Briefing for
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(W)

for

Meetings with Admiral Foley,
General Counsel Farrell
and with the Under Secretary
on
Rocky Flats

I. BACKGROUND

We have not been able to close on the Rocky Flats final agreement because of a dispute between the Department of Energy (DOE) and the Environmental Protection Agency (EPA) over EPA's authority under RCRA to issue administrative orders to Federal facilities. The goal in the negotiations was to "finesse" the issue so as to preserve both sides' positions. The negotiators worked on wording designed to accomplish this; however, DOE's General Counsel (GC) found their efforts unsatisfactory. Repeated subsequent discussions between EPA, DOE, some involving the Department of Justice (DOJ), saw a shift in emphasis from trying to avoid the issue to each side focussing on and hardening with respect to their positions on that issue.

The issue of EPA's authority under RCRA revolves around Section 3008 of the statute entitled "Federal Enforcement." That section allows EPA to issue orders (1) where there is a violation of RCRA or (2) where there is a release of hazardous waste from an interim status (i.e., permit application pending) facility. The former provision refers to orders being issued to "persons;" the latter does not. DOE's GC maintains that because the definitions portion of the statute does not define "persons" to include government agencies, an order may not be issued under RCRA to a Federal facility.1/ However, EPA points out that Section 6001 of RCRA provides that Federal agencies shall be subject to RCRA requirements both substantive and procedural. There are plainly intelligent legal-technical arguments for both sides of the issue; this discussion is not exhaustive of each side's arguments.

GC's real fear of EPA being able to issue an order under RCRA is that the order would allegedly be subject to citizen suit enforcement. The order, being final and valid on its face, would be prime material for a successful summary judgment motion, GC maintains.

1/GC is of the view that EPA can issue an order under E.O. 12088. The basis of such an "order" and its effect are somewhat vague, however.

Thus far, the conflict between DOE and EPA has been carried on at the staff level. However, last week EPA espoused its position at the Synar Congressional committee hearings. It claims that it has done so before in hearings where EPA was trying to dissuade Congress from changing the law to give EPA more power over Federal facilities. Allegedly, Lee Thomas made such statements at one point. EPA also claims that DOJ has at sometime joined them in this position. DOE has apparently not had occasion to address the matter before now, but DOE's GC feels strongly about its position.

It is apparent the underlying issue will not be resolved by staff. However, staff can agree to the principle of avoiding the issue, but finding wording to do this is increasingly problematic in light of GC's concerns. The surest way of saving Rocky Flats is to get DOE to agree to the language we have indication EPA will accept.

II. MAJOR POINTS TO BE MADE AT THE MEETINGS

A. The EPA proposed language is consistent with the language in the June 4 Agreement in Principle, and our failure to accept it will be a rejection of the Agreement in Principle and a show of bad faith.

B. The language seeks to "finesse" the issue of EPA's authority to issue "orders" to Federal facilities, and the only question is one of whether there is a sufficient degree of vagueness and ambiguity; the proposed language provides this.

C. The compliance posture of Rocky Flats makes it a poor candidate for testing fine points of law.

D. Failure to bring the Rocky Flats effort to fruition would set back, if not destroy, the credibility of the Secretary's environmental program.

E. Failure to complete the Rocky Flats process will impact on DOE's ability to deal credibly with the regulators at other sites.

F. The interest sought to be protected, viz., avoidance of citizen suits, is marginal and is of questionable policy value.

G. The matter here is essentially one of policy, i.e., the theoretical legal risks in terms of citizen suits of entering into the real agreement balanced against the impacts, described above, of not entering into it.

II. MAJOR POI ; EXPANDED UPON

A. What EPA is proposing is consistent with the Agreement in Principle and our failure to agree to this language is a rejection of the Agreement in Principle and is bad faith.

The Agreement in Principle plainly acknowledges that EPA has authority under 3008 of RCRA over DOE facilities. It states:

> "EPA will enforce all provisions [of the final agreement] pursuant to EPA's oversight authority under 42 U.S.C. Section 6928. [3008 of RCRA]."

The latest wording we have indication that EPA would accept adopts the language of the Agreement in Principle, to wit:

> "This Agreement and Order is entered into pursuant to EPA's oversight authority under Section 3008 of RCRA..."

In fact, this language does not use the word "enforcement" that DOE GC has found so offensive, but which it could based on the language in the Agreement in Principle.

Our allowing the Rocky Flats effort to fall through because of our rejection of the language that is in the Agreement of Principle will make DOE look like it is welching on the deal that was struck on June 4, smack of bad faith, and generally discredit the Department.

B. The approach to the final agreement has been to avoid deciding the issue of EPA's authority to issue orders against Federal facilities under RCRA, and the only question is whether there is a sufficient degree ambiguity and vagueness in the wording of the fir agreement; the subject language provides this.

The reference in the subject language to EPA's authority under 3008 as "oversight" authority and the further reference to the Executive Order 12088, which DOE acknowledges gives EPA "order authority," as the basis for the final agreement further serves to blurr the question of EPA's authority to issue orders to Federal facility as it is intended to do.

Moreove. EPA has agreed to call t document an "Agreement and Order" to preserve the idea, for DOE's convenience, that the document is an order only with respect to the state, not EPA.

As an aside, DOE in fact proposed language albeit without reference to 3008, that acknowledges EPA's oversight authority under RCRA. Any reference to EPA's authority under RCRA brings us by definition to acknowledge that EPA has such authority. Thus, what we are dealing with here is a matter of degree. Clearly we are splitting hairs.

C. The compliance posture of the Rocky Flats facility makes it a poor candidate for testing fine points of law.

Rocky Flats, an NPL candidate, is in poor condition generally in terms of environmental compliance.

We have basically no RCRA groundwater monitoring wells, our permit applications are grossly deficient (some of the waste facilities there are patently "illegal"). We have serious contamination, and we have extremely limited environmental and waste characterization data for a site of this complexity. There are CERCLA problems here which are within EPA's exclusive jurisdiction.

Much of the good press we have gotten from the Agreement in Principle has taken attention away from just how really bad the site is.

If we scrap the agreement and let ourselves fall into litigation, we are likely to find ourselves trying to win issues in a less than favorable context we have now finessed or avoided.

D. Failure to bring the Rocky Flats effort to a final agreement would set back, if not destroy, the credibility of the Secretary's environmental program.

A prime goal of the Secretary's initiatives is a proactive environmental program of dealing with DOE's environmental problems and the regulators, including EPA. Environment, Safety and Health is to take an active, aggressive role.

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The Rocky Flats effort is historic and precedent setting and it has brought much credit and recognition to his administration, in this regard.

That effort is now perceived as being stymied at DOE Headquarters over shortsighted legal considerations; DOE's good faith is being questioned.

If we fail to reach agreement, the changes in DOE direction that the initiatives were meant to signal will be regarded as lacking in substance, discrediting this and all the Secretary's policies and initiatives.

E. The failure to complete the Rocky Flats process will impact on other sites.

The Rocky Flats effort and its accomplishments thus far have exemplified DOE's ability to deal with it's problems and with the regulators.

The ultimate failure of this effort will jeopardize DOE's future ability to negotiate and resolve peacefully with the regulators its problems at other sites.

The inability of DOE to bring this to fruition will suggest that direct, harsh, enforcement action, e.g., Fernald, will be more expeditious and productive.

DOE will lose most in this process in that it will lose the flexibility that pre-enforcement negotiations bring; we will be less the "masters of our own fate."

DOE will also lose in the effect that lawsuits have on its reputation as an environmental polluter.

F. The interest sought to be protected is marginal and is of questionable policy value.

The concern about EPA issuing an order to DOE is that the order would be enforceable under the citizen suit provisions of RCRA, if the order is considered as issued under RCRA.

This concern is exaggerated because,

(1) the wording of the agreement leaves DOE room to make its arguments when such a suit is filed,

(2) such a suit would not be filed if we comply with the agreement, including availing ourselves of the terms that provide for extensions of time, other modifications, etc.,

(3) in any event, citizens could, rather that suing on the "order," sue directly on the requirements of the agreement, as these are acknowledged to be requirements of RCRA, and

(4) such a suit would be a suit in equity, and if DOE is conducting itself in good faith, the citizens would have no equitable grounds for injunctive relief.

Finally, DOE has to ask itself as a matter of policy if it wants to appear overly sensitive to citizen suits.

G. The matter at issue here is essentially a policy one.

The Department has to weigh the impacts of the loss of the Rocky Flats agreement against the projected legal "dangers" of the agreement.

From the legal side there are the risks associated with the theoretical success of a citizen suit based on the agreement, which suit would lie in any event on the underlying requirements of the agreement.

Against these are arrayed the very real impacts of loss of the agreement, including discrediting of the Secretary's initiatives, loss of ability to effectively negotiate with other regulators, and the overall negative effect on DOE's already tarnished image.

Again, as indicated above, DOE has to ask itself as a matter of policy if it wants to appear to be "afraid" of citizen suits.

IV. What to do if GC or the Under Secretary will not agree to the proposed language.

If the proposed reference to RCRA Section 3008 is utterly unacceptable, this matter must be elevated to high policy levels at EPA, and perhaps DOJ, for a final attempt at resolution. Otherwise, it appears inevitable that we will fail to win a final

agreement, ar[illegible] the accomplishments th[illegible]far will be lost (unless EPA [illegible]ff does an about face). In any event the underlying issue of EPA's authority to issue orders to DOE under 3008 should be to this level at once as it is present with regard to a number of Federal facilities compliance "agreements" now being negotiated, viz., Fernald, Idaho, and Hanford.*

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*You should be aware that GC has appeared disinclined to engage other agencies such as DOJ in any sort of brokering of the resolution ot this issue. The idea of the involvement of an objective third party has not attracted GC. In fact, GC refuses to send the language referencing to 3008 to DOJ to determine if in DOJ's view the language protects everyone's options. This is ironic in that one of the policy reasons given for EPA not issuing orders to Federal facilities is the Federal family concept, yet it appears that this will not be addressed as a "family."

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