

**ATTACHMENT 1**

**DOCUMENTATION CONCERNING ISSUES RAISED BY THE ATTORNEY GENERAL OF  
THE STATE OF NEVADA**

1. April 13, 2004 Letter from Brian Sandoval, Attorney General State of Nevada to Jesse Roberson, DOE Assistant Secretary for Environmental Management
2. April 30, 2004 Letter from Marc Johnston, DOE Deputy General Counsel for Litigation to Brian Sandoval, Attorney General State of Nevada
3. July 28, 2004 Letter from Lee Liberman Otis, DOE General Counsel to Brian Sandoval, Attorney General State of Nevada
4. August 23, 2004 letter from Brian Sandoval, Attorney General State of Nevada to Lee Liberman Otis, DOE General Counsel



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April 13, 2004

Ms. Jessie H. Roberson  
Assistant Secretary for Environmental Management  
U.S. Department of Energy  
EM-1, Room 5A-014  
1000 Independence Ave. S.W.  
Washington, D.C. 20585

Re: Planned Shipment of Wastes from Fernald to Nevada Test Site

Dear Ms. Roberson:

The State of Nevada has been advised that DOE's Environmental Management Division is intending imminently to ship some 7,000 containers of radioactive waste from DOE's Fernald, Ohio site to the Nevada Test Site ("NTS") for disposal. DOE's attempt to bring this dangerous waste into Nevada is a flagrant violation of applicable federal and state laws and, indeed, of DOE's own rules. Even worse, the consequence of this unlawful action will be to create an extraordinary public health and environmental hazard in our state. Accordingly, Nevada hereby notifies DOE that we intend to seek prompt judicial redress to prevent the transport to and disposal of the Fernald wastes at NTS unless DOE takes immediate action to stop the shipments.

It is Nevada's understanding that the waste destined for disposal at NTS may amount to as much as 153.6 million pounds of material from Silos 1 and 2 and Silo 3 at Fernald, with a volume of at least 14,000 cubic yards, or 378,000 cubic feet. When stabilization is complete, volumes will be substantially greater. We also understand that hazardous constituents in this waste exceed standards established by the Resource Conservation and Recovery Act ("RCRA") for lead and probably other hazardous substances (such as selenium); and thus the waste would normally constitute "mixed waste" under Nevada's federally approved RCRA program.

However, according to DOE documents, this waste has been classified by DOE and EPA as Atomic Energy Act ("AEA") section 11(e)(2) waste, ostensibly providing for an exemption from safe and environmentally sound disposal requirements of RCRA. Moreover, this material is evidently of such a high radioactivity concentration that it

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cannot be sent for disposal to Envirocare's commercial radioactive waste disposal facility in Utah, a facility properly licensed by the NRC for safe and effective management of radioactive waste and the chosen disposal location for most of Fernald's other radioactive wastes, including mixed wastes.

As discussed in detail below, DOE's designation of this waste as 11(e)(2) material not subject to Nuclear Regulatory Commission ("NRC") or Agreement State regulation blatantly misapplies that section of the AEA. If DOE chooses to classify the waste as 11(e)(2) waste pursuant to the AEA, then DOE must also comply with the waste management requirements established through the AEA in conjunction with the 11(e)(2) waste designation and dispose of the wastes at a facility appropriately licensed by the NRC or an Agreement State for 11(e)(2) waste disposal. The NTS disposal facility is clearly not such a facility.

As a fundamental legal matter, it must be recognized by DOE that the status of waste as "11(e)(2) waste" is not simply a matter of nomenclature, but explicitly entails an array of regulatory treatments including, to be sure, an exemption from RCRA requirements under the 1978 Uranium Mill Tailings Radiation Control Act ("UMTRCA)," but also affirmative obligations to comply with the other requirements of UMTRCA. After all, section 11(e)(2) was added to the AEA by UMTRCA. These attributes of section 11(e)(2) byproduct waste reflect UMTRCA's twofold purpose:

*[F]irst, to close the gap in NRC regulatory jurisdiction over the nuclear fuel cycle by subjecting uranium and thorium mill tailings to the NRC's licensing authority; and second, to provide a comprehensive regulatory regime for the safe disposal and stabilization of the tailings.*

*Kerr-McGee Chemical Corp. v. NRC*, 903 F.2d 1, 3 (D.C. Cir. 1990) (emphasis added).

UMTRCA established regulatory regimes for historical uranium sites (Title I), as well as for those that would continue operating (Title II), and conferred regulatory jurisdiction on EPA and NRC to regulate their activities. DOE's own uranium processing wastes have never been subject to NRC jurisdiction. Section 11(e)(2) was created by UMTRCA to deal with uranium mining and processing hazards not within the DOE complex, authorizing regulation of those hazards by EPA and NRC. DOE cannot now call Fernald wastes section 11(e)(2) wastes, a classification created by UMTRCA, without also complying with all the attributes of such a classification that Congress both required in UMTRCA and, as discussed below, explicitly reaffirmed in the Energy and Water Development Appropriations Act of 2004.

For DOE to avail itself of the benefits of the status of section 11(e)(2) waste but absolve itself of any duty to comply with the other requirements of that status—requirements designed by Congress to assure the safe disposal of radiological and

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non-radiological materials associated with uranium mining and processing—is a transparently unlawful usurpation of prerogatives belonging only to Congress. Such a maneuver would also violate the safety requirements of the Atomic Energy Act applicable to DOE even when it self-regulates, and would fly in the face of requirements in CERCLA at 42 U.S.C. Section 9621(d)(3) that wastes shall be transferred only to a disposal facility operating in full compliance with applicable federal law and all applicable State requirements.

Indeed, escaping from applicable Nevada RCRA disposal safety requirements appears to be the only reason for DOE's strange classification of the Fernald materials as 11(e)(2) waste somehow exempt from NRC or Agreement State regulation, with the perverse result that wastes which were too dangerous to go to a permitted, lined, and adequately monitored facility at Envirocare are now slated for NTS's unpermitted, unlined, and inadequately monitored disposal site. As you are aware, waste reclassification of precisely this convenient sort was soundly overruled in DOE's dispute last summer with the Natural Resources Defense Council in federal court in Idaho.

In any event, even if the Fernald waste is 11(e)(2) waste, it very likely predates the 1978 UMTRCA and thus would not be eligible for that statute's RCRA exemption. If, on the other hand, the waste does not predate that statute and is in fact 11(e)(2) waste, federal law clearly contemplates its disposal *only* at an authorized 11(e)(2) disposal site, and not at a low-level radioactive waste disposal site without such authorization.

The reason for this requirement is obvious. Uranium processing wastes are not merely low-level wastes. Regulations at 40 C.F.R. Part 192 were designed to deal with the fact that uranium processing wastes also contain certain quantities of hazardous constituents. This is evident in that regulation's establishment of maximum concentration requirements for hazardous elements such as lead and selenium (see 40 C.F.R. 192, Subpart A, Table 1, and Appendix I. See also NRC's parallel regulations at 10 C.F.R. Part 40, Appendix A). Thus, 11(e)(2) disposal-site licensing contemplates the performance assessment of accompanying quantities of non-radiological hazardous elements typically associated with uranium processing. (See, e.g., NRC's 10 C.F.R. Part 40, Appendix A Introduction, referring to protection against "nonradiological hazards" as well as radiological hazards.) The same is not true for low-level radioactive waste disposal licensing, even under DOE's self-regulatory regime as reflected in DOE Order 435.1-1, which addresses only radiological hazards.

DOE has no authority to refashion the legal attributes of section 11(e)(2) waste by simply calling the Fernald material post-1978 11(e)(2) waste that is magically exempt from all federal and state hazardous waste regulations and otherwise applicable 11(e)(2) disposal licensing requirements. Indeed, it is Nevada's understanding that DOE has no plans even to test whether the Fernald wastes, after stabilization, meet the universal treatment standards under the land disposal requirements of RCRA. DOE

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thereby avoids all appropriate scientific inquiry as to the long-term impacts of hazardous constituents it would dispose of at NTS—the precise assessment required for every other 11(e)(2) and RCRA disposal facility in this country.

Any conceivable doubt about DOE's lack of authority to dump the Fernald 11(e)(2) wastes at NTS was put to rest by Congress in the Energy and Water Development Appropriations Act of 2004 (Public Law 108-137, December 1, 2003), which in Section 312 specifically referred to the Fernald silo wastes at issue and required that "[t]he Nuclear Regulatory Commission or an Agreement State, as appropriate, shall regulate the material as '11e.(2) by-product material' for the purpose of disposition of the material in an NRC-regulated or Agreement State-regulated facility." (Emphasis added.) NTS, of course, is not such a facility.

As if that were not enough, DOE's plan to send the Fernald silo wastes to NTS is also in direct conflict with DOE's *Record of Decision (ROD) for the Department of Energy's Waste Management Program: Treatment and Disposal of Low-Level Waste and Mixed Low-Level Waste; Amendment of the Record of Decision for the Nevada Test Site* (DOE 6450-01-P). The ROD defines "Low-Level Waste" as "all radioactive waste not classified as high-level waste, transuranic waste, spent nuclear fuel, or by-product tailings containing uranium or thorium from processed ore (as defined in Section 11(e)2 of the Atomic Energy Act of 1954." (Emphasis added.) While the Record of Decision for the NEPA documentation completed for the Fernald site identified "NTS or an appropriately-permitted commercial disposal facility" for disposition of wastes, we believe any such designation could not summarily override the Waste Management ROD as it applies to NTS. Moreover, we submit that the Fernald decision was based on DOE's intent to apply for and obtain a RCRA permit for disposal of hazardous waste at NTS. We do not believe the Fernald decision anticipated disposal of these disputed wastes as merely low-level waste.

Finally, DOE's own governing manual of regulations for radioactive waste disposal at NTS, Order M-435.1-1, clearly prohibits the disposal of over 14,000 cubic yards—by any measure hardly a "small quantity"—of 11(e)(2) waste at the NTS low-level waste disposal site. That manual, at Section IV.B(4), provides that "[s]mall quantities of 11e.2 byproduct material and naturally occurring radioactive material may be managed as low-level waste provided they can be managed to meet the requirements for low-level waste disposal in Section IV.P [performance requirements] of this Manual." (Emphasis added.) DOE's Implementation Guide for M-435.1-1 refers to the legislative intent of the UMTRCA in further defining "small quantities" of 11(e)(2) materials that are otherwise "managed by the Department according to the requirements of 40 CFR Part 192 and disposed at specially designed tailings disposal sites established under the UMTRCA." DOE G-435.1-1 at IV-12 (emphasis added). Two specific examples given by DOE of "small quantities" were "a few vials" and "100 cubic meters" of non-eligible wastes. *Id.* at IV-13.

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In short, there appears to be no legal, regulatory, or scientific justification whatsoever for DOE's plan to dispose of massive quantities of Fernald's most hazardous and radioactive wastes at NTS. DOE's plan is reckless and unsafe, and it flagrantly violates the law. Please confirm by April 30, 2004, that this waste will not be coming to Nevada. If DOE cannot so certify by that time, Nevada intends to seek prompt judicial redress. I am confident Nevada's federal court will look no more favorably on DOE's expedient actions here than did the court in Idaho last summer.

Sincerely regards,



BRIAN SANDOVAL  
Attorney General

c: Honorable Mike Leavitt, Administrator  
U.S. Environmental Protection Agency

Honorable Nils J. Diaz, Chairman  
U.S. Nuclear Regulatory Commission



April 30, 2004

The Honorable Brian Sandoval  
Attorney General  
100 N. Carson Street  
Carson City, Nevada 89701-4717

Re: Waste Shipments from Fernald to Nevada Test Site

Dear Mr. Sandoval:

I have been asked to respond to your April 13, 2004, letter to Assistant Secretary Roberson. In that letter you requested that the Department of Energy certify that it will not ship the materials that are currently stored in the silos at its Fernald facility to the Nevada Test Site.

The Department is evaluating the points raised in your letter, and at this time we are unable to state how long that process will take. Accordingly, I have been authorized to represent that the Department will not ship any of the material stored in the Fernald silos to the Nevada Test Site without first providing to you 45-days advance notice.

Sincerely,

Marc Johnston  
Deputy General Counsel  
For Litigation



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Department of Energy  
Washington, DC 20585

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July 28, 2004

The Honorable Brian Sandoval  
Attorney General  
100 N. Carson Street  
Carson City, NV 89701-4717

Re: Shipment of Fernald Silo Wastes to the Nevada Test Site

Dear Attorney General Sandoval:

I appreciated the opportunity to speak with you on July 6 about the Department's plans regarding the materials currently stored in three silos at the Department's Fernald facility. As I indicated during our conversation, while we disagree with the legal objections raised in your April 13 letter to Assistant Secretary Roberson to disposing of these materials at the Nevada Test Site (NTS), we do share your fundamental concern that any disposition must be protective of human health and safety and of the environment. Accordingly, it seemed to us - and still does - worth exploring whether our legal differences can be compromised and set aside by developing a process through which the Nuclear Regulatory Commission would be called upon to vouchsafe the appropriateness of disposition at NTS, albeit not as a licensor.

In response to this suggestion you indicated that you needed a better understanding of DOE's legal position before you could assess the prospects for any compromise along these lines. You therefore asked us to provide our legal analysis of the basis for disposing of the Fernald silo materials at NTS, and specifically mentioned three issues that your April 13 letter discussed: whether disposition would be consistent with section 312 of Public Law 108-137; whether disposition would be consistent with DOE Order 435.1; and whether disposition would be consistent with applicable Uranium Mill Tailings Radiation Control Act requirements. I told you we would get you our views on these issues within approximately two weeks. This letter addresses each of those issues in order.

1. Section 312 of Public Law 108-137 directs that "[n]otwithstanding any other provision of law, the material in the concrete silos at the Fernald uranium processing facility currently managed by the Department of Energy \* \* \* shall be considered 'byproduct material' as defined by section 11e.(2) of the Atomic Energy Act." This direction is clear on its face: the materials currently stored in the Fernald silos "shall be considered" 11e.(2) material "notwithstanding any other provision of law." However DOE or anyone else might otherwise have classified those materials, with the enactment of section 312 they are now, by law, 11e.(2)



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byproduct material.

Section 312 then goes on to state that "[t]he Nuclear Regulatory Commission or an Agreement State, as appropriate, shall regulate the material as '11e.(2) by-product material' for the purpose of disposition of the material in an NRC-regulated or Agreement State-regulated facility." Whether disposition at NTS of the materials currently stored in the Fernald silos would be consistent with section 312 depends on how this second sentence is read. Because NTS is not an NRC-regulated or Agreement State-regulated facility, disposing of the Fernald silo materials at NTS would be inconsistent with the second sentence of section 312 if the second sentence is construed to direct that those materials can only be disposed of at an NRC-regulated or Agreement State-regulated facility. If, on the other hand, the second sentence of section 312 is read merely to direct the NRC (or an Agreement State) to regulate the Fernald silo materials as 11e.(2) byproduct material in the event that DOE seeks to dispose of those materials at a regulated facility, then section 312 poses no bar to disposition at NTS.

Both the statutory text and the legislative history of section 312 indicate that this latter reading is the correct one. On its face, the text of section 312 simply does not say that the Fernald silo materials must be disposed of in a regulated facility. Indeed, the text does not mandate any action on the part of DOE with respect to these materials. The direction provided in section 312 is instead to the NRC, which "shall regulate" the Fernald silo materials as 11e.(2) material. That direction, however, applies only "for the purpose of disposition of the material in an NRC-regulated" facility. Section 312 thus provides no direction at all that is applicable where the Fernald silo materials are not disposed of in an NRC-regulated facility. Since Department of Energy facilities are generally excepted from NRC regulation (see Atomic Energy Act of 1954, sec.11.s, 42 U.S.C. 2014.s; see also AEA sec.110, 42 U.S.C. 2140; Energy Reorganization Act of 1975, sec.104, 42 U.S.C. 5814; Department of Energy Organization Act, sec. 301, 42 U.S.C. 7151), and since Congress speaks clearly when it wants DOE's actions to be subject to NRC regulation (see, e.g., 42 U.S.C. 5842 (titled "Licensing and Related Regulatory Functions Respecting Selected [DOE] Facilities")), an intent to restrict disposition of the Fernald silo materials to NRC-regulated facilities or to require NRC licensing of a DOE facility such as NTS by virtue of disposal of the Fernald material there cannot be inferred from the text of section 312.

Moreover, the legislative history of section 312 confirms that it was meant to allow, but not compel, disposition of the Fernald silo materials at a regulated facility. Section 312 had its genesis in DOE's desire to have the option of disposing of the Fernald silo materials at a commercial disposal facility. Since a commercial facility would be regulated by the NRC or an Agreement State, that option was unavailable given the NRC's conclusion that its (and Agreement States') statutory authority to regulate byproduct material was limited to byproduct material that either had been generated at sites that were licensed as of the date of the enactment of section 11e.(2) in 1978 or that was generated at a licensed site thereafter. In re Envirocare of Utah and Snake River Alliance, NRC DD-00-06, at 18 (Dec. 13, 2000). Although the materials stored in the Fernald silos met the physical criteria for byproduct material, they did not meet the NRC's definition of 11e.(2) material because, as they were under the control of DOE, they had

not been generated at a licensed facility.

Legislative attention was first focused on this problem in the Senate version of the Energy and Water Development Appropriations Act for Fiscal Year 2004, where, as originally introduced, what ultimately became section 312 read: "The Nuclear Regulatory Commission \* \* \* shall regulate the material as '11c.(2) by-product material' in the event that the Department of Energy proposes to dispose of the material in an NRC-regulated \* \* \* facility." S. 1424, 108th Cong. § 311 (2003) (emphasis added). See also S. Rep. No. 108-105, at 147 (2003) (this provision "allows the Department to dispose of certain waste at Fernald \* \* \* as 'byproduct material'"). On a parallel legislative track, on July 22, 2003, the Administration officially transmitted a similar proposal, which was referred to the Senate Environment and Public Works Committee (July 28) and the House Energy and Commerce Committee (July 25), and which stated "If the Department of Energy disposes of the material in such a facility, the Nuclear Regulatory Commission \* \* \* shall regulate the Material \* \* \*." The Administration explained that it was offering this proposal so that the materials stored in the Fernald silos "can be disposed of \* \* \* at a commercial facility." Letter from Spencer Abraham, Secretary of Energy, to J. Dennis Hastert, Speaker of the House, dated July 22, 2003 (emphasis added). Senator Voinovich filed language based on this proposal as an amendment (S.A. 1443) to the Senate version of the Energy Policy Act of 2003, S. 14, 108th Cong. (2003), which stated "the Secretary may dispose of the material in a facility under the jurisdiction of the Commission or a State." 149 Cong. Rec. S10,696 (daily ed. July 31, 2003) (emphasis added). This amendment was never offered on the Senate floor, but in the Conference Report on the companion House bill, H.R. 6, the House and Senate conferees included a provision stating that "[t]he Department of Energy may dispose of the material in a facility regulated by the Nuclear Regulatory Commission" and that, "[i]f the Department of Energy disposes of the material in such a facility, the Nuclear Regulatory Commission \* \* \* shall regulate the material as byproduct material." H.R. Conf. Rep. No. 108-375, § 634 (2003) (emphasis added). As the underscored language in these precursors to section 312 clearly states, Congress's intention was to give DOE the option of disposing of the Fernald silo materials at an NRC-regulated facility, not to limit DOE's disposal options to NRC-regulated facilities.

There is no indication in the legislative record that Congress meant to convey any different intention when, in Conference Committee on the Energy and Water Development Appropriations Act, it "modifie[d] [the] provision proposed by the Senate" by changing "in the event that the Department of Energy proposes to dispose" to the more succinct final formulation, "for the purpose of disposition." H.R. Conf. Rep. No. 108-357, at 175 (2003). Had Congress intended this variation in wording to convert what throughout the legislative process had always been understood to be an option into a mandate, it is reasonable to expect that it would have provided some indication that it was making such a fundamental change. There is no such indication, however, anywhere in the legislative record. In fact, the only clear substantive modification that the Conference Committee made to the original Senate proposal was to add the ore processing residual materials in the Niagra Falls Storage Site managed by the Army Corps of Engineers as material that also shall be considered 11c.(2) byproduct material. This addition suggests that the reason why the Conference Committee chose to abbreviate the language that

the Senate had employed was to avoid an overly cumbersome formulation such as "in the event that the Department of Energy or the Army Corps of Engineers, as appropriate, proposes to dispose." In any event, the Conference Committee Report reaffirmed that Congress's intent remained what it had been all along: to "allow[ ] the disposal of certain waste at Fernald \* \* \* as 'byproduct material.'" H.R. Conf. Rep. No. 108-357, at 175 (emphasis added).

2. The Fernald silo materials are managed by DOE pursuant to its authority under the Atomic Energy Act, see, e.g., 42 U.S.C. 2121(a)(3), 2201(b), and the Department of Energy Organization Act, see, e.g., 42 U.S.C. 7133(a)(8). Under these authorities DOE may, *inter alia*, "establish by rule, regulation, or order \* \* \* standards and instructions to govern \* \* \* special nuclear material, source material, and byproduct material," 42 U.S.C. 2201(b), and may "provide for safe storage, processing, transportation, and disposal of hazardous waste (including radioactive waste)" resulting from the program activities of DOE and its predecessor agencies. 42 U.S.C. 2121(a)(3). Pursuant to these authorities DOE has adopted Order 435.1, which establishes standards and procedures for managing radioactive wastes at DOE-owned facilities.

Under Order 435.1 DOE may dispose of "small quantities" of 11e.(2) byproduct materials in a low-level waste disposal facility (such as at NTS) "provided they can be managed to meet the requirements for low-level waste disposal." We do not understand there to be any doubt that the Fernald silo materials "can be managed to meet the requirements for low-level waste disposal" at NTS. The proposal to dispose at NTS of the materials currently stored in the Fernald silos was the product of a rigorous public process conducted under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), at the end of which DOE and the United States Environmental Protection Agency jointly decided that the appropriate disposition for these materials is to dispose of them either at NTS or at a commercial disposal facility. In addition, DOE has prepared a Performance Assessment for the disposal of the Fernald silo materials at NTS which demonstrates that disposal of the Fernald silo materials at NTS would meet the disposal requirements set forth in Order 435.1, Manual, Chapter IV, for low-level waste. For example, the Performance Assessment calculated potential doses and potential releases for a 1,000 year period, and concluded that disposal at NTS of the Fernald silo materials would result in a radon flux level of about 3 pCi per square meter per second, a level well below the 20 pCi per square meter per second requirement.

A question has been raised, however, whether the Fernald silo materials exceed the "small quantities" of 11e.(2) material that can be disposed of as low-level waste under Order 435.1 since the volume of the Fernald silo materials is about 14,000 cubic yards. It would be odd to interpret this requirement of the Order as precluding disposal of the Fernald silo materials at NTS since the CERCLA decision to do just that had already been made. In fact, the Guide to Order 435.1 dispels any ground for speculation as to whether the Order *sub silentio* countermanded that CERCLA decision: it specifically mentions (at IV-13) the Fernald materials as an example of 11e.(2) material that can be disposed of as low-level waste. As the Guide explains (at IV-12), the "small quantities" requirement is intended to distinguish the 11e.(2) material that can be disposed of as low-level waste from the material found at byproduct waste tailings sites subject to UMTRCA. UMTRCA sites typically contain two to seven million cubic

yards of byproduct material per pile. Seen in this light, it is plain that disposing of the much smaller volume of Fernald materials as low-level waste is not what the "small quantities" requirement of Order 435.1 was intended to prevent.

3. UMTRCA was enacted to deal with uranium mining and processing wastes produced outside of the DOE complex. It established a "Remedial Action Program" for uranium processing sites (Title I), and a framework for "Uranium Mill Tailings Licensing and Regulation" (Title II). Section 206 of UMTRCA added a new section to the Atomic Energy Act, 42 U.S.C. 2022, which required EPA to promulgate "standards of general application \* \* \* for the protection of the public health, safety, and the environment from radiological and nonradiological hazards associated with residual radioactive materials." Sections 202, 203 204 and 205 of UMTRCA added or amended various sections of the Atomic Energy Act to give the NRC regulatory jurisdiction over "Certain Byproduct Material." 42 U.S.C. 2113 (title), 2114 (same).

Pursuant to the authority delegated to it in UMTRCA, the NRC has promulgated 10 C.F.R. Part 40, which sets forth "procedures and criteria for the issuance of licenses" and "provide[s] for the disposal of byproduct material." 10 C.F.R. 40.1(a). By the express terms of part 40, however, the requirements of that part are inapplicable to DOE "except \* \* \* to the extent that its facilities and activities are subject to the licensing and related regulatory authority of the Commission pursuant to section 202 of the Energy Reorganization Act of 1974 [42 U.S.C. 5842] and the Uranium Mill Tailings Radiation Control Act of 1978 [42 U.S.C. 2111-2114]." 10 C.F.R. 40.4. Neither of these exceptions is applicable to the materials stored in the Fernald silos and their disposition: Section 202 of the ERA defines certain specific contexts in which DOE facilities are subject to NRC licensing, none of which is implicated here. And the relevant UMTRCA provisions apply to DOE only where it takes over ownership and custody of byproduct material or a disposal site from an NRC licensee, which also is not the case here. Accordingly, disposition at NTS of the materials stored in the Fernald silos is not subject to NRC regulation under 10 C.F.R. Part 40.

Pursuant to the authority delegated to it in UMTRCA, EPA has promulgated 40 C.F.R. Part 192, which establishes health and environmental protection standards for uranium and thorium mill tailings. Subparts A, B and C of Part 192 are expressly applicable only to sites designated under sections 102 or 108 of UMTRCA, 42 U.S.C. 7912, 7918, and thus are inapplicable here. Subparts D and E of Part 192 by their express terms only apply to the management of byproduct material under section 84 of the Atomic Energy Act, 42 U.S.C. 2114, which "simply authorizes the NRC to implement and enforce the standards to be promulgated by EPA at those sites it licenses as well as at the sites to be remediated by DOE under Title I [of UMTRCA]." NRC DD-00-06 at 13. This too is inapplicable to disposition at NTS of the materials stored in the Fernald silos.

\* \* \*

The foregoing legal analysis of the issues raised in your April 13 letter to Assistant Secretary Roberson summarizes the legal basis for proceeding with the planned disposition at NTS of the materials that are currently being stored in the silos at Fernald. It is provided partly in the hope that it will persuade you that it is correct, but also in the hope that it is at least sufficient to persuade you that there are grounds for seeing whether we can set our legal differences aside and instead work together to develop a process that will provide assurances that disposal at NTS of the Fernald silo materials will be, as DOE believes, consistent with the protection of human health and safety and the environment. For example, although we believe that the requirements of 40 C.F.R. Part 192 are inapplicable as regulations, we also believe that disposing of the Fernald materials at NTS would in fact conform with those requirements, and we are willing to work to devise a process that would let the NRC review this question.

Please let me know at your earliest convenience whether you are interested in pursuing this path.

Sincerely,



Lee Liberman Otis  
General Counsel

ATTORNEY GENERAL  
NEVADA DEPARTMENT OF JUSTICE

100 North Carson Street  
Carson City, Nevada 89701-4717

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BEN SANDOVAL  
Attorney General



ANN WILKINSON  
Assistant Attorney General

August 23, 2004

Ms. Lee Liberman Otis  
General Counsel  
U.S. Department of Energy  
Room 6A-245  
1000 Independence Ave. S.W.  
Washington, D.C. 20585

Re: Proposed Shipments of 11e.2 wastes from Fernald to Nevada Test Site

Dear Ms. Otis:

Thank you for your letter of July 28, 2004, explaining DOE's position concerning disposition of the Fernald silo wastes at the Nevada Test Site (NTS). After studying it, I am even more certain that these dangerous wastes cannot legally be disposed of at NTS, and in any event, it would be inappropriate for me to enter into an agreement with you that would violate applicable laws. While I appreciate the dilemma DOE is in with respect to these wastes, the solution is not to disregard the law to facilitate an expedient disposal option. Instead, DOE should take the appropriate steps now to secure placement of these materials for storage or disposal at an NRC or Agreement State licensed facility.

We disagree with you on your interpretation of Section 312 of Public Law 108-137. Having defined the Fernald silo wastes as 11e.2 wastes, that law goes on to state that "[t]he Nuclear Regulatory Commission or an Agreement State, as appropriate, shall regulate the material as 11e.2 byproduct material for purpose of disposition of the material in an NRC-regulated or Agreement State-regulated facility." If this sentence means what you advocate—that it simply directs NRC (or an Agreement State) to regulate the materials in the event DOE elects to dispose of those materials in a regulated facility—then the sentence itself is wholly unnecessary and redundant, since no waste materials (including DOE wastes) can ever be disposed of in a "regulated" facility without being regulated by NRC or an Agreement State.

Having defined the wastes as 11e.2, Congress needed to do nothing more to arrive at your interpretation. But Congress wisely did otherwise.

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Moreover, the legislative history provisions you cite strongly support the view that, in enacting the actual language of the statute, Congress deliberately removed the elective element of previous drafts. Indeed, we know that Envirocare and its lobbyists were pushing the drafters for this precise result because they wanted to emerge from the appropriations process as the exclusive disposal option for the Fernald silo wastes. Of course, the wastes later proved to be too hazardous for Envirocare's state regulators to allow disposal there, but that does not negate the intent of the statute.

It is unreasonable to believe that, having reclassified these wastes in a non-conservative direction relative to safety in the first sentence of the legislation, Congress would then, in the second sentence, give DOE the option to simply dispose of the wastes in an unlicensed, unlined facility that does not even remotely meet the protections required by NRC or Agreement States for 11e.2 disposal.

Precisely because Congress knew it was cutting corners to facilitate cleanup by redefining the Fernald silo wastes, it is far more plausible that it wished to ensure that the precautions of an NRC or Agreement State license be applied.

In short, even giving DOE the full benefit of *Chevron*, we think your reading of the statute is irrational, contrary to the normal precepts of statutory construction, contrary to the legislative history, contrary to sound safety policies implicit in all regulatory regimes for 11e.2 wastes, and impermissible under the law.

Similarly, your argument with respect to DOE's Order 435.1 is unpersuasive. After all, that rule begins with the mandate that 11e.2 wastes are *precluded* from being disposed of in a low-level disposal site. Such a mandate is necessary because low-level sites have none of the protections customarily associated with hazardous as well as radioactive constituents, unless, *unlike* NTS's Pit 5, they are also permitted for RCRA wastes and/or 11e.2 wastes.

Moreover, it is difficult to believe that any judge would consider 3,750 truckloads of wastes, wastes *more* dangerous than all other 11e.2 wastes, as a "small quantity" qualifying for a wholesale exemption from your own disposal rule. Indeed, that quantity substantially exceeds the annual quantity of all hazardous wastes disposed in Nevada at every permitted RCRA facility *combined*.

If it is DOE's desire to radically redefine "small quantity" to actually mean "large quantity," then you are required to follow the APA's rulemaking requirements. You cannot obliterate one of your own rules by the mere stroke of a pen in a CERCLA order.

Finally, your discussion of UMTRCA appears to illustrate exactly why your proposal to dispose of the Fernald silo wastes at NTS is, like your other self-serving interpretations, out of bounds. As you note, Part 40 and Part 192, regulating 11e.2 filings, indeed do not apply to DOE's disposal facilities. That is undoubtedly why the drafters of Order 435.1 precluded disposal of 11e.2 materials in DOE's low-level disposal sites.

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If such materials were disposed of in DOE's low-level sites, they would not be subject to the kind of protections needed for waste this dangerous. It is precisely because Part 40 and Part 192 do not apply to NTS that Nevada objects to your proposal and believes your interpretation of the law to be incorrect. Put simply, your interpretation strains to avoid the application of any of the established disposal standards by which Nevada's citizens and environment can be protected from this dangerous waste.

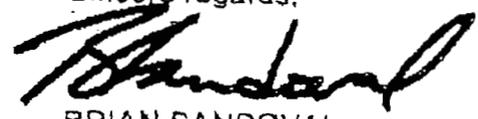
In conclusion, on behalf of the citizens of Nevada, I will continue to oppose any effort by DOE to dispose of these unauthorized and highly dangerous wastes at NTS, a site that is wholly inappropriate and unlicensed to accept the Fernald wastes. Moreover, despite your suggestion otherwise, I will not enter into an agreement with DOE that compromises the law.

Specifically, I do not understand how DOE could ask NRC to vouch for the safety of disposal of wastes at NTS when NRC has no jurisdiction to do so. Your suggestion contradicts former acts of DOE. For example, DOE expressly rejected this sort of voluntary oversight role by NRC in *Waste Control Specialists v. DOE*, 141 F.3d 564 (5th Cir. 1998).

If you are confident that NTS can meet the requirements of Part 192, then perhaps you should simply apply for an 11e.2 disposal license for the site. Nevada would not, and could not, object to disposal of this material in an appropriately licensed and properly lined and regulated landfill.

If you are seeking other disposal options, I understand that Waste Control Specialists (WCS) has applied for an 11e.2 disposal license for its site in West Texas. This site has rail access and WCS is both legally able and willing to store the wastes there pending issuance of its 11e.2 license. Unlike DOE's NTS proposal, this option would be legal, cost effective, and provide a permanent solution that protects the health and safety of the citizens of Nevada and Ohio.

Sincere regards,



BRIAN SANDOVAL  
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By United States Mail and Facsimile (202-586-1499)

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