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July 3, 1997

Fred Hansen
Deputy Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Deputy Administrator Hansen:

Thank you for the meeting on June 5, held in response to my letter to the Administrator dated May 8, 1997, and attended by yourself, Dick Wilson, Larry Weinstock, Greg Foote, Bob Neill of the Environmental Evaluation Group (EEG), and myself. I have not received any letter from you reflecting our agreement, and I believe it should be carefully recorded so that the many involved parties will know what the rules are. Also, my understanding differs from what I have seen in a letter dated June 17, 1997 from Frank Marcinowski of EPA to Lindsay Lovejoy of my office, and Mary Kruger of EPA has erroneously stated that certain meetings would be excluded from our agreement. Therefore, clarification is required. I would like to discuss with you on the telephone how our understanding may be recorded.

My commitment in this matter is to ensure the fullest possible public participation in the compliance determination as to the Waste Isolation Pilot Plant (WIPP), so that the ultimate decision can be regarded as valid. Thus, I felt it was important for us to discuss the circumstances in which DOE and EPA have met concerning WIPP in private, and may do so in the future, because of the general concern about nonpublic discussions affecting the course of the WIPP compliance determination.

During our talk you agreed that EPA personnel will have no discussions relating to WIPP with personnel of DOE or DOE contractors (Sandia, Westinghouse, etc.) on any substantive issues without giving reasonable public notice of the meetings or other discussions and inviting the public to participate. You agreed to give such notice and access. You stated that nonsubstantive discussions—those termed "purely procedural"—such as discussions of the time of availability of forthcoming data, would be excluded from EPA's commitment as to public notice and access. You explained that this exclusion relates only to discussions of the time of availability of particular requested or

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promised data and does not relate to the sufficiency or interpretation of any data. Such an exclusion would not apply to discussions involving management of either agency, which by definition would be convened to request and exchange commitments on substantive issues.

However, the June 17 letter from Mr. Marcinowski erroneously states that EPA "would continue to meet, as necessary, with DOE management to resolve procedural (though not technical) issues." Further, Mary Kruger of EPA has stated to Mr. Lovejoy of my office that meetings such as those held between management personnel of EPA and DOE on March 26, April 3 and April 14 would be excluded from the notice and access requirement. Neither Mr. Marcinowski nor Ms. Kruger was present at our discussion. Moreover, such management-level meetings between EPA and DOE were not excluded from our agreement as to public access, and I am quite surprised to see such a claim made by EPA personnel. One of the main causes of my concern about private meetings has been the high-level meetings such as took place on March 26, April 3, and April 14, 1997, where the two agencies discussed critical substantive issues. EPA's inadequate docket memos of those meetings are at least sufficient to show that major substantive issues were discussed. I specifically mentioned the problems presented by these meetings in my letter to the Administrator dated May 8, 1997. I did not agree, and you did not request, that such meetings be excluded from public access.

I am further shocked to hear that Ms. Kruger now states that "technical" meetings between EPA and DOE—which she concedes were covered by our agreement as to access—will not be open to attendance by representatives of the State or any other members of the public. She says that EPA will only allow EEG to attend those meetings. She also states that personnel of EPA who deal with technical issues, such as Tom Peake and Chuck Byrum, are not available to meet with my office or other members of the public to discuss their exchanges with DOE, and that we must get all our information through EEG or herself. She states that she is operating on instructions from her senior management in this regard.

Such rules are directly contrary to the agreement we made less than a month ago. I request that you correct the record concerning the commitments made by EPA. Management-level meetings are not excluded. You stated that meetings between DOE and EPA staff concerning the timing of the availability of data would be held without public notice. Although I did not agree to this, you insisted on this exclusion. At no time did you say that management-level meetings, where significant commitments from one agency to the other are requested and made, would be nonpublic. Further, the State and the public are not excluded from DOE-EPA meetings on technical issues. The whole purpose of our discussion was to set up the ground rules for access to such meetings. In addition, I am at loss as to why we should be barred from contact with the technical staff which is knowledgeable in the decisions being made by EPA. Our agreement is being badly distorted by EPA staff, and it is time to put it right.

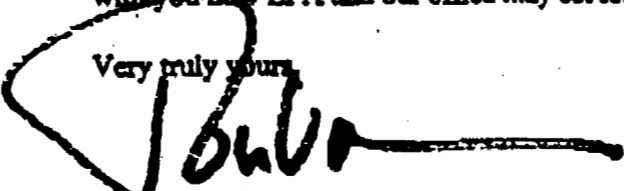
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Mr. Marcinowski's letter also states that EPA agreed to better reflect the nature of the nonpublic meetings in its docket memos. This should certainly be done. I request that EPA fully reflect the occurrences and agreements made at the March 26, April 3, and April 14 meetings in revised docket memos. He also states that it was agreed that EPA would give notice of DOE-EPA meetings by informing EEG of forthcoming technical meetings. We did not discuss the exact mechanics of notice, and I believe that EPA should also give public notice to all concerned by posting notice on the WIPP information telephone line. Notice is required of any meeting or discussion that is not "purely procedural."

Some other EPA-DOE meetings may need to be specifically mentioned in our agreement. Soon EPA will complete its final internal draft of a ruling on certification. EPA may then initiate a process of review of that final draft in discussions involving the Office of Management and Budget, DOE, and DOE contractors. I believe that the written record of previous similar reviews has not fully reflected the exchanges of information and statements of position. The recent D.C. Circuit decision states that if "DOE had supplied EPA with additional data, on which EPA relied in the final rule and on which others had no chance to comment, we would have cause for concern." I remain concerned about this possibility. Therefore, I request that the State be allowed to participate in these discussions. Specifically, I request that representatives of the State (including this office) and contractors for the State be invited to attend and participate in any discussions by EPA or EPA contractors with DOE or DOE contractors concerning drafts of the proposed or final rule. Please advise whether you can grant this request.

Thank you again for the candid discussion on June 5. I look forward to discussing with you how EPA and our office may set forth in writing the terms of our agreement.

Very truly yours,



TOM UDALL
Attorney General

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cc: Kathleen A. McGinty, CEQ