note that DOE and the University may have the lawful option of withdrawing their requests. I am not certain at this time whether withdrawal

could occur unilaterally, or whether the Director's and/or the hearing officer's concurrence would be necessary. If DOE or the University have positions and authority on this point they wish EID to consider, please let me know. If the requests are withdrawn, however, the compliance orders would by operation of law become final orders and DOE and the University would be held to the compliance dates in the orders as if no request for hearing had been made. In the absence of a withdrawal of the requests, EID has no option but to proceed to hearing as mandated by § 74-4-10.

I expect to send you copies within a week of the procedures I will propose to Mr. Hendley for the hearing in Docket Nos. 880801 and 880801-A. I will invite your concurrence in the procedures, but if concurrence is not forthcoming, I will propose them unilaterally.

Please call me if you have any question or wish to discuss this letter.

Sincerely,

Gini Nelson
Assistant General Counsel

GN/lr

Enclosure

cc: Kirkland Jones, EID Deputy Director
Boyd Hamilton, EID Hazardous Waste Program Manager
Michael Brown, EID District II Manager

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