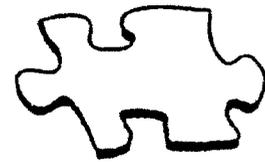


F.A.C.T.S.

(For A Clean Tonawanda Site)

"PUTTING THE PIECES TOGETHER"



263 Exchange Street
Alden, NY 14004

www.factsofwny.org

Phone/Fax
(716) 937-7870

Buffalo District, US Army Corps of Engineers

Att: FUSRAP Team

1776 Niagara Street

Buffalo, NY 14207

October 26, 2008

Subject: Comments on the Army Corps of Engineers' Proposed Plan for the Seaway Site

Setting/future use:

- 1) This property will continue to be a prime location for intensive human use and re-use far into the future. The highest uses will be residential uses and intensive industrial/commercial uses.
- 2) Residential re-use will be the most intensive future use of this property owing to the excellent physical attributes of the location. Use by resident farmers has been the most intensive use in the past and may well recur at some point in the future. Therefore, this most intensive of the full spectrum of human uses -- the resident farmer scenario -- should be the limiting scenario that is used to establish cleanup criteria.
- 3) Deed restrictions to prevent intensive uses can reasonably be relied upon only for a 100 year period. This assumption is well supported by the findings of the federal low-level radioactive waste disposal siting rulemaking (10CFR61) which limits institutional controls, including deed restrictions, as a low-level radioactive waste management tool to a maximum period of time no longer than 100 years; see http://edocket.access.gpo.gov/cfr_2006/janqtr/10cfr61.59.htm. This 1982 rulemaking came after years of NRC deliberation; it was the subject of widespread public participation and is supported by extensive public input. This short 100 year period of time is one-half of the minimum remedy effectiveness period required by EPA -- 200 years, and one-tenth of the maximum effectiveness period -- 1000 years. Of course, even one thousand years is a short time when compared to the 77,000 year half-life of thorium-230; also see cleanup criteria comment (7) below. Therefore, the unspecified deed restrictions against intensive uses ambiguously suggested for this property should not even have been contemplated for these wastes at this site. See F.A.C.T.S.' and others' (notably former DEC radiation bureau chief Paul Merges) previous comments in this regard.

Cleanup criteria:

- 4) When it passed the Uranium Mill Tailings Radiation Control Act (UMTRCA) in 1978, Congress clearly intended that all uranium mill sites, whether still operating or not, be subject to regulation by the

SEA_0025

Nuclear Regulatory Commission (NRC). Unfortunately, NRC has failed to regulate most FUSRAP sites and has allowed them to fall into a regulatory limbo. See <http://www.factsofwny.org/latest.htm>.

5) The MED/AEC wastes on the Linde property were licensed in 1978 in order to avoid designation of the Tonawanda Site (as a whole) into Title I of UMTRCA, which would have required immediate site cleanup. All the other Tonawanda Site properties were contaminated above the licensing requirements for source material (170 pCi/g U-238) by the transport of wastes from the Linde property during MED/AEC refinery operations or afterwards and therefore should also have been subject to the same NRC/NYS license control. The NYS Department of Labor radioactive materials license amendment for the Linde MED/AEC wastes was illegally terminated in 1996, without the required license termination cleanup to the applicable NRC/New York State criteria; see <http://www.factsofwny.org/sweeney.htm>. In view of the foregoing, the remediation of all Tonawanda Site properties, including Seaway, should properly be subject to all of the pertinent NRC requirements; see comments (7), (8), and (10) below.

6) The NRC's License Termination Rule (LTR), 10 CFR 20 Subpart E, is not applicable to the Tonawanda Site properties, including Seaway, because uranium mill sites were specifically cut out of that rulemaking.

7) The primary, directly pertinent, cleanup guideline for the Tonawanda Site properties remains Option 1 of NRC's 1981 Branch Technical Position for Disposal or Onsite Storage of Thorium and Uranium Wastes from Past Operations, October 23, 1981, 46 FR 52061, owing to the site's setting and its likely future residential use; see <http://www.factsofwny.org/btp.htm>. These NRC cleanup criteria have been employed by NRC at several formerly licensed SDMP sites (Site Decommissioning Management Plan) under Title II of UMTRCA. Option 1 of this BTP, where residential use is anticipated, limits post-cleanup soil concentrations of total uranium to 10 pCi/g, i.e., 5 pCi/g each for U-238, Th-230, and Ra-226. The purpose of limiting total uranium to 10 pCi/g is to prevent any future accumulation of radium above the EPA radium standard of 5 pCi/g as a result of radium ingrowth from decay of higher concentrations of thorium-230 (or U-238). The thorium cleanup level chosen by Army Corps for Tonawanda, 44 pCi/g, means that the radium-226 concentration will remain below the EPA standard for only the minimum regulatory period of 200 years; thereafter it will rise above the standard. This is unacceptable for this site's setting and likely future intensive uses.

8) The legally applicable NRC onsite storage standard for the Tonawanda Site properties, including Seaway, is **the complete set of criteria** that are contained in 10 CFR 40 Appendix A; see <http://www.factsofwny.org/10cfr40a.htm>. These criteria are intended to be applied as a complete set. They cannot be expected to meet their full protective purpose if only two of them are applied, as the Army Corps has proposed; see comment (10).

9) The Uranium Recovery Facilities (URF) rule is not applicable nor is it appropriate for the Tonawanda Site properties, including Seaway; for further explanation see FACTS letter to NRC Chairman Jackson: <http://www.factsofwny.org/urf.htm>. The URF's technique of "benchmarking" was developed for remote western mill sites; it is embodied in an addendum to 10 CFR 40 Appendix A Criterion 6(6). As employed by Army Corps for Tonawanda Site properties, including the Seaway property, this "benchmarking" approach is neither applicable nor appropriate.

10) The Army Corps' preferred alternative -- onsite storage in an existing 1930s era landfill -- does not satisfy the fundamental technical siting requirements of NRC's 10 CFR 40 App. A criteria:

a) "Criterion 1--The general goal or broad objective in siting and design decisions is permanent isolation of tailings and associated contaminants by minimizing disturbance and dispersion by natural forces, and to do so without ongoing maintenance. ... Tailings should be disposed of in a manner that no active maintenance is required to preserve conditions of the site."

The Seaway property, like the other Tonawanda Site properties, is a physically very unsuitable site that will require expensive, ongoing active maintenance. It is a wet, erosion-prone site with 40" liquid precipitation per year, some in excursionary, highly erosive rainfall events; it is subject to freeze/thaw cracking and to cap penetration by woody plants. In 1994 DOE's Bill Seay reported the estimated **annual cost of cap maintenance at the Niagara Falls Storage Site to be one-half million dollars.** The Army Corps' proposal fails miserably to satisfy this fundamental no active maintenance provision. It is not cost effective in the long term.

b) Criterion 2 seeks to avoid a proliferation of small storage sites. The Army Corps' proposal does not satisfy Criterion 2.

c) Criterion 3, the "prime option" of deep, below grade disposal is not satisfied.

d) Criteria 4 (c) and (f) are not satisfied: the existing tumulus (landfill) cap slopes exceed 10% and the expected severe erosion will remove, not deposit, cap materials. This will raise long term active maintenance costs, which are to be avoided [see comment (10a) above].

f) Seaway's landfill does not have the required engineered liner. The landfill sits on native soils; it does not meet the requirements of Criterion 5 which are intended to protect groundwater. Two years ago, the Army Corps demonstrated a willingness to violate both State and federal groundwater protection laws at the Linde property when it issued a "no action" ROD for MED/AEC contaminated Linde groundwater. Neither that Linde groundwater stance nor this "no action" is acceptable to the community.

g) As previously noted, the "benchmarking" embodied in the 1999 addition to Criterion 6(6), i.e. the URF rule, is not allowed at FUSRAP sites. However, the EPA 5/15 pCi/g surface/subsurface radium standards of this criterion do apply.

h) The Criterion 6A - 1 requirement for immediate placement of a cap to limit radon release has been allowed to go unmet for decades.

i) The Army Corps has not provided any details on how the financial assurance requirements of Criterion 10 will be met. In the current fiscal environment, there should be no exceptions excusing governments from providing financial assurance to ensure performance of monitoring and active maintenance.

j) The Army Corps shows no intention of complying with Criterion 11 which requires the transfer of ownership of disposal site lands to the federal government. This federal land ownership and institutional control requirement is a fundamental requirement of these regulations and should be applicable to the Tonawanda Site properties per comments (4) and (5) above. Instead, Army Corps makes vague reference to the NYS solid waste regulations and federal land use controls to be specified at a later date in the ROD. Such proposed plan ambiguity is clearly inadequate; it does not satisfy the CERCLA requirement to provide informed public review.

Other CERCLA ARARs not identified by the Army Corps:

11) The 1993 NYS TAGM-4003, now known as DSHM-RAD-05-01, is an appropriate and relevant regulation that should be applied at all the Tonawanda Site properties, including the Seaway property. This guideline calls for decontamination of soils to levels that will result in no more than a 10 millirem annual dose increment (TEDE) above background to an unrestricted user of the property.

Community's preferred alternative:

12) The community's preferred alternative is Alternative 2, i.e. complete excavation and removal of all MED/AEC wastes down to the NRC's BTP cleanup level of 10 pCi/g total uranium (comment 7 above), or to a level that will satisfy the 10 millirem dose increment of NYS's DSHM-RAD-05-01 for unrestricted future use of the property.

13) The MED/AEC wastes removed from the Seaway property should be stored at the best available long-term physical storage sites, i.e. where no active maintenance is required to maintain waste isolation, preferably the federal Nevada Test Site, or, alternatively, the privately operated Energy Solutions facility at Clive, Utah.

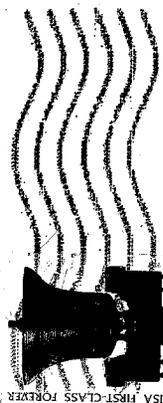
Department of Energy liability:

14) The Army Corps of Engineers does not have any authority to regulate radioactive materials under the established federal Atomic Energy Act (AEA) regulatory regime that is designed to protect public health and the environment; NRC, EPA, and NYS (as an Agreement State) do have such AEA authority. Although successive Congresses have unwisely transferred implementation of the FUSRAP (see <http://www.factsofwny.org/fusrap.htm>) to Army Corps starting in FY1998 and directed Army Corps to use CERCLA (Superfund) rather than the proper AEA regulatory regime, the federal Department of Energy will retain liability for all remedial activities by the Army Corps that do not meet the AEA regime. If implemented as described, the Army Corps' preferred alternative for the Seaway property, onsite containment, will not satisfy the legitimate AEA regulatory regime [see comments (7), (8), (10), and (11)]. It will largely waste 30 million taxpayer dollars (plus ongoing long-term monitoring and tumulus maintenance) and will leave the Energy Department still holding a large liability.

FACTS, INC.
263 EXCHANGE ST.
ADDEN, NY 14004

27 OCT 2008 PM 2 T

ADDEN NY 140



USA FIRST-CLASS FOREVER

BUFFALO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
ATT: FUSRAP TEAM
1776 NIAGARA STREET
BUFFALO, NY 14207

14207+3133

