

Generator



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May 14, 2002
HAND DELIVERED

Tannis L. Fox, Deputy General Counsel
Office of General Counsel
New Mexico Environment Department
Harold Runnels Building
1190 St. Francis Drive
Santa Fe, New Mexico 87502

RE: Compliance Order No. 98-02: Response to Settlement Proposal

Dear Ms. Fox:

We are in receipt of your letter dated February 19, 2002, wherein you set forth the New Mexico Environment Department's ("NMED") legal and factual position with regard to the issues in Compliance Order No. 98-02 ("Compliance Order"), and offer to settle the matter for \$165,000 to be paid by the University of California ("UC") and the United States Department of Energy ("DOE").¹ We appreciate your taking time to set forth in some detail NMED's legal and factual position.

We continue to believe that NMED's offer of settlement is too high and overlooks the weaknesses in NMED's legal and factual case. We further disagree with many of the assumptions and conclusions reached in the analysis contained in your letter and our response to the major legal and factual issues is enclosed. However, in the interest of ending this matter that has continued on for close to four years, we are prepared to settle through payment of the

¹ UC and DOE believed that in February 2001 a settlement in principle had been reached for \$165,000, \$100,000 of which was to be paid in cash and \$65,000 of which was to be offset by UC/DOE undertaking a Supplemental Environmental Project ("SEP"). That settlement was contingent upon NMED approving the SEP and upon the parties agreeing on the terms of the settlement agreement. After spending significant resources in working up and then proposing more than a dozen such SEPs and having NMED reject each such project, UC/DOE concluded that the costs involved in satisfying NMED's requirements did not warrant further efforts in this direction. Consequently, by way of letter dated November 15, 2001, UC/DOE offered in good faith to settle the matter by adding to the \$100,000 a \$32,500 amount, representing one-half of the earlier agreed upon \$65,000 SEP amount.

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\$165,000 amount, provided that we reach agreement on settlement language. As we discussed, the enclosed Stipulated Final Order reflects our agreement and has been signed by UC and DOE representatives. Our acceptance of your offer is open until May 24, 2002, and will be withdrawn at that time if the enclosed Stipulated Final Order has not been signed by NMED.

Sincerely,



Deborah Woitte
ESH Practice Group Leader
Office of Laboratory Counsel
Los Alamos National Laboratory



Elizabeth Oshiem
Counsel
Department of Energy
Los Alamos Site Operations

DKW:tsd

Enc. Response to NMED's Legal and Factual Arguments
Stipulated Final Order

Cy: LC/ESH file

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Response to NMED's Legal and Factual Arguments

The following addresses what we consider to be the significant points at issue and provides a more accurate representation of the matter from UC/DOE's perspective.

1. NMED states that the Los Alamos National Laboratory (LANL) facility "generated" at least 156 of the pressurized gas cylinders as the result of various scientific experiments in Building 3 North and Building 4 North at TA-21. It suggests that the cylinders were used as containers for process wastes, which they clearly were not. They were containers of useful chemical products, which were used from time-to-time for experiments both at TA-21 by Chemical Science and Technology ("CST") scientists and elsewhere by other scientists around the LANL facility. See UC's Answers to NMED's First set of Interrogatories ("Answers to Interrogatories"), Nos. 2, 3 and 4. To the extent that the Letter asserts or suggests that the cylinders contained process wastes, it is inaccurate.
2. NMED relies on cases involving process wastes that were secondary materials to argue that all of the surrounding circumstances regarding handling of the cylinders lead to the conclusion that they were abandoned or discarded at various times between 1994 - 1995 and 1996. The cases cited by NMED are simply inapplicable to useful chemical products, which are in no way "secondary materials," as discussed by the cases cited by NMED. Clearly the issue of when the contents of the cylinders became waste is tied to "intent to discard." The two cases cited, however, relate more to the issue of actual land disposal of secondary materials. See 40 CFR 261.33 (commercial chemical products are hazardous wastes if and when they are discarded or intended to be discarded). See also, Military Munitions Rule, 62 FR 6626 (unused commercial products stored do not become waste until an intent to discard is demonstrated). The required intent was first manifest in the setting up of the satellite accumulation area ("SAA") in August of 1996 by CST. See Answers to Interrogatories Nos. 8 and 9. NMED's reliance on cases addressing process wastes, when the real issue involves intent to discard as it relates to useful chemical products, is misplaced.
3. The August 1996 establishment of the satellite accumulation area (SAA) was the determinative step in the management of the gas cylinders as waste. NMED argues that the use of this waste management mechanism fails on three counts, *i.e.*, the wastes were not managed at or near any point of generation where wastes initially accumulate; the wastes were not within the control of the operator of the process generating the waste; and the accumulated wastes exceeded the volume limitations placed on a SAA. We will address each assertion in order.
 - A) As to the first issue of the wastes not being kept at or near the point of generation, NMED appears to be relying on the same mistaken notion identified in Nos. 1 and 2 above, namely that the cylinders either contained secondary materials as process wastes or became process wastes as the result of the move out of the scientists who for the most part used them. This ignores the fact that a useful chemical product does not *ipso facto*

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automatically become waste because its immediate and most recent users are no longer physically present. It also faultily suggests that an immediate programmatic purpose has to exist for an otherwise valuable chemical or else it becomes waste. Neither assertion is true and we know of no regulatory authority that requires an entity to manage a product as waste that it would otherwise keep for some long term purpose. The gas cylinders at issue were being stored in Room 513 pending further evaluation about future use. In August 1996, the decision was made to begin managing most of the cylinders as waste. The point of generation of waste in this instance was the room in which the cylinders were kept at the time the decision to discard was made. This was the appropriate place to set up the SAA as it was the location where the act that first subjected the cylinders to regulation took place. *See* 40 CFR 260.10 (definition of generator).

- B) As to NMED's assertion that the management of the cylinders did not meet the requirement of being within the control of the operator of the process generating them as waste, it is clear from the definition of "person" and "generator," as found in the regulations that an organization can be a generator and that the generation of waste can consist of the action that first subjects the material to regulation. *See* 40 C.F.R. 260.10. CST personnel made the decision to begin managing most of the cylinders as waste in August 1996 and at all times thereafter the cylinders were subject to CST facility management control, to the point that access to the room where they were located required special permission. CST, as the operator that generated the cylinders as waste, was at all times in control of the SAA where the cylinders were managed as waste.
- C) As to NMED's assertion that the permissible volume limits of an SAA were exceeded beyond the one quart limit for acutely hazardous wastes, UC/DOE maintain that the weight of the chemical contents, not the volume of the cylinder container, is a more accurate measurement of the actual contents of a cylinder. This is the case because with regard to a gas cylinder, the container volume remains constant, while weight varies depending upon how much of the contents of the cylinder are used. Under NMED's argument it would not matter if 40%, 60% or even 95% of a cylinder's contents had been emptied, the measurement of contents for waste purposes would remain the same. This simply does not make sense. The chemicals in the cylinders are bought, sold, exchanged and transported on the basis of weight not volume. Using a weight approach, the contents of the cylinders containing acutely hazardous wastes were calculated to be significantly less than 1000 grams or one quart. We continue to maintain that weight and not volume is the appropriate method for measuring cylinder contents. We further note that even if volume were determined to be the appropriate measurement, it does not negate the validity of the SAA management tool for the majority of cylinders that were not in excess of the limitation.
4. NMED's letter heavily relies on a number of DOE and UC written communications that suggest the cylinders were abandoned, and then argues that the cylinder contents constituted wastes prior to the August 1996 establishment of the SAA. NMED in particular relies on the documents referenced in footnotes 3 and 5-8 (referencing the Letter of Notification), in

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footnotes 9, 10 and 13 (referencing the Plum Memorandum), and in footnotes 11 and 13-15 (referencing the Todd Memorandum) as the basis for making the argument that the cylinders were somehow suddenly “discovered,” were “abandoned” or were “orphaned.” The author of the first two documents referenced – and possibly of the third – described his individual perceptions and opinions. Those perceptions, while perhaps reflective of the perspective of the individual expressing them, were not accurate as to those actively involved in managing the cylinders. Thus the cylinders were not at any time “discovered” by the CST facility management team; they were fully aware of the existence of the cylinders. The gas cylinders were not abandoned or orphaned as they were at all relevant times under the management and control of the CST organization – the entity that utilized their contents for experimental purposes and the entity that took responsibility for the management of those cylinders to be moved to other facilities and those to be discarded as waste.

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