STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 25, 2015

Via e-mail to steven.croley@hq.doe.gov
and U.S. Postal Service

Mr. Steven P. Croley
General Counsel
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Dear Mr. Croley:

Thank you for your September 22, 2015 letter in response to my August 14, 2015 letter addressed to John Kotek, Acting Assistant Secretary for the Office of Nuclear Energy, DOE. Based upon your assertions of exigency to make a decision, may I respectfully suggest that face-to-face negotiations will be more efficient and productive. I will make myself available for negotiations. In the spirit of advancing discussion, however, I provide the following response to your letter.

Your letter acknowledges that Governor Otter and I sent a letter on January 8, 2015 addressed to DOE Secretary Dr. Ernest J. Moniz in response to his December 31, 2014 request to allow SNF shipments to enter Idaho. Our January 8, 2015 letter complied with the Secretary's demand that we respond within eight days, and, in part, provides as follows:

> *As you are aware, the 2011 Memorandum of Agreement is not operative at this time because DOE is not in compliance with the 1995 Settlement Agreement. Nonetheless, Idaho remains supportive of the type of research described in your letter and will grant a* ***one-time, conditional waiver*** *to allow receipt of the proposed SNF shipments at INL* ***if*** *DOE and Idaho are able to agree upon an enforceable commitment and timeframe for timely resolving the 1995 Settlement Agreement noncompliance issues. (Emphasis added.)*

You are no doubt aware that on January 8, 2015, and still today, DOE is not in compliance with the 1995 Settlement Agreement in two primary areas. First, since December 31, 2014 DOE has failed to comply with its obligation to ship 2,000 cubic meters of Transuranic (TRU) waste to WIPP, or some other facility (1995 Settlement Agreement

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paragraph B. 1. C).[1] Second, DOE was to have completed calcination of sodium bearing high level liquid waste on December 31, 2012 (1995 Settlement Agreement paragraph E. 5). DOE has not met that deadline and 900,000 gallons of sodium bearing high level liquid waste remain in aging tanks overlying the Snake River Plain Aquifer. As you are aware, DOE's failure to comply with these two terms of the 1995 Settlement Agreement invoke Idaho's **sole remedy**, which is to preclude shipments of SNF to Idaho (1995 Settlement Agreement paragraphs B. 2. and E. 9). That remedy has been in place since December 31, 2012 and will remain so until DOE satisfactorily addresses its noncompliance.

In the second paragraph of your September 22 letter, you state:

> *As Mr. Kotek has previously indicated, additional conditions cannot form the basis of a reasonable accommodation.*

I find this assertion curious. DOE has specifically requested and sought a waiver. It is reasonable for Idaho to request compliance with the direct terms of the 1995 Settlement Agreement as a pre-condition to DOE's request to waive another provision of the same Agreement. This is particularly so when one considers that the 1995 Settlement Agreement contains the terms to which DOE voluntarily agreed. Those terms are contained in an Order issued by the Federal District Court and the Settlement Agreement was subjected to, and passed, a referendum by the citizens of the State of Idaho. Therefore, I have great difficulty understanding your assertion that these terms are "additional conditions." Rather, what I have proposed are simply measures to be negotiated to assure compliance with terms of the Settlement Agreement.

The second paragraph of your letter further provides:

> *Nor are additional conditions consistent with the expectations of representatives of the Department following meetings with Idaho's Department of Environmental Quality that lead [sic] to the March signing of the Notice of Non-Compliance Consent Order.*

There is no basis for DOE to have expected that the IDEQ Consent Order would substitute for compliance with the Settlement Agreement. As you recall, I sent a letter to Dr. Ernest J. Moniz dated February 27, 2015 reaffirming my position that DOE must "enter into an enforceable agreement to resolve the 1995 Settlement Agreement noncompliance issues." This letter was sent and received well before DOE signed the Consent Order with IDEQ and again put DOE on notice that signing the Consent Order was not going to fully resolve DOE's noncompliance with the 1995 Settlement Agreement. With some redundancy, I specifically noted in the letter my expectation that DOE have the Integrated

[1] I have personally viewed DOE's cleanup activity at INL and sincerely applaud DOE's successful efforts to continue cleanup and prepare TRU waste for shipment to WIPP or some other facility. I have also personally visited WIPP and recognize the challenges DOE faces in reopening that facility.

Waste Treatment Unit (IWTU) operational as a pre-condition to importing the designated SNF shipments into Idaho.[2]

As General Counsel for the Department of Energy, you understand both the legal and practical difference between the 1995 Settlement Agreement and the IDEQ Notice of Non-Compliance Consent Order. The 1995 Settlement Agreement is the resolution of a separate lawsuit by the State of Idaho against DOE. The IDEQ Notice of Non-Compliance Consent Order is issued in an enforcement action by IDEQ for a variety of DOE RCRA violations. Although addressing similar issues, the two proceedings are not the same.

While the Consent Order signed in March addresses DOE's noncompliance with the RCRA Consent Order, DOE has yet to address its noncompliance with the 1995 Settlement Agreement and has not yet suggested a pathway forward to bring DOE into compliance. This was made clear in both the January 8 and February 27 letters, which directly stated that the condition precedent for DOE receiving a waiver is for DOE to resolve "the **1995 Settlement Agreement** noncompliance issues." (Emphasis added.) DOE entering into the IDEQ Notice of Non-Compliance Consent Order and agreeing to pay penalties, did not, in any way, resolve the 1995 Settlement Agreement noncompliance issues. The path forward to resolve the 1995 Settlement Agreement noncompliance issues is for DOE to perform. I continue to wait for any proposal DOE wants to make or discussion DOE may wish to have on these issues.

DOE has repeatedly assured me that the IWTU will be operational. I take DOE at its word. If DOE believes the IWTU will be operational[3], it should have no difficulty agreeing

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[2] The redundancy to which I refer is the fact that the January 8 letter refers to the "1995 Settlement Agreement noncompliance issues." As I have previously pointed out in this letter, there are two such issues: 1) failure to ship TRU Waste; and 2) failure to process 900,000 gallons of sodium bearing high level liquid waste. As you are aware, the machine designed to process the liquid waste is called the Integrated Waste Treatment Unit (IWTU). The startup of the IWTU was the subject of direct discussions between me and DOE Representatives Pete Lyons, Liz Ramsey and Mark Whitney in my office on January 6, 2015. The DOE representatives indicated that (although they did not promise) they were confident the IWTU would be operational in September 2015. I took them at their word. As a consequence, my decision to agree to negotiate a one-time conditional waiver was itself conditioned on the DOE representation that the IWTU would be operational in September 2015. Therefore, the issue concerning the IWTU was included in the January 8 letter as one of the two "1995 Settlement Agreement noncompliance issues."

However, as my February 27 letter pointed out, DOE representatives negotiating with the IDEQ repudiated the prior DOE representations that the IWTU would be operational in September 2015. When DOE representatives changed their position during the negotiations with IDEQ, it became apparent that I needed to reiterate the condition precedent to DOE obtaining a waiver. As a consequence, I sent the February 27 letter that restated the condition that DOE "enter into an enforceable agreement to resolve the 1995 Settlement Agreement noncompliance issues" and for emphasis and clarity, redundantly stated that I would negotiate a conditional waiver, "provided the Integrated Waste Treatment Unit was operational before December 31, 2015."

[3] Please note that my definition of "operational" comes from Bill Lloyd, the lead engineer on the IWTU. Mr. Lloyd told me that he would deem the IWTU operational after it has generated 100 casks of dry waste.

to its operation as a pre-condition to the receipt of SNF. Again, I await any proposal DOE wants to make or discussion DOE may wish to have on this issue.

Your September 22, 2015 letter indicates that you received my letter of August 14, 2015 that included an attached draft conditional waiver with a number of terms that may need further discussion and explanation. In order to allay any of your concerns, I reiterate that I stand ready to discuss that proposal. Although Mr. Kotek has proposed alternatives, these alternatives continue to neglect my condition that a waiver address DOE's noncompliance with the 1995 Settlement Agreement.

For example, terms relating to TRIGA waste and EBR-2 waste were suggested by Mr. Kotek as an alternative to having the IWTU operational. While I told Mr. Kotek that proposal did not suffice as an alternative, I indicated a willingness to consider TRIGA and EBR-2 as one element of the waiver agreement. Thus, I included this proposal in the draft conditional waiver. I await any discussion you may wish to have with regard to the draft conditional waiver.

Finally, I note that your September 22, 2015 letter creates a self-imposed October 9, 2015 deadline for reaching a "final written agreement on a waiver." That is certainly possible if DOE engages in meaningful, good faith negotiations. I have not imposed **any** deadlines in this matter and I have been available to discuss all issues with DOE on an expedited basis since DOE contacted me on December 31, 2014. For DOE to dictate deadlines to Idaho without addressing the 1995 Agreement with me is unacceptable.

Please note that I have responded within three days. In contrast, DOE took some 39 days to respond to my last letter. As you know, negotiations involve give and take. I again suggest that face-to-face negotiations with persons from DOE authorized to resolve these issues would be more productive.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

LGW:jc

C: The Honorable C. L. "Butch" Otter