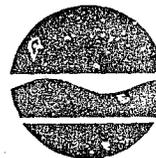


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New York State Department of Environmental Conservation  
Division of Solid & Hazardous Materials  
Bureau of Pesticides & Radiation  
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518-457-2225 FAX 518-485-8390



Commissioner

FEB 29 1996

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██████████  
U.S. Nuclear Regulatory Commission  
Region 1  
475 Allendale Road  
King of Prussia, PA 19406

Dear ██████████

Earlier this month, I called you and posed several questions about the State's and NRC's jurisdiction over certain radioactive materials now in Tonawanda, New York. On February 21, 1996, you and Dennis Sollenberger (of NRC's Office of State Programs) called ██████████ of this Bureau to discuss the issue and answer our questions. I am writing to obtain the NRC's written confirmation of those answers.

As we have explained to you, the Niagara Landfill at the Seaway Industrial Park contains by-product material as defined in Section 11(e)(2) of the Atomic Energy Act. The US Department of Energy (DOE) has included the landfill in its Formerly Utilized Sites Remedial Action Program (FUSRAP). The landfill was operated and closed by Browning-Ferris, Inc (BFI). As part of the closure, BFI has installed a methane gas collection system, which consists of 34 wells connected to a blower and a flare stack. As soon as the electrical connections are completed, the blower and flare will go into operation. Ultimately, BFI plans to use the landfill gas to generate electricity. The company has applied to this Department for the environmental permits required for that process. At the present time, the landfill gasses are venting passively, directly from the wells to the atmosphere.

When I called, I asked you about New York State's and NRC's relative jurisdictions over the FUSRAP wastes. Based on your telephone call to ██████████, we now understand that because the FUSRAP waste is 11(e)(2) material, New York State cannot license it. Under the Atomic Energy Act, Agreement States must have a specific agreement with the NRC to regulate 11(e)(2) material, and 11(e)(2) licensing is not addressed in our Agreement. However, you said that under New York State's general powers to control pollution and protect the environment, this Department can limit access to the material and prevent others from moving or disturbing it.

Given that only the NRC can license this byproduct material, we asked if NRC would do so in this case. You and ██████████ that as a matter of policy

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(which NRC has not publicly distributed), the NRC does not seek to regulate 11(e)(2) material that DOE has included in the FUSRAP program, even though DOE does not own the material. In a May 31, 1995 letter to [REDACTED] of BFI, [REDACTED] of DOE stated,

Ownership of 11.e.(2) material remains with the property owner until custody has been transferred to DOE. Transfer of custody will occur at the time DOE undertakes the physical removal of the material from the site.

You and [REDACTED] said that as long as DOE is studying the site to decide on remedial actions, NRC will still not assert regulatory control over the material. If DOE eliminates the site from the FUSRAP program, NRC will assess the need for regulatory actions to protect public health and safety.

That is our understanding of NRC's position regarding this 11(e)(2) material. We would appreciate a written response from the NRC, either confirming our understanding or correctly explaining the NRC's role and policy. Because of the permit applications this Department has before it for the electric generating project, we need to settle the regulatory status of the radioactive material in the landfill (and the decay products of that material) by March 31, 1996.

Thank you for your assistance. If you have any questions, please call me or Barbara Youngberg.

Sincerely,

[REDACTED]  
Bureau of Pesticides & Radiation  
Division of Solid & Hazardous  
Materials

BY/

cc:

[REDACTED], US DOE

[REDACTED], BFI

[REDACTED], NYS Dept. of Labor

[REDACTED], NYS Dept. of Health

[REDACTED], NYS Energy Research & Development Authority

[REDACTED], NYS Dept. of Law

[REDACTED], NYSDEC, Region 9 S&HME

[REDACTED], NYSDEC Region 9 RPA

[REDACTED], NYSDEC Region 9

[REDACTED], NYSDEC, DEE