



Department of Energy
Albuquerque Operations
Los Alamos Area Office
Los Alamos, New Mexico 87544

FEB 10 1989

RECEIVED
FEB 10 1989
LEGAL

Ms. Gini Nelson
Assistant General Counsel
New Mexico Health and Environment
P. O. Box 968
Santa Fe, New Mexico 87504-0968

Dear Ms. Nelson:

This letter will serve as a confirmation of the discussions in our meeting on Friday, February 3, 1989, and to the extent necessary our meeting on January 30, 1989, regarding resolution of the Compliance Order/Schedule issued by the Director of the Environmental Improvement Division (EID) on August 30, 1988, against the Department of Energy (DOE) and the University of California (the University)

During our morning session, which was attended by Jim Mitchell, Alice Barr, Boyd Hamilton, and the two of us, we discussed primarily the parameters of the technical undertaking. The issues raised and understandings reached are summarized below:

1. EID's position on the alleged violations associated with the outfall from Building 340. In our January 30 discussions, you had indicated that EID would be willing to agree to disagree on EID's authority to regulate this outfall under the New Mexico Hazardous Waste Act because it was your understanding that the activities which led EID to be concerned about this site had ceased. Jim Mitchell and I agreed to verify that the site is now inactive. Our investigations revealed that it is not; therefore, our first question was how we could resolve this issue. Your response was that the particular activity of concern to EID--the discharge of a solvent into a drain--had stopped. Alice Barr confirmed that to the best of her knowledge the discharge of solvents into that drain would not reoccur and that a solvent distillation system has been obtained.

Therefore, it is understood that the parties will agree to disagree on which law governs the outfall from Building 340 and that EID will not enforce the assessed fine related to the outfall nor will EID assert jurisdiction over the outfall under the New Mexico Hazardous Waste Act in the future.

2. Effect of the identification of previously unidentified hazardous waste management units as a result of evaluating waste streams. In the January 30 discussions, you had indicated that EID would not attempt to assess penalties against DOE or LANL if new hazardous waste management units are identified during the term of the proposed settlement agreement. DOE/LANL questioned

16493



whether the proposed agreement could include provisions for bringing these units into the system within a reasonable timeframe without the issuance of a Compliance Order or other enforcement mechanism by EID. You responded that EID is willing to include such provisions but you could not identify what those provisions would be. We agreed that both EID and DOE/LANL will develop for consideration proposed procedures for bringing new units into the system.

3. Timeframe for compliance. The proposed draft agreement which was the focus of our January 30 discussions (the draft agreement) proposed completing the evaluation of all LANL waste streams within a 39-month period. Because DOE/LANL are uncertain about how much time will be required to complete the evaluation, we asked how much flexibility there was in this number; whether EID would consider meshing the schedule of activities under this settlement with related schedules under DOE's Environmental Restoration program and under the Hazardous Solid Waste Amendments; whether EID would consider other factors in establishing the schedule such as the need to use Environmental Restoration funding; and whether EID would allow the University to hire a subcontractor to determine the timeframe and site priority for the evaluation of waste streams. You responded that EID is willing to consider a longer timeframe for the schedule and that EID may be able to agree to having a LANL subcontractor determine priorities and the time needed to complete the evaluation. You also mentioned that the use of a subcontractor would require the parties' consideration of three more time periods: the time to contract; the time to develop the priorities and schedule; and the time for EID to consider the proposed priorities and schedule.

4. Waste stream evaluation. DOE/LANL asked what EID expects from the evaluation of waste streams--a snapshot view or a historical view over a long period. You responded that EID will be satisfied with a snap shot, unless a process changes during the term of the agreement.

DOE/LANL also asked whether EID will accept "knowledge of process" methodology in the identification of waste streams. You responded that knowledge of process is acceptable so long as sufficient information is provided to support its use. DOE/LANL then requested that the agreement include specific criteria for determining what is sufficient information. You responded that EID is unable to come up with such criteria and it was agreed that DOE/LANL would draft some criteria for consideration.

5. Coordination with Part B Permit requirements. DOE/LANL asked how the requirements of the proposed settlement will be coordinated with the same or similar requirements being considered for LANL's Part B Permit. DOE/LANL also requested that the agreement acknowledge similar or identical requirements.

You responded that EID does not want duplication of requirements and that the agreement can be coordinated with the Part B Permit. DOE/LANL expressed a preference for having the settlement agreement control the prescribed activities rather than the Part B Permit to avoid the need for major permit modifications.

6. Intermediate, periodic reports. EID indicated in response to a question by DOE/LANL that the requirement for intermediate reports (proposed at the completion of each three sites) can be more flexible.

7. Other technical information. DOE/LANL asked whether more definition could be given to the meaning of "other technical reports" as used in paragraph VI.C.a.(4) of the draft agreement. You responded that some definition could be provided and suggested that we add a "such as" phrase followed by "maps, the identification of sampling locations on maps, and additional information to support knowledge of process."

7. EPA acceptance of a settlement agreement. DOE/LANL are concerned that the Environmental Protection Agency (EPA) may reject certain aspects of the proposed settlement or may have requirements which are duplicative of or inconsistent with the proposed settlement. Therefore, DOE/LANL questioned what the role of EPA would be in this settlement and suggested that, at a minimum, EPA concur in any settlement reached.

During the afternoon session of our meeting on February 3, 1989, only Jim Mitchell, you, and I were present. First, we acknowledged that the original purpose of this afternoon session was to discuss the draft rules for the hearing. However, you had suggested in a telephone call the previous Friday that it might be more beneficial to continue to discuss settlement if it appeared we were making progress. You indicated, however, that if there were time, you would continue to work on your comments to Jim's December draft of the rules.

Secondly, Jim and I pointed out that because our technical staffs had not reviewed the draft agreement until the previous Friday, we were not in a position to respond in any substantive way to the consideration proposed in the draft. Within that context, we had the following discussion:

1. Suspension of Obligation clause. You provided us a copy of a rewrite of a clause entitled "Suspension of Obligation," which you had furnished earlier at our request for a force majeure provision. Jim and I agree to review it.

2. Full time equivalents. The draft agreement proposed three types of monetary burdens--a fixed sum to be paid at the outset to assuage the insult of our alleged violations; one and

one-half full time equivalents (FTEs) to assist EID in reviewing the undertaking proposed in the draft agreement; and stipulated penalties for noncompliance with the agreed-to undertaking. In our discussion on January 30, you had no clear idea of what costs would be included for an FTE. At the February 3 meeting you indicated that the FTE included actual salary, labor burden, and an additional 19.9 percent to cover accounting costs. You explained that EID cannot accept an hourly rate and payment based on actual hours worked, but must, if it is to hire additional personnel, have a guaranteed FTE. You also indicated that you wished in addition to the FTE to have the costs of training and travel for the FTE. You further explained that the 1/2 FTE proposed was to cover the cost of supervising the FTE, in other words, it would contribute to the costs of personnel already on board such as Boyd Hamilton. Jim and I responded that we would consider recommending one FTE if EID can justify that a full-time or nearly full-time person is needed to review LANL activities under any settlement reached; that we were not willing to recommend the payment of travel and training costs because such sums were clearly an addition to the scope of the draft agreement, but that we would consider time spent in related training as part of the duties covered by the agreement; and that we were unwilling to recommend the payment of another 1/2 FTE for the supervision of the FTE.

Jim and I explained our reluctance to concede more money in this area as follows. The undertaking set forth in the draft agreement is similar to that being considered for LANL's Part B Permit. Therefore, contrary to a position stated by you earlier, these activities will have to be reviewed by EID regardless of the settlement of the Compliance Order. In other words, payment for an FTE cannot be justified in terms of additional work for EID; it can be justified only in the spirit of compromise. Because the willingness to consider payment for an FTE is made in the spirit of compromise and not because the alleged violations have resulted in a greater administrative burden for EID, DOE/LANL must be assured that they are offering no more than the agreement may be worth to them. Furthermore, EID has proposed other cost burdens in the draft agreement which have to be balanced against the amounts asked for to review LANL activities. Finally, we suggested that a reduction or elimination of those other costs might cause us to look again at the amounts we would be willing to recommend for administrative assistance.

3. Stipulated penalties. I again stressed that I am unwilling to recommend any stipulated penalties primarily because they do not afford the federal government the procedural safeguards of the Compliance Order process set forth in the New Mexico Statutes. You indicated that you were willing to consider dispute resolution language in the agreement, but you insisted on stipulated penalties.

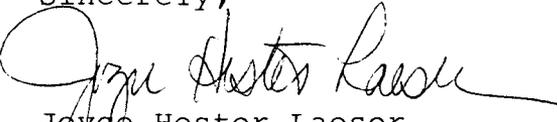
Ms. Gini Nelson

5

We ended our discussion with an agreement that Jim and I would provide you this confirming memo and that we would provide you a counterproposal in writing by Wednesday or Thursday, February 8 or 9, 1989, either at your office or faxed to your hotel in Salt Lake City. I also promised to provide draft language for a clause to avoid any violation of the Antideficiency Act as soon as possible.

If you disagree with my statement of the content of our discussions, please let me know.

Sincerely,



Joyce Hester Laeser
Counsel

cc:

James E. Mitchell, Senior Counsel, LANL, MS-A187
James A. Phoenix, Chief, Technical Programs Branch, LAAO
James A. Stout, Chief Counsel, AL