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August 21, 1997

Lawrence G. Weinstock
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U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Larry:

I appreciate the time that you and Frank Marcinowski were able to give to Don Hancock and me on our August 14 telephone discussion. Several issues are still unresolved after our talk, and I would like to record the points and request that you respond.

As we explained in the phone call, and as we have commented on several times previously, the problem we face is that we are not currently able to comment effectively on the grounds for EPA's certification decision, and we are concerned that in the future we may be unable to comment for similar reasons. Our comments must necessarily be addressed to the materials on the basis of which EPA will make its certification decision, which, under §8(d) of the Land Withdrawal Act, is DOE's Compliance Certification Application (CCA). Further, under the Compliance Criteria the CCA is specifically required to be made available for public comment (40 CFR §194.61). Moreover, there is provision for a determination of completeness by EPA, which determination should give some certainty as to the materials to be addressed in public comments. However, the actions of EPA and DOE have destroyed any such certainty. As you know, the CCA has changed substantially since it was filed on October 29, changed since the public comment period expired on March 17, 1997, and changed even since EPA determined that the CCA is complete on May 16, 1997. EPA itself has brought about changes by issuing determinations as to parameter values and by requesting the Performance Assessment Verification Test (PAVT).

At present we are faced with EPA's decisions as to parameter values, which are accompanied by no explanation or supporting data, and which, in effect, stand as amendments to



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the CCA, but we are blocked from commenting on the amended application without the supporting data. Such an inability to comment frustrates the underlying assumption of public rulemakings—that a better decision results if the public can participate—and conflicts with the Compliance Criteria, which contemplate that the public can comment on the CCA before EPA issues its proposed decision.

We are concerned that in the future a similar situation may occur, e.g., when after the proposed decision is made public and the comment period begins, DOE submits new data to which we have insufficient or no time to respond, or EPA generates new studies, information, or rationales which are either made public late in the predecisional time frame or not until after the final decision—again, precluding public comment. We specifically raised such possibilities in the phone call, and you seemed to appreciate the problem and said that adequate time for comment would be provided. However, we remain concerned, especially in light of the obvious time pressure that EPA believes it is under. We also pointed out in the phone call that a 120-day post-proposal comment period is extremely short, given the voluminous nature of the CCA and other submittals, and particularly given the difficulties we have had in obtaining supporting data.

Specific issues we discussed are as follows:

1. Data presented to peer review panels: Although Frank stated that EPA will rely on the reports of the peer review panels and will not concern itself with the data presented to them, this is hard to swallow, and it seems plain that EPA will find that the data presented must be considered in deciding what weight to give a panel's report. It is clear that data not otherwise available have been given to peer review panels, such as in the case of the Conceptual Model Peer Review Panel. You were going to check and get back to us about how such data are identified and verified. When may we expect that?

We have found that the peer review data are not on file in the Sandia WIPP Records Center (SWRC), and you stated that they are on file in Carlsbad. On the phone call you said that you would see that we get those data. When may we expect those data?

2. Discussion with technical staff: Both Don and I requested a discussion with the technical staff which has been developing the basis for, e.g., the parameter values contained in EPA's April 17 and 25 letters, the methodology of the PAVT, and other technical judgments. EPA has discussed such matters both with DOE and with EEG. I have written detailed letters (June 3, 1997, and July 14, 1997) asking both for the materials that EPA described to EEG as supporting EPA's judgments and an explanation of such judgments. EPA has given no substantive response. In the phone discussion you declined to make EPA technical personnel available. Especially since EPA staff has met on technical issues with EEG and DOE, we request that you reconsider and make knowledgeable personnel available, so that we can address the decisions EPA has been making and can effectively participate in the compliance process.

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Please make such personnel available before September 12, so that we can effectively comment on the basis of their statements before EPA's proposed decision is issued.

3. Identification of new DOE data and reports made available to EPA: Recent reports concerning new data made available to EPA have underscored the problem of data apparently being put on file in the Sandia WIPP Records Center (SWRC) or elsewhere and identified to EPA, but not identified for anyone else. Effectively, such data are unavailable to the public, since the public is not told that they exist, or if we are told that they exist we are not told where they are filed. Several examples are referred to in my letter dated July 14 to Mary Kruger. I asked her in that letter to arrange for (1) a docket listing on new items put in the SWRC since the CCA was filed and (2) regular docket notice of any additional materials put in the SWRC. She responded on August 6 that such listings "can be addressed," but they have not been addressed, and it is EPA's responsibility to maintain a public process. In the phone call you said you would talk to Sandia about having such listings prepared and docket notices sent. Please advise when the requested practices to notify the public of materials relied upon by EPA are put into effect.

4. Nonpublic EPA data and reports: You advised in the phone call that numerous materials on which EPA is basing its decisions as to parameter values—such as the sensitivity analyses used by EPA in making parameter value decisions—cannot be made public now because they have not been written up. You said that EPA management established parameter values based on oral presentations by staff or contractors. You said also that contractor reports—such as the reports EPA has obtained on solubility values and the work done for EPA on fluid injection—also cannot be disclosed. However, you said that you would check further to see whether some such materials are in sufficient form that they can be made available for public review and comment. Please advise when we may expect to have such materials.

In case there is any need to make it more clear, please have no doubt that we request EPA to make public and put in the docket as soon as they are produced any materials generated by staff or contractors for EPA, or otherwise obtained by EPA, that EPA is using in any way in making its certification decision.

5. Correction of record as to EPA parameter value decisions: You said that the April 17 and April 25, 1997 letters contained only preliminary parameter decisions and apply only to the PAVT, not to EPA's certification decision. I suggested that the record be set straight on that point, since from the letters one can only conclude that values of various parameters were "no longer in question" (April 17, 1997 letter at 1; April 25, 1997 letter at 2). You declined to do so, but at my request said you would look further into the matter.

6. Identification of parameter values which should be the subject of comment: I asked what parameter values we should comment on. Since DOE's values in the CCA would

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seem to be supplanted in EPA's mind by the values contained in EPA's April 17 and April 25 letters, which ones are under consideration by EPA (assuming EPA's mind is still open on the matter)? You said we should comment on both DOE's and EPA's sets of values. This is quite difficult, particularly since as noted above we do not have the basis for the EPA values. I request again that EPA disclose the bases for its parameter values, so that we may comment effectively.

7. DOE preproposal submissions: Concerning additional submissions by DOE before the proposed rule is issued, you said that you expect only a further submission about how the results of the particle size expert elicitation may be incorporated in performance assessment and that nothing in addition is expected from DOE. But, when pressed, you said you would check whether anything more is coming. What is the result of your checking?

8. EPA postproposal studies: You said that EPA and its contractors would do no further work by way of studies, PA runs, data development, or the like, after the proposal is issued, except such work as responds to comments. We are particularly concerned that EPA may in fact do further work (which work may relate to comments—indeed, we expect that comments will be so far-ranging that nearly any work would relate to some comment), but will not make it available until late in the comment period, or after the comment period, or even after the final rule. We have reason to be concerned, as I said, based on how EPA handled the mining issue in the compliance criteria (for example). Thus, I request that if EPA does any substantive work of significance to its certification decision, EPA make it public and allow comment sufficiently before issuing its final decision to allow effective comment. Please confirm that EPA will do so.

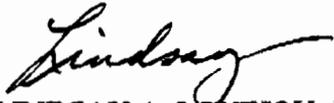
9. DOE postproposal submissions: Concerning additional DOE submissions (e.g., "comments" or "amendments") after the proposed rule issues, you stated that you did not expect such, but if it does happen, EPA would make certain that the public has a chance to comment. Such opportunity may be critical to the outcome of the certification process. Please confirm our understanding of your assurance.

10. EPA-DOE meetings: I asked several questions about the meetings that EPA had with DOE on March 26, April 3, and April 14, 1997, which are recorded only in cursory and inadequate docket memos. In substance, I wanted to know whether EPA had then stated either what data had satisfied EPA on one or more issues or what data, if furnished, would satisfy EPA. However, neither you nor Frank were able to recall much about these meetings. We would like to discuss these meetings with one or more EPA attendees who have a better recollection (perhaps with the assistance of their notes) of these meetings so that we can determine the nature of the decision-making process, e.g., what decisions were made by EPA at what time. May we expect such a discussion?

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Thank you for considering these requests. We look forward to your early response.

Very truly yours,



LINDSAY A. LOVEJOY, JR.
Assistant Attorney General

LAL:mh

cc: Don Hancock, SRIC