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FERNALD DISPUTES RESOLVED

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LETTER**



United States
Environmental Protection
Agency
Washington, DC 20460

2001
United States
Department of
Energy
Washington, DC 20585



MONDAY, MAY 13, 1991

FERNALD DISPUTE RESOLVED

(EPA) Mary Mears (202) 382-4355
(DOE) Fred C. Lash (202) 586-5806

The U.S. Environmental Protection Agency (EPA) and the Department of Energy (DOE) today announced a resolution to a dispute involving implementation of a cleanup agreement for a DOE facility at Fernald, Ohio. The issues involved procedural and reporting requirements -- and in no instance were related to environmental releases or any other actions that affect human health and safety.

Under the settlement, DOE agrees to an assessment of a monetary penalty in the amount of \$100,000 and to allocate an additional \$150,000 to undertake additional environmental projects at or near the Fernald facility. The settlement also includes procedures for improved communications between EPA and DOE, and requires the formation of a technical support group to assist in the cooperative resolution of technical issues that may arise at the facility.

"By settling this dispute," EPA Administrator William K. Reilly said, "both Agencies can now address the most vital issue confronting Fernald --- cleanup of the facility. We can focus our attention on implementing the cleanup commitments in the 1990 agreement. When fully implemented this agreement will assure full and complete cleanup of the Fernald facility."

According to Reilly, this settlement also reaffirms EPA's authority to insure that federal agencies meet their commitments to federal facility cleanups. President Bush has pledged to hold federal facilities to the same environmental standards as private ones, Reilly noted.

Regarding the settlement, Secretary of Energy James D. Watkins underscored DOE's priority for the Fernald cleanup and stated, "The department remains committed to our cleanup mission at the Fernald facility and to meeting the terms of the Compliance Agreement. We

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are taking important steps to improve our environmental performance at the site, and will be spending a record \$339 million during fiscal year 1992 at Fernald on environmental restoration and waste management programs. In addition, the department continues to pledge its support to communities near the facility and is embarking on cooperative local programs.

In 1986, EPA and DOE originally signed an agreement requiring DOE to cleanup the Fernald facility. In 1990, the agencies updated the cleanup portion of the agreement. This revised agreement contained a provision that authorized EPA to assess stipulated penalties for failure to comply with certain provisions of the agreement.

Fernald was a uranium metal processing facility which produced uranium fuel elements and other uranium products for use in the U.S. nuclear weapons program. It is located approximately 20 miles northwest of Cincinnati.

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U.S. ENVIRONMENTAL PROTECTION AGENCY
U.S. DEPARTMENT OF ENERGY
FERNALD (OHIO) DISPUTE RESOLUTION

A. In December of 1990, pursuant to Section XVII of the 1990 Fernald "Consent Agreement Under CERCLA Section 120 and 106(a)," Administrative Docket Number: V-W-90-C-057, (hereinafter referred to as "Consent Agreement"), the U.S. Environmental Protection Agency (EPA) issued three notices of violation and assessed three stipulated penalties against the U.S. Department of Energy (DOE).

B. The substantive issues and disputes related to the notices of violation have been resolved by DOE and EPA. The only dispute remaining relates to the application of stipulated penalties to these matters. DOE invoked the dispute resolution provisions of Section XIV of the Consent Agreement to contest the application of the stipulated penalty provision of the Consent Agreement in the given cases. The dispute was subsequently raised in accordance with terms of the Consent Agreement to the Senior Executive Committee (SEC) for resolution. Following review by the SEC, the Regional Administrator for EPA Region V issued a written decision on February 15, 1991, supporting the Region's assessment of stipulated penalties against DOE. Under the terms of the Consent Agreement, DOE elevated the dispute to the EPA Administrator on March 22, 1991.

C. Without admitting liability for the assessed penalties, in order to resolve the dispute related to the assessment of stipulated penalties, and to concentrate the efforts of the parties on the cleanup challenge posed by the Fernald facility, EPA and DOE agree as follows:

1. DOE agrees to the assessment of a monetary penalty in the amount of \$100,000, to be paid from funds authorized and appropriated for that specific purpose in accordance with Section XVII of the Consent Agreement.
2. DOE will expend an additional \$150,000 to conduct supplemental environmental projects at or in the vicinity of Fernald. The parties agree that funds for the supplemental environmental projects will not affect the obligation of funds to implement the Consent Agreement. These projects will be established upon the mutual agreement of the parties and will consist of environmental projects not already required by the Consent Agreement or committed to by DOE.¹

¹ DOE will use as a guide for the supplemental environmental projects EPA's February 12, 1991, policy entitled, "EPA Policy on the Use of Supplemental Environmental Projects in Enforcement Settlements."

D. To clarify the parties' interpretation of the appropriate use of stipulated penalties, and to avoid future disputes as to the application of the stipulated penalty provision, the parties agree that the Fernald Consent Agreement authorizes document review and stipulated penalty assessments under any of the following circumstances:

1. In the event that DOE fails to submit a primary document (including a draft Record of Decision or Responsiveness Summary) to EPA pursuant to the applicable timetable or deadline, or fails to comply with a term or condition of the Consent Agreement which relates to the implementation of: (a) removal actions in Section IX of the Consent Agreement, or (b) the remedy at each operable unit (i.e., remedial design and remedial action), or (c) related activities, including DOE's obligations under Section XXVIII of the Consent Agreement, that will affect the timely completion of the removal or remedial action to be performed under the Consent Agreement, EPA may issue a notice of intent to assess a stipulated penalty against DOE. DOE shall have thirty (30) days after receipt of this notice of intent to invoke formal dispute resolution under Section XIV of the Consent Agreement. If DOE does not invoke formal dispute resolution within this period, DOE will be deemed to have concurred in EPA's assessment of a penalty. EPA may assess penalties only after the conclusion of the thirty (30) day period, or following conclusion of the dispute resolution proceedings, whichever is later. Any such penalties shall relate back to the date of the violation.
2. Draft primary documents² shall be submitted by DOE to EPA for review and comment as set forth in Section XII of the Consent Agreement. EPA shall review, evaluate and comment upon draft primary documents as set forth in Section XII, Paragraph G.2, of the Consent Agreement. Within the time period set forth in Section XII, Paragraphs G.5 and G.6 of the Consent Agreement, DOE shall respond to all EPA comments received on the draft primary document and shall submit a draft final primary document to EPA which complies with the terms of the Consent Agreement, CERCLA, the NCP, and any applicable EPA guidance or policy. The draft final primary document shall become the final primary document unless EPA

² The terms "primary document," "draft primary document" and "draft final primary document" shall have the same meaning as in the Consent Agreement.

subjects the document to dispute resolution³ within thirty days of receipt of the draft final primary document. If, upon review of the draft final primary document, EPA determines that the document does not comply with the requirements of the Consent Agreement, CERCLA, the NCP, or any applicable EPA guidance or policy, EPA may issue a notice of intent to assess a stipulated penalty against DOE. However, the parties agree that the draft final primary document shall go through the dispute resolution process prior to EPA's actual assessment of a stipulated penalty. If DOE's position as to the adequacy of the draft final primary document is upheld in dispute resolution, EPA agrees not to assess a stipulated penalty with respect to the document and that its notice of intent to assess will be deemed withdrawn. However, if EPA's position as to the adequacy of the draft final primary document is upheld in the dispute resolution process, EPA may assess a stipulated penalty against DOE which relates back to the date of the notice of intent to assess a stipulated penalty. Further, if EPA's position is upheld in the dispute resolution process, DOE shall revise the draft final primary document as set forth in Section XII, Paragraph I of the Consent Agreement.

E. For a period of four months, beginning on the date this Agreement is signed by both parties, EPA and DOE will negotiate in an effort to develop modified schedules for the completion of the response actions required under the Consent Agreement. The modified schedules may include acceleration of some schedules and lengthening of some schedules. DOE agrees to use its best efforts to propose modification of any schedules which can be accelerated. The four month negotiation period may be extended by agreement of both parties. EPA agrees not to issue a notice of violation or notice of intent to assess a stipulated penalty for activities to be performed under the Consent Agreement during this period. If modified schedules for the completion of the response actions are not agreed to in writing, then stipulated penalties that may have accrued during the negotiation period may be assessed.

F. Any modification of schedules agreed to by the parties pursuant to Paragraph F shall be set forth as a written modification to the Consent Agreement, and shall be submitted to

³ The parties agree that any dispute associated with EPA's review of a draft final primary document shall proceed directly to the Dispute Resolution Committee, eliminating the thirty (30) day period for informal dispute resolution.

the public for review and comment. Following public review and comment, and any appropriate response by EPA and DOE to public comment, the schedules contained in the modification shall operate in lieu of the original schedules contained in the Consent Agreement.

G. In the future, when controversies arise at Fernald which appear likely to result in the need for formal dispute resolution or an assessment of stipulated penalties, the parties will, as soon as practicable, use their best efforts to provide written notice of the circumstances of the controversy as follows: (1) by the DOE Fernald Site Manager to the Associate Director of DOE's Office of Environmental Restoration, and (2) by the EPA Region V Project Manager to the Director of EPA Region V's Waste Management Division. The Associate Director of DOE's Office of Environmental Restoration and the Director of EPA Region V's Waste Management Division shall thereafter use their best efforts to assist in resolution of the controversy so as to minimize the need for formal, time-consuming dispute resolution pursuant to Section XIV of the Consent Agreement. This "early warning system" shall operate in addition to, not in lieu of, the dispute resolution process set forth in Section XIV of the Consent Agreement.

H. EPA and DOE agree that establishment of a technical support group may assist EPA and DOE in performing their obligations under the Consent Agreement. The parties agree to establish such a group, composed of technical experts from DOE and EPA and mutually agreed upon independent experts representing organizations or interests that are external to DOE and EPA. The precise roles, functions, membership and charter of the technical support group will be developed jointly by DOE and EPA at a later date.

I. The parties agree that this Agreement resolves the dispute elevated by DOE to the Administrator of EPA on March 22, 1991.

J. No provision in this agreement shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. 1341.

K. Nothing in this Agreement shall be interpreted or construed as an admission of liability.

IT IS SO AGREED:

BY: Raymond B. Ludwiszewski
Raymond B. Ludwiszewski
Acting Assistant Administrator
U.S. Environmental Protection Agency

MAY 13 1991

Date

BY: Leo P. Duffy
Leo P. Duffy, Director
Office of Environmental Restoration
and Waste Management
U.S. Department of Energy

MAY 13 1991

Date