



DEPARTMENT OF THE AIR FORCE

HEADQUARTERS 27th FIGHTER WING (ACC)  
CANNON AIR FORCE BASE, NEW MEXICO

4 FILE: Real 93  
Cannon

13 JAN 1993

27 FW CC  
100 S DL Ingram Blvd Suite 100  
Cannon AFB NM 88103-5214

Mr Edward Horst, Program Manager  
Hazardous and Radioactive Materials Bureau  
New Mexico Environment Department  
1190 St Francis Drive  
Santa Fe NM 87503



RE: Cannon AFB, NM 7572124454  
31 Dec 92 NMED Letter Concerning Compliance Agreement

Dear Mr Horst

In response to your letter dated 31 Dec 92, Cannon AFB is submitting this Notice of Dispute pursuant to Section XII of the Compliance Agreement. At issue is whether the compliance agreement requires Cannon AFB to merely start quarterly RCRA background quality monitoring over a year's period for termination of the agreement or actually complete the monitoring before termination.

Our position is that you are unreasonably withholding termination of the compliance agreement since the plain language of the agreement merely requires Cannon AFB to start quarterly RCRA background quality monitoring.

The compliance agreement provides in Section XIII, Termination, that:

"Cannon's obligations under this Compliance Agreement shall terminate upon EID's certification to Cannon in writing that all conditions of the Agreement have been completed by Cannon. Such notification shall not be unreasonably withheld."

The language under dispute in Section V. B., Paragraph 5, Resolution for Alleged Violations, states:

"After installation of an adequate groundwater monitoring system, Cannon shall begin determination of RCRA background groundwater quality pursuant to HWMR-5, as amended, 40 CFR, Section 265, Subpart F."

Under New Mexico law, in interpreting contract language, the usual and customary meaning is given to language used. Sun Vineyards, Inc. v. Luna County Wine Development Corp., 760 P.2d 1290, 107 N.M. 524. (N.M. 1988). Here there is no ambiguity in the disputed paragraph and the word "begin" should be given its usual and plain meaning. Black's Law Dictionary, Sixth Edition, defines "begin" as "To originate; to come into existence; to start; to institute; to initiate; to commence..." Thus, Cannon's obligation is merely to start background monitoring, not to compile a year's worth of monitoring data before the agreement can be terminated. Furthermore, a contract may not be given a meaning which the language of the contract itself does not permit, El Paso Natural Gas Col v. Western Bldg. Associates, 559 F.2d 927, (C.A.N.M. 1979), appeal after remand, 675 F.2d 1135. This is exactly what you are attempting to do contrary to the language of the agreement and generally accepted New Mexico contract law.

Notwithstanding this construction of the compliance agreement, there are three other equitable reasons why the contract should be terminated now. First, the underlying 11 Aug 89 Notice of Violation (NOV) was based upon an inadequate monitoring system - not failing to provide quarterly monitoring data. Once the violations of the NOV, as incorporated into the compliance agreement, are satisfied, the compliance agreement should be terminated. Second, there is an independent legal obligation to provide the requested data above and beyond the compliance agreement. Cannon AFB is required to continue groundwater monitoring under HWMR-6, Part VI, Section 40 CFR 265.90 and all other interim status requirements for Cell 3 of Landfill 5. Finally, Cannon AFB, in good faith, intends to comply with the law. Funding for groundwater monitoring for FY93 has been obtained from HQ ACC and forwarded to the Tulsa District Corps of Engineers for action.

Since the NMED position is contrary to the plain meaning of the agreement as interpreted under New Mexico law, your action is unreasonable under the compliance agreement. As such, the only logical, rational and legally responsible action is for you to certify all conditions of the agreement have been satisfied and terminate the agreement.

Sincerely



RICHARD N. GODDARD  
Brigadier General, USAF  
Commander