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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

4WD-FFB

Mr. W. Don Seaborg, Site Manager
United States Department of Energy
Paducah Site Office
P.O. Box 1410
Paducah, Kentucky 42001

Mr. Gordon Dover, Paducah Manager of Projects
Bechtel Jacobs Company LLC
761 Veterans Avenue
Kevil, Kentucky 42053

SUBJ: Federal Facility Agreement Formal Dispute Concerning
Missed Milestones for the C-410 Removal Action
U.S. Department of Energy
Paducah Gaseous Diffusion Plant

Gentlemen:

Enclosed is the Regulator Parties' Resolution of the above-referenced dispute issued pursuant to Section XXV.B.3 of the Federal Facility Agreement (FFA) for the Department of Energy Paducah Gaseous Diffusion Plant. This resolution has been reached by agreement of the Environmental Protection Agency (EPA) and Kentucky Natural Resources and Environmental Protection Cabinet (KNREPC) members of the FFA Dispute Resolution Committee. Although the enclosed decision confirms the correctness of EPA's and KNREPC's prior determination that DOE failed to meet two October 31, 2001, milestones, we are pleased that all FFA parties have now agreed to a schedule for the subsequent remaining milestones for the C-410 Removal Action, and we look forward to start of the action in June 2002 in accordance with that agreement.

This letter and the enclosed resolution decision are initially being transmitted by facsimile, and the original will reach you by regular mail in due course. If you have any questions regarding this matter then please contact Jon D. Johnston at (404) 562-8527.

Sincerely,

Richard D. Green
Director
Waste Management Division
U.S. EPA Region 4

Enclosure

I-05102-0151

cc: R. Daniels, KDEP
M. Welch, KDEP
R. McDowell, KDEP
J. A. Volpe, KY RCB
W. Murphy, DOE-HQ
L. Fritz, DOE-ORR
R. Sleeman, DOE-ORR
R. Blumenfeld, DOE-ORR

REGULATOR PARTIES' RESOLUTION OF DISPUTE OVER MISSED MILESTONES FOR THE C-410 COMPLEX DECONTAMINATION AND DECOMMISSIONING PROJECT, PADUCAH GASEOUS DIFFUSION PLANT, PADUCAH, KY

Section XXV of the Federal Facility Agreement (FFA) for the Paducah Gaseous Diffusion Plant (PGDP), entered into in 1998 by the United States Department of Energy (DOE), the Kentucky Natural Resources and Environmental Protection Cabinet (KNREPC), and the United States Environmental Protection Agency (EPA), provides a process for resolving disputes arising under the FFA. As part of this process, a Dispute Resolution Committee (DRC) is established, consisting of DOE's Site Manager for the Paducah Site Office, the Director of the Kentucky Division of Waste Management, and the Director of the Waste Management Division, EPA Region 4. Pursuant to FFA Section XXV.B.3, if the DRC does not reach an agreed resolution within a 28-day period, its EPA and KNREPC members, as representatives of the regulator parties, may attempt to resolve the matter jointly, and, if successful, issue their written decision of resolution.

A dispute has arisen from DOE's failure to submit for review two primary documents for the C-410 Complex Decontamination and Decommissioning removal action (C-410 Project) – the D1 Action Memorandum (AM) and the D1 Removal Action Work Plan (RAWP) – by the milestone dates duly established under FFA procedures for DOE's submittal of these documents. The dispute was not resolved by the DRC within the 28-day period (expiring on February 27, 2002) as specified in the FFA for resolution by consensus of DRC members representing all three FFA parties. Consequently, EPA and KNREPC have agreed upon, and hereby issue, their two-party decision to resolve this dispute as follows:

FACTUAL BACKGROUND

DOE invoked FFA informal dispute procedures on November 30, 2001, (Letter from W. Seaborg to J. Crane and M. Welch), in response to a November 12, 2001, notice from EPA and KNREPC stating the regulators' determination that DOE had failed to comply with the October 31, 2001, milestones for the C-410 Project AM and RAWP documents. In its letter invoking informal dispute procedures, DOE acknowledged October 31, 2001 as the FFA milestone date "currently scheduled" for the two FFA milestones. Moreover, DOE did not deny missing the two milestones or claim that the failure to meet the two milestones was caused by an event of force majeure.

Instead, DOE asserted disagreement that the regulators' determination could be used as a basis for assessing stipulated penalties under the FFA. Although the parties' subsequent discussion of C-410 Project did result in agreement on amendments to FFA milestones for the Action Memorandum Signature and Remedial Action Start Date, a consensus was not reached during the informal dispute resolution process on matters related to the missed October 31, 2001

milestones. As a result, DOE invoked formal resolution procedures on January 30, 2002 (Letter from W. Seaborg to J. Crane and M. Welch). The DRC members representing all three FFA parties failed to resolve the dispute by February 27, 2002.

JOINT DECISION OF EPA AND KNREPC

1. The joint determination made by EPA and KNREPC and set forth in the notice letter dated November 12, 2001, indicating that DOE failed to comply with both the October 31, 2001 milestone for the D1 AM and the October 31, 2001 milestone for the D1 RAWP was a correct determination. Although the above-referenced dispute invocation letters assert DOE's disagreement with that determination, this disagreement is confined to the issue of whether failures to meet these milestones "may be utilized as a basis for assessing stipulated penalties." DOE has not disputed either the fact that FFA October 31, 2001 milestones existed for the two documents or the fact that it did not submit the two documents by that date.

2. DOE has advanced several reasons to support its contention that submission of the C-410 Project D1 AM and the D1 RAWP by their enforceable milestone date should not have been required. To the extent that DOE was aware of these reasons when it received EPA's September 13, 2001, letter of nonconcurrency on DOE's request to extend these milestones beyond October 31, 2001, DOE could have disputed this nonconcurrency within the 14-day period specified in FFA Section XXIX.E.3. This section clearly provides that "If DOE does not invoke dispute resolution within fourteen (14) Days of receipt of a statement of nonconcurrency [on an extension request], then DOE shall be deemed to have accepted EPA's or KNREPC's nonconcurrency and the existing schedule." [Emphasis added.] When DOE received EPA's September 13, 2001 letter of non-concurrence on DOE's request to extend these milestones beyond October 31, 2001, DOE had an opportunity to dispute the non-concurrence within the 14-day period as specified in the FFA.

Alternatively, if DOE became aware of reasons to further extend the October 31, 2001 milestone date after this 14-day dispute period had elapsed, DOE could have submitted these reasons to support another milestone extension request, which would have been timely under FFA Section XXIX.A if made at any time "prior to the deadline or schedule deliverable date" of October 31, 2001. However, DOE chose to disregard both FFA options for asserting its reasons for extending the milestone date before it had passed, and its untimely assertion of the reasons after receiving the EPA/KNREPC determination that the FFA milestones had been missed is not an adequate basis for altering that determination.

3. Moreover, the reasons DOE has given to justify failure to meet these two FFA milestones do not involve the types of matters which – even assuming DOE's positions on these matters were to be accepted in the dispute resolution process – would relieve DOE of liability for stipulated penalties. When, as in this case, DOE invokes the FFA dispute resolution process to challenge a determination by EPA and KNREPC that DOE has failed to submit a primary document by its milestone date, FFA Section XLIII (B) limits the scope of matters in dispute to

“the question of whether of the failure did in fact occur or was caused by force majeure” and limits the occasions where DOE will not be liable for any stipulated penalty assessed to those situations in which ... “the failure is determined, through the dispute resolution process, not to have occurred or to have occurred as the result of a force majeure event.” Neither of these two situations is present in this dispute.

Accordingly, EPA and/or KNREPC are entitled to assess stipulated penalties for DOE’s failure to meet the C-410 Project AM and RAWP milestones pursuant to FFA Section XLIII. Although neither EPA nor KNREPC has yet assessed a penalty for this failure, this Regulator Parties’ Resolution of Dispute does not waive or otherwise affect EPA’s and/or KNREPC’s discretion to do so in the future.



Richard D. Green
Director
Waste Management Division
EPA Region 4

Date 4 MAR 02

**REGULATOR PARTIES' RESOLUTION OF DISPUTE OVER MISSED MILESTONES
FOR THE C-410 COMPLEX DECONTAMINATION AND DECOMMISSIONING
PROJECT, PADUCAH GASEOUS DIFFUSION PLANT, PADUCAH, KY**



Date 3-4-02

Robert H. Daniell
Director
Division of Waste Management
Kentucky Department for Environmental Protection