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**U. S. DOE REQUEST FOR EXTENSION FOR OU2
MILESTONES AND ADDITIONAL WORK IN OU3**

02/09/93

**USEPA/DOE-FN
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LETTER**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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REPLY TO THE ATTENTION OF:

Mr. Jack R. Craig
United States Department of Energy
Feed Materials Production Center
P.O. Box 398705
Cincinnati, Ohio 45239-8705

HRE-8J

RE: U.S. DOE Request for
Extension for OU 2
Milestones and
Additional Work in OU 3

Dear Mr. Craig:

The United States Environmental Protection Agency (U.S. EPA) has carefully considered the United States Department of Energy's (U.S. DOE) February 2, 1993, Notification of Additional Work or Modification to Work Under Section XV (Additional Work) and Request for Extension Under Section XVIII (Extensions) of the Amended Consent Agreement. However, for the following reasons, U.S. EPA needs more information on the proposed additional work, and does not concur with U.S. DOE's extension request.

ADDITIONAL WORK

Pursuant to Section XV, paragraph B, of the Amended Consent Agreement ("ACA"), U.S. DOE must submit written proposals for additional work to U.S. EPA and such requests are subject to review as primary documents. Primary documents contain a more detailed and substantive description of proposed activities than is presented in the U.S. DOE proposal for Operable Unit 3 ("OU 3") and the procedures for review of primary documents, which are set forth in Section XII, paragraph G.2., of the ACA, differ significantly from those for review of an extension request. In addition, since there is no apparent nexus between the U.S. DOE proposal to accelerate the dismantling of the OU 3 buildings and the requested extension, there is no reason to consider the two requests in tandem. Therefore, U.S. DOE must submit its request for additional work in the form of a primary document and U.S. EPA will consider the request in accordance with the procedures for review of such documents. U.S. EPA suggests that the parties meet to discuss U.S. DOE's proposal prior to submission of the primary document.

(Craig)
PARTIAL ACTION
RESPONSE TO
DOE-1032-93
(5593)

EXTENSION REQUEST

U.S. DOE requests extensions for submittal of all of the Operable Unit 2 ("OU 2") Remedial Investigation, Feasibility Study, and Proposed Plan reports and for the Record of Decision for three of the five OU 2 sub-units. Pursuant to Section XVIII, paragraph A, of the ACA, "a timetable, deadline, or a schedule shall be extended when good cause exists." Good cause is defined in Section XVIII, paragraph B, of the ACA and includes delay caused by (1) an event of Force Majeure, (2) the fault of another party, (3) the good faith invocation of dispute resolution, (4) the grant of any other extension, or (5) any other event or series of events that the parties agree constitutes good cause. In its request, U.S. DOE states that good cause for the requested extensions exists because additional sampling is required to adequately characterize the OU 2 contamination.

U.S. DOE's request does not specify, nor can U.S. EPA find, any evidence of an event of Force Majeure (See Section XIX of the ACA), fault attributable to another party, dispute resolution, or any other extension. Consequently, if good cause exists, it must be an event or series of events that both U.S. EPA and U.S. DOE agree constitutes good cause. In Section XVIII, paragraph C.1., of the ACA, U.S. EPA and U.S. DOE agreed that if, despite U.S. DOE's best efforts, additional sampling is required, good cause may exist for an extension. Consistent with its December 16, 1992, disapproval and comments on the Draft OU 2 Remedial Investigation report, U.S. EPA agrees that additional sampling is necessary. However, "best efforts" requires something more than mere good faith and, in effect, requires U.S. DOE to show that delay due to additional sampling is necessary due to no fault on U.S. DOE's part.

In the extension request, U.S. DOE maintains that the need for additional sampling is due to (1) U.S. EPA's December 16, 1992, comments expanding the scope of OU 2 sampling, (2) recent discoveries concerning the characterization of OU 2 contamination, and (3) uncertainty concerning the validity of Characterization Investigation Study ("CIS") data. These explanations, considered individually or in combination, do not demonstrate that U.S. DOE exercised "best efforts" to avoid delay attributable to additional sampling activities. Therefore, U.S. EPA cannot agree that good cause exists for the requested extensions.

U.S. EPA's comments on the Draft Remedial Investigation report did not change or expand the scope of OU 2 sampling which is, and always has been, that sampling which is necessary to characterize the sources of potential radiological and chemical contamination, to determine if the sources are impacting environmental media, and to provide data necessary to support a Feasibility Study. Although U.S. EPA has approved work plans and

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addenda that recommend OU 2 sampling locations, U.S. DOE supplied the sampling locations based on its knowledge of the site. It is U.S. DOE's responsibility to assure that sampling is performed which adequately identifies and characterizes all OU 2 contamination. This may require U.S. DOE to conduct sampling in areas adjacent to the boundaries of OU 2 in order to determine whether a particular waste unit in OU 2 is a source of contamination. However, we do not agree that such sampling is an expansion of the scope of OU 2 sampling. Consequently, U.S. EPA finds that U.S. DOE should have been aware that the existing sampling data was insufficient and could have conducted additional sampling prior to submission of the draft Remedial Investigation report.

During the summer of 1992, U.S. DOE collected data from the solid waste landfill and monitoring well number 1433 which is inconsistent with the data and interpretations presented in the draft Remedial Investigation report. U.S. EPA concurs with U.S. DOE that in light of these findings, additional sampling is required. However, independent of these findings, U.S. EPA identified other data deficiencies which indicate that other areas in both the solid waste landfill and south field require additional investigation. U.S. DOE provided no explanation of what action, if any, it has taken during the past six months in reaction to the summer of 1992 sampling data. Absent such an explanation, U.S. EPA cannot see how these findings can be fairly characterized as demonstrating unavoidable delay despite U.S. DOE's best efforts.

U.S. DOE also states that good cause for an extension exists due to the discovery on January 27, 1993, that CIS data could not be validated for use in quantitative risk assessment. The CIS sampling occurred in 1986 and 1987, and should have been validated long before submittal of the draft Remedial investigation report. Considering that the CIS data comprises approximately 70 percent of the total radiological data available for OU 2, validation of that data should have been a high U.S. DOE priority. Therefore, U.S. DOE had ample opportunity within the schedules established in the OU 2 workplan to resolve any questions about the validity of the CIS data and resample, if necessary. Consequently, U.S. EPA cannot concur that such questions are good cause for an extension.

Because U.S. EPA finds that the additional sampling could have been conducted earlier if U.S. DOE had exerted its best efforts by diligently reviewing existing data to determine if additional characterization was necessary and by conducting data validation at an earlier date to assure that the majority of the data was useable, U.S. EPA cannot concur with the requested extensions.

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PENALTIES

Pursuant to Section XVII of the ACA, U.S. EPA gives notice of its intent to assess stipulated penalties for U.S. DOE's failure to timely submit a draft Final Remedial Investigation report for OU 2 which was due February 8, 1993. Further, U.S. DOE has in effect notified U.S. EPA that the OU 2 Feasibility Study, Proposed Plan, and Record of Decision will not be submitted when due March 15, March 15, and December 10, 1993, respectively. Therefore, since those documents will not be submitted on time for the same reasons as the draft Final Remedial Investigation report, U.S. EPA also gives notice that it intends to assess stipulated penalties for late submission of those documents and will issue formal notice at the appropriate time.

DISPUTE RESOLUTION

In the event U.S. DOE invokes dispute resolution regarding U.S. EPA's decision not to concur with the requested extensions, U.S. EPA suggests that the parties agree to resolve all existing and reasonably foreseeable and related disputes in a consolidated manner in order to avoid multiple and essentially duplicative dispute resolution procedures.

If you have any questions concerning this letter, please contact me at (312) 886-0992.

Sincerely,



James A. Saric
Remedial Project Manager

cc: Graham Mitchell, OEPA-SWDO
 Pat Whitfield, U.S. DOE-HQ
 Nick Kaufman, FERMCO
 Jim Theising, FERMCO
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bcc: David Ullrich
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