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Department of Energy

Rocky Flats Office

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CORRESPONDENCE

ER:RHB:02377

Ten Day Supplemental Report Concerning Enforcement Action Against the Department of Energy With Regard to Operable Unit No. 8

Thomas P. Grumbly, Assistant Secretary for Environmental Restoration & Waste Management, EM-1, HQ

Tara J. O'Toole, Assistant Secretary for Environment, Safety, and Health, EH-1, HQ

Donald W. Pearman Jr., Acting Associate Deputy Secretary for Field Management, FM-1, HQ

Robert R. Nordhaus, General Counsel, Office of the General Council, GC-1, HQ

Please find attached the ten day supplemental report to the Occurrence Notification Report of February 16, 1994, per the August 18, 1993, S-1 memorandum.

The Department of Energy (DOE) Rocky Flats Office received a fax of a signed letter from the U.S. Environmental Protection Agency, Region VIII, (EPA) and the Colorado Department of Health (CDH) on February 15, 1994. The letter states that EPA and CDH are taking enforcement action against DOE for the failure of submitting the Draft Phase I Resource Conservation and Recovery Act (RCRA) Facility Investigation/Remedial Investigation Report for Operable Unit No. 8 by February 14, 1994, as required by the Rocky Flats Plant Interagency Agreement.

Please note that an occurrence notification report required by DOE Order 5400.3B and a related Informational Paper on the enforcement action required by the August 18, 1993 S-1 memorandum were previously transmitted to you.

for Mark N. Silverman  
Manager

Attachment

ACTION	DIST	LTR	ENC
BERMAN, H.S.			
CARNIVAL, G.J.			
COPP, R.D.			
CORDOVA, R.C.			
DAVIS, J.G.			
FERRERA, D.W.			
FRANZ, W.A.			
HANNI, B.J.			
HEALY, T.J.			
HEDAHL, T.G.			
HILBIG, J.G.			
HUTCHINS, N.M.			
KELL, R.E.			
KIRBY, W.A.			
KUESTER, A.W.			
MAHAFFEY, J.W.			
MANN, H.P.			
MARX, G.E.			
McKENNA, F.G.	X	X	
MORGAN, R.V.			
PIZZUTO, V.M.			
POTTER, G.L.			
SANDLIN, N.B.			
SATTERWHITE, D.G.			
SCHUBERT, A.L.			
SETLOCK, G.H.			
STIGER, S.G.	X	X	
SULLIVAN, M.T.			
SWANSON, E.R.	X	X	
WILKINSON, R.B.			
WILSON, J.M.			
Peterman			
B	X	X	

CORRES CONTROL	x	x
ADMN RECORD/080	x	2
PATS/T130G		

Reviewed for Addressee  
Corres. Control RFP

3-2-94 Cui  
DATE BY

Ref Ltr. #

DOE ORDER # 5400-3

ER:RHB:02377

cc w/Attachment:

W. Bixby, EM-60, HQ  
E. Livingston-Behan, EM-20, HQ  
R. Scott, EM-20, HQ  
R. Lightner, EM-45, HQ  
R. Greenberg, EM-453, HQ  
A. Rampertaap, EM-453, HQ  
R. Pelletier, EH-23, HQ  
L. Smith, OOM, RFO  
D. Simonson, OOM, RFO  
J. Roberson, AMER, RFO  
M. McBride, ER, RFO  
F. Lockhart, ER, RFO  
R. Birk, ER, RFO  
B. Thatcher, ER, RFO  
D. Lindsay, OCC, RFO  
J. Hartman, AMSSS, RFO  
S. Olinger, AMESH, RFO  
S. Stiger, EG&G  
B. Peterman, EG&G

DATE: February 23, 1994

SUBJECT: Denial of modification of work and extension request for submittal of the Draft and Final Phase I RFI/RI Reports for OU 8, 700 Area.

ISSUE: The Colorado Department of Health (CDH) and the Environmental Protection Agency (EPA) sent a rejection letter of DOE, RFO's January 31, 1994 request for modification to work and subsequent extension of the Draft and Final Phase I RFI/RI Reports for OU 8. The rejection letter was received by FAX on February 15, 1994 at 4:55 pm. CDH's letter states that the "DOE is in violation of the Interagency Agreement (IAG)."

BACKGROUND: This notice is required in accordance with the August 18, 1993 memoranda from the Secretary entitled "Guidance on Reporting Procedures for Enforcement Actions Related to Violations of Environmental Requirements". This information is provided to meet 10-day notice requirements as described under Section 1 - Enforcement Against the Department. The 10-day report provides followup information from the 24-hour informational paper AMER:MHM:01388 submitted on February 16, 1994. The following four topics of the 10-day reporting requirements are addressed as follows.

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

DOE has accepted responsibility for this violation of the IAG for missing the milestones for the Draft and Final Phase I RFI/RI Reports. This acceptance of responsibility is based upon the submittal of the modification to work and extension request submitted by DOE to the CDH and EPA on January 31, 1994 (attached).

- (B) **Whether the Operations Office or any affected contractor disagrees with the legal or factual grounds for the alleged violation;**

Although DOE has requested a modification to work for OU 8 and an extension to the milestone for the Draft and Final Phase I RFI/RI Reports for OU 8, we disagree with several of the reasons, as stated by CDH and EPA, that are used as the basis for denial of the modification to work and extension request as outlined with the issuance of the subsequent violation of the IAG.

First, CDH and EPA claim that DOE is attempting to convince them that extensions for the OU 8 milestones are justified because of "eleventh hour proposal to modify work". DOE's request dated January 31, 1994 is based on Part 32 of the IAG which allows any party to the IAG to identify modifications of work that are necessary to accomplish the objectives of the IAG. DOE acknowledges that the need to modify work was identified over a year ago during development of the Phase I RFI/RI Work Plan and the FY93 Work Packages. A formal request to modify work scope should have been completed and transmitted to the agencies much earlier than January 31, 1994, and DOE does bear the responsibility for not initiating a modification to work earlier. However, in early 1992 an IAG team was established to begin renegotiations of the IAG. Considerable work to identify milestone slippages and to approach the CDH and EPA with revisions to the IAG was completed during that timeframe. The expectation was that the IAG enforceable milestones for OU 8 would have already been re-negotiated by this time by the established IAG team. Unfortunately, this effort was not completed and is now being revisited. However, the justification as stated in the formal request for the modification to work still stands. Also, included with the modification to work was an extension request from DOE. The planning for modification to work for OU 8 has existed for some time and has been discussed both informally and formally with CDH and EPA during the development of the Phase I RFI/RI Work Plan in 1992. In the modification to work letter, DOE stated the work needed to be modified prior to formalizing an scheduled revision. Additionally, CDH and EPA have been informed through meetings and discussions regarding modification of the scope

for work for OU 8 based on the change in mission at Rocky Flats throughout 1993. DOE has also sent preliminary documents that discuss reorganization for approaches to implementation of environmental work, which includes OU 8. Examples include the "An Analysis of the Potential for Redirection of the Rocky Flats Environmental Restoration Program" dated October 1993, initiation of IHSS evaluations to determine linkages to Transition/Decontamination and Decommissioning (T/D&D) which began in May 1993, and identification of IHSS reorganization issues by the Quality Action Team (QAT) which meets weekly and includes members from DOE, EG&G, CDH and EPA.

Second, CDH and EPA cited funding as a major issue causing delays for implementation of field work and development of the Phase I RFI/RI Reports. DOE recognizes that funding limitations are an issue, specifically funding levels provided in FY92 and FY93 that were insufficient to achieve the enforceable IAG milestones. The funding limits were primarily a result of prioritization of higher risk projects, e.g. funding OU 4 - Solar Ponds to achieve expedited pond clean out, and other work scope changes which the federal funding process could not immediately react to support.

Overall, the current available funding has affected the performance of work for OU 8 and its ability to meet the remaining IAG enforceable milestones. However, the main issue, regardless of funding, is that the current IAG scope and schedule is unrealistic. Severe constraints exist in the IAG that never allowed for technical and logistical issues to be considered during the scheduling of the work scope for OU 8. The schedule constraints are so severe that regardless of the amount of money that could have been given to OU 8, the physical limitations, logistics, and resources that would be have been necessary to complete the work within the timeframes of the IAG were unachievable. The schedules were planned out 12 years in advance utilizing no-risk considerations, i.e. no schedule contingency exists in the IAG. Examples of the IAG's lack of consideration for implementation include, unrealistic procurement leads times, no consideration

towards critical buried utilities that could catastrophically affect building safety and protection of human health and the environment, limited laboratory capacities for the amount of samples to be collected (this is a nationwide situation), and the physical limitation of resources, e.g. regional drill rig availability.

Presently, DOE is utilizing several approaches for revisiting the approach for the investigation of OU 8. These proactive efforts are documented within the latest meetings and documents being produced by the Environmental Restoration Management Accelerated Cleanup Working Group. The outcome of this work group has been to establish approaches to aid in the realistic scoping and scheduling of not only OU 8, but many other OUs, e.g. OUs 9, 10, 12, 13, and 14, which are soon to be in a similar situation of missing IAG Enforceable milestones. An example of documentation that the agencies have been involved in and is a major plan that will support renegotiation of the IAG is the Interim Measures/Interim Response Action/Decision Document for the RFP Industrial Area. This document is in draft form as of February 16, 1994 and will soon be transmitted to the agencies.

Additionally, the recent change in mission of RFP has considerably altered the approach to the work considered in the original IAG. The implementation of T/D&D schedules and the subsequent interaction with OU 8, has affected when parts of OU 8 should be investigated and cleaned up. Also, changes identified during development of the Phase I RFI/RI Work Plan identified improvements to the original IAG scope of work. For example, duplication of effort improvements were realized which include consideration of field sampling plans from other OUs that are adjacent to or overlap IHSSs within OU 8. Originally, the IAG and the CDH and EPA did not allow for consideration of other work efforts in these areas.

- (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

DOE initiated a request for modification to work, for good reason, along with the extension request submitted on January 31, 1994. The existing IAG under Part 32 paragraph 191 is designed to allow modifications to work, including investigatory work, etc. The justification for denial of an extension request and, more importantly, the ability to allow formal consideration of DOE's modification to work is inappropriate. DOE should be allowed to formally present the proposed technical modifications to OU 8, regardless of funding level, without incurring stipulated penalties at this time. However, the deadlines for the OU 8 Draft and Final Phase I RFI/RI Reports are still legally binding milestones under the current IAG, and regardless, DOE remains liable for the slippage in schedules. DOE should formally focus the dispute on the changes in scope to OU 8 and then proceed to negotiate with CDH and EPA on the schedule.

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

OUs 9, 10, 12, 13 and 14 are currently in similar situations with respect to funding allocations and subsequently will be missing IAG enforceable milestones. Also each of these OUs will also each require modifications to work scope based on the same issues e.g. T/D&D. DOE has already identified these OUs as "at risk" of receiving similar IAG violations and has involved CDH and EPA for over a year in the process. DOE has initiated the development of several documents designed to address how the work at Rocky Flats will be changed for OUs 8, 9, 10, 12, 13, and 14. A number of documents were drafted in 1993 which are now being formally delivered to the regulatory agencies. A recent example includes the document prepared by the Environmental Restoration Management Accelerated Cleanup Working Group entitled "An Analysis of the Potential for Redirection of the Rocky Flats Environmental Restoration Program" which includes an IHSS by IHSS evaluation to quantify linkages to T/D&D. Also, the most recent document is the Interim Measures/Interim Response Action/Decision Document for the RFP Industrial Area. The initial draft of this

document was submitted on February 16, 1994 (see section B above). Regardless of these existing efforts to proactively modify work and no matter how often DOE has involved CDH and EPA, the IAG still remains the only official agreement by which DOE is being held accountable.

### **Attendant Issue**

The CDH issued a Notice of Violation (NOV) on May 22, 1992 on the Draft Phase I RFI/RI Work Plan for OU 8. The NOV identified the Draft Phase I RFI/RI Work Plan submitted on May 1, 1992 as deficient. The deficiencies were identified as several technical issues and EG&G's procurement process which only allowed for one month to complete the Work Plan before the IAG due date of May 1, 1992. Through the dispute resolution process DOE corrected the technical deficiencies and delivered a Final Work Plan which was acceptable by the regulatory agencies. Also, in order to resolve the procurement deficiency DOE and the regulators agreed that training would be provided concerning RCRA/CERCLA issues to both DOE and EG&G procurement staff. The training action is still pending and thus the NOV has not been formally closed out to date.