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Date: 4-29-99
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Pages: 5 (including cover page)
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Comments:

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Date: April 29, 1999
Refer to: 10520-9812/9914

VIA FACSIMILE

Nicholas Persampicri, Esq.
New Mexico Environment Department
Office of General Counsel
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Santa Fe, NM 87505

RE: Compliance Order 98-03

Dear Nick,

We appreciate your prompt response to our letter and proposed Stipulated Final Order to resolve Compliance Order 98-03. We are disappointed in NMED's counter proposal and do not believe it provides an appropriate basis for settling this matter. Our position continues to be that the Compliance Order is founded on erroneous facts and improper application of the hazardous waste laws and could not withstand either administrative or judicial challenge.

We believe that our legal memoranda, one of which was included with our answer last July, and the other sent to you on April 16, 1999, conclusively demonstrate that the asphalt material was neither a solid nor a hazardous waste and was therefore not subject to the New Mexico Hazardous Waste Act or Regulations. Additionally, as we have discussed with you and described in our paper of December 21, 1998, our internal investigation has clarified that none of the asphalt removed from the swale of the pad at Area L, TA-54, was disposed of in Pit 37 or in the County Landfill as alleged in the Compliance Order.

While we have repeatedly apologized for the fact that NMED's letter of July 22, 1994 was eventually overlooked when the material from the swale adjacent to the pad was removed to Area G, it has since become apparent to us that since the asphalt was not a solid or hazardous waste, NMED's directive that the material be handled as hazardous waste is certainly subject to challenge. Additionally, we believe that the Group Leader's statement indicates his good faith belief that the material was not a solid or hazardous waste.

It is troubling that NMED would attempt to impose a penalty of \$90,000 under such circumstances and our clients cannot agree to expend public monies to pay such a substantial penalty for a matter on which we believe there is minimal liability. We have made every effort to assess our potential responsibilities in this matter and as far as we can determine, the only legal

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basis which NMED has set forth for the payment of a fine in either the Compliance Order, or in your letter of April 27. is the alleged failure to characterize the material. Since the asphalt pad was in fact sampled, we dispute this allegation. However, in the interests of settling this matter we offered to pay a \$15,000 penalty as set forth in the first count of the Compliance Order.

With regard to the landfilling of the asphalt material, while you are correct that originally some asphalt was sent to an incinerator, this proved to be unnecessary, and since that time numerous shipments of asphalt from TA-54 have been shipped to Kettleman Hills hazardous waste landfill in California. We understand that your inspectors have reviewed the manifests for some of these shipments but we would also be happy to provide you with copies verifying that such material is appropriate for landfilling and need not be incinerated.

Because of our legal position that the asphalt material is not solid or hazardous waste, we prefer the language as we originally set forth in paragraph 2 of the Stipulated Final Order. However, we believe that if this matter is ultimately compromised we can come to an agreement on this language and most of the other changes you have made to the Stipulated Order.

We do strenuously object, however, to leaving the rubble pile corrective action subject to this Order. The facts do not support any conclusion that the asphalt material which is the subject of the Compliance Order was transported to the County landfill. The County submitted its proposed corrective action plan to NMED in August of 1998 and has not yet received a response. NMED has jurisdiction under other authorities to deal with necessary corrective actions at the landfill. We would like to have the Stipulated Order resolve all matters related to CO 98-03 and leave the resolution of the corrective action on the rubble pile to other appropriate NMED authorities. It is our understanding from our conversations with you that NMED is close to a resolution of this matter and we believe this is a reasonable request.

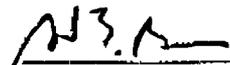
Our clients continue to be desirous of settling this matter in order to avoid the additional costs of going forward to a hearing. In order to finally and completely settle CO 98-03, our clients are willing to include the alleged economic benefit as set forth in our letter of April 23, 1999 in the payment of the penalty. This brings our total offer to \$35,000. The rationale for this amount is \$15,000 for the alleged failure to characterize plus \$20,000 for the alleged economic benefit which was never realized as the material was neither a solid nor a hazardous waste. Under the circumstances, we believe this offer is extremely reasonable and we would have great difficulty justifying any additional amount to our clients. This offer is made in an attempt to compromise disputed claims, and this letter is not to be construed as an admission and may not be used in a judicial or administrative proceeding to prove liability.

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We earnestly hope that NMED will consider our counter to your counter proposal and appreciate your efforts to resolve this matter.

Yours very truly,

University of California
Los Alamos National Laboratory



Sheila E. Brown
Deputy Laboratory Counsel

U. S. Department of Energy
Los Alamos Area Office



Lisa Cummings
Acting Counsel

Cys: Records Room
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