

997

G-000-710.8

**WRITTEN STATEMENT TO SENIOR EXECUTIVE  
COMMITTEE - CONSOLIDATED DISPUTES ON  
STIPULATED PENALTIES**

**01/28/91**

**DOE-627-91  
DOE-FMPC/DOE-OR/USEPA  
5  
LETTER**



**Department of Energy**

997

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

JAN 25 1991

DOE-627-91

Mr. Joe La Grone, Manager  
Oak Ridge Operations  
U. S. Department of Energy  
200 Administration Road  
Oak Ridge, TN 37830

Mr. Valdas V. Adamkus, Regional Administrator  
U. S. Environmental Protection Agency  
Region V - 5A-14  
230 South Dearborn Street  
Chicago, IL 60604

Dear Mr. La Grone and Mr. Adamkus:

**WRITTEN STATEMENT TO SENIOR EXECUTIVE COMMITTEE - CONSOLIDATED  
DISPUTES ON STIPULATED PENALTIES**

This letter is a written statement to the Senior Executive Committee (SEC) under Section XIV.F. (RESOLUTION OF DISPUTES) of the 1990 Consent Agreement between the U. S. Department of Energy (DOE) and the U. S. Environmental Protection Agency (EPA). There are now three unresolved disputes between our agencies over the application of the stipulated penalties provision of the Consent Agreement. These disputes were initiated by DOE and involve a common issue. The Dispute Resolution Committee (DRC) has been unable to unanimously resolve these disputes within the twenty-one days allotted under the Consent Agreement. DOE is consolidating the three disputes in this letter and forwarding them to you for resolution as required by Section XIV.E. of the Consent Agreement.

This consolidated dispute is over EPA's application of stipulated penalties under Section XVII (STIPULATED PENALTIES) of the Consent Agreement. EPA is assessing stipulated penalties against DOE for: (1) alleged failures to comply with Section XVIII (ACCESS) of the Consent Agreement (References 1 through 5, described in enclosure); (2) alleged deficiencies in the Operable Unit #4 Remedial Investigation/Risk Assessment Report (References 6, through 11, described in enclosure); and (3) alleged deficiencies in the Operable Unit #3 Initial Screening of Alternatives Report (References 12 through 14, described in enclosure).

The issue common to the three disputes is one of a fundamental difference in interpretation over EPA's use of the stipulated penalties provision of the Consent Agreement. DOE believes that Section XVII (STIPULATED PENALTIES) of the Consent Agreement does not authorize the assessment or imposition of stipulated penalties for the failures/deficiencies alleged by EPA to have occurred before implementation of a remedial action. The stipulated penalties provision is "model" language negotiated in 1988 between Headquarters' representatives of our agencies and, as such, represents a voluntary agreement between our agencies to include stipulated penalties in interagency agreements (IAGs) pursuant to Section 120 of CERCLA of 1980, as amended, 42 USC Section 9620. Although the statute provides for civil penalties for enforcement of violations of IAGs entered into for remedial action implementation, stipulated penalties are not required. Numerous discussions were held between DOE and EPA Headquarters regarding the potential use and scope of stipulated penalties in IAGs entered into for remedial studies. The conclusion of those discussions resulted in DOE's agreement to include a stipulated penalties model provision for these IAGs while EPA agreed that the scope of application of those penalties would be very limited and the assessed amounts per week would be small. Specifically, DOE and EPA representatives agreed that penalties could be assessed for 1) the failure to submit any primary documents, and 2) the failure to comply with a term or condition relating to remedial action implementation. DOE agreed to the first because it agreed that schedule milestones should be met. DOE agreed to the second because the statute is clear that full civil penalties could be assessed to enforce the terms and conditions of the IAG for remedial action implementation. Therefore, DOE's understanding of the negotiated provision is that the phrase "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 IAG. DOE does not believe that the model language is a broad authorization to assess stipulated penalties for alleged failures or deficiencies in the investigatory stage of activities under an IAG except for failures to submit primary documents in accordance with agreed schedules. None of these disputes involve such a failure.

To further clarify DOE's dispute, it is important to note that it entered into the 1990 Consent Agreement for the Feed Materials Production Center (FMPC) in advance of the statutory deadline for entering interagency agreements. Section 120(e)(2) of CERCLA, 42 USC Section 9620(e)(2) requires federal agencies to enter into interagency agreements such as the FMPC Consent Agreement within 180 days after completion of the remedial investigation and feasibility study. The purpose of those agreements is to facilitate "expeditious completion . . . of all necessary remedial action" as stated in Section 120(e)(2). DOE believes that EPA's use of stipulated penalties at the FMPC is without foundation in the statute. DOE also believes that it is inappropriate because it entered into an interagency agreement in good faith before it was required to do so under the statute.

## References for DOE-627-91

**Written Statement to Senior Executive Committee - Consolidated Disputes on Stipulated Penalties****OPERABLE UNIT 5**

- 1) Letter, D. A. Ullrich, Director, Waste Management Division to W. D. Adams, Acting Assistant Manager for Environmental Restoration and Waste Management, "Notice of Violation OU #5 Access," dated December 4, 1990
- 2) Letter, DOE-472-91, G. W. Westerbeck, FMPC Site Manager to D. A. Ullrich, Director, Waste Management Division, "Notice of Violation Operable Unit #5 - Access Issues," dated December 19, 1990
- 3) Letter, C. A. McCord, Remedial Project Manager to A. P. Avel, Remedial Project Manager, "OU #5 Access Dispute," dated January 4, 1991
- 4) Letter, DOE-563-91, G. W. Westerbeck, FMPC Site Manager to W. Muno, Associate Director, Waste Management Division, "Operable Unit 5 Access Dispute," dated January 9, 1991
- 5) Letter, C. A. McCord, Remedial Project Manager to A. P. Avel, Remedial Project Manager, "OU #5 Access Dispute," dated January 17, 1991

**OPERABLE UNIT 4**

- 6) Letter, D. A. Ullrich, Director, Waste Management Division to W. D. Adams, Acting Assistant Manager for Environmental Restoration and Waste Management, "Notice of Violation OU #4 RI/Risk Assessment," dated December 7, 1990
- 7) Letter, DOE-452-91, G. W. Westerbeck, FMPC Site Manager to D. A. Ullrich, Director, Waste Management Division, "Notice of Dispute - U. S. EPA Disapproval - Operable Unit 4 Remedial Investigation (RI) Report and U. S. EPA Notice of Violation (NOV)," dated December 20, 1990
- 8) Letter, C. A. McCord, Remedial Project Manager to A. P. Avel, Remedial Project Manager, "Extension Request OU #4 FS Report," dated December 19, 1990
- 9) Letter, DOE-499-91, G. W. Westerbeck, FMPC Site Manager to D. A. Ullrich, Director, Waste Management Division, "Supplement to Notice of Dispute - Operable Unit 4 Remedial Investigation (RI) Report," dated December 26, 1990
- 10) Letter, C. A. McCord, Remedial Project Manager to A. P. Avel, Remedial Project Manager, "OU #4 RI Dispute," dated January 4, 1991
- 11) Letter, C. A. McCord, Remedial Project Manager to A. P. Avel, Remedial Project Manager, "Dispute OU #4 RI," dated January 10, 1991

OPERABLE UNIT 3

- 12) Letter, D. A. Ullrich, Director, Waste Management Division to W. D. Adams, Acting Assistant Manager for Environmental Restoration and Waste Management, "Notice of Violation OU #3 ISA Report," dated December 21, 1990
- 13) Letter, DOE-535-91, G. W. Westerbeck, FMPC Site Manager to D. A. Ullrich, Director, Waste Management Division, "Notice of Dispute - U. S. EPA Disapproval of Operable Unit 3 - Initial Screening of Alternatives (ISA) Report and U. S. EPA Notice of Violation," dated January 4, 1991
- 14) Letter, DOE-626-91, G. W. Westerbeck, FMPC Site Manager to W. E. Muno, Associate Director, Waste Management Division, "Operable Unit 3 Dispute," dated January 18, 1991

Section XIV.F. (RESOLUTION OF DISPUTES) affords the SEC twenty-one days within which to resolve a dispute. If the SEC cannot reach an unanimous resolution, the Regional Administrator issues a written position of the dispute. Within twenty-one days, DOE may then elevate the dispute to the EPA Administrator.

Sincerely,



Gerald W. Westerbeck  
FMPC Site Manager

Enclosures: As stated

cc w/encl.:

R. P. Whitfield, EM-40, FORS  
 R. P. Berube, EH-20, FORS  
 G. L. Dever, EH-221, FORS  
 E. G. Feldt, EH-232, FORS  
 K. A. Hayes, EM-422, GTN  
 J. J. Fiore, EM-40, GTN  
 W. D. Adams, EW-90, ORO  
 P. J. Gross, SE-31, ORO  
 G. E. Mitchell, OEPA-Dayton  
 W. E. Muno, USEPA-V  
 J. Benetti, USEPA-V  
 K. J. Pierard, USEPA-V  
 D. A. Ullrich, USEPA-V  
 M. Butler, USEPA-V  
 E. Schuessler, PRC  
 R. L. Glenn, Parsons  
 W. H. Britton, WMCO  
 S. W. Coyle, WMCO  
 S. M. Peterman, WMCO  
 J. D. Wood, ASI

ERA Files  
 AR Files