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**NOTICE OF DISPUTE - U.S. EPA DISAPPROVAL -
OPERABLE UNIT 4 REMEDIAL INVESTIGATION
(RI) REPORT AND U.S. EPA NOTICE OF
VIOLATION (NOV)**

12/20/90

**DOE-452-91
DOE-FMPC/USEPA
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ENCLOSURE**



Department of 948
FMPC Site Office
P.O. Box 398705
Cincinnati, Ohio 45239-8705
(513) 738-6319

DEC 20 1990
DOE-452-91

Mr. David A. Ullrich, Director
Waste Management Division
U. S. Environmental Protection Agency
Region V - 5H-12
230 South Dearborn Street
Chicago, IL 60604

Dear Mr. Ullrich:

NOTICE OF DISPUTE - U. S. EPA DISAPPROVAL - OPERABLE UNIT 4 REMEDIAL INVESTIGATION (RI) REPORT AND U. S. EPA NOTICE OF VIOLATION (NOV)

- References:
- 583 1) Letter, DOE-215-91, A. P. Avel to C. A. McCord and G. E. Mitchell, "Operable Unit 4 - Remedial Investigation (RI) Report," dated November 6, 1990
 - 2) Letter, DOE-336-91, A. P. Avel to C. A. McCord, "Operable Unit 4 - RI/FS Schedule," dated November 30, 1990
 - 3) Letter, DOE-366-91, A. P. Avel to C. A. McCord and G. E. Mitchell, "FMPC Remedial Investigation/Feasibility Study (RI/FS) Schedule," dated December 6, 1990
 - 4) Letter, D. A. Ullrich to W. D. Adams, "Notice of Violation OU#4 RI/Risk Assessment U.S. DOE Fernald OH6 890 008 976," dated December 7, 1990
 - 5) Letter, C. A. McCord to A. P. Avel, "OU#4 Disapproval U.S. DOE Fernald OH6 890 008 976," dated December 7, 1990

The second draft of the Operable Unit 4 Remedial Investigation (RI) Report was transmitted to U. S. EPA and Ohio EPA on November 6, 1990 (Reference 1). This report was revised based on earlier U. S. EPA and Ohio EPA comments and included all site characterization data that had been obtained for Operable Unit 4. DOE disputes both U. S. EPA's disapproval of the RI Report and U. S. EPA's Notice of Violation (NOV) and proposed stipulated penalty assessment. This dispute, and its resolution, affects all subsequent work, primary and secondary documents, proposed plan, and draft Record of Decision for Operable Unit 4.

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As U. S. EPA is aware, DOE began a project to resample the K-65 Silos in February, 1990. This resampling was a follow-up to sampling which had taken place in the Summer of 1989. The Summer of 1989 sampling was not completely successful because it did not obtain a complete cross section of the silo contents. The samples obtained were analyzed and the results were included in Reference 1. The Consent Agreement schedule for Operable Unit 4 assumed that the Summer of 1989 sampling would be completed successfully. The goal of the resampling, which began in February, 1990, is to obtain a complete cross section of the silo contents to determine the physical characteristics of the material from top to bottom and to confirm the radiological and chemical data from the prior sampling. Sampling of the silo berms and borings underneath the silos is also planned in conjunction with the residue resampling.

The U. S. EPA is also aware that a number of unforeseen events prevented completion of the resampling (and subsequent analytical work) before submittal of the RI Report. In March, 1990 the Radon Treatment System, which is used to reduce the radiation levels on the silo domes for worker safety and health, was found to have a crack in the piping system. The repair, testing, and start-up of this system required approximately six months. Also, because of uncertainties in the structural integrity review of the silo domes, safety nets were installed around each manway for worker safety. The procurement, preparation of procedures, and installation of the safety nets added another one-month delay to the start of resampling.

The technical difficulties which have been encountered in the resampling effort were reported to U. S. EPA, Ohio EPA and RI/FS Project Managers on a regular basis through monthly Project Managers meetings, monthly progress reports, and through the review cycle for the approval of the resampling procedures. Ohio EPA approved the resampling procedures on July 26, 1990; U. S. EPA verbally approved the procedures on October 9, 1990, but to date has not provided written approval. To preclude further delay of the resampling, DOE started the resampling effort in October based on U. S. EPA verbal approval. The latest revised K-65 residue sampling procedures were transmitted to U. S. EPA on November 9, 1990.

The resampling of the silos is now expected to be completed in the Spring, 1991. The schedule for completion remains subject to health and safety considerations, adverse weather, and other unforeseen events that might affect performance.

DOE, U. S. EPA, Ohio EPA, and RI/FS Project Managers met on November 27, 1990 to discuss the status of obtaining data from Operable Unit 4 and to begin initial discussions concerning Consent Agreement milestone renegotiations. This meeting was documented in Reference 2. DOE, U. S. EPA, Ohio EPA, and RI/FS Project Managers also met in Chicago on December 3, 1990 to further discuss the impact of the unanticipated technical difficulties encountered in obtaining complete site characterization data on Consent Agreement milestones. This meeting was documented in Reference 3.

On December 7, 1990, U. S. EPA transmitted a NOV (Reference 4) to DOE for violation of Section X.C. of the 1990 Consent Agreement. The U. S. EPA position maintains that the second draft of the Operable Unit 4 RI Report did not contain sufficient data to characterize the site and determine the risk to human health and the environment. DOE disagrees with this position. Also, on December 7, 1990, U. S. EPA disapproved the second draft of the RI Report (Reference 5) and invoked the dispute resolution process outlined in the 1990 Consent Agreement.

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 U. S. 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. In this case, DOE submitted the primary document on schedule. The model Stipulated Penalty provision is not authorization to assess penalties for unanticipated technical difficulties in the Remedial Investigation.

DOE negotiated the FMPC Consent Agreement in good faith with U. S. 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/Feasibility Study (RI/FS). The purpose of the agreement is to facilitate "expeditious completion . . . of all necessary remedial action." U. S. 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 NOV and proposed assessment of the stipulated penalties for the Operable Unit 4 RI Report, and the disapproval of the RI Report.

Sincerely,



Gerald W. Westerbeck
FMPC Site Manager