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JT  
RECEIVED

August 14, 1997

O. Wes J. Layton  
Major - USAF  
2000 Wyoming Blvd.  
Kirtland AFB, NM 87117-5650



Dear Major Layton:

This letter responds to your offer of settlement and letter dated July 24, 1997. You have requested the New Mexico Environment Department (NMED) to settle this matter based upon the following agreement in principle: (1) payment of a civil penalty in the amount of \$1,600 (reduction from the proposed penalty of \$36,400); (2) agree to a Supplemental Environmental Project (SEP) to remove the spent lead shot and periodically sample; and (3) to "handle to subject road" as a solid waste management site under the facilities' Part B Permit. As explained below, the proposed settlement is unacceptable.

A. KAFB's PROPOSED SEP

Based upon our last meeting, we understood that Kirtland Air force Base (KAFB) would prepare a proposed SEP for NMED review that conforms with our penalty policy ( e.g. a proposal which is not already required to be completed under the law, or pursuant to the facilities' RCRA Part B permit). I transmitted to you a copy of the applicable policy and legal criteria which are required to be met. The proposed SEP is precisely the type of action expressly prohibited under the penalty policy. A SEP is defined as a project which the respondent agrees to undertake which it is "not otherwise legally required to perform." See Penalty Policy and guidelines regarding "accelerated compliance" projects. "Accelerated compliance" may be acceptable for pollution reduction projects which go substantially beyond compliance and can result in significant pollution reduction. See EPA policy on the use of SEPs in enforcement settlements). The proposed SEP is clearly an action which KAFB is required to legally perform and in fact is required to perform under the terms of the compliance order. Further, as drafted, the SEP contains no timelines, is vague and essentially unenforceable.

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For these reasons, NMED cannot approve the SEP as proposed. Nevertheless, if KAFB desires to use a SEP to offset a portion of the civil penalty, NMED would encourage it to submit to the Department a proposal which conforms with the criteria set out for use of SEPs. The criteria is found on pages 37-39 of NMED's penalty policy and I have attached further guidance for your review. Further, to approve a SEP, NMED will need to review documentation justifying the cost estimate associated with any SEP. KAFB should also propose a SEP which clearly identifies the type of SEP, how it conforms to the legal criteria and a contains a detailed description of the proposal. KAFB may even consider proposing several options as a SEP to expedite this matter.

Finally, NMED cannot agree to any settlement which states that the obligations of KAFB are dependent or contingent upon the availability of funding. As a matter of Department policy, supported by case law, the obligations of KAFB to comply with the law and terms of any settlement stemming from a compliance order is not "contingent" upon funding.

#### B. REDUCTION OF CIVIL PENALTY

NMED's compliance order has required a payment of a civil penalty in the amount of \$36,400.00. NMED cannot simply agree to substantially reduce its civil penalty as proposed to a potential \$800.00. As you know, NMED cannot reduce a civil penalty by more than 40%, except for unusual circumstances (not present here), in which the penalty can be adjusted up to 75%. A proposed reduction of the civil penalty of more than 95% is clearly unsupportable. See NMED's penalty policy.

#### C. UNFOUNDED ASSERTIONS

Your letter also contains many unfounded and inaccurate assertions. (1) NMED inspectors did not base this compliance order upon assumptions or "rumors" that the unlawful practice occurred in the past. To the contrary, our evidence is based upon proof that KAFB actually deposited contaminated soils on the road; KAFB was notified of, and acknowledged that fact; (2) NMED is not imposing a penalty which it is unauthorized to do under the law. RCRA contains a clear waiver of sovereign immunity, which was bolstered by the passage of the Federal Facility Compliance Act. I am unaware of any legal precedent that supports your assertion. The fact is that contaminated soils were deposited upon the road for "at least 60 days" since the date of notification and issuance of the compliance order, and remain in place even to this point in time. To our knowledge, KAFB has taken no action whatsoever to perform any of the

required corrective action items set for in Paragraph 21 of the Compliance Order.

D. NMED'S PROPOSED SETTLEMENT

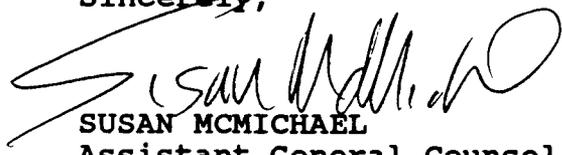
For these reasons, NMED cannot accept KAFB's proposed settlement. However, NMED is hopeful that KAFB is interested in settlement and therefore, we propose to settle this matter based upon an agreement in principle of the following: (1) payment of a civil penalty in the amount of \$21,840.00 ( representing 40% of the proposed penalty); (2) submittal of an acceptable SEP which conforms with the legal criteria for SEPs, has a value that corresponds to the proposed reduction and is approved by NMED prior to the execution of any settlement or before September 22, 1997; and (3) compliance with the corrective active items set forth in paragraph 21 of the Compliance Order in a timely manner, substituting the term "Order" for "Stipulated Final Order." Finally, an "agreement" to handle the road as a solid waste management unit (SWMU) under the Part B Permit is unnecessary. This is a legal requirement; there should no dispute that the site is a SWMU and will be subject to corrective action requirements under the under the Hazardous Waste Act.

Please contact me as soon as possible and no later than August 29, 1997, regarding the acceptability of this agreement in principle. If your clients approve, we will expect to receive a SEP proposal for review and consideration within the next few weeks. If we can reach an agreement, I will forward to you a copy of a Final Stipulated Order (SFO) which is required by regulation to settle cases resulting from a compliance order issued under the Hazardous Waste Act. See 20 NMAC 1.5.601.B. The SFO will be entirely consistent with those entered into by the Department with other entities, including federal facilities. If we do not receive a response, we will prepare for a hearing on this matter.

Further, the parties are required to provide a report regarding the status of settlement progress pursuant to the Hearing Officer's order dated June 17, 1997. Therefore, I have enclosed a copy of NMED's status report recommending that a hearing be set if we cannot reach an agreement in principle on or before September 22, 1997. Due to the nature of KAFB's proposal regarding the SEP and civil penalty, we are very concerned that KAFB is not serious in its efforts to achieve a mutually acceptable settlement. Nevertheless, we are hopeful that the parties can resolve this matter amicably.

If you have any questions, do not hesitate to call me.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan McMichael". The signature is fluid and cursive, with a large loop at the end of the last name.

SUSAN MCMICHAEL  
Assistant General Counsel

cc: Benito Garcia  
John Tymkowych  
Richard Mertz

Enclosures