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Metzenbaum - WTI [Waste Technologies Industries]

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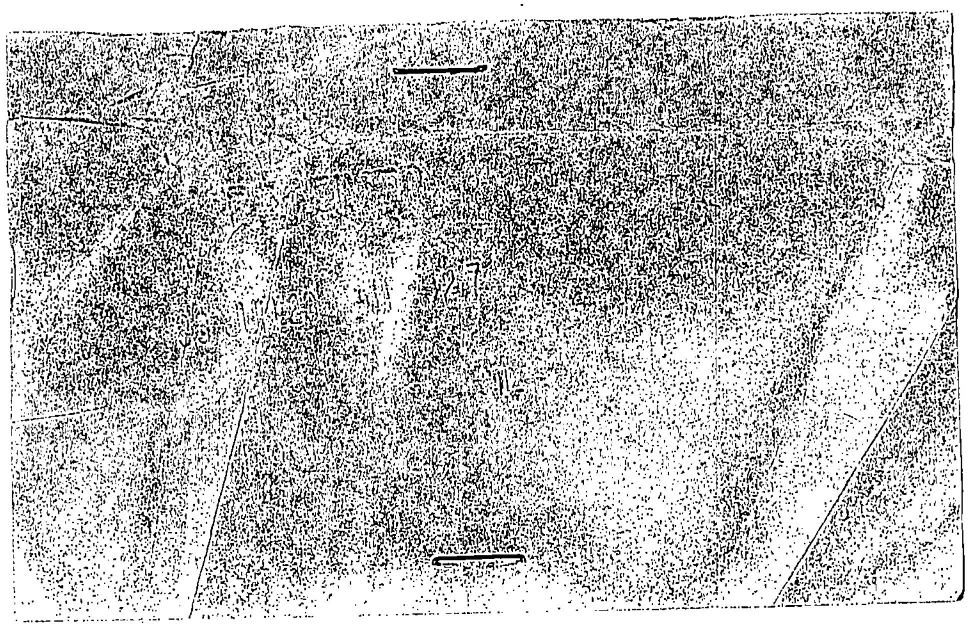

U.S. Senator Howard M.
METZENBAUM
of Ohio

Committees:
Judiciary
Labor and Human Resources
Select Committee on Intelligence
Environment and Public Works

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor

FOR IMMEDIATE RELEASE
Date: July 24, 1992

Contact: Nancy Coffey
(202) 224-2315

METZENBAUM REACTS TO APPEALS BOARD RULING ON WTI

"THIS RULING CONFIRMS WHAT WE HAVE BEEN SAYING ALL ALONG ---THAT EPA ACTED ILLEGALLY AND IMPROPERLY IN ISSUING THE PERMIT TO WTI. SURELY EPA KNEW THAT FEDERAL REGULATIONS REQUIRE THAT THE OWNER OF THE LAND BE LISTED ON THE PERMIT. SURELY EPA KNEW THAT NO PERMIT SHOULD HAVE BEEN ISSUED BEFORE IT WAS VERY CLEAR WHO OWNS THE INCINERATOR. BY NOW THE EPA SHOULD KNOW AND JUST ADMIT THAT THE WTI PERMIT IS HOPELESSLY FOULED UP AND SHOULD BE REVOKED."

U.S. Senator Howard M. METZENBAUM *of Ohio*

Committees:
Judiciary
Labor and Human Resources
Select Committee on Intelligence
Environment and Public Works

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor

STATEMENT OF SENATOR HOWARD M. METZENBAUM
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
MAY 20, 1992
WTI AMENDMENT

--THIS AMENDMENT PROHIBITS THE INCINERATOR BUILT IN EAST LIVERPOOL, OHIO, FROM BURNING HAZARDOUS WASTE UNTIL SUCH TIME AS THE COURT AND ADMINISTRATIVE APPEALS RELATING TO THE PROJECT HAVE BEEN RESOLVED TO FINAL JUDGEMENT.

--IT IS A NARROWLY DRAFTED AMENDMENT. IT APPLIES ONLY TO THE INCINERATOR BUILT BY WASTE TECHNOLOGIES INDUSTRIES IN EAST LIVERPOOL, AND ONLY TO THE ADMINISTRATIVE AND COURT ACTIONS PENDING AS OF THE DATE OF ENACTMENT.

--MR. CHAIRMAN, THE WTI PROJECT HAS BEEN A CLASSIC END RUN FROM THE VERY BEGINNING WHEN IT WAS SOLD TO THE TOWNSPEOPLE AS AN OHIO RIVER PORT DEVELOPMENT.

--13 YEARS AGO, THE OHIO LEGISLATURE, IN AN EFFORT TO BOOST THE SAGGING ECONOMY OF THIS DEPRESSED OHIO RIVER COMMUNITY, APPROPRIATED $4 MILLION "TO ACQUIRE PROPERTY AND MAKE SUCH IMPROVEMENTS AS ARE NECESSARY TO ENHANCE THE USE OF OHIO'S RIVERS."

--BUT, THEY NEVER GOT A PORT. WHAT THEY GOT INSTEAD WAS A HAZARDOUS WASTE INCINERATOR.

--IN FACT, THE DEAL WAS CUT AND A LEASE WAS SIGNED BETWEEN THE NEWLY FORMED COLUMBIANA COUNTY PORT AUTHORITY AND WTI BEFORE THE PORT AUTHORITY EVER EVEN PURCHASED THE LAND.

--IRONICALLY, ALTHOUGH LOCATED ON THE WATER AS A PORT FACILITY, WTI IS PROHIBITED BY THE ARMY CORPS OF ENGINEERS FROM OBTAINING ITS SHIPMENTS BY WATER. IT'S TOO DANGEROUS.

--MR. CHAIRMAN, OF ALL THE DEALS THAT I'VE EVER SEEN, THIS ONE IS PROBABLY THE MOST QUESTIONABLE.

--THE ORIGINAL RCRA PERMITTEES NO LONGER OWN THE PROJECT. IN FACT WE DON'T EVEN KNOW WHO THE REAL OWNERS ARE.

--THE RCRA PERMIT LISTED WTI AS THE OPERATOR. NOW IT APPEARS THAT VON ROLL COMPANY IS THE OPERATOR, AND THAT VON ROLL MAY OWN WTI. HOWEVER, VON ROLL WAS NEVER CERTIFIED AS THE OPERATOR ON THE PERMIT - A VIOLATION OF RCRA.

--IF THE EPA DOESN'T KNOW WHO THE REAL OWNERS ARE, THEN HOW ARE THEY GOING TO HOLD ANYONE ACCOUNTABLE IN THE EVENT OF AN ACCIDENT?

--THE OHIO ATTORNEY GENERAL HAS LAUNCHED A FULL-SCALE INVESTIGATION TO DETERMINE WHO THE TRUE OWNERS ARE.

--TWO WEEKS AGO, THE NEW YORK TIMES REPORTED THAT EPA LAWYERS ADMITTED IN A CONGRESSIONAL HEARING THAT THE, "EPA VIOLATED THE HAZARDOUS WASTE LAW IN ISSUING THE [WTI] PERMIT."

--HOW? THE OWNER OF THE PROPERTY ON WHICH THE INCINERATOR WAS

BUILT - THE COLUMBIANA COUNTY PORT AUTHORITY NEVER SIGNED THE PERMIT.

--WHEN CONFRONTED WITH THE PROBLEM NINE YEARS LATER, THE US EPA UNILATERALLY PUT THE PORT AUTHORITY ON THE PERMIT WITHOUT ITS CONSENT - AND AGAINST ITS WISHES.

--HOW DID EPA'S LAWYERS CHARACTERIZE THAT ACTION?

--ANOTHER VIOLATION OF THE LAW.

--THAT'S NOT ALL.

--THE INCINERATOR IS 1,100 FEET FROM AN ELEMENTARY SCHOOL, WHOSE SCHOOL CHILDREN WILL BREATHE THE LEAD, MERCURY AND OTHER HEAVY METALS SPEWED INTO THE AIR BY THE PLANT.

--IT'S 400 FEET FROM A NEIGHBORHOOD FULL OF HOMES.

--THE INCINERATOR IS BUILT IN A FLOOD PLAIN. OHIO BUILDING REGULATIONS RELATING TO SOIL COMPACTION WERE WAIVED, OHIO STATUTORY SET-BACK REQUIREMENTS WERE IGNORED.

--THE REGION IS A CLEAN AIR ACT NON-ATTAINMENT AREA. THAT ISSUE WAS FUDGED.

--THE STATE OF WEST VIRGINIA HAS SUED WTI, THE U.S. EPA, AND THE OHIO EPA IN FEDERAL DISTRICT COURT.

--THE CITY OF PITTSBURGH HAS FOUR PERMIT APPEALS NOW PENDING BEFORE THE OHIO BOARD OF ENVIRONMENTAL REVIEW. THE CITY SOLICITOR IS ALSO CONSIDERING A FEDERAL LAWSUIT.

--YET IN SPITE OF ALL THIS, THE U.S. EPA IS BULLDOZING FORWARD CONSIDERING WHETHER TO LET WTI PROCEED WITH ITS TRIAL BURN PROJECT NEXT MONTH - AND COMMERCIAL BURNING AFTER THAT .

--THE <u>CLEVELAND PLAIN DEALER</u> SUMMED IT UP WELL IN AN EDITORIAL TWO WEEKS AGO: "WTI OFFICIALS HAVE CONSISTENTLY DISPLAYED AN ARROGANCE BORN WITH THE EASE WITH WHICH THEY GOT WHAT THEY WANTED FROM THE TOWN AND STATE."

--"[WTI] OFFICIALS POOH-POOHED EAST LIVERPOOL RESIDENT'S CONCERNS ABOUT EMISSIONS ARGUING THAT THE OHIO RIVER VALLEY WAS ALREADY SO POLLUTED A LITTLE EXTRA WOULDN'T MATTER."

--BUT, I BELIEVE THEIR ARROGANCE LED THEM TO MISJUDGE THE LEVEL OF OPPOSITION THROUGHOUT OHIO, PENNSYLVANIA AND WEST VIRGINIA.

--14 LOCAL GOVERNMENTS, AND SCORES OF HEALTH, ENVIRONMENTAL, AND WORKER GROUPS HAVE REGISTERED THEIR OPPOSITION TO THE PLANT.

--SENATORS AND REPRESENTATIVES FROM OHIO, PENNSYLVANIA AND WEST VIRGINIA HAVE QUESTIONED THIS PROJECT.
-- SENATORS BYRD AND ROCKEFELLER, SENATOR GLENN, REPRESENTATIVES MOLLOHAN, STAGGERS AND KOLTER OPPOSE IT.

--THIS INCINERATOR NEVER SHOULD HAVE BEEN BUILT.

--MY AMENDMENT WILL AT LEAST MAKE SURE IT DOESN'T OPERATE UNTIL THE COURT CASES AND APPEALS RUN THEIR COURSE.

--THE PEOPLE SHOULD HAVE THEIR DAY IN COURT BEFORE THE FACILITY IS PERMITTED TO OPERATE.

Calendar No. 495

102d Congress *2d Session*	SENATE	REPORT 102–301

RESOURCE CONSERVATION AND RECOVERY ACT AMENDMENTS OF 1992

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

together with

ADDITIONAL VIEWS

TO ACCOMPANY

S. 976

JUNE 19 (legislative day, JUNE 16), 1992.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
55–947 WASHINGTON : 1992

ps. As part of a comprehensive solid process, States were urged to prohibit within five years of the date on which grant program for State solid waste authorized under subtitle D. Grant hat continued to allow the operation

or sanitary landfills in 1979. The cri- of facilities in flood plains, protection ance with the discharge requirements nd water contamination, land applica- ase vectors, prohibition of open burn- ases and other safety hazards.

Solid Waste Amendments Act Con- fy the criteria for sanitary landfills wastes and small quantity generator s for siting, ground water monitoring ised criteria were promulgated in Oc-

dumps has been in place for many lly implemented. Although EPA can y against facilities that do not satisfy ills, EPA has chosen to rely principal- cement. However, the grant program s that developed comprehensive solid ibition on open dumps has not been there has been little inducement for Federally-imposed requirement.

res the Federal impetus for the sani- prohibition on open dumps. It uses the d loss of Federal grant dollars, origi- atute. The bill requires the Adminis- the Clean Air Act, the Clean Water osal Act (including grants for hazard- ams) for every State that continues to umps.

e years after enactment of the Re- very Act Amendments of 1992. They er the authority of each of the three is required to make the reductions ds that no open dump is receiving must the State have a prohibition on , the prohibition must be effectively

o be phased in with reductions of 10 r enactment, 20 percent in the fourth ent in the fifth year after enactment year and each subsequent year after the allocation of any State not com- vill be reallocated to other States for l the authorizing statutes.

pply to the Freshkills landfill which is e municipal waste generated in New of the largest landfills in the nation

and will spend tens of millions of dollars to improve performance. The State of New York has taken enforcement action with respect to Freshkills and the landfill is under order to upgrade its operations to provide additional protection for human health and the environment.

Prohibition on Burning (Section 418)

SUMMARY

This section specifically prohibits the Waste Technologies Industries (WTI) hazardous water incinerator, located in East Liverpool, Ohio from conducting test burns until such time as the litigation and administrative appeals pending on the date of enactment have been resolved to final judgment.

DISCUSSION

Currently pending in Federal District Court is a 9 count suit against WTI, the U.S. EPA and the Ohio EPA filed by the Attorney General of West Virginia. In addition, the City of Pittsburgh, Pennsylvania has 4 WTI permit appeals pending before the Ohio Board of Environmental Review, and has filed a notice of intent to sue WTI and the Ohio EPA.

At issue are allegations that hazardous waste permits issued to WTI by U.S. EPA pursuant to the Resource Conservation and Recovery Act, and Ohio EPA pursuant to state law are illegal. More specifically, the parties allege that (1) the landowner was not made a party to the permit, a violation of the Resource Conservation and Recovery Act, (2) the facility operator was not certified on the RCRA permit, also a violation of RCRA; (3) the partnership that currently owns WTI is comprised of different companies than the partnership in whose name the RCRA permit was issued; (4) after the RCRA permit was issued, the activities authorized pursuant to the permit were expanded without modification and interested parties were not notified; (5) the plant does not meet the specifications required in the state construction permit; (6) U.S. EPA and Ohio EPA failed to review the suitability of the proposed incinerator location after the State of Ohio enacted new siting standards; (7) the construction of the incinerator on property owned by the Columbiana County Port Authority (CCPA) violates the terms of an agreement between CCPA and the State of Ohio; (8) the lease agreement between WTI and CCPA is invalid because CCPA ignored Ohio law on private sector solicitation and public notice; and (9) the incinerator is located within a floodplain, on the banks of a river, within 1,100 feet of an elementary school, and within 800 feet of a neighborhood.

The issues raised in the litigation and administrative actions should be resolved before the WTI incinerator is permitted to burn hazardous waste.

II

Calendar No. 495

102D CONGRESS
2D SESSION

S. 976

[Report No. 102–301]

The "Resource Conservation and Recovery Act Amendments of 1991".

IN THE SENATE OF THE UNITED STATES

APRIL 25, 1991

Mr. BAUCUS (for himself, Mr. CHAFEE, and Mr. BURDICK) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

JUNE 19 (legislative day, JUNE 16), 1992

Reported by Mr. BURDICK, with an amendment and an amendment to the title

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

The "Resource Conservation and Recovery Act Amendments of 1991".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~SHORT TITLE AND TABLE OF CONTENTS~~

~~SECTION 1. This Act may be cited as the "Resource Conservation and Recovery Act Amendments of 1991".~~

SEC. 418. PROHIBITION ON BURNING.

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b), the Administrator of the Environmental Protection Agency may not approve a trial burn plan for the commercial hazardous waste incinerator located in East Liverpool, Ohio, with respect to which a permit was issued with the Environmental Protection Agency hazardous waste permit identification number OH980613541, and no burning of hazardous waste may be carried out at the incinerator.

(b) APPLICABILITY.—The prohibitions under subsection (a) shall apply until such time as all State and Federal administrative appeals pending on the date of enactment of this section relating to the incinerator have been exhausted, and a final judgment has been entered in any related action pending in a State or Federal court on the date of enactment of this section.

SEC. 419. MUNICIPAL SOLID WASTE RESEARCH.

Section 8006 of the Solid Waste Disposal Act (42 U.S.C. 6986) is amended to read as follows:

"MUNICIPAL SOLID WASTE PROGRAMS

"SEC. 8006. (a) MUNICIPAL SOLID WASTE RESEARCH, DEVELOPMENT, AND DEMONSTRATION.—(1) The Administrator may establish a comprehensive research, development, and demonstration program for the purpose of identifying and addressing, in the safest and most efficient manner,

HOWARD M. METZENBAUM
OHIO

COMMITTEES:
JUDICIARY
LABOR AND HUMAN RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
ENVIRONMENT & PUBLIC WORKS

CHAIRMANSHIPS:
SUBCOMMITTEE ON ANTITRUST
SUBCOMMITTEE ON LABOR

United States Senate

WASHINGTON, DC 20510-3502

October 16, 1992

Mr. William K. Reilly
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Reilly:

On October 5, 1992, I wrote to you expressing very serious concerns about the way in which your Region V staff was handling the Waste Technologies Industries hazardous waste incinerator/RCRA permit process.

USEPA internal memorandums made public over the past few weeks made very clear that there has been a consistent agency bias in favor of permitting WTI to move forward with the plant. That is why I urged you in my letter to assemble a new team to undertake an independent and impartial review of the WTI/RCRA project.

The day after my letter was received in your office, your spokesman Dave Cohen told a Cleveland Plain Dealer reporter that a reaction to Metzenbaum will take time. However, Mr. Cohen was then quoted as having said "I'd wage a guess that it will end up being said that an examination reflects the fact that the agency feels all of the procedures and decisions made so far stand up to any scrutiny."

Once again, your staff has made a predetermined conclusion without so much as having considered the facts of the matter. That has been my concern all along -- that the agency's modus operandi has been to ignore the facts, to disregard the concerns expressed by citizens and public officials, and to do whatever it takes to move WTI forward.

I always believed that you brought integrity to the USEPA. The top environmental post is a difficult job in the Bush administration, and you have always had my support. But I am frank to say to you now that I am mightily disappointed in your handling of this project.

I urge you again to undertake an independent review of USEPA's role in permitting the WTI facility. And I would appreciate hearing from you on the matter.

Very sincerely yours,

Howard M. Metzenbaum
United States Senator

HMM/dwj

HOWARD M. METZENBAUM
OHIO

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WASHINGTON, DC 20510-3502

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U.S. Environmental Protection Agency
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Washington, D.C. 20460

Dear Mr. Reilly:

As you know, I have been closely monitoring decisions made by the USEPA regarding the Waste Technologies Industries (WTI) hazardous waste incinerator in East Liverpool, Ohio.

Accordingly, I was shocked by the contents of the attached memorandum prepared by the USEPA Assistant Regional Counsel Nancy-Ellen Zusman, and made public last week. According to Ms. Zusman, the document, which was addressed to all of the senior EPA regional personnel working on WTI, "serves to memorialize the schedule of items to be accomplished in relation to the ...incinerator... which was discussed in a briefing of the Regional Administrator on August 20, 1992."

The memo outlined a sixteen point chronology of steps that USEPA would undertake culminating in a date certain in which, "WTI would be allowed to bring hazardous waste on site (Feb. 1993)." What the memo makes clear is that it was the position of USEPA all along to give WTI the go-ahead. The questions raised by the USEPA Inspector General, the administrative appeals and other outstanding issues were merely to be handled for public relations purposes. There would be no serious examination of the issues, just a resume of steps to be completed before announcing the final decision to bring hazardous waste on site.

Furthermore, Ms. Zusman concluded the memo by stating, "There is nothing to indicate that the original permit is invalid, nor that the Agency did not have a viable liable party to pursue..." However, a second USEPA internal memorandum addressed to Ms. Zusman from Mr. Ignacio Arrazola, Law Clerk, SWERB V, titled "Possible transfer of the WTI RCRA permit" contradicted Ms. Zusman's conclusion. Mr. Arrazola concluded that "Good faith legal arguments can be made to either buoy or sink WTI's existing permit. Ultimately, the decision of whether the permit should pass through the legal niceties unscathed is a policy determination." That is exactly what USEPA Region V did. They made a policy decision, in advance of any investigation, to permit WTI to move forward.

Mr. William K. Reilly
October 5, 1992
Page Two

I don't believe that I have ever seen such irresponsibility on the part of government officials. The Region V staff from the Administrator down through the fourteen other individuals to whom the Zusman memo was addressed are so completely compromised that the public has no chance of getting a fair determination. And I am frank to say to you that you don't seem to understand that you are being made a party to this. I urge you to suspend the WTI permit, and to designate an entirely new team to undertake a complete review of the WTI/RCRA situation.

Very sincerely yours,

Howard M. Metzenbaum
United States Senator

HMM/dwj

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

OPA

DICK
WOODRUFF

21 pages

REPLY TO THE ATTENTION OF:

FOIA EXEMPT
ATTORNEY-CLIENT
PRIVILEGE
INTERNAL USE ONLY

MEMORANDUM

SUBJECT: Waste Technologies Industries
~~July~~ August 20, 1992 Briefing

FROM: Nancy-Ellen Zusman NEZ
Assistant Regional Counsel

TO: See Below

DATE: ~~July~~ August 21, 1992

This memorandum serves to memorialize the schedule of items to be accomplished in relation to the Waste Technologies Industries ("WTI") hazardous waste incinerator in East Liverpool, Ohio, which was discussed in a briefing of the Regional Administrator on ~~July~~ August 20, 1992.

It was agreed that the following activities would take place in regard to the above referenced facility:

1. ORC will write a letter to the Ohio Attorney General's Office formally requesting its determination on the ownership and operational control issues for the WTI permit.

2. Bill Muno will contact HQ (Rich Guimond) and explain what actions the Region intends to take with regard to the WTI facility.

3. U.S. EPA will inspect the WTI facility on 8/25 and 8/26 to determine compliance with its permit.

4. A "Dear Interested Party" letter will be sent by OPA explaining recent developments at the WTI facility, including the lead issue (raised in the IG report) and

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the July 24, 1992, ruling by the Environmental Appeals Board. (Week of 8/24/92)

5. U.S. EPA will issue a letter to WTI stating the results of the technical inspection and that there are problems with the permit in relation to the ownership and operational control of the facility. Until those issues are cleared up to U.S. EPA's satisfaction no hazardous waste will be permitted to be brought on site. (Early Sept.)

6. A "Note to Correspondents" will be sent by OPA explaining the inspection results and that no waste will be brought on site until the ownership and operational control issues have been cleared up to the Agency's satisfaction. (Early Sept.)

7. The real estate transaction between the Columbiana County Port Authority and WTI/Von Roll will be consummated, clearing up the property owner problem. (Mid Sept.)

8. WTI will submit its revised permit application, as previously requested. (Mid Sept.)

9. The Ohio AG's Office will give U.S. EPA its preliminary assessment of the owner/operator issues. (Mid Oct.)

10. U.S. EPA will respond to the IG Report. (Due Oct. 15)

11. U.S. EPA will take enforcement action against WTI for failure to notify and will request a Class 2 modification to correct the problems with the current permit. (Mid Oct.)

12. Ohio will issue its formal determination. (Early Nov.)

13. WTI will initiate a Class 2 modification. (Early Nov.)

14. The permit will be modified to correct the owner/operator issue. (Jan. - Feb. 1993)

15. HQ (Guimond) will respond to the Metzenbaum letter. (Feb. 1993)

16. WTI will be allowed to bring hazardous waste on-site. (Feb. 1993)

The majority of these dates are tentative. The dates and/or milestones may change at any time if U.S. EPA determines that human health or the environment is not being protected. At some point during this timeframe it is presumed that the trial burn plan will be approved by U.S. EPA and that Ohio EPA will issue a permit to operate to WTI. The West Virginia lawsuit, Palumbo v.

WTI, U.S. EPA, Ohio EPA, et al., will also be ongoing. OPA will issue "Notes to Correspondents" to let the public know about milestones. There is nothing to indicate that the original permit is invalid, nor that the Agency did not have a viable liable party to pursue for violations of the WTI permit at all times. For any questions about any of these issues, I can be reached at 6-7161.

Addressees:
Valdas V. Adamkus - Reg. Admin.
David Ullrich - Acting Dep. Reg Admin.
William Muno - " ~~Waste~~ Dir Waste Mgt. Div.
Margaret McCue - Dir. Office of Public Affairs
Gail Ginsberg - Reg. Counsel
Norman Niedergang - Acting Assoc. Dir Director RCRA
Anne Rowan - Public Affairs
Suzanne Kircos " "
Karl Bremer Chief RCRA permitting branch
Gary Victorine Section RCRA (under Bremer)
Larry Kyte - Office Reg. Counsel Chief
Rett Nelson - Attny Reg. Counsel Chief
Dan O'Riordan State Coordinator Ohio + Wis.
Mary Canavan Cong. Liaison
Tami Odell Cong. Asst.

HOWARD M. METZENBAUM
OHIO

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Furthermore, Ms. Zusman concluded the memo by stating, "There is nothing to indicate that the original permit is invalid, nor that the Agency did not have a viable liable party to pursue..." However, a second USEPA internal memorandum addressed to Ms. Zusman from Mr. Ignacio Arrazola, Law Clerk, SWERB V, titled "Possible transfer of the WTI RCRA permit", contradicted Ms. Zusman's conclusion. Mr. Arrazola concluded that "Good faith legal arguments can be made to either buoy or sink WTI's existing permit. Ultimately, the decision of whether the permit should pass through the legal niceties unscathed is a policy determination." That is exactly what USEPA Region V did. They made a policy decision, in advance of any investigation, to permit WTI to move forward.

I don't believe that I have ever seen such irresponsibility on the part of government officials. The Region V staff from the Administrator down through the fourteen other individuals to whom the Zusman memo was addressed are so completely compromised that the public has no chance of getting a fair determination. And I am frank to say to you that you don't seem to understand that you are being made a party to this. I urge you to suspend the WTI permit, and to designate an entirely new team to undertake a complete review of the WTI/RCRA situation.

Very sincerely yours,

Howard M. Metzenbaum
United States Senator

HMM/dwj

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 30 1992

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

The Honorable Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

On July 23, 1992, your staff met with my deputy, Richard J. Guimond, regarding the Waste Technologies Industries (WTI) incinerator in East Liverpool, Ohio. You expressed concerns about the ownership and operational control of the facility. I would like to report to you our findings on these issues.

As you noted in your letter, the United States Environmental Protection Agency (USEPA) requested extensive information from WTI with respect to the ownership and operational control issues surrounding the facility under section 3007 of the Resource Conservation and Recovery Act (RCRA). Based on our review of the certified materials submitted by WTI, we believe that the WTI permit is valid and that WTI is the owner of the facility, as well as an operator of the facility. However, we believe that WTI's managing partner, Von Roll (Ohio), Inc. (VRO), is also an operator of the facility, and that WTI should have submitted a permit modification request, and VRO should have signed a permit application, to add VRO to the permit. These issues are discussed in more detail below.

OWNERSHIP OF THE FACILITY

With respect to the ownership issues, you expressed concern that WTI was constituted pursuant to a joint venture agreement and applied for a RCRA permit in 1981, but did not apply for a partnership license in the State of Ohio until November 1987. This is true, but we do not believe that a general partnership in Ohio is required to obtain a license in order to do business. The filing of a certificate of general partnership is necessary to enable the partnership to commence or maintain an action on or on account of a contract in the partnership's name in state court, or transfer a conveyance of real estate to or from the partnership. Ohio Revised Code sections 1777.02, 1777.04. We do not believe that WTI was required to obtain a license in order to be recognized as a bona fide partnership and to apply for a RCRA permit.

Concerns have also been expressed about changes in the ownership of WTI, and whether these changes have caused WTI to dissolve or become a different legal entity than the entity that applied for and received a permit. Based on our review of the materials submitted by WTI and meetings regarding this issue with both concerned citizens and WTI, we have no basis to conclude that there has been a legal change in the partnership entity. The original four partners in the partnership were Koppers Environmental Corp., Energy Technology Co., Waste Technologies, Inc. (with a comma), and Von Roll America, Inc. (VRA). Since 1981, Stephens Inc., which owned 98.96% of the stock of Waste Technologies, Inc., sold Waste Technologies, Inc.'s interest in WTI to WTI Acquisition, Inc., which was wholly owned by Stephens. WTI Acquisition, Inc. then changed its name to Waste Technologies Inc. (without a comma). As a result of this transaction, Stephens Inc., became the sole owner of the partner company. In addition, VRA created VRO as a subsidiary, and sold its interest in the partnership to VRO. Koppers changed its name to Environmental Elements Ohio (Inc.), and there has been no change with respect to Energy Technology Co. Finally, although the four original companies had separate corporate parents, all are now owned by VRA.

The WTI joint venture agreement specifically limits the grounds for dissolution, and contemplates that the partnership will continue notwithstanding changes in the partners. We believe that such provisions prevent dissolution upon the change of partners. See, e.g., Cherry Hill Corp. v. Estate of Riley, 1982 WL 5555 (Oh. App.)(unreported); Heath v. Spitzmiller, 663 S.W.2d 351 (Mo. App. 1983); Hunter v. Straube, 543 P.2d 278 (Or. 1975); Adams v. Jarvis, 127 N.W.2d 300 (Wis. 1964); 59A Am. Jur. 2d Section 829. In view of these provisions, we do not believe the decision in Fairway Dev. Co. v. Title Ins. Co., 621 F. Supp. 120 (N.D. Oh. 1985), holding that a change in partners dissolves a partnership, is controlling. Based on the express provisions of the joint venture agreement, we cannot conclude that the transfer of partnership interests dissolved WTI.

We also inquired into whether the ownership by VRA of the stock in all four partners, along with the fact that the four partners and VRA have substantially identical directors, would lead an Ohio court to disregard the corporate entities and conclude that WTI is not a valid partnership. We do not believe a court would come to this conclusion. WTI is composed of four corporations that, according to the documentation submitted by WTI in its certified response to USEPA's RCRA section 3007 information request, are validly incorporated and in good standing both in their states of incorporation and in Ohio. Our understanding is that Ohio law will not disregard the corporate form unless the form is used to perpetrate a fraud or other wrong or injustice. North v. Higbee Co., 3 N.E.2d 391 (Oh. 1936);

Bacyrus-Erie Co. v. General Products Corp., 643 F.2d 413 (6th Cir. 1981). We do not believe that complete ownership of a subsidiary by a parent and the fact of common directorates would lead a court to disregard the corporate form. Therefore, we do not believe that the composition of WTI would lead an Ohio court to conclude that it is not a valid partnership.

Because these are difficult, technical issues of state law, we will continue to monitor the inquiry into WTI presently being conducted by the Ohio Attorney General's Office as part of its routine background check of RCRA facility owners, and we are of course receptive to any other new information or arguments on the issues. In addition, we are forwarding to the Ohio Attorney General's office documents and information received in the course of our inquiry into WTI's ownership, including information provided by local citizens. However, it should be noted that, regardless of the resolution of these technical issues, the de facto owners and operators of RCRA facilities are fully liable for compliance with RCRA regardless of whether they are on the permit, and USEPA has full authority to enforce the applicable statutory and regulatory requirements against all such parties. We do not believe that the enforceability of a RCRA permit turns on technical issues of state business association law.

In addition, with respect to the financial assurance mechanisms obtained by the facility pursuant to regulatory requirements, 40 CFR Part 264 Subpart H, the required liability insurance was obtained by WTI (the partnership) effective December 31, 1991. Thus, even if the above-referenced transactions effected a change in the partnership (and, as explained above, we believe they did not), they all occurred prior to the date the policy was issued, and the policy therefore would be held by WTI as presently constituted. The standby letter of credit for closure, also required by the regulations, was obtained by VRO, which is a properly incorporated entity according to the information and documentation submitted by WTI. As explained below, U.S. EPA Region 5 is taking steps to add VRO to the permit a facility operator.

A final issue that has been raised with respect to the ownership status of the facility is whether the absence from the permit as originally issued of the land owner, the Port Authority of Columbiana County, renders the permit invalid. It does not. Although USEPA's regulations require that landowners be included on RCRA permits, the practice in USEPA regional offices at the time of permit issuance varied, and WTI's permit, as well as others, was issued without identifying the landowner as permittee. As we have explained, the failure to include the Port Authority was inadvertent, and the issue was not raised by anyone during two rounds of public comment on the draft permit. The time period provided under RCRA for legal review of the permit has long expired. In any event, the issue is now moot because

WTI purchased the land from the Port Authority, effective September 18, 1992.

OPERATIONAL CONTROL OF THE FACILITY

With respect to the operational control issues, WTI entered into a contract with VRO on September 21, 1990, assigning substantial independent operational discretion and control to VRO. We believe that, under this arrangement, VRO is an "operator" of the facility within the meaning of RCRA and that the arrangement should have been effected through a Class I permit modification with prior approval. 40 CFR Section 270.40. We further believe that a 1987 amendment to the WTI joint venture agreement making VRO managing partner and giving VRO exclusive authority to manage and control the partnership made VRO an "operator" prior to the execution of the 1990 contract and required prior approval. WTI maintains that the 1990 contract simply reflected VRO's role as managing partner under the 1987 amendment. Finally, VRO obtained the letter of credit for facility closure, which is a responsibility of the facility owner or operator, 40 CFR 264.143. We therefore believe that WTI violated the RCRA regulations by effecting this change without approval.

However, the error does not affect the validity of the permit. As stated above, VRO is fully liable for compliance with RCRA requirements as a de facto operator of the facility regardless of whether it is on the permit.

Moreover, we do not believe WTI's violation of its permit warrants action by USEPA to prohibit facility operation. We do not have evidence indicating that WTI's violation of the regulations was willful. USEPA typically has not required that individual partners or shareholders of owner and operator companies be identified as owners or operators on the permit. However, where individual partners or shareholders exercise such independent discretion and control that they themselves fall within the definition of "operator" in 40 CFR Section 270.2, EPA believes they must be included on the permit, see In re Southern Timber Products, Inc, RCRA Appeal 89-2 (February 28, 1992). WTI maintains that, under USEPA's permit regulations, an individual partner acting in its capacity as manager is not itself an "operator," and that therefore a permit modification was not necessary to delegate management authority to VRO. We disagree with WTI's reading of the regulations based on the substantial independence and control exercised by VRO, but we recognize that the determination of whether an individual or entity falls within the "operator" definition is a fact-specific determination that must be made on a case-by-case basis.

Based on the foregoing analyses, we believe the WTI permit is valid. USEPA Region 5 is notifying WTI and individuals on the facility mailing list of our analysis, and reminding WTI that it may not receive hazardous waste until it has complied with the terms of a stipulation entered into by the parties to West Virginia vs. WTI et al, requiring WTI to notify all parties to the suit seven days prior to the commencement of operations. In the meantime, Region V plans to process a Class I permit modification request that WTI has submitted to add VRO to the facility permit as operator. Region 5 will also request that VRO submit a signed permit application as required under regulation, 40 CFR Section 270.40. Although notice and the opportunity for comment are not required by the regulations on Class 1 modifications, Region V plans to provide a 30-day period for public comment on the change because the change was originally accomplished without prior approval and there is significant public interest in issues relating to WTI's ownership and operational control.

If you have any questions, please feel free to call me.

Sincerely,

Don R. Clay
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 25 1992

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

Honorable Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

Thank you for your letter of July 24, 1992 concerning the briefing given to your staff regarding the Waste Technologies Industries (WTI) facility. The purpose of the briefing was to provide you with information on the status of the WTI facility and the then pending Environmental Appeals Board decision. In your letter, you raise questions regarding ownership and operational control of the facility.

As you know, the Regional office issued a letter to WTI under section 3007 of RCRA, inquiring into the details of the corporate partnership and operational control of the facility. Region V is currently reviewing WTI's response to this request. I plan to fully respond to you as soon as their review has clarified the matter.

I appreciate your concern regarding the WTI facility. Please be assured that EPA will conduct a thorough inspection of the facility and of all the materials submitted by WTI.

Sincerely,

Richard J. Guimond
Assistant Surgeon General, USPHS
Deputy Assistant Administrator

HOWARD M. METZENBAUM
OHIO

COMMITTEES:
JUDICIARY
LABOR AND HUMAN RESOURCES
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CHAIRMANSHIPS:
SUBCOMMITTEE ON ANTITRUST
SUBCOMMITTEE ON LABOR

United States Senate

WASHINGTON, DC 20510-3502

July 24, 1992

Mr. Richard J. Guimond
Deputy Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Guimond:

I wish to follow up on the meeting that took place last night between you, other USEPA officials, my staff and the staffs of Senators Wofford, Rockefeller, Glenn, and Specter regarding the Waste Technologies Incinerator in East Liverpool, Ohio.

The USEPA's own Inspector General and Regional Counsel have raised significant questions, ones that were brought up again last night, about who really owns and exercises control over WTI. The question of ownership and control, which has never been answered adequately, has a direct bearing on whether anyone is financially responsible for the incinerator.

Furthermore, there is a second level of outstanding issues relating to whether the alleged operator, Von Roll, Inc., and the owner-partners it allegedly controls, are fully obligated to the terms of the 1983 RCRA permit that was issued to WTI. Additionally, there is the question of whether WTI could have legally applied for and received a RCRA permit in the first place. According to the Inspector General, "In 1981, the WTI partners developed a partnership agreement and applied for a Federal RCRA permit. However, WTI did not apply for a partnership license in the State of Ohio until November 1987," three years after the permit was issued.

Last night you indicated that USEPA is attempting to obtain answers to all of these questions. You said the agency was awaiting WTI's compliance with USEPA's RCRA Section 3007 information request about ownership and control. You indicated that once the agency receives the information from WTI, the agency would make a decision, fully supported by examination of the documents and interviews with the individuals responsible, as to the validity of the 1983 permit. You agreed that USEPA would put all of the relevant facts and justification for the agency's decision in writing in a letter to me. Finally, you agreed that if USEPA finds the existing permit to be valid, the above mentioned letter would be signed and delivered to my office before WTI is permitted to initiate any activities relating to incinerator start-up, trial burn, and bringing hazardous materials on site in East Liverpool.

Finally, apart from the above-stated concerns about questions of WTI's control and ownership, I continue to have a number of concerns about this facility from the standpoint of public health and safety. Should the issues of control be legally resolved, USEPA still has not demonstrated to my satisfaction that the facility can and will operated and monitored to prevent plant emissions from harming the community.

I appreciate your cooperation, and look forward to hearing from you on this very important matter.

Very sincerely yours,

Howard M. Metzenbaum
United States Senator

HMM/dwj

cc: William K. Reilly, Administrator

HOWARD M. METZENBAUM
OHIO

United States Senate
WASHINGTON, DC 20510-3502

COMMITTEES:
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SUBCOMMITTEE ON LABOR

June 30, 1992

The Honorable J. Danforth Quayle
Chairman
White House Council on Competitiveness
Old Executive Office Building
Washington, D.C. 20501

Dear Mr. Chairman:

We are deeply concerned about news reports that staff of the White House Council on Competitiveness recently met with supporters of the Waste Technologies Industries (WTI) hazardous waste incinerator in East Liverpool, Ohio.

Every citizen is entitled to be heard by his or her elected officials on matters of concern, and WTI's supporters have every right to meet with the Competitiveness Council staff. However, we want you to know that we have studied this highly controversial incinerator very carefully, and there is nothing about it that involves excessive government regulation, red tape or hindrance of business. To the contrary, permits to build the WTI incinerator were handed over by state and federal regulators with little regard for the law. USEPA officials admitted to Congress that the agency broke the nation's hazardous waste law when it issued WTI an operating permit in 1983.

The Attorney General of West Virginia has a nine count lawsuit against WTI, USEPA and Ohio EPA currently pending in Federal District Court. Administrative appeals relating to Ohio EPA's permits to WTI are pending before the Ohio Board of Environmental Review. A House Judiciary Subcommittee is investigating the role of USEPA in issuing permits to the incinerator. The Ohio Attorney General is investigating to ascertain who the true owners of WTI are pursuant to Ohio's public disclosure statute. In addition, legislation is pending on the Senate calendar that would prohibit the incinerator from operating until such time as the litigation and administrative appeals have been resolved to final judgement.

Given the tremendous amount of controversy surrounding the entire WTI matter, the ongoing litigation, inquiries and administrative appeals, we urge you in the strongest terms to

The Honorable J. Danforth Quayle
June 30, 1992
Page Two

direct the Council on Competitiveness not to intervene further. There is clearly no appropriate role for the Council in the WTI matter.

We appreciate your personal attention to this.

Sincerely yours,

Howard M. Metzenbaum

Harris Wofford

Jay Rockefeller

John D. Rockefeller, IV

Robert C. Byrd

Robert C. Byrd

vonRoll

[illegible] BLAKE MARSHALL
PRESIDENT

VON ROLL INC.
[illegible] NORTH WOODS CIRCLE
SUITE [illegible]
NORCROSS, GEORGIA [illegible]
TELEPHONE [illegible]
TELEFAX [illegible]

May 21, 1992

The Honorable J. Danforth Quayle
Vice President of the United States
The White House
Washington, D.C.

Dear Mr. Quayle,

Von Roll America, a subsidiary of Swiss-based Von Roll A.G., is engaged in an intensely pitched battle to open a $140 million hazardous waste incinerator in East Liverpool, Ohio. I believe our story -- an incredible one, to say the least -- underscores the need for the sane measures you have taken to balance the nation's regulatory process and put America back to work.

Almost two years ago we approached the United States EPA for permission to include some advanced pollution control equipment in the design of the plant, which could have been built as originally designed and permitted back in the mid-1980s. This equipment, essentially a sophisticated spray dryer, would eliminate any low-grade contaminated waste water from going into the municipal water system. Its effectiveness has been proven at other Von Roll facilities since the Ohio permits were originally secured. Incorporating the spray dryer would not save the company any money; quite the contrary, but was considered essential because Von Roll, with over 500 environmental facilities world-wide, wanted to own and operate the world's most advanced facility in North America for obvious business advantages.

Had the company not taken the initiative to ask for this environmental improvement, the plant would now be in commercial operation.

Instead, the plant sits idle. We are $15 million over budget, technically in default with our bankers and the future of our 100 highly trained employees is uncertain. Also uncertain is the waste treatment opportunities for our three primary customers -- Du Pont, BASF and Chemical Waste Management -- each of which pre-purchased the plant's capacity for the next ten years. More than 60 companies, employing some 90,000 workers, will feed the plant via Chem Waste. The demand for capacity illustrates need.

vonRoll

Honorable J. Danforth Quayle
May 21, 1992
Page Two

The re-regulatory process over the last two years regarding this one piece of proven technology - - a benefit to the environment --has placed us squarely at the mercy of the regulatory process run amok. Both the state and federal EPAs approve of the spray dryer, we finally got the U.S. EPA permit in February. But our initiatives to improve the plant gave opponents opportunity to file appeals to the permit. This action puts us on hold while the highest levels of EPA review the appeals. The valid permits to construct we once had are now invalid. We sought environmental improvements (in keeping with the plant's purpose to provide environmental solutions in the treatment and destruction of wastes) but now we wait with new roadblocks to operation cropping up almost daily.

Ironically, we believe the regulators are impressed with both our technologies and commitment to safety. For example, even without the spray dryer the plant's emissions will be magnitudes lower than what the EPA deems safe. We are the only company within the industry, and perhaps within all of industry, that has willingly published our expected emissions and made a commitment to voluntarily achieve these low levels.

Clearly, we did not foresee that Greenpeace would use our efforts to improve the plant as an opening to mount significant smear campaigns against the company and enlist short-sighted politicians who are unwilling to deal realistically with our nation's industrial waste issues. Together these groups have severely criticized and pressured the EPA, which has responded almost to the point of inaction. This scenario has been our reality, bringing the company to the brink of default.

And yet while these obstructionist groups use every possible regulatory avenue to impede progress, the majority of the residents support the plant. I believe we have earned the respect of regulators, Governor George Voinovich, the local and state Chamber of Commerce and the Ohio Manufacturing Association. A show of support rally for the plant this past weekend drew more than 1,000 people, three times the number plant opponents have been able to gather at any given time. And there have been over 10,000 job applications. Yet, with all this support, the regulatory "due process" is stacked against both the creation of industry in America and certainly against environmental incentives.

Mr. Quayle, over the last several months you have spoken up for companies like mine. To move forward we must have a 180 day temporary authorization permit from the U.S. EPA, which can be granted while the EPA reviews the appeals. I believe we need your help and ask that you please consider whether there is anything you can do to assist Von Roll.

T[illegible] be allowed to move forward would signal to industry everywhere that the barriers to entry are formidable and that any initiative to build better and safer can be a death sentence.

Yours very truly,

VON ROLL, INC.

D. J. B. Marshall
President

cc: Mr. C. Boyden Gray
Honorable Samuel K. Skinner
Dr. Michael J. Boskin
Mr. William K. Reilly