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**OPERABLE UNIT 4 - DISPUTE RESOLUTION**

**10-11-90**

**DOE/USEPA**

**DOE-46-91**

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**LETTER**



**Department of Energy**

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OCT 11 1990  
DOE-46-91

Ms. Catherine A. McCord, Remedial Project Director  
U. S. Environmental Protection Agency  
Region V - 5HR-12  
230 South Dearborn Street  
Chicago, IL 60604

Dear Ms. McCord:

**OPERABLE UNIT 4 - DISPUTE RESOLUTION**

On September 4, 1990, you disapproved DOE's revised Initial Screening of Alternatives document based on nine general comments and eleven specific comments. The document is a primary report under Section XII.C. of the Consent Agreement and your disapproval followed the second review cycle for the document. You initiated informal dispute resolution and a teleconference was held on October 3, 1990 to resolve EPA's comments. Subsequently, you advised DOE that the dispute over the document "may" terminate and directed DOE to submit a revised document within twenty-one days of your October 3, 1990 letter.

Your October 3, 1990 letter "terminating" the dispute and directing DOE to revise the document is inconsistent with the procedures in Section XII of the Consent Agreement. You have directed DOE to revise the primary report within twenty-one days under Section XIV.J. of the Consent Agreement. This is inconsistent with Section XII.I. which affords DOE thirty days to finalize a final primary report following dispute of the report. Under either section, the revision must conform to the results of the dispute resolution. Therefore, DOE will revise the document within thirty days in accordance with Section XII.I. and conforming with the resolution of the dispute as outlined below.

With the exception of EPA comments pertaining to 40 CFR 191, DOE will revise the document consistent with its responses to EPA comments dated September 26, 1990, and which were discussed during the October 3, 1990 teleconference. As summarized below, DOE will revise the document on the basis that its position on the applicability of 40 CFR 191 has been sustained; therefore, DOE will not include 40 CFR 191 (Subparts A and B) as an Applicable or Relevant and Appropriate Requirement (ARAR) or a requirement To Be Considered (TBC) in the appendix.

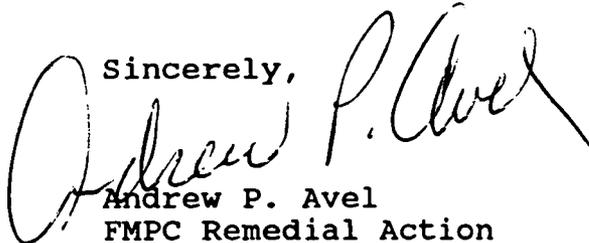
Your October 3, 1990 letter purports to "terminate" dispute resolution over the applicability of 40 CFR 191 to the K-65 residues. Yet the letter evidences that EPA still considers the judicially-remanded standards of 40 CFR 191 to be ARARs for operable unit (OU) 4. The October 3, 1990 letter does not withdraw the original September 4, 1990 comments that 40 CFR 191 (Subparts A and B) be considered a "relevant and appropriate requirement" and that the K-65 residues will "need to be handled as high level wastes." Indeed, the October 3, 1990 letter correctly identifies this issue as the focus of the dispute. Your October 3, 1990 letter does not address any of the concerns expressed by DOE in either the teleconference or its September 26, 1990 response to comments. As discussed in the teleconference, DOE cannot and does not agree with EPA's comments on the issue. Nonetheless, EPA has apparently chosen not to elevate the issue through dispute resolution. Instead, you advised DOE that a written policy statement (to be developed) for the K-65 residues will be forwarded to DOE. Your letter states that "the detailed analysis must further develop and evaluate alternatives in consideration of this policy."

EPA's formulation of a written policy statement following dispute of a primary document does not resolve the issue. Because the issue is one with significant potential for affecting the OU 4 alternatives and schedule, it is unrealistic (and outside the Consent Agreement procedures) to require DOE to later revise this and subsequent documents based on an unwritten policy. Contrary to EPA's assertions in the teleconference, any future policy is not and cannot be treated as an ARAR. Furthermore, this approach precludes any opportunity for DOE to review and comment upon significant policy issues that would otherwise be addressed through rulemaking. This approach circumvents the CERCLA's ARAR process and the Consent Agreement review and consultation process for primary decision documents. The retroactive application of a policy to be developed later does not resolve any issues/disputes raised by your September 4, 1990 comments on the applicability of judicially-remanded standards to OU 4. Such a procedure is patently unrealistic (especially when EPA cuts off dispute resolution over the issue) and may significantly impede the remedy-selection process for OU 4.

The revised Initial Screening of Alternatives document for OU 4 will be submitted to EPA on November 2, 1990.

If you have any questions, please contact me at FTS 774-6161 or Jack Craig at FTS 774-6159.

Sincerely,



Andrew P. Avel  
FMPC Remedial Action  
Project Director

cc:

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