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**NOTICE OF VIOLATION OPERABLE UNIT 5 -
ACCESS ISSUES**

12-19-90

DOE/USEPA

DOE-472-91

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LETTER

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Department of Energy

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DEC. 19, 1990

DOE-472-91

Mr. David A. Ullrich, Director
Waste Management Division
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. Ullrich:

NOTICE OF VIOLATION OPERABLE UNIT 5 - ACCESS ISSUES

This is in response to the Notice of Violation (NOV) of December 4, 1990 in which U.S. EPA Region V alleged that the Department of Energy (DOE) had violated Section XXVIII of the Consent Agreement by failing to refer to the Department of Justice (DOJ) certain cases in which DOE was not able to obtain voluntary access to private property. The access in question was to properties identified as necessary to conduct the Paddy's Run South Seepage Investigation. The Work Plan for this effort was approved by Region V on September 7, 1990 and referral of the cases in question to the DOJ had not been made as of the date of the NOV.

DOE will not institute Dispute Resolution under Section XIV of the Consent Agreement with respect to the date of submission of the Work Plan Addendum for the Paddy's Run South Seepage Investigation, the date of Region V's approval, and the fact that DOE had not referred any cases to DOJ as of November 6, 1990. DOE is not admitting, however, that its failure to invoke dispute resolution with respect to these events constitutes a violation of the Consent Agreement.

DOE hereby invokes the provisions of Section XIV, Resolution of Disputes, with respect to Region V's assessment of stipulated penalties under Section XVII of the Consent Agreement. Section XVII, as negotiated by U.S. EPA and DOE, was not intended to cover matters such as access issues during the Remedial Investigation/Feasibility Study; DOE's position in this regard will be articulated further later in this letter.

Access for Work Plan Addendum

The approved Work Plan Addendum states that up to twelve 2000-series wells (and up to twelve 3000-series wells) plus two stilling wells will be installed for the Paddy's Run South Seepage Investigation. The approximate locations

for all the wells (26 total) were shown on the map attached to the Work Plan Addendum. The wells will provide sampling points for water-level measurements and water quality data in the Paddy's Run area of the south plume. DOE's map showed wells on twelve parcels of property not owned by the United States. By November 7, 1990, seven of the twelve property owners had signed access agreements or letters voluntarily consenting to DOE's access. DOE obtained the signature of the eighth property owner on November 19, 1990. On December 4, 1990, DOE was still working to obtain the voluntary access to the remaining four properties. Since that time, one of the four property owners referred to in your letter has signed a licensing agreement with our contractor. DOE is preparing referrals on the three remaining property owners. At the same time, DOE has obtained voluntary agreement for access for alternate locations in these three cases. We have signatures from some of the owners of the alternate locations and are awaiting signature from other owners who have advised that they will sign the proposed access agreements. By separate correspondence, DOE will request EPA's expedited review and approval of these alternate locations.

Performance of Its Obligations Under the Consent Agreement

DOE agreed in the 1990 Consent Agreement to exercise its access authorities under Section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as amended, 42 U.S.C. Section 9604(e) when necessary to assure timely performance of its obligations under the Consent Agreement. The Consent Agreement allots sixty (60) days within which DOE must obtain voluntary access from private landowners or refer them to DOJ for access when necessary to assure timely performance of its obligations under the Consent Agreement.

DOE agrees that it exceeded 60 days in securing access with respect to four of a possible twelve locations in the approved Work Plan Addendum. However, DOE does not agree that this automatically affects timely performance of obligations under the Consent Agreement. If the alternate locations are acceptable, the delays in obtaining access will not necessarily affect performance of the Work Plan Addendum. Refer any questions concerning the alternate locations, to Mr. Carlos J. Fermainnt at FTS 774-6157.

DOE recently committed to streamline its internal process for preparing and submitting referrals to DOJ. DOE does not believe, however, that each referral to DOJ in order to comply with the requirements of Section XXVIII of the Consent Agreement will result in automatic litigation. While DOE had committed to make the referral, DOE also believes that the responsible exercise of its authority under Executive Order 12580 requires that it inform DOJ of all factors relevant to the referral, upon which DOJ will make its decision as to what action is in the best interests of the United States. DOJ should be advised of the potential benefits and risks to the United States associated with a prospective lawsuit. DOJ should also be advised when a referral may lead to litigation that may not be the most expeditious or appropriate means for implementing work under the Consent Agreement. Finally, DOJ needs to know when access can be obtained to technically suitable alternative locations more quickly than resorting to litigation.

Stipulated Penalties Assessment

DOE invokes the provisions of Section XIV, Resolution of Disputes, concerning the assessment of stipulated penalties. In negotiating the model language of the Stipulated Penalties provision, DOE and EPA agreed that the language "fails to comply with a term or condition of this Agreement which relates to a removal or final remedial action" refers to a failure on DOE's part during the implementation stage of a cleanup under an agreement. The model language is not a broad authorization to assess stipulated penalties concerning alleged failures in the investigative stage of activities under an agreement except for the failure to submit primary documents in accordance with the schedules specified in the Consent Agreement.

DOE negotiated the FMPC Consent Agreement in good faith with EPA. In doing so, however, it entered into the Agreement in advance of the statutory mandate for entering an interagency agreement. As you know, Section 120(e)(2) of CERCLA requires federal agencies to enter into interagency agreements such as this within 180 days after completion of the Remedial Investigation and Feasibility Study (RI/FS). The purpose of the Agreement is to facilitate "expeditious completion...of all necessary remedial action." EPA's use of stipulated penalties in this matter is without foundation in the statute and is particularly inappropriate when considering the language of Section 120, DOE's good faith in entering into an agreement before it is required by the statute, and the negotiated scope of the model provision.

This constitutes a written statement of dispute pursuant to Section XIV, Resolution of Dispute, regarding the inappropriate assessment of stipulated penalties.

Sincerely,



Gerald W. Westerbeck
FMPC Site Manager

cc:

- R. P. Whitfield, EM-40, FORS
- R. P. Berube, EH-20, FORS
- W. D. Adams, EW-90, ORO
- C. S. Przybylek, CC-10, ORO
- J. S. Rogers, DOJ
- V. A. Adamkus, U.S. EPA-V

bcc:

- W. H. Britton, WMCO
- S. M. Peterman, WMCO
- J. D. Wood, ASI
- R. L. Glenn, Parsons