

United States Government

Department of Energy

Rocky Flats Office

**memorandum**

DATE SEP 2 , 1993

REPLY TO  
ATTN OF ERD SRG 11140

SUBJECT Notice of Violation for OU2 Notification as per September 16 1993 Secretarial Guidance

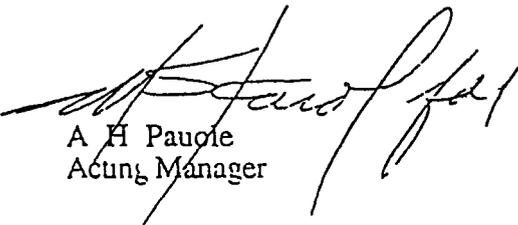
TO Associate Deputy Secretary for Field Management, FM 1 HQ  
General Counsel GC 1 HQ  
Assistant Secretary for Environmental Restoration and Waste Management EM 1 HQ  
Assistant Secretary for Environment Safety and Health EH 1 HQ

In compliance of the September 16 and August 18 1993 memoranda from the Secretary we are providing 10 day follow on information from our September 13 1993 memorandum (ERD HR 10795 attached) This information is required within 10 days of a Notice of Violation as specified in the guidance information entitled Guidance on Management Procedures for Addressing responsibility for Violations of Environmental Requirements and Related Fines and Penalties

The Notice of Violation was received September 10 1993 (attached) from U S Environmental Protection Agency (EPA) and the Colorado Department of Health (CDH) for missing a milestone under our InterAgency Agreement (IAG) The missed milestone is for the Final RCRA Facilities Investigation/Remedial Investigation (RFI/RI) Report for Operable Unit 2 (903 Pad Mound and East Trenches)

In consultation with EM 40 we have agreed to dispute the Notice of Violation through the Dispute Resolution process laid out in the IAG The basis of the dispute is that we have not missed the August 9 1993 milestone for the Final RFI/RI Report at this time (due to an August 12 1993 (attached) EPA/CDH stop the clock authorization on the schedule as of June 21 1993) but will miss it in the future Once the schedule stop the clock has been lifted we will miss the milestone by approximately nine months this makes us subject to additional stipulated penalties of up to \$355 000 (1 week at \$5 000 and 35 weeks at \$10 000)

We will keep all parties informed on the progress on the Dispute with EPA and CDH If you have any questions about this please contact James Hartman at 966 5918

  
A. H. Paule  
Account Manager

Attachments

ADMIN RECEIVED

FM 1 GC 1 EM 1 & EH 1  
ERD SRG 11140

2

SEP 27 1993

cc w/Attachment  
A Rampertaap EM 453  
R Schassbur\_er ERD RFO  
M Roy OCC RFO  
H Rose ERD RFO  
S Grace ERD RFO  
N Hutchins EG&G  
W Busby EG&G  
A Primose EG&G

Within 24 hours

(A) The nature of the alleged violation and of the environmental threat posed thereby.

The nature of the violation is the failure to meet the InterAgency Agreement (IAG) milestone for submittal of the Final RCRA Facilities Investigation/Remedial Investigation (RFI/RI) Report for Operable Unit 2 (903 Pad Mound and East Trenches). We missed the milestone for the Draft RFI/RI Report, due March 12, 1993, and as a result we are missing subsequent milestones. The Final RFI/RI Report due August 9, 1993, is the second milestone to be missed for Operable Unit 2. We received the Notice of Violation on September 10, 1993 (attached).

There is no immediate environmental threat posed by this alleged violation of the IAG.

(B) whether the alleged violation has been corrected, or is continuing.

The alleged violation is continuing. The U.S. Environmental Protection Agency (EPA) and Colorado Department of Health (CDH) have told us verbally that once they receive the Draft RFI/RI Report they will assess the amount of the stipulated penalties and then correct the schedules to put us back on track.

(C) the basis for the regulatory authority's discovery of the alleged violation (e.g., Department or contractor self-reporting or external regulatory inspection).

We informed the EPA and CDH in writing on August 12, 1993, that we were going to miss the milestone for the Draft as well as the Final RFI/RI Reports.

(D) whether fines or penalties are being assessed and, if so, the amount and

We have been notified that once we submit the Draft RFI/RI Report the regulators will assess the amount of the stipulated penalties. We are subject to stipulated penalties of up to \$5,000 for the first week and \$10,000 a week thereafter for each missed milestone. Since the stipulated penalties are additive and we will be subject to the \$5,000 and \$10,000 amounts for each missed milestone, we won't know the actual amount until we meet the milestones and negotiate with EPA/CDH.

Before the stop the clock authorization from the regulators was received, we were anticipating approximately a nine-month delay in both the Draft and Final RFI/RI Reports. Once the schedule is resumed, we still anticipate a nine-month delay. This would make us subject for up to \$355,000 for each missed milestone (one week at \$5,000 and 35 weeks at \$10,000 equals \$355,000) or \$710,000 in stipulated penalties.

(E) whether duplicative notices were issued to the Department and to a contractor for the same alleged violation.

The notice was sent to DOE only.

Attachment to ERD SRG 11140

Within 10 working days

(A) the degree of responsibility of the Department and its contractor for the alleged violation, regardless of who received the notice,

In this case DOE has accepted responsibility for the violation of the IAG for missing the milestone for the Draft RFI/RI Report. This is based upon the March 29 1993 memorandum from R. P. Whitfield to the Acting Manager Rocky Flats (attached).

(B) whether the Operations Office or any affected contractor disagrees with the legal or factual grounds for the alleged violation,

Although we have told the EPA and CDH that we agree to the stipulated penalties for missing the milestone for the Draft RFI/RI Report we disagree that we are currently in violation of the milestone for the Final RFI/RI Report.

A stop the clock authorization was received from EPA and CDH on August 12 1993 (attached) that retroactively stopped the schedule as of June 21 1993. Since the missed milestone date for this alleged violation was August 9 1993 we maintain that we have yet to miss the milestone. However once the schedule is restarted we will ultimately miss the milestone.

(C) whether the issuing regulatory authority's proposed resolution should be accepted, or whether an attempt should be made to contest the notice or to negotiate a different settlement, and

In coordination with EM 40 we have agreed to dispute the notice of violation. The Dispute will follow the Dispute Resolution process laid out in Part 19 of the IAG. We will argue that the schedule was stopped as of June 21 1993 therefore we could not have missed the August 9 1993 date at this time.

We emphasize that although not currently in violation of the IAG milestone for the Final RFI/RI Report once the clock is restarted we will ultimately miss the milestone.

(D) the actions taken, or proposed, to prevent similar alleged violations from occurring in the future

The primary reason for the missed milestone for the Draft RFI/RI Report was the failure to coordinate with EPA/CDH in a timely manner to resolve the FY92 funding/scope increase issue and to reach agreement on a schedule extension. We have since developed a closer working relationship with EPA/CDH to identify issues early on that potentially impact IAG deliverables and milestones.

As noted in D above we maintain that we have not currently missed the milestone. However we will be in the future once we revise the schedule can be determined.

ERD SRG 11736

## RESOLUTION OF DISPUTE

## BACKGROUND

- 1) June 29 1993 letter (93 DOE 07580) DOE to EPA/CDH asking for clarification on the approach for the Operable Unit (OU) No 2 Baseline Risk Assessment.
- 2) July 21 1993 letter (93 DOE 08449) DOE to EPA/CDH requesting that the clock be stopped on the schedules for Operable Units 1 through 7 until such time that we receive and agree to guidance on the methodology for the baseline risk assessments
- 3) August 12 1993 letter EPA/CDH to DOE notifying that our July 21 request to stop the clock was granted because EPA and CDH believe that stoppage of work is necessary until such time as an agreement is reached among the parties to the IAG on how the above issues will be resolved and implemented The schedule stopped as of June 21 1993 for Operable Units 1 2 and 7 and August 12 1993 for Operable Units 4 5 and 6 Operable Unit 3 as of July 23 1993
- 4) August 12 1993 letter (93 DOE 08698) DOE to EPA/CDH notification that we would miss the August 9 1993 milestone for the OU2 Final RFI/RI Report
- 5) August 18 1993 memorandum (ERD SRG 08450) DOE to EG&G authorization for EG&G to stop work on certain parts of the RFI/RI Reports for OUs 1 7
- 6) Dispute Resolution Committee (DRC) determination (made verbally within 5 days of the August 12 EPA/CDH letter) that the schedule stoppage was appropriate as per Part 24 (Work Stoppage) of the IAG
- 7) Undated letter (received DOE mailroom September 10 1993) EPA/CDH to DOE notification that By failure to submit that document [Final RFI/RI Report] DOE has not met the milestone and is in violation of the IAG you are hereby notified that stipulated penalties are accruing pursuant to Part 19 of the IAG penalties will begin to accrue on the date DOE receives this notice of violation
- 8) September 24 1993 letter (93 DOE 10930) DOE to EPA/CDH invoking Dispute Resolution on whether or not we are currently in violation of the IAG by missing the August 9 1993 milestone for submittal of the Final RFI/RI Report

## RESOLUTION OF DISPUTE

- A It is agreed that DOE is in violation of the IAG for the missed Final RFI/RI Report submittal milestone This violation continued for the period of August 9 1993 through Augusts 12 1993 (when the clock was stopped) In light of the retroactive nature of the EPA/CDH August 12 stop work letter EPA agrees not to assess stipulated penalties for the period August 9 12 1993
- B It is understood that there is no provision in the IAG to lift work stoppages agreed to by the Dispute Resolution Committee (DRC) as prescribed by Part 24 of the IAG Work Stoppage. The IAG Coordinators agree to recommend to the Parties of the IAG to amend the IAG to incorporate language on how to rescind a work stoppage The proposal to amend the IAG would be according to Part 41 of the IAG Amendment of Agreement.

RESOLUTION OF DISPUTE PAGE 2  
ERD SRG 11736

The proposed amendment to the IAG would be the addition of the text below to the existing language of Paragraph 164

Any Party may request a work stoppage order to be rescinded. Such request shall be made in writing by the DRC member of the requesting Party, sent to the DRC members of all other Parties, and shall state the reason as to which the work stoppage order should be rescinded. If the DRC unanimously agrees to rescind the work stoppage order, work shall resume immediately, unless the DRC establishes an alternate time upon which the work shall resume. If the DRC fails to reach unanimous agreement within five (5) business days of the request to rescind the work stoppage, the issue shall be referred to the SEC. Once the issue is referred to the SEC, the Lead Regulatory Agency member of the SEC shall render its decision within five (5) business days and work shall proceed accordingly. The procedures of Parts 12 and 16 shall apply as appropriate.

- C The Coordinators agree to use the above process to rescind the work stoppage currently in effect while the Parties undertake formal procedures to amend the IAG. At the time that the work stoppage is lifted, DOE shall submit proposed new milestones for OU 2 pursuant to Part 42 Extensions of the IAG. The proposed new milestones shall be based on an extension period equivalent to the time in which work was stopped.

We the IAG Coordinators agree that the above resolves the dispute invoked by DOE on September 24 1993 (background reference #8)

Richard Schassburger  
Richard Schassburger DOE IAG Coordinator

10/14/93  
date

Martin Hestmark  
Martin Hestmark EPA IAG Coordinator

10/14/93  
date

Gary W. Baughman  
Gary Baughman CDH IAG Coordinator

Oct 14, 1993  
date