



## Department of Energy

Ohio Field Office  
Fernald Area Office

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JUL 07 1997  
DOE-1171-97

Mr. James A. Saric, Remedial Project Manager  
U.S. Environmental Protection Agency  
Region V-SRF-5J  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

Mr. Tom Schneider, Project Manager  
Ohio Environmental Protection Agency  
401 East 5th Street  
Dayton, Ohio 45402-2911

Dear Mr. Saric and Mr. Schneider:

### AGREEMENT IN PRINCIPLE TO RESOLVE DISPUTE

- References:
- 1) Letter, J. Reising to J. Saric and T. Schneider, "Agreement in Principle to Resolve Dispute," dated June 30, 1997.
  - 2) Letter, J. Saric to J. Reising, "Re: OU 4 Dispute," dated July 2, 1997.

After our last telephone conference on July 2, 1997, DOE agreed to send a revised proposal. Pursuant to that agreement we have prepared a draft revised proposal for transmittal today but have not included it with this letter as we believe additional discussion is merited between our agencies. We have outlined the concerns that we want to discuss. The areas below represent DOE's primary concerns and do not encompass all comments or revised proposals that we intend to transmit to you. We suggest a follow-up conference call tomorrow with all parties for this discussion. Since I will be out-of-the-office tomorrow morning I suggest that we convene our call at 2:00 PM EDT (1:00 PM CDT).

### ENFORCEMENT OF OBSOLETE RD/RA SCHEDULES

Your July 2, 1997, correspondence states:

With respect to the issue of modifying currently approved OU4 schedules, U.S. EPA may agree to refrain from enforcement of those schedules so long as DOE remains in compliance with this settlement agreement. At the point where DOE proposes an approvable replacement RD/RA schedule, U.S. EPA will assent to modification of the ACA.

We are seeking clarification of the basis for this position. It is inconsistent with the AIP, in which both DOE and U.S. EPA agreed to modify the ACA by July 14, 1997. With U.S. EPA's approval and at U.S. EPA's direction, DOE has agreed to modify the remedy selected in the OU 4 ROD for Silo 3, and to perform a supplemental Feasibility Study/Proposed Plan to reevaluate the remedy selected in the OU 4 ROD for Silos 1 and 2, and to amend the OU 4 ROD. DOE had previously proposed, and U.S. EPA rejected, a "parallel path" arrangement where DOE would continue to work towards the current Silo 1 and 2 remedy while studying other options at the same time. We believe that maintaining obsolete RD/RA schedules for enforcement purposes is not reasonable in light of the fact that DOE's earlier proposal for such a parallel path has been rejected and compliance with obsolete RD/RA schedules is impossible while we proceed with modification of the OU 4 ROD. DOE also believes that such an approach would represent a departure from the terms and conditions of the AIP to resolve this dispute. DOE agrees that the Settlement Document and the ACA as amended should be enforceable if DOE fails to comply with their terms. This is a reasonable approach that preserves U.S. EPA's enforcement options with respect to the agreed upon path forward.

The requirements of Paragraphs 12, 13, and 15 of the AIP will not be met, and any agreements therein will not be effective, unless the ACA is amended by July 14, 1997. A settlement proposal that does not amend the ACA lacks consideration for DOE's agreement not to further dispute U.S. EPA's denial of good cause for extensions to the obsolete RD/RA schedules and DOE's agreement to modify the remedy selected in the OU 4 ROD for Silo 3, to perform a supplemental Feasibility Study/Proposed Plan to reevaluate the remedy selected in the OU 4 ROD for Silos 1 and 2, and to amend the OU 4 ROD.

DOE does not agree with U.S. EPA's position, as relayed on the July 2, 1997 telephone conference, that the RD/RA work plan schedules may not be amended since they are not incorporated within the ACA. Section XXXIII.B. of the ACA incorporates all deliverables required by the ACA upon approval by U.S. EPA. These schedules have been commonly amended by letter agreement between project managers under the ACA.

#### U.S. EPA'S STIPULATED PENALTIES PROPOSAL & APPENDIX B PROJECTS

DOE also seeks clarification of U.S. EPA's stipulated penalties proposal with respect to the Appendix B projects. First, it is DOE's understanding that implementation of projects operates in lieu of a portion of the stipulated penalties calculated by U.S. EPA. Second, DOE believes that the Parties should be able to mutually agree to modify a project, and that there may be circumstances in which it may be appropriate for U.S. EPA to assess an increment of the negotiated amount for each project (e.g., if the project is substantially complete when the delay occurs and, in U.S. EPA's sole discretion, the nature or duration of the delay does not warrant assessment of the entire amount set forth in Paragraph 12). Finally, if a project schedule is missed and the stipulated penalty is reassessed, or if the parties agree to a new or modified project, DOE's obligation to complete the original Appendix B project should terminate.

Although DOE agrees (subject to DOE management review) that reassessment of stipulated penalties would be appropriate if DOE fails to accomplish projects selected to mitigate stipulated penalties in this matter, this provision along with the potential reassessment of stipulated penalties in Paragraph 12 subjects DOE to "double jeopardy" if it fails to accomplish a project. In consideration of DOE's agreement to the reassessment of stipulated penalties for failure to perform mitigating projects, and DOE's agreement not to dispute those assessments, U.S. EPA's sole remedies to enforce the completion of those projects should be the additional penalties, or modified or replacement projects.

After our conference call of July 8, 1997, we are prepared to fax you a copy of our draft response to your July 2, 1997, letter and draft settlement agreement.

We look forward to discussing these concerns with you tomorrow and will continue in good faith to negotiate to meet the terms of the agreement and amend the ACA no later than July 14, 1997.

If you have any questions, please feel free to contact me at (513) 648-3139.

Sincerely,



Johnny W. Reising  
Fernald Remedial Action  
Project Manager

FEMP:Akgunduz

Enclosure: As Stated

cc w/enc:

N. Hallein, EM-42/CLOV  
G. Jablonowski, USEPA-V, 5HRE-8J  
R. Beaumier, TPSS/DERR, OEPA-Columbus  
F. Bell, ATSDR  
D. S. Ward, GeoTrans  
R. Vandegrift, ODOH  
R. Geiger, PRC  
J. Craig, DOE-FEMP  
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J. Harmon, FDF/90  
R. Heck, FDF/52-5  
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Pursuant to Section 12, Paragraph D of the May 15, 1997, Agreement in Principle (AIP), the Department of Energy (DOE) has reviewed the U.S. Environmental Protection Agency's (U.S. EPA) approval of DOE's June 30, 1997, submittal of draft schedules, and disapproval of DOE's proposal for resolution of stipulated penalties. The proposals contained herein remain subject to final review and approval by the DOE.

The DOE appreciates the cooperation and progress toward final resolution exhibited by the U.S. EPA and Ohio Environmental Protection Agency (OEPA). As a result of conference calls of July 1, 2 and 8, 1997, with both EPAs, the DOE offers the following proposal for resolution of stipulated penalties. As stated in your correspondence of July 2, 1997, U.S. EPA agrees on the projects proposed in DOE's June 30, 1997, letter, so long as they are enforceable elements of the settlement, as mitigating factors when determining the amount of the monetary penalty. In addition to performance of these projects, DOE proposes to request an appropriation and authorization from Congress in the amount of \$100,000 pursuant to Section XVII of the Amended Consent Agreement ("ACA") and in accordance with DOE procedures.

DOE has reviewed the Settlement Document provided in U.S. EPA's July 2, 1997, correspondence. Enclosed please find a redline/strikeout version of U.S. EPA's settlement document, incorporating DOE's comments which are as follows.

1. Paragraph 11 - Language of subparagraph (g) modified to indicate that projects are intended to benefit the environment in or near the FEMP.
2. Paragraph 12 - DOE's understanding of U.S. EPA's proposal is that implementation of these projects operates in lieu of a portion of the stipulated penalties that U.S. EPA intended to assess in this matter. Second, DOE believes that the Parties should be able to mutually agree to modify a project, and that there may be circumstances in which it may be appropriate for U.S. EPA to assess an incremental amount (e.g., if the project is substantially complete when the delay occurs and, in U.S. EPA's sole discretion, the nature or duration of the delay does not warrant assessment of the entire amount set forth in Paragraph 12). Third, if a project schedule is missed and the stipulated penalty is reassessed, or if the parties agree to a new or modified project, DOE's obligation to complete the original Appendix B project should terminate.
3. Paragraph 13 - \$175,000 becomes \$100,000. This represents a mid-range between the amounts initially proposed by DOE and U.S. EPA.
4. Paragraph 14 - The Fiscal Year (FY) 1998 budget request has already been submitted. In accordance with DOE procedure, DOE will request funds for any penalty assessed in its 1999 budget request. For any additional penalty which may be assessed under Paragraph 12, DOE will request funds in its next open budget cycle.
5. Paragraph 15 - The Settlement Document modifies the ACA to incorporate the additional OU4 deliverables as agreed to in the AIP. The word "Supplemental" is added to the schedule for the FS/PP submission, to distinguish this from the original OU4 deliverable.
6. Paragraphs 16 - The Settlement Document deletes the obsolete schedules contained in the previously submitted RD/RA work plan, and provides the timing by which future deliverables must be submitted. Submittal of the new RD/RA workplans would be enforceable under the ACA.
7. Paragraph 17 - This paragraph incorporates page changes (35, 36 and 36a) into the ACA as Attachment C. U.S. EPA's proposed agreement to refrain from enforcement of the approved Record of Decision (ROD) or RD/RA work plans is deleted, since those schedules are deleted by Paragraph 16.

8. Paragraph 18 - Although DOE agrees (subject to DOE management review) that reassessment of stipulated penalties would be appropriate if DOE fails to accomplish projects selected to mitigate stipulated penalties in this matter, this provision along with the potential reassessment of stipulated penalties in Paragraph 12 subjects DOE to "double jeopardy" if it fails to accomplish a project. In consideration of DOE's agreement to the reassessment of stipulated penalties up to the agreed-upon amounts for failure to perform mitigating projects, and DOE's agreement not to dispute those assessments, U.S. EPA's sole remedies to enforce the completion of those projects should be the additional penalties, or modified or replacement projects.
9. Paragraph 19 - DOE agrees not to further dispute U.S. EPA's October 2, 1997, good cause determination, upon execution of this agreement by both parties.
10. Paragraph 21 - This paragraph has been changed to incorporate the language preferred by the U.S. Department of Justice with respect to the Anti-Deficiency Act.

We look forward to the U.S. EPA's response to this letter and reiterate our willingness to participate in direct negotiation in the interim. Pursuant to the Agreement in Principle, Section 12, Paragraph D, DOE will continue in good faith to negotiate to meet the terms of the agreement and amend the ACA no later than July 14, 1997.

If you have any questions, please feel free to contact me at (513) 648-3139.

Sincerely,



Johnny W. Reising  
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Project Manager

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