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**Certified Mail - Return Receipt Requested**

February 3, 2023

George H. Cushman  
Headquarters, Department of the Army  
Office of the DCS, G-9  
Army Environmental Office, Room 5C140  
600 Army Pentagon  
Washington, DC 20310-0600

**RE: RESPONSE TO STATUS UPDATE CONCERNING FWDA NOV'S AND  
ON-GOING REMEDIAL ACTIONS  
FORT WINGATE DEPOT ACTIVITY  
MCKINLEY COUNTY, NEW MEXICO  
EPA ID# NM6213820974  
HWB-FWDA-MISC**

Dear Mr. Cushman,

The New Mexico Environment Department (NMED) is in receipt of the U.S. Army (Army) Fort Wingate Depot Activity (Permittee) email with the subject: *Status Update Concerning FWDA NOV's [Notices of Violation] and On-going Remedial Actions (Update)*, dated November 15, 2022.

The primary reason provided in the Update for failure to submit most of the past due documents, including six additional documents the Permittee failed to submit subsequent to the NOV's, is Army contracting issues. The Permittee's contracting issues do not relieve the Army of the requirements of their RCRA Permit. In addition, the three NOV's were issued in 2019, therefore, contracting issues do not provide justification for the lack of commitment or progress by the Permittee to return to compliance for the past three and a half years. The Army states in the Update that the contracting needed to complete the submittal of these documents is just now occurring, which indicates that the Permittee did not initiate action prior to recent weeks and suggests a lack of good faith on the part of the Permittee in making a concerted effort to return to compliance.

The Permittee has claimed for over five years that they are unable to complete documents until they resolved the limit of quantitation (LOQ) issue with NMED. NMED has repeatedly provided written direction to the Permittee on how to resolve this issue, dating back to 2017. NMED also met with and discussed this issue with the Permittee on several occasions prior to 2017. The

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Permittee failed to follow the February 2021 NMED direction requiring them to evaluate all available analytical methods when contacting laboratories prior to submittal of their December 2021 and July 2022 LOQ reports. This was again pointed out to the Permittee on April 13, 2022 via email, yet the Permittee submitted an incomplete document to NMED on July 18, 2022, which failed to include any alternative methods. After multiple delays, the LOD/LOQ report was received by NMED on December 30, 2022 and is in NMED review.

In addition, the Permittee has also been provided ample direction from NMED on how to resolve their issues with Incremental Sampling, discussions which have also been ongoing for over five years. Previously collected data is not sufficient to complete outstanding reports and does not change NMED's position or the requirements of the RCRA Permit. NMED has met with and discussed this issue with the Permittee on several occasions that have not resulted in adequate resolution of the outstanding technical issues. In addition, all decision-making must be recorded and included in the administrative record so that it is available to the public and stakeholders when permit actions and remedy selections occur; therefore, these discussions must be in writing.

Included with the Update was a table detailing each document listed in the three NOV's. This Response will address the documents in that order.

**1. Final Interim Measures Work Plan Areas of Concern and Solid Waste Management Units in the Kickout Area, Parcel 3, Revision 1**

The table provided misrepresents the history of this document. This history of this document is listed in the June 6, 2019 NOV. The withdrawal request did not cite any *"need to first complete an RFI"*, as claimed in the Update table. The withdrawal request specifically stated, *"the Army is withdrawing this document from further review due to contract termination and lack of available funding for a follow-on contract to complete the work."*

The Army has had over six years to respond to the original 2016 Disapproval, has been out of compliance on this document for almost four years, and currently has no proposed date for submittal. NMED has repeatedly stated that contracting and funding issues do not relieve the Permittee of the requirements of the FWDA RCRA Permit. Even though the Permittee withdrew the work plan, the resubmittal of the work plan must address all comments included in the September 7, 2016 Disapproval.

**2. Final Report Munitions and Explosives of Concern Removal and Surface Clearance Kickout Area, Parcel 3**

This document was required to be submitted no later than November 15, 2018. The reasons provided by the Permittee for not completing this task are related to contracting. As stated in Item 1 above, contracting and funding issues do not relieve the Permittee of the requirements included in the FWDA RCRA Permit. In addition, while the Permittee could

have requested an extension for the submittal of this document based on the fieldwork completion schedule, no extension was requested. The Permittee failed to submit the document per the required schedule and has provided no schedule for submittal of the document to return to compliance. As such, NMED does not have evidence that any action has been taken in the past four years to address this violation; the Army states that it is currently preparing a contract action.

**3. Permittee-Initiated Interim Measures Report, Parcel 6, Areas of Concern 28, SWMU 8 - Former Building 537, SWMU 20 - Feature 4 (Areas A and B) and Locomotive, Parcel 6, Revision 2**

The second revision of this document was required to be submitted no later than April 1, 2019. The reasons provided by FWDA for not completing this task are related to contracting. Contracting and funding issues do not relieve the Permittee of the requirements of the FWDA RCRA Permit. The Permittee failed to submit the document per the required schedule and in the subsequent period of time, which is approaching four years, and has not provided a schedule for completion or submittal of the document in order to return to compliance. NMED does not have a record that any action has been taken to address this violation. All comments in the November 7, 2018 Disapproval must be addressed in the required second revision.

**4. Final RCRA Facility Investigation Report, Parcel 7**

The second revision of this document was required to be submitted no later than April 30, 2019. Again, the reasons provided by FWDA for not completing this task are related to contracting. See responses to Item 1 through 3 above. The Permittee failed to submit the document per the required schedule and, in the subsequent almost four years, has provided no schedule for completion or submittal of the document to return to compliance. NMED does not have a record that action has been taken in the past four years to address this violation, as the Army states that it is currently preparing a contract action. All comments provided in the October 29, 2018 Disapproval must be addressed and the second revision must be submitted for the Permittee to be in compliance.

**5. Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 11**

The second revision of this document was required to be submitted no later than February 25, 2019. Again, the reasons provided by FWDA for not completing this task are related to contracting. See responses to Item 1 through 3 above. The Permittee failed to submit the document per the required or in the subsequent four years, and also has not provided a schedule for completion or submittal of the document in order to return to compliance. NMED does not have a record that action has been taken in the past four years to address this violation. The Army states that it is currently preparing a contract action, which appears

to verify that no action has been taken. All comments provided in the October 17, 2018 Disapproval must be addressed and the second revision must be submitted.

#### **6. Final Groundwater Supplemental RCRA Facility Investigation Report**

This document was required to be submitted no later than February 8, 2019. FWDA provided no reason for not completing this task on time. Subsequently, the Permittee submitted the document approximately three years later. The Permittee failed to submit the document per the required schedule and has received two Disapprovals for the late document. All comments provided in the July 25, 2022 Disapproval must be addressed and the second revision must be submitted. NMED may remove the document from the NOV or reduce any penalty assessed in a future enforcement action.

#### **7. Groundwater Monitoring Work Plan, Parcel 3**

This initial submittal was required to be submitted no later than April 2, 2019. FWDA provided no reason for not completing this task on time. The Permittee failed to submit the document per the required schedule and, after almost four years, has not provided a date for submittal of the document of March 2023 to return to compliance. NMED does not have evidence that any action has been taken in the past four years to address this violation.

#### **8. Groundwater Monitoring Report, Parcel 3**

This initial submittal was required to be submitted no later than April 2, 2019. Since the data collected in 2018 was not collected under an NMED-approved work plan, the Permittee has determined that the data is invalid and, therefore, must not be presented or used for decision-making purposes in the future. Based on this fact, review of the data, and therefore, submittal of the report, is no longer required.

#### **9. Interim Measures Report – SWMU 1 - TNT Leaching Beds, Parcel 21**

This submittal was provided by the Permittee and was subsequently removed from further enforcement consideration.

#### **10. Final RCRA Facility Investigation Phase 2 Report, Parcel 21**

This document was required to be submitted no later than June 28, 2019. FWDA provided no reason for not completing this task on time. Following multiple extensions, the Permittee failed to submit the document per the required schedule and, after nearly four years, has not provided a schedule for completion or submittal of the document in order to return to compliance. NMED has no evidence that action has been taken in the past four years to address this violation since the Army states that it is currently preparing a contract action. As an aside, the Permittee must only report on the scope of work included in the Phase 2

RFI Work Plan; data that has already been reviewed under the SWMU 1 PIIM Report must not be incorporated into the Phase 2 RFI Report except if used in a risk assessment evaluation.

#### **11. Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 24**

This document was required to be submitted no later than June 28, 2019. Again, the reasons provided by FWDA for not completing this task are related to contracting. And again, contracting and funding issues do not alleviate the requirements of the FWDA RCRA Permit. The Permittee failed to submit the document per the required schedule and has provided no schedule for completion or submittal of the document to return to compliance. NMED does not have evidence that action has been taken over the past four years to address this violation since the Army states it is currently preparing a contract action.

#### **12. Background Well Installation Completion Report**

This submittal was provided by the Permittee and was subsequently removed from further enforcement consideration.

#### **13. Final RCRA Facility Investigation Report, Parcel 13**

This document was required to be submitted no later than June 30, 2019. Again, the reasons provided by FWDA for not completing this task are related to contracting. See responses to Item 1 through 3 above. After receiving an extension, the Permittee failed to submit the document per the required schedule and has not provided a schedule for completion or submittal of the document in order to return to compliance. NMED does not have evidence that action has been taken over the the past four years to address this violation with the exception that the Army states that it is currently preparing a contract action. The Permittee must provide a revised Report that responds to all comments provided in NMED's December 7, 2018 Disapproval.

#### **14. Final Permittee-Initiated Interim Measures Report, Parcel 21**

The revision of this document was required to be submitted no later than June 30, 2019. Again, the reasons provided by FWDA for not completing this task are related to contracting. See responses to Item 1 through 3 above. The Permittee failed to submit the document per the required schedule and has provided no schedule for completion or submittal of the document to return to compliance. NMED does not have evidence that action has been taken in the past three plus years to address this violation. The Army state that it is currently preparing a contract action which indicates that no action was previously taken. The Permittee must provide a revised Report that responds to all comments provided in NMED's February 6, 2019 Disapproval.

**15. Final RCRA Facility Investigation Report, Parcel 22**

The fourth revision of this document was required to be submitted no later than August 12, 2019. Again, the reasons provided by FWDA for not completing this task are related to contracting. See responses to Item 1 through 3 above. The Permittee failed to submit the document per the required schedule and has provided no schedule for completion or submittal of the document to return to compliance. No action has been taken in the past three plus years to address this violation based on the Army statement that it is currently preparing a contract action. The Permittee must provide a revised Report that responds to all comments provided in NMED's May 10, 2018 Disapproval.

**16. Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 7**

This document was required to be submitted no later than September 5, 2019. Again, the reasons provided by FWDA for not completing this task are related to contracting. See responses to Item 1 through 3 above. The Permittee failed to submit the document per the required schedule and has provided no schedule for completion or submittal of the document to return to compliance. NMED does not have evidence that action has been taken in the past four years to address this violation, and the Army states that it is currently preparing a contract action suggesting that this is the initial action to address the violation. The Permittee must provide a revised Report that responds to the requirements provided in NMED's October 29, 2018 RFI Report Disapproval.

**17. Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 13**

This document was required to be submitted no later than September 30, 2019. Again, the reasons provided by FWDA for not completing this task are related to contracting. See responses to Item 1 through 3. The Permittee failed to submit the document per the required schedule and has provided no schedule for completion or submittal of the document to return to compliance. It appears that no action has been taken over the past four years to address this violation since the Army states that it is currently preparing a contract action. The Permittee must provide a revised Report that responds to the requirements provided in NMED's December 7, 2018 RFI Report Disapproval.

**18. HWMU Removal Progress Report, Parcel 3**

The first progress report was required to be submitted no later than September 30, 2019. The Permittee failed to submit the report, so it was added to the October 22, 2019 NOV. The Permittee submitted the report on May 29, 2020. This submittal was subsequently removed from further enforcement consideration.

The Update did not offer an acceptable resolution to the three 2019 NOVs and was not responsive regarding the return to compliance. No later than **March 6, 2023**, the Permittee

Mr. Cushman  
February 3, 2023  
Page 7

must provide an acceptable schedule for submitting the 19 outstanding documents listed in the attached table in an accelerated manner. The lack of response in submitting the outstanding documents on an aggressive schedule acceptable to NMED will subject the Permittee to an administrative compliance order and civil penalties in accordance with NMSA 1978 Section 74-4-10. The penalties will be assessed and adjusted accordingly should the Permittee fail to demonstrate good faith in its effort to return to compliance by providing an acceptable schedule for submittal of all outstanding documents for NMED approval.

Should you have any questions regarding this letter, please contact Ben Wear of my staff at (505) 690-6662.

Sincerely,

**Rick Shean**

Rick Shean  
Chief  
Hazardous Waste Bureau

Digitally signed by  
Rick Shean  
Date: 2023.02.03  
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cc: D. Cobrain, NMED HWB  
B. Wear, NMED HWB  
M. Suzuki, NMED HWB  
L. McKinney, EPA Region 6 (6LCRRC)  
L. Rodgers, Navajo Nation  
S. Begay-Platero, Navajo Nation  
K. Noble, Pueblo of Zuni  
A. Whitehair, Southwest Region BIA  
G. Padilla, Navajo BIA  
J. Wilson, BIA  
B. Howerton, BIA  
R. White, BIA  
C. Esler, Sundance Consulting, Inc.  
A. Soicher, USACE

File: FWDA 2023 and Reading

Mr. Cushman  
 January 16, 2023  
 Attachment

FWDA Outstanding Documents				
#	NOV #	Parcel	Document Name	Past Due Date
1	1	KO Area	Final Interim Measures Work Plan Areas of Concern and Solid Waste Management Units in the Kickout Area, Parcel 3, Revision 1	4/1/2019
2	2	KO Area	Final Report Munitions and Explosives of Concern Removal and Surface Clearance Kickout Area, Parcel 3	11/15/2018
3	2	6	Permittee-Initiated Interim Measures Report, Parcel 6, Areas of Concern 28, SWMU 8 - Former Building 537, SWMU 20 - Feature 4 (Areas A and B) and Locomotive, Parcel 6	4/1/2019
4	2	7	Final RCRA Facility Investigation Report, Parcel 7, Revision 2	4/30/2019
5	2	11	Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 11, Revision 2	2/25/2019
6	2	3	Groundwater Monitoring Work Plan, Parcel 3	4/2/2019
7	3	21	Final RCRA Facility Investigation Phase 2 Report, Parcel 21	6/28/2019
8	3	24	Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 24	6/28/2019
9	3	13	Final RCRA Facility Investigation Report, Parcel 13, Revision 1	6/30/2019
10	3	21	Final Permittee-Initiated Interim Measures Report, Parcel 21, Revision 1	6/30/2019
11	3	22	Final RCRA Facility Investigation Report, Parcel 22, Revision 4	8/12/2019
12	3	7	Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 7	9/5/2019
13	3	13	Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 13	9/30/2019
14	NA	22	Final RCRA Facility Investigation Phase 2 Work Plan, Parcel 22	11/15/2019
15	NA	19	RCRA Facility Investigation Work Plan, Parcel 19	12/31/2019
16	NA	9	RCRA Facility Investigation Work Plan, Parcel 9	12/31/2019
17	NA	2	RCRA Facility Investigation Work Plan, Parcel 2	12/31/2019
18	NA	9	Final RCRA Facility Investigation Report, Parcel 9	12/31/2019
19	NA	3	Final RCRA Facility Investigation Report, Parcel 3	5/1/2020