



Department of Energy  
Washington, DC 20585

August 14, 1992

Mr. Thomas McCall  
Acting Deputy Assistant Administrator for  
Federal Facility Enforcement  
~~Environmental Protection Agency~~  
401 M Street, S.W.  
Washington, D.C. 20460

Dear Mr. McCall:

I am writing to express concerns about certain Environmental Protection Agency (EPA) regional enforcement actions related to compliance with EPA's National Emissions Standards for Hazardous Air Pollutants (NESHAP) for radionuclide emissions other than radon from Department of Energy (DOE) facilities (40 CFR Part 61, Subpart H). As discussed in my September 17, 1991, letter to Ed Reich, Acting Assistant Administrator, EPA Office of Enforcement (enclosed), a number of DOE facilities do not meet the continuous monitoring requirements of Subpart H. For most, if not all, of these facilities, DOE has proactively contacted the appropriate EPA regional office and initiated discussions for a Federal Facility Compliance Agreement (FFCA), or other compliance alternative such as EPA approval of alternative procedures. The enforcement actions of concern appear, inappropriately in our view, to look past the Department's frank acceptance of its responsibility for compliance with the NESHAP monitoring requirements, and instead to focus on DOE's management and operating contractors, as if they are the parties primarily responsible for compliance with these requirements.

We are particularly concerned with the NESHAP enforcement action taken by EPA Region VIII at the Rocky Flats Plant (RFP). As early as 1990, DOE, with the technical support of its contractor, EG&G Rocky Flats, Inc., began discussions with Region VIII on RFP's noncompliance with the monitoring requirements, and possible approaches towards achieving compliance with Subpart H. In May 1991, DOE requested that Region VIII negotiate a NESHAP FFCA for the RFP. Region VIII, however, stated that it preferred to use the enforcement mechanism of a compliance order against DOE's operating contractor and, on March 3, 1992, the Region issued a compliance order against EG&G. The Region, recognizing that EG&G cannot comply fully with the terms of the order, has indicated that a consent decree (preceded by a "friendly" lawsuit) may be necessary at the end of the one-year term of the order.

Likewise, we are becoming very concerned about the evolving enforcement strategy of EPA Region IX for two of our California facilities. As background, in May 1991, Region IX issued unilateral orders against both DOE and the University of California (UC), DOE's management and operating contractor, for failing to demonstrate compliance with the monitoring requirements at DOE's Lawrence Livermore National Laboratory (LLNL) and the Lawrence Berkeley Laboratory (LBL). In response, DOE prepared compliance plans and Region IX and DOE agreed in the summer of 1991 to negotiate NESHAP FFCAs for LLNL and LBL.

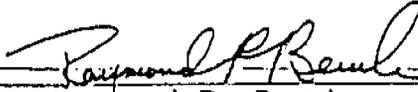
~~Despite DOE's continued efforts to include UC as a party to the FFCAs, it is our understanding that EPA Region IX is unwilling to include UC as a party to the FFCAs. Rather, EPA Region IX representatives have stated that the only available mechanism for addressing UC is the filing of a civil complaint and subsequent negotiation of a consent decree. As DOE and UC are both willing to work with EPA on NESHAP issues at LLNL and LBL, we believe that EPA, having chosen at the outset to involve UC in this process, should be open to a resolution that stops short of the entirely unnecessary and inappropriate step of requesting the Department of Justice (DOJ) to file suit against DOE's contractor.~~

DOE believes that contractors at its facilities should have primary responsibility for compliance problems that result from the contractors' own actions or inactions, and our newly revised procurement procedures implement this as DOE policy. However, noncompliance with requirements such as the Subpart H monitoring requirements that necessitate significant capital investments are generally not the result of contractor action or inaction, but rather are the result of the need for significant modifications to DOE-owned facilities. DOE's management and operating contracts are not structured in such a way as to allocate this risk or burden to the contractor. DOE believes, therefore, that the primary responsibility for compliance with Subpart H monitoring requirements at DOE facilities rests appropriately with DOE as the facility owner. FFCAs with DOE, or with DOE and its contractor, are in our opinion the most appropriate and effective enforcement strategy for compliance with these requirements.

It is our intention with regard to the RFP to continue to attempt to negotiate a NESHAP FPCA with Region VIII that is basically consistent with the requirements of the compliance order issued to EG&G. This FPCA could include EG&G as a party, to the extent the agreement addresses matters within its control, and could remain in effect until the RFP fully attains NESHAP compliance. DOE also will continue to pursue discussions with Region IX to enter into two-party or three-party FFCAs for LBL and LLNL that

effectively address UC's understandable concerns regarding potential unilateral enforcement actions.

I appreciate your attention to this matter and would appreciate an opportunity to discuss these significant DOE concerns with you.



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Raymond P. Berube  
Deputy Assistant Secretary  
for Environment