Department of Energy
Washington, DC 20585

October 4, 2012

MEMORANDUM FOR: **GLENN S. PODONSKY**
CHIEF HEALTH AND SAFETY AND SECURITY OFFICER
OFFICE OF HEALTH, SAFETY AND SECURITY

FROM: **DAVID S. SHAFER, PH.D.**
OFFICE OF LEGACY MANAGEMENT
ASSET MANAGEMENT TEAM LEAD

Tracy A. Robinson for

SUBJECT: Supplement to the 2011 Annual Site Environmental Reporting for Department of Energy Legacy Management Sites

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Identified below are lawsuits to which the U.S. Department of Energy Office of Legacy Management (DOE-LM) was an involved party during 2011. Please include this memorandum as a supplement to the Annual Site Environmental Reporting (ASER) for calendar year 2011 which was submitted by DOE-LM on October 1, 2012.

1. **Uranium Leasing Program (ULP) Lawsuit**

   Colorado Environmental Coalition v. Office of Legacy Management, 819 F. Supp. 2d 1193 (D. Colo. 2011), amended on reconsideration, 2012 U.S. Dist. LEXIS 24126 (D. Colo. Feb. 27, 2012).

   On July 31, 2008, a lawsuit was filed against the DOE in the United States District Court for the District of Colorado (CEC v. DOE), on behalf of four environmental organizations. The complaint alleged that (1) DOE violated the National Environmental Policy Act (NEPA) multiple times during the last few years by its actions taken in conjunction with the DOE ULP, including the entire programmatic environmental assessment process; and (2) through its actions, DOE is responsible for the resurgence of activity within the domestic uranium industry.

   On March 26, 2010, the Plaintiffs in the lawsuit, CEC v DOE, amended their complaint to add alleged violations of the Endangered Species Act. Additionally, as part of the amended complaint, a fifth environmental organization joined the Plaintiffs.

   On October 18, 2011, the Court issued an adverse ruling in the case. The Court invalidated the 2007 Programmatic Environmental Assessment and Finding of No Significant Impact and enjoined DOE from leasing-related activities.

   On December 9, 2011, DOE filed a motion with the Court to reopen and reconsider the previous decision. On February 27, 2012, the District Court granted in part DOE's motion for reconsideration and modified its injunction in order to permit DOE and the ULP lessees to conduct only certain specified activities that are absolutely necessary.

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2. **El Paso Lawsuit**

El Paso Natural Gas Co. v. US, 632 F.3d 1272 (D.C. Cir. 2011).

The El Paso Natural Gas Co. (EPNG) filed suit in May 2007 against the U.S. (numerous agencies), claiming, among other things, that DOE failed to designate certain sites as vicinity properties during the Uranium Mill Tailings Radiation Control Act (UMTRCA) cleanup of the Tuba City Mill Site on the Navajo Reservation in Arizona. EPNG also claimed that if UMTRCA did not apply, then the Resource Conservation and Recovery Act (RCRA) applied. EPNG asked for a judgment under UMTRCA declaring that DOE is exclusively responsible for the remediation of the groundwater and soil at the sites allegedly contaminated by residually radioactive uranium mill waste materials. Under the alternative RCRA claim, EPNG is seeking a permanent injunction ordering the U.S. to perform cleanup activities necessary to abate present and imminent threats to human health or the environment caused by U.S. treatment, storage, disposal or management of solid, hazardous or radioactive waste and is seeking further appropriate civil penalties to be paid to the U.S. Treasury. Because EPNG was a former operator of the mill site it also asked for the U.S. to prospectively reimburse it for the cost of all cleanup activities which EPNG may be ordered or required to perform at the specified sites.

The Navajo Nation filed to intervene and became party to the lawsuit in May 2009. In addition to alleging the same violations raised by EPNG's RCRA and UMTRCA claims, the Tribe also alleged various other claims under federal and tribal law. Numerous court rulings favoring the U.S. followed, including a subsequent appeal by the Plaintiffs upholding the dismissal of the UMTRCA claims. Most recently the U.S. District Court for the District of Columbia ruled in May 2012 to dismiss the lawsuit. In August 2012, both EPNG and the Navajo Nation filed appeals, seeking review of the District Court's final judgment and previous rulings.

The Court of Appeals affirmed, finding the claim was not subject to judicial review, and the cannon of statutory interpretation directing courts to construe statutes in favor of Native Americans did not apply to UMTRCA.

3. **Church Rock Lawsuit**

General Electric Co. v. US, Civil Action No. 1:10-CV-00404 (N.M. Dist. Ct. 2011).

On April 26, 2010, Plaintiffs, General Electric Company (GE) and United Nuclear Corporation (UNC), brought action against the United States Department of the Interior, the United States Bureau of Indian Affairs, the United States Department of Energy, and the United States Nuclear Regulatory Commission seeking declaratory relief, cost recovery, and contribution under CERCLA for Defendants' actions at the Northeast Church Rock Mine site (the Site).

Plaintiffs sought to recover or obtain contribution for certain costs allegedly incurred in response to the release or threatened release of hazardous substances at the Site, as well as a declaration as to the liability of the U.S. for costs to be incurred at the Site in the future. After GE and UNC filed their complaint in April 2010, the Parties agreed to a series of extensions of the United States' answer date to allow time for settlement negotiations. Defendants filed an answer and a counterclaim against UNC on April 25, 2011. On May 19, 2011 UNC filed its answer to the Defendants' counterclaim. A consent decree was filed on September 1, 2011 resolving any and all claims potentially asserted by the Plaintiffs against the U.S., establishing cost allocation, but not addressing liability or issues of fact or law.

Under the consent decree, GE and UNC agreed not to sue the U.S. and released all claims or causes of action under CERCLA. Additionally, GE and UNC agreed to indemnify and hold harmless the U.S. against all future claims or causes of actions with regard to the contamination at the Site. The court found that the U.S. was entitled to contribution protection under CERCLA Section 1130(1), 42 U.S.C. § 96130(1), and the U.S. agreed to pay Plaintiffs the sum of $2,523,124.00 to reimburse a portion of their past response costs, and to pay a defined percentage of any future response costs incurred by Plaintiffs at the Site.

Please call me at (720) 880-4347 if you have any questions. Please address any correspondence to:

U.S. Department of Energy
Office of Legacy Management
2597 Legacy Way
Grand Junction, CO 81503

cc w/attachment:
R. Natoli, DOE
D. Geiser, DOE-LM (e)
T. Pauling, DOE-LM (e)
T. Ribeiro, DOE-LM (e)
S. Osborn, Stoller (e)
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