



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

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Ref: 8HWM-FF

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ADMIN RECORD

Mr. Martin McBride  
Department of Energy/Rocky Flats Office  
P.O. Box 928  
Golden, CO 80402-0928

Bob Duprey  
Environmental Protection Agency

Re: Ponds IM/IRA Dispute

Dispute Resolution Committee Member:

In accordance with an agreement made among the project coordinators, EPA has compiled the attached statement of dispute and the supporting details of each party's position. DOE has declined an opportunity to sign the statement because they disagree with the CDH and EPA positions.

It is our understanding that DRC meetings are being scheduled to take up this dispute during the first week of March. If there is any information we can provide in the interim to help with your preparations, please contact me at 294-1134.

Sincerely,

Martin Hestmark, EPA  
Manager  
Rocky Flats Project

Enclosure

cc: Gary Baughman, CDH  
Rich Schassburger, DOE  
Gail Hill, DOE  
Shirley Olinger, DOE  
Peter Ornstein, EPA-ORC

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February 14, 1994

EPA, DOE and CDH JOINT STATEMENT OF DISPUTE

February 14, 1994

BACKGROUND

On January 24, 1994 EPA received a letter from DOE regarding the Pond Water Management IM/IRA (94-DOE-00887). It requested a 60 day extension of the period allowed for invoking dispute resolution on milestones dates for IM/IRA Decision Document submittals set by EPA in a January 10, 1994 letter. As lead agency, EPA denied the request.

In accordance with DOE's stipulation, dispute resolution was thus invoked as of January 24, 1994. Part 16 of the IAG requires a written statement of dispute "setting forth the nature of the dispute, DOE's position with respect to the dispute, and the information relied upon to support its position" be provided upon invocation. DOE provided the required statement on February 9, 1994, at which time a conference call between the three parties resulted in the collective conclusion that no viable possibility of informal resolution within the allowable timeframe existed.

EPA denied the extension because it did not see that any useful purpose would be served by granting the requested delay. The EPA position on the Ponds IM/IRA and the basis for directing that this action be completed have been clearly stated on the record for over two years. The chronology of events enclosed provides numerous references the DRC may wish to consult which document how we arrived at the current impasse.

STATEMENT OF DISPUTE

The following disputed issue is being forwarded to the Rocky Flats IAG Dispute Resolution Committee for resolution pursuant to the procedures set forth in Part 16 of the IAG:

Do EPA and CDH have the authority under the IAG to set milestones requiring the development and implementation of a surface water IM/IRA to regulate discharges from surface water ponds, control discharges of hazardous wastes and hazardous substances into surface water ponds, and require DOE to develop off-channel spill-treatment capacity?

POSITION OF DOE (as gleaned from DOE's 2/9/94 letter)

EPA and CDH lack authority because:

1. The basis for the proposed IM/IRA is inconsistent with factors prescribed in the National Contingency Plan (NCP);
2. Discharges from the terminal ponds currently meet all NPDES limits;
3. EPA has acknowledged that use of the detention ponds is an example of Best Management Practices for stormwater control and treatment; and
4. The focus of the CERCLA cleanup is on the pond sediments, not pond water. Regulation of pond water under CERCLA is inappropriate.

In addition, DOE does not believe that an IM/IRA is the proper vehicle for integrating various water programs under the Clean Water Act, CERCLA, and RCRA. To avoid duplication, other options, including a Surface Water Management Plan, would be better suited to address water management and OU work.

#### POSITION OF EPA

##### EPA REJECTS THE NOTION THAT EPA LACKS THE AUTHORITY TO SET MILESTONES REQUIRING THE DEVELOPMENT AND IMPLEMENTATION OF THE DISPUTED IM/IRA.

One of the primary objectives of the IAG is to identify situations where IM/IRAs are appropriate (see Paragraph 15.A of the IAG). As described below, EPA believes this particular IM/IRA is wholly appropriate.

Once EPA and CDH identify an appropriate IM/IRA, "DOE agrees that it shall develop and implement Interim Remedial Actions/Interim Measures (IRAs/IMs) as required by EPA and the State." The language in the IAG is explicit. EPA and CDH have required DOE to develop and implement the IM/IRA. If DOE fails to implement, DOE will be in violation of this provision. The IAG further states that in the event that DOE fails to propose an IRA, EPA may unilaterally select the IRA instead.

##### EPA REJECTS DOE'S ARGUMENTS AS INCORRECT AND/OR IRRELEVANT TO THIS DISPUTE.

**Inconsistency with the National Contingency Plan:** The IM/IRA is not inconsistent with the NCP. The legal basis for conducting IM/IRAs as part of IAG activities is derived, in part, from the NCP and the preamble to the NCP. The preamble to the NCP states that early actions (i.e., IM/IRAs) are appropriate to "eliminate, reduce, or control the hazards posed by a site or to expedite the completion of total site cleanup." 55 Fed. Reg. 8704. The disputed IM/IRA 1)

clearly eliminates some of the hazards posed by the site by requiring the development of off-channel spill containment and treatment capacity; 2) reduces the hazards posed by the site by intercepting and treating contamination leaching into the landfill pond; 3) controls the hazards posed by the site by placing discharge limits on the terminal ponds when the NPDES discharge restrictions are removed; and 4) expedites completion of total site cleanup by preventing routine releases into the ponds as the ponds undergo CERCLA characterization and cleanup, and ensure pond usage is consistent with ongoing CERCLA activities.

**NPDES Limits:** DOE's assertion that it is in compliance with the current NPDES permit and with applicable water quality standards (at the outlet of the terminal ponds) is irrelevant. The IM/IRA is prophylactic. It is intended to abate a real threat of future releases of hazardous substances into the ponds, similar to the releases that have frequently occurred in the past. In addition, EPA has informed DOE of EPA's intent to issue an NPDES permit to control point source discharges upstream of the ponds in order to protect Colorado Water Quality Control Commission water quality standards, as required by the Clean Water Act.

**Best Management Practices:** Regardless of EPA's determination concerning DOE's Best Management Practices for the purposes of implementing the Clean Water Act, EPA has determined that these practices are not consistent with our joint mission of cleaning up the Rocky Flats facility. EPA does not believe that episodic releases into the ponds is consistent with pond site characterization activities (much of which has already concluded) nor with future remedial activities.

**Cleanup of Pond Sediments:** DOE's assertion that the CERCLA cleanup of the ponds is exclusively limited to the sediments is wrong. The CERCLA cleanup is concerned with all potential (and actual) releases of hazardous substances into both the sediments and the surface waters. In addition, hazardous substances released into the surface waters often get into the sediments, and contaminated groundwater seeps into surface waters. The CERCLA process is holistic. It does not focus on one environmental media to the exclusion of other media. The IM/IRA is intended to further the objectives of the CERCLA cleanup by eliminating additional contamination of the pond waters and sediments. Note: If DOE prevails in this dispute and is allowed to continue releasing hazardous substances into the ponds, DOE's costs associated with characterization and cleanup of the ponds will be open ended.

**EPA BELIEVES THIS IM/IRA IS NECESSARY.**

EPA's primary objectives in implementing this IM/IRA are five fold: 1) the IM/IRA will abate further contamination of the ponds and ultimately reduce the overall time and expense of cleaning up the ponds; 2) the IM/IRA will ensure that

use of the Ponds is consistent with CERCLA remedial objectives; 3) the IM/IRA will virtually eliminate any environmental threat associated with accidental releases into the drainages; 4) the IM/IRA will provide the public the assurance it needs that discharges from the terminal ponds will continue to be regulated after the NPDES permit is removed; and finally, 5) the IM/IRA will address the current release of hazardous wastes and hazardous substances seeping into the landfill pond.

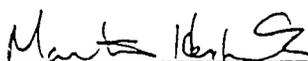
Given the importance of these objectives, and given the low cost of the IM/IRA, EPA believes the IM/IRA is wholly appropriate.

POSITION OF CDH

(See Attached)

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Richard Schassburger, IAG Project Coordinator  
U.S. Department of Energy

  
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Martin Hestmark, IAG Project Coordinator  
U.S. Environmental Protection Agency

Surface Water Management IM/IRA Statement of Dispute  
February 14, 1994

CDH Position

CDH does not agree with EPA's delineation of the "Statement of Dispute." Even though DOE has reserved their rights to reinvoke a dispute regarding the scope of the IM/IRA, we believe that in the 14 months that have elapsed since then, remaining issues regarding the previous dispute should have been resolved. We believe, as described below, that the only remaining disputable issue with respect to this IM/IRA should be the final milestones as delineated by EPA and CDH on January 10, 1994.

However, notwithstanding the above, we agree fully with those portions of the EPA statement of dispute regarding "Background", and "Position of EPA," particularly that section entitled "EPA believes this IM/IRA is necessary." Rather than repeat arguments made in those sections, the following text expands those items we believe to be appropriate, and adds RCRA/CHWA concerns.

The Issue of Closure:

It is known that several, and maybe all, of the RFP ponds have received, or continue to receive, listed hazardous wastes. These ponds do not meet the minimum technical requirements for hazardous waste surface impoundments and, as such, cannot receive a permit. Therefore, any of the ponds that have received hazardous waste must go through the RCRA/CHWA closure process.

It was CDH's intent that the characterization and cleanup of the ponds under the IAG would meet the requirements of closure. To that end, we felt the Surface Water Management IM/IRA would create an effective vehicle for solving past and continuing hazardous waste management problems at the ponds (including such items as 1) proper recognition of when pond water and pond influent are, or should be managed as, hazardous waste and, 2) the ramifications of hazardous waste regulations on such practices as water transfers between ponds and spray evaporation) while setting the stage for coordination with, and facilitation of, closure requirements. Without the IM/IRA, however, the following points must be considered:

- 1) there are no milestones in the IAG for pond cleanup beyond the submittal of the RFI/RI Reports for OUs 5 and 6; therefore, there is no existing schedule to meet closure requirements,
- 2) DOE has stated (94-ECE-01530) that "no further action is necessary" for the ponds, though present pond management includes continued reception of hazardous waste into the landfill pond and pond B-2 at a minimum, and does not

- prevent other ponds from potentially receiving hazardous waste,
- 3) management of the ponds under the Clean Water Act does not ensure compliant management under RCRA/CHWA which is required by the IAG (compliance with other laws),
  - 4) none of the ponds qualify as waste water treatment units under RCRA/CHWA, and
  - 5) CDH could call in closure plans for any and all of the ponds that have received hazardous waste. From call-in, DOE would have 15 days to submit the closure plans pursuant to 6 CCR 1007-3, Section 265.112(d)(3), and 180 days from approval of the closure plan to complete closure activities (Section 265.113(b)).

Further Issues:

1) CDH feels it is imperative, once the NPDES compliance point has been moved to the STP outfall, to assure the public that releases from the terminal ponds will continue to be regulated in an enforceable manner.

2) DOE claims that this IM/IRA does not meet the intent of Paragraph 40 of the IAG where IM/IRAs are completed to "abate an actual or potential threat to public health, welfare, or the environment at or from the site." We disagree with that assessment. Actual releases through the Woman and Walnut Creek drainages have occurred as a matter of historical fact. No containment for "off-spec" waters or spills from the plant currently exist outside of the ponds in question. Therefore, potential release is still a possibility - witness the Standley Lake Protection Project and the Broomfield Diversion Ditch.

Dispute Scope:

DOE cannot dispute whether EPA and CDH can require an IM/IRA. DOE can, however, dispute the scope of a required IM/IRA and DOE did dispute the scope of the Surface Water Management IM/IRA on November 9, 1992. After a subsequent meeting, DOE withdrew their dispute via correspondence of November 23, 1992.

DOE stated in the November 23, 1992, letter that they conditionally withdrew their dispute "without prejudice," reserving their right to re-invoke dispute should they deem it necessary. They further stated that they were withdrawing the dispute to allow time for dialogue between the affected parties.

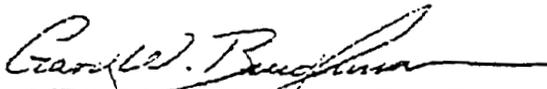
CDH believes that DOE had plenty of opportunity to resolve their continuing concerns over the IM/IRA scope in the intervening 14 months. From our perspective, slow progress on the IM/IRA was occurring, culminating in the submittal of the draft IM/IRA Decision Document on November 22, 1993. In fact, it was not until December 21, 1993, at a meeting set up to resolve agency comments

to the Draft IM/IRA, that we were made aware of the extent of the remaining DCE issues. To us, the magnitude of the intervening time period and the development of the Draft IM/IRA constitutes tacit approval of the IM/IRA scope and places the current re-invocation of the IM/IRA scope dispute outside the intent of Paragraph 92 of the IAG.

Therefore, CDH believes that only the dates for the final three milestones for the IM/IRA, as outlined in EPA correspondence of January 10, 1994, are currently disputable. As delineated in Paragraph 117 of the IAG, the pendency of any dispute shall not affect DOE's responsibility for timely performance of the work required by the IAG. Therefore, until changed as a potential result of this dispute resolution, the milestones defined previously for this IM/IRA remain.

Conclusion:

CDH believes that the current dispute should be settled by requiring DOE to continue to develop the Surface Water Management IM/IRA as currently scoped. Further, as no effort has been made on the part of DOE to dispute the milestones finalized for this IM/IRA, and the appropriate timeframes for this dispute have passed, the milestones are final and enforceable.



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Gary W. Baughman, Chief  
Hazardous Waste Facilities Section  
Colorado Department of Health

## Chronology of Events - Ponds IM/IRA

December 19, 1991 - EPA and CDH meet with DOE and EG&G, explain that the regulatory framework applied to the ponds will be changed and provide the reasons why this is necessary. Compliance with Clean Water Act requirements, and consistency with CERCLA/RCRA program requirements are cited as the primary considerations.

June 26, 1992 - EPA sends a letter to DOE confirming that the NPDES discharge points and other aspects of pond regulation will be changed and urging DOE to begin developing an IM/IRA to take over regulation of the ponds in conjunction with the issuance of the new NPDES permit. The reasons for this action are clearly set forth, and remain unchanged during subsequent discussions.

October 22, 1992 - EPA and CDH send a letter requiring development of an IM/IRA for management of the ponds, pursuant to Paragraph 150 of the IAG. This action is taken in light of DOE's refusal to initiate an IM/IRA based on our previous requests.

November 9, 1992 - DOE invokes Dispute Resolution under the IAG, contending that since the ponds are in compliance with the current NPDES permit, there is no reason for an IM/IRA.

November 16, 1992 - DOE, EPA, and CDH meet to discuss the dispute over the directive to implement an IM/IRA for the ponds. Based on this discussion, DOE agrees to withdraw their dispute.

November 23, 1992 - DOE letter sent to EPA and CDH indicating they will "conditionally withdraw the invocation of the Dispute Resolution Process" and requesting another meeting to obtain further clarification of the requirement to perform an IM/IRA for the ponds.

January 21, 1993 - Scoping meeting held at which reasons for requiring the IM/IRA and expectations for the Decision Document are explained. DOE/EG&G indicate they understand the new NPDES permit will regulate discharges from the STP outfall and several stormwater discharges from the developed area of the plant, and pond operations and the terminal pond discharges will be regulated by requirements of the IM/IRA. This approach is as explained in previous correspondence.

February 3, 1993 - Second scoping meeting is held. DOE proposes a schedule, which begins schedule discussions continuing through the Spring and Summer.

August 17, 1993 - DOE/EG&G submits the last in a series of draft schedules for the IM/IRA. It fails to meet basic requirements for streamlining established on similar projects.

September 16, 1993 - Citing continued failure of schedule

discussions to reach consensus, CDH/EPA letter to DOE establishes November 22, 1993, milestone for delivery of Draft IM/IRA Decision Document. No dispute is raised by DOE.

November 8, 1993 - DOE submits letter to EPA/CDH asserting that they are "not legally bound to execute" an IM/IRA for the ponds and asserting they only "agreed to scope the possibility" of such an action out of good faith.

November 18, 1993 - EPA (as lead regulatory agency) sends letter indicating November 22, 1993 milestone for submittal of Draft Decision Document will be enforced under the IAG terms.

November 22, 1993 - DOE submits Draft Decision Document. Transmittal asserts this is "good faith" and argues that the milestone was invalid and compromised technical quality. Document clearly states (page 1-3) that DOE understands EPA/CDH intentions for changing the regulatory framework applicable to the ponds.

December 14, 1993 - EPA and CDH submit comments on the draft IM/IRA Decision Document. Some basic problems are noted, and a comment resolution meeting is scheduled.

December 21, 1993 - At the comment resolution meeting, DOE/EG&G announce they intend to fight any change in the regulatory approach to the ponds by any means available. Their reasons for this remain unclear. Comment resolution for the IM/IRA is suspended since this change undermines the foundation for the Decision Document.

January 10, 1994 - EPA sends letter establishing milestones for the Draft Final and Final IM/IRA DD and RS. Agreement is reached at staff level to attempt to restart the comment resolution process, with the understanding that EPA's position on the regulatory framework applicable to the ponds is established on the record and will not be open for discussion.

January 13, 1994 - Second comment resolution meeting held. EPA/CDH again review the basic requirements for the IM/IRA Decision Document and answer questions on specific comments. DOE/EG&G indicate the regulatory position and the required document revisions are clear.

January 24, 1994 - DOE submits letter requesting an additional 60 days to decide whether to invoke dispute resolution on the January 10, 1994, EPA letter. The DOE letter indicates they will consider a denial of the request to be an invocation of dispute, but provides no statement of what is being disputed or why, citing a need to evaluate "potential DOE-wide policy implications" as justification for the requested delay.