



GARY E. JOHNSON
GOVERNOR

State of New Mexico
ENVIRONMENT DEPARTMENT
Harold Runnels Building
1190 St. Francis Drive, P.O. Box 26110
Santa Fe, New Mexico 87502

OFFICE OF GENERAL COUNSEL

PHONE: 505-827-2990
FAX: 505-827-1628



ENTERED

MARK E. WEIDLER
SECRETARY

EDGAR T. THORNTON, III
DEPUTY SECRETARY

April 30, 1997

William A. Wilcox, Jr.
Environmental Law Specialist
Civil & Admin Law Division
Department of the Army
Fort Bliss, Texas 79916-0058

Dear Mr. Wilcox:

This letter responds to your request for confirmation that the four sewage ponds at issue located at Fort Bliss will be regulated under RCRA. The four sewage ponds are currently listed as solid waste management units (SWMU) in Fort Bliss' RCRA permit application filed with NMED pursuant to the Hazardous Waste Act. Under state law, facilities with RCRA permits are required to comply with all corrective action requirements and permit conditions determined by the State as needed to protect human health and the environment. See NMSA 1978, §§74-4-4.2 and 20 NMAC 4.1.900 (incorporating by reference 40 CFR §270.32).

Pursuant to the authority under RCRA and delegated to the State of New Mexico, NMED will require that the Fort Bliss facility submit groundwater discharge plans for the three sewage ponds (not including the Meyer pond) as needed to comply with 40 CFR §270.42 and the New Mexico Water Quality Act. NMED has determined that this is required as necessary to protect human health and the environment under state law. As we agreed, any directives issued by NMED as a result of the discharge plans will be under NMED's RCRA corrective action authority.

With regard to the issue of sovereign immunity, NMED agrees that the requirement to submit groundwater discharge plans under these circumstances has no clear basis under the federal Clean Water Act. As stated in our letter dated January 5, 1996, we do not believe that whether these waters are hydrologically connected to surface water is a relevant inquiry. Instead, NMED's authority under federal law to require Fort Bliss to submit groundwater discharge plans stems from RCRA. Under RCRA, Congress clearly and unequivocally waived sovereign immunity and required federal facilities to comply with all state law regulations and requirements. 42 USC §6961. (the federal government is subject to "all Federal, State, interstate, and local requirements....") See also Federal Facility Compliance Act of 1992. 42 U.S.C. § 6001. Further, a primary purpose of RCRA is to protect groundwater. Id.

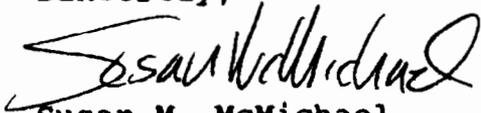
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For the above reason, NMED cannot state as you request, that Fort Bliss has not waived whatever sovereign immunity may exist with respect to the ponds. This is an issue of law which assertions from the State would have no force of law to bind either the State or Fort Bliss. United States v. Ohio, 112 S.Ct 1627, 1639 (1992). Nevertheless, Fort Bliss may choose to "agree to disagree" and submit the discharge plans with a proviso that the submittal does not constitute any such waiver and/or challenge the State if desired.

I am hopeful that this letter provides Fort Bliss with ample assurance that the ponds will be regulated under NMED's RCRA corrective action authority and that we will receive discharge plans shortly.

If you have any further questions, do not hesitate to call me at (505) 827-0127.

Sincerely,



Susan M. McMichael
Assistant General Counsel

cc: Ed Kelley
Steve Pullan, HRMB
Cecilia Abeyta
Marchell Schuman, GWB

