



DEPARTMENT OF THE ARMY
U.S. Army Legal Services Agency
Environmental Law Division
901 North Stuart Street, Suite 420
Arlington, VA 22203-1837

JALS-EL

3 March 2011

MEMORANDUM FOR DAIM-ODB-RA

SUBJECT: Fort Wingate Depot Activity RCRA Facility Investigation Work Plan

1. The United States Army Legal Services Agency, Environmental Law Division has reviewed letters of June 23, 2009, July 22, 2009, and February 4, 2010 sent from the New Mexico Environment Department ("NMED") regarding the Resource Conservation and Recovery Act ("RCRA") Facility Investigation Work Plan at Fort Wingate Depot Activity ("FWDA"). In those letters, NMED purports to require the Army to sample the inside of munitions storage igloos in Parcels 4a, 6, and 22 under the terms of the Army's RCRA hazardous waste permit. Because such a requirement is outside the scope of RCRA, the Army cannot sample the inside of these igloos, with the exception of 12 igloos that FWDA's contractor used to store waste military munitions.

2. There is no evidence that the Army or its contractor stored hazardous wastes in any of the igloos in these parcels (with the exception of 12 igloos specifically identified and used for the storage of waste military munitions, discussed below). New Mexico has adopted the federal regulations regarding the management of specific hazardous wastes. *See* 20.4.1.700 NMAC ("Except as otherwise provided, the regulations of the EPA set forth in 40 CFR Part 266 through July 1, 2008 are hereby incorporated by reference."). Pursuant to 40 C.F.R. §266.202 (a)(2), unused munitions, or components thereof, are not a solid waste if they are being repaired, reused, recycled, reclaimed, disassembled, or reconfigured. The igloos in these parcels were used for the storage of unused munitions awaiting use (or reuse) and unused components of munitions (propellant) awaiting recycling. Therefore, there could not have been any release of hazardous waste subject to the RCRA permit.

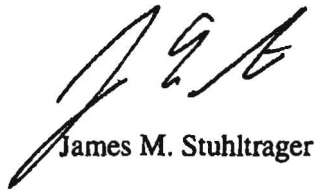
3. Moreover, New Mexico cannot claim there was ever a spill of a hazardous waste in the igloos. New Mexico has adopted the federal regulations regarding the identification and listing of hazardous waste. *See* 20.4.1.200 NMAC ("Except as otherwise provided, the regulations of the EPA set forth in 40 CFR Part 261 through July 1, 2008 are hereby incorporated by reference."). Pursuant to 40 C.F.R. §261.33, spills of commercial chemical products ("CCPs") may be hazardous waste. Those specific CCPs are listed at 40 C.F.R. §261.33(e) and (f). However, at FWDA, there is no evidence that any listed CCPs were stored – let alone spilled – in igloos in these parcels. Although the unused propellants that were stored in Parcel 22 contained a combination of chemicals that may have included CCPs, because there is no evidence that these CCPs were stored in their pure form, they cannot be hazardous waste. *See* RCRA Online 11161 ("If you cannot show that the products are listed under §261.33(e) and (f) (e.g., if the pesticides contained a combination of chemicals, rather than the pure chemicals), the residues would not be a hazardous waste under §261.33.").

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4. Because there is no evidence the igloos on these parcels ever stored RCRA hazardous waste, New Mexico cannot require sampling of the interior of these igloos. The only exceptions to this analysis are the 12 igloos in Block B, Parcel 6 that were used by FWDA's facility use contractor, TPL, specifically to store waste military munitions. These igloos are: B105, B1008, B1009, B1015, B1021, B1022, B1047, B1048, B1056, B1080, B1081, C1103. Although the waste military munitions stored in these igloos were exempt from RCRA regulation pursuant to 40 C.F.R. §266.205, sampling in these 12 igloos is appropriate.

5. The Point of Contact is James Stuhltrager at james.stuhltrager@us.army.mil or (703) 696-1663.



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