



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 542D CREW TRAINING WING (MAC)
KIRTLAND AIR FORCE BASE, NEW MEXICO 87117 - 5000

ENTERED

10 JAN 1992

MEMO TO
ATTN OF JA (Maj Kurtz)

SUBJECT: Settlement Proposal - RCRA Permit Appeal, Case No 12,550

TO Tracy Hughes
Special Assistant Attorney General
New Mexico Environment Dept
1190 St Francis Dr
Santa Fe, NM 87503

1. The following discussion and proposal is submitted for your consideration in an attempt to settle all remaining issues before the Court of Appeals. References to issues adopts the same numbers as those used in the briefs. Because issues I and III, the 90-day reclassification of material to waste and the definitions of Group I and Group II, are closely related, they will be discussed together. Similarly, issues II and IV, annual waste stream testing and specific tests required, will be discussed together because they are also closely related. If settlement can be obtained on these four issues, the remaining issue regarding terminology and usage may also be resolved.

2. 90-Day Reclassification and Group I and II Definitions (Issues I and III):

a. Kirtland AFB (KAFB) is receptive to NMED's position in its Answer Brief that the permit does not regulate material outside Bldg 1024, the newest storage building, and concurs in this position.

(1) If the 90-day reclassification is applicable only to materials inside the building, this avoids the problem of hazardous material that would become hazardous waste in 90 days if they are stored outside of a state-of-the-art building. It also avoids the adverse impact on our recycling and waste minimization efforts that comes from treating all hazardous materials as hazardous waste. KAFB is now using the newest storage building for hazardous waste only, although we did not use it originally to avoid further problems with this appeal. At present, no hazardous material that has not been designated waste is stored there because of this appeal. If hazardous waste is allowed to stay in the facility for one year, then the annual RCRA inspection will easily identify material which has remained there too long without the using the arbitrary 90 day classification. However, 90 days does not allow time for large quantity buyers.

(2) The way the permit now reads, the material stays three months as material and then can stay another year as hazardous waste. However, KAFB proposes that the permit be clarified to state that the reference to DRMO does not apply to the whole organization, but only to the storage facility, and the



90 days applies only to what is inside it. KAFB still sees no rational basis for the 90 day criteria and for the reasons cited in the briefs, would prefer it be eliminated. This would allow KAFB the discretion to use the storage building for hazardous material, as well as hazardous waste, if there is space after storage of hazardous waste, as opposed to storing hazardous material elsewhere where it may be more at risk. However, limiting the application of the 90 day reclassification to the inside of the building only partially addresses the fact that if DRMO knows the material will be hazardous waste in 90 days, it has no incentive to find buyers because by waiting 90 days everything will be disposed of as hazardous waste. If the 90 day rule remains for hazardous material stored inside the building, KAFB will not use it to store mere material. It may be of interest to know that KAFB has not for some years used storage facilities for hazardous material.

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b. KAFB proposes that the first full paragraph on PA-11, p.4, be deleted in its entirety (it also contains reference to Group I and II wastes that are at issue) or that the paragraph begin "KAFB personnel determine whether the item turned in is...and in coordination with DRMO personnel." This brings the paragraph in line with 40 CFR 262.11 (vice the 261.11 erroneously cited in our Brief in Chief) which states that "A person who generates a solid waste,...must determine if that waste is a hazardous waste using the following method:". Because DRMO is not the generator and KAFB personnel are the generators, it should be KAFB personnel that determine how the substance is turned in, which is in accordance with the CFR section quoted above.


c. Regarding the definitions of Group I and II waste, KAFB proposes to eliminate them and simply use the characterization based on the flow chart in 40 CFR Appendix I, Figure 1. Either a substance is turned in as waste or it is not, based on this chart. The definition of Group I waste on PA-11, p.4, first says "unopened," then later says "unopened and unused." However, there are items which have been turned in as opened, but the remaining contents may be reused. The Group I definition precludes reuse because once a container has been opened it is automatically classified as Group II waste. Further, the definition of Group I does not match the listing of Group I wastes on PA-11, pp. 11 - 32. This list contains wastes that may meet the definition of unused and unopened, or may be the result of a process. If they are the result of a process, then by definition they are not unused and unopened, which makes them Group II wastes. They are not listed in the Group II wastes. Further, Group I waste, as currently defined, would not be stored in Bldg 1024, because it is material. It stays outside awaiting a buyer. KAFB has received two RCRA inspections since this provision became effective, the last one was no notice, and has not received any NOV's for not following the Group I and II definitions and the reuse/storage of these items. Quite frankly, the inspectors seemed unaware of these requirements or the distinctions between them and KAFB suspects that the confusion surrounding these classifications is as confusing for the inspectors as it is for us. Both the regulator and the regulated are better served when all parties are following the same flow chart analysis, creating common ground and like standards. Either an item is waste at turn in, or it is not.

3. Annual Waste Stream Testing and Specific Testing Required (Issues II and IV):

a. KAFB is also receptive to NMED's statement in its Reply Brief that annual waste stream testing is only required for Group II (if this categorization remains) wastes without a profile sheet and no testing is required of Group I wastes. KAFB currently does profile sheets on all waste streams that are not in unopened containers. If the Group II definition is deleted, then KAFB proposes two lists for KAFB, one listing the steady-state processes as referenced in PA-II, p.5, that will be tested annually and the other listing the reoccurring batch process waste streams that will have a profile sheet and be tested based on user knowledge. The latter will not be tested annually just for the sake of testing, which is costly and time consuming. This will bring NMED's waste stream testing on par with EPA's requirement in KAFB's HSWA permit. Specifically, EPA does not require annual testing, but rather testing based on user knowledge. This eliminates another inconsistency, because that permit, as NMED notes in its Reply Brief, does not require testing of Group II wastes with a profile sheet, yet requires annual testing of all waste streams. Either annual testing is needed or it is not. KAFB has not received any NOV's from NMED for failure to comply with the annual testing requirement since issuance of the permit.

b. Again, KAFB is receptive to NMED's interpretation in its Reply Brief that, if Group II terminology is kept, a Group II waste with a profile sheet does not require any additional testing. If there is no profile sheet, then appropriate tests, per Table C-2, must be run in addition to the flashpoint and other mandatory tests listed in the first paragraph on PA-II, p. 5. To make this clear, KAFB proposes changing the title of Table C-2, PA-II, p. 46, by adding the word "appropriate" and deleting the word "all" in the title of the table. Further, KAFB does flashpoint, TCLP, reactivity, and Ph testing, plus any other appropriate tests, on all wastes streams needing testing. Keeping the requirement for the EP Toxicity test, which is outdated and cannot be used per EPA, serves no purpose. Therefore, KAFB proposes substituting TCLP for EP Toxicity testing in the permit. If the Group II language is deleted, then this testing would apply to all wastes without a profile sheet, not just Group II. Those wastes with a profile sheet would not need to be tested.

4. KAFB still offers to retype the permit with changes made throughout. However, if NMED prefers, any settlements can be placed at the beginning of the permit with language that requires any permit provision relating to any of the settled issues must refer back to the settled issues for interpretation. This avoids redoing the entire permit with all references to any particular issue needing revision. If settlement can be reached, we propose that language should be included in the settlement agreement that the parties agree that a stipulation with a dismissal will be filed with the Court of Appeals, with each party bearing its own costs. Please review with your client as soon as possible and let us know if further discussion is feasible.


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