

**STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT**

**WATER AND WASTE MANAGEMENT DIVISION  
OF THE NEW MEXICO ENVIRONMENT DEPARTMENT,**

**Complainant,**

**v.**

**HWB-09-00 (CO)**

**UNITED STATES AIR FORCE  
KIRTLAND AIR FORCE BASE,**

**Respondent.**

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**STIPULATED FINAL ORDER**



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Pursuant to the authority vested under the New Mexico Hazardous Waste Act (“Act”), NMSA 1978, §§74-4-1 to 74-4-13, the Hazardous Waste Management Regulations (“Regulations”), and 20.1.5.600(B)(2) NMAC, the Secretary of the New Mexico Environment Department (“Department”) hereby issues this Stipulated Final Order to resolve the proceedings relating to the above captioned case.

The Water and Waste Management Division of the Department and Kirtland Air Force Base (“KAFB”) have entered into a Settlement Agreement pursuant to 20.1.5.600(B) NMAC. This Settlement Agreement resolves KAFB’s alleged violations of the Act and the Regulations as described in the Settlement Agreement.


For the purposes of this Stipulated Final Order, KAFB admits the jurisdictional allegations of the draft Compliance Order and consents to the civil penalty and related relief specified in the Settlement Agreement.

IT IS THEREFORE ORDERED that the Settlement Agreement is hereby approved and KAFB shall comply with the terms and conditions of the Settlement Agreement, which are hereby incorporated into this Stipulated Final Order.


BY:  DATE:   
Ron Curry, Secretary  
New Mexico Environment Department

APPROVED AS TO FORM:

WATER AND WASTE MANAGEMENT DIVISION  
NEW MEXICO ENVIRONMENT DEPARTMENT

  
Leslie Barnhart, Assistant General Counsel  
Office of General Counsel  
New Mexico Environment Department  
1190 St. Francis Drive  
Santa Fe, New Mexico 87505

KIRTLAND AIR FORCE BASE

 24 Sep 09  
Michael S. Duvall, Colonel, USAF  
Commander Kirtland Air Force Base  
2000 Wyoming Boulevard, SE, Bldg. 20604  
Albuquerque, New Mexico 87117

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**SETTLEMENT AGREEMENT**

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**I. BACKGROUND**

1. The Water and Waste Management Division (“Division”) is an organizational unit of the New Mexico Environment Department (“Department”), created pursuant to NMSA 1978, §9-7A-6.B(3) (1991). The Secretary of the Department has delegated to the Director of the Division the authority to seek administrative enforcement, including injunctive relief and civil penalties, for violations of the Act, NMSA 1978, §§74-4-1 to 74-4-13, and the Regulations.

2. The United States Air Force is the owner and operator of Kirtland Air Force Base (“KAFB”) located in Bernalillo County, New Mexico.

3. On May 22, 2009, the Division issued a draft Compliance Order and proposed civil penalty to KAFB. (Appendix A)

4. The Division and KAFB have negotiated this Settlement Agreement

("Agreement") to resolve the alleged violations in the draft Compliance Order and proposed civil penalty.

## II. DEFINITIONS

5. Unless otherwise expressly provided herein, a term used in this Agreement that is defined in the New Mexico Hazardous Waste Act or implementing regulations shall have the meaning set forth therein.

6. Whenever a term set forth below is used in this Agreement, the following definitions shall apply:

"Agreement" means this Settlement Agreement, including any attachments and modifications.

"Act" means the New Mexico Hazardous Waste Act, NMSA 1978, §74-4-1 to 74-4-13.

"CO" and "civil penalty" means the draft Compliance Order and proposed civil penalty issued on May 22, 2009 by the Division to KAFB attached to this Agreement as Appendix A.

"Day" means a calendar day. In computing any period of time for which an action must be taken under this Agreement, when the last day would fall on a Saturday, Sunday or federal or New Mexico holiday, the period shall run until the close of the next business day.

"Department" means the New Mexico Environment Department and any successor department or agency.

"Division" means the Water and Waste Management Division of the Department.

"Effective Date" shall have the meaning set forth in Section XXI (Effective Date and Termination of Agreement).

"Facility" means all of the property, structures, equipment, and other appurtenances,

which includes bulk fuels tanks and related appurtenances, within the exterior boundaries of Kirtland Air Force Base under the control of the United States Air Force.

“Objection Notice” means a notice issued by the Department indicating requirements of KAFB related to Section V (Environmental Projects) which remain to be completed by KAFB prior to Termination of this CO.

“Parties” means collectively the Division and KAFB.

“Permit” means the draft Hazardous Waste Facility Permit pertaining to open burn and open detonation units released for public comment on April 16, 2007, and currently pending before the Department.

“State” means the State of New Mexico, including all of its departments, agencies, and instrumentalities.

### **III. APPLICABILITY**

7. This Agreement shall apply to and be binding upon the Department, the Division, KAFB, their officers, agents, successors, contractors, subcontractors, assigns, and any other entity responsible for control and operation of jet fuel tanks and related appurtenances at the Facility.

8. In any action to enforce this Agreement, KAFB shall not assert as a defense the failure of its officers, directors, employees, servants, agents, contractors, subcontractors, laboratories, consultants, or any other entity subject to the direction or control of KAFB to conduct, monitor or otherwise take an action required by or necessary to comply with this Agreement. Furthermore, KAFB shall not assert as a defense the failure of KAFB to provide a copy of this Agreement to each entity responsible for implementing this Agreement.

#### IV. CIVIL PENALTY

9. KAFB agrees to pay a cash penalty of two thousand one hundred dollars (\$2,100) to resolve this dispute. Within ninety (90) days of the effective date of this Agreement, the cash payment shall be made by electronic funds transfer (Fed wire), and shall be transferred to account number 004276144893 through routing number 026009593. A copy of verification of the electronic funds transfer shall be sent to the Department at the following address:

James P. Bearzi, Chief  
Hazardous Waste Bureau  
New Mexico Environment Department  
2905 Rodeo Park Drive East, Building 1  
Santa Fe, NM 87505

10. This Agreement shall constitute an enforceable order and shall be treated by the Parties as a judgment for the purpose of post-judgment collection in accordance with state law, and the State of New Mexico shall be deemed a judgment creditor for the purpose of collecting any unpaid amount of civil penalties.

11. If KAFB fails to make timely and complete payment, the Respondent shall pay an additional civil penalty of \$25.00 per day for each day that full payment is not made.

12. Nothing in this Stipulated Order and Settlement Agreement shall be interpreted to require obligation of funds in violation of the Anti-Deficiency Act, 31 USC §§1301, *et seq.*

#### V. ENVIRONMENTAL PROJECTS

13. **Open Burn Unit Closure.** KAFB agrees to cease all operations of the Open Burn Unit upon the effective date of this Agreement.

a. By the deadline stated in Section VII (Completion Deadlines) of this Agreement, KAFB agrees to submit a Revised Closure Plan for the Open Burn Unit to the

Department for its review and approval. The Revised Closure Plan shall include provisions for removal of the Open Burn Unit's steel container, concrete base, and concrete walls.

b. By the deadline stated in Section VII (Completion Deadlines) of this Agreement, KAFB shall submit a letter to the Department withdrawing its request for continued operation of the Open Burn Unit, and that the draft permit currently pending before the Department be revised to reflect this request. This agreement does not affect KAFB's open detonation permit.

c. KAFB agrees that it will not operate or request a permit for an open burn unit at the Facility.

14. **Bulk Fuels Tank System.** No later than the completion of the new fuel tank system installation project described in subparagraph (a), KAFB agrees to remove the current bulk fuel tanks operated by KAFB.

a. By the deadline stated in Section VII (Completion Deadlines) of this Agreement, KAFB agrees to install and operate a new bulk fuel tank system as described in Appendix B.

b. KAFB agrees to operate the existing above-ground wastewater tanks, and any wastewater tanks associated with the new bulk fuel tank system, in compliance with 40 C.F.R. §262.34 (90-day accumulation rule). If KAFB is unable to comply with 40 C.F.R. §262.34, KAFB shall obtain a storage permit for tanks pursuant to 40 C.F.R. §270.1 or immediately cease using the tanks to store wastewater from fuel tank dewatering operations.

15. **Permits.** For any action required by or necessary to comply with this Agreement, including the projects implemented pursuant to Section V (Environmental Projects), that requires

a federal, state, or local permit or approval, KAFB shall be responsible for submitting the necessary applications and other information such that the permit or approval is obtained in sufficient time to allow KAFB to comply with the applicable deadline.

16. **Certification of Completion.** KAFB shall submit a certification of completion for each element of each project implemented pursuant to Section V (Environmental Projects), no later than thirty (30) days after completion of the open burn permit requirements (paragraph 13) and no later than sixty (60) days after completion of the bulk fuels tank system requirements (paragraph 14).

## **VI. CORRECTIVE ACTIONS**

17. By the deadline stated in Section VII (Completion Deadlines) of this Agreement, KAFB shall submit certifications for approval by the Department demonstrating that the current above ground tanks used to store wastewater from fuel tank dewatering operations comply with 40 C.F.R. §265, Subpart J.

18. By the deadline stated in Section VII (Completion Deadlines) of this Agreement, KAFB shall submit a procedure for approval by the Department for labeling and managing wastes that are pending analysis for making a final hazardous waste determination.

## **VII. COMPLETION DEADLINES**

19. KAFB shall complete all projects identified in Section V (Environmental Projects), including design, installation, and operation of the new bulk fuels tank system described in paragraph 14, in accordance with the following schedule:



<b>Activity</b>		<b>Completion Date</b>
a.	KAFB ceases use of OB Unit	Effective Date of this Agreement
b.	KAFB submits letter for removal of OB Unit provisions from draft permit	November 15, 2009
c.	KAFB submits 40 C.F.R. §265 Subpart J certifications for existing tanks	November 15, 2009
d.	KAFB submits procedure for managing waste pending final hazardous waste determination	November 15, 2009
e.	KAFB submits revised closure plan for OB Unit	February 19, 2010
f.	KAFB replaces bulk fuels tank system	September 30, 2011

#### **VIII. PROVISIONS GOVERNING EXTENSIONS OF TIME**

20. KAFB may seek an extension of time in which to perform a requirement of this Settlement Agreement, for good cause, by sending a written request for extension of time and proposed revised schedule to the Department. The request shall state the length of the requested extension and describe the bases for the request. The Department will respond in writing to any request for extension within ten (10) business days following receipt of the request. If the Department denies the request for extension, it will state the reasons for the denial. If the Department does not respond in writing within ten (10) business days, the requested extension shall automatically be granted.

#### **IX. RECORD PRESERVATION**

21. For at least five (5) years after the date of termination of this Agreement pursuant

to Section XXI (Effective Date and Termination of Agreement), KAFB shall maintain all records related to this Agreement. Nothing in this Agreement shall be construed as a waiver of any privilege that KAFB might possess.

#### **X. ENTRY AND INSPECTION**

22. Nothing in this Agreement shall be construed to limit or impair the Department's authority under any law or regulation to enter and inspect KAFB.

#### **XI. AVAILABILITY OF INFORMATION**

23. Nothing in this Agreement shall be construed to limit or impair the Department's authority under any law or regulation to require KAFB to provide information regarding KAFB, or to otherwise enforce this Agreement.

#### **XII. COMPLIANCE WITH APPLICABLE LAWS**

24. This Agreement is not a permit. Nothing in this Agreement shall relieve KAFB of its responsibility to comply with all federal, state, and local laws and regulations and orders of the Department.

25. If any future federal, state, or local law or regulation conflicts with, or has the effect of changing any requirement in this Agreement, the new requirement shall apply.

#### **XIII. EFFECT OF SETTLEMENT**

26. This Agreement constitutes a complete and final release of all civil claims at KAFB for violations alleged in the draft CO and civil penalty. The Agreement does not constitute a release of any claims that may arise for any other violations of the Act and Regulations, nor does it constitute any admission of a violation or liability by KAFB.

27. The Department expressly reserves all rights, defenses, claims, demands, and

causes of action that it might have against KAFB with respect to any matter, transaction, or occurrence that is not addressed in this Agreement. KAFB expressly reserve all rights and defenses which it may have to any claim, demand, or cause of action related to KAFB that is not addressed in this Agreement.

28. Nothing herein shall prevent the Department from taking an action under applicable law to address conditions at the KAFB that constitute an emergency or that present an immediate threat to public health or the environment.

#### **XIV. RETENTION OF JURISDICTION**

29. The Department shall retain jurisdiction of this matter for the purpose of enforcing the terms and conditions of this Agreement until the termination of this Agreement.

#### **XV. COSTS AND LIABILITY**

30. KAFB shall assume all of its own costs and liabilities incurred in performing any obligation under this Agreement. The Department, on its own behalf or on behalf of the State of New Mexico, shall not assume liability for KAFB's performance of any obligation under this Agreement.

#### **XVI. SEVERABILITY**

31. If any provision or authority of this Agreement is held by a court of competent jurisdiction to be invalid, if that provision or authority is severable from the remainder of this Agreement, the remainder of this Agreement shall remain in force and shall not be affected by the court's order and ruling. If the application of this Agreement to any party or circumstance is held by a court of competent jurisdiction to be invalid, the application of this Agreement to the other party or circumstances shall remain in force and shall not be affected thereby.

## **XVII. ENFORCEMENT**

32. The Department reserves the right to take any action, administrative or judicial, to enforce the requirements of the Act, the Hazardous Waste Management Regulation, the Stipulated Final Order or this Settlement Agreement. In any such action, the Respondent reserves the right to assert any defenses it may have.

## **XVIII. INTEGRATION AND MODIFICATIONS**

33. This Agreement merges all prior written and oral communications between the Parties concerning this Agreement, and contains their entire agreement. Any material modification of this Agreement shall be in writing, signed by the Parties, and approved by amendment of the Stipulated Final Order by the Secretary of the Department. Non-material modifications of this Agreement shall be made upon written agreement of the Parties.

## **XIX. DISCLOSURE TO SUCCESSORS-IN-INTEREST**

34. KAFB shall disclose this Agreement to any successor-in-interest and shall advise the successor-in-interest that this Agreement is binding on the successor-in-interest until the termination of this Agreement.

## **XX. NOTICE TO PARTIES**

35. Whenever this Agreement requires a Party to provide notice or submit a document to another Party, the notice or document shall be sent to the following persons in electronic format (.pdf) unless the size or other characteristic of the notice or document requires the submission of a hard copy.

Notice to the Department

Art Vollmer, Compliance and Technical Assistance Program Manager  
New Mexico Environment Department  
Hazardous Waste Bureau  
2905 Rodeo Park Drive East, Building 1  
Santa Fe, NM 87505  
Phone: (505) 476-6004  
Fax: (505) 476-6030  
art.vollmer@state.nm.us

Notice to KAFB:

Brent Wilson, Base Civil Engineer  
377 MSG/CE 2050 Wyoming Boulevard, SE, Bldg. 20684  
Kirtland AFB, New Mexico 87117  
Phone: (505) 846-7911  
Fax: (505) 846-8025  
Brent.Wilson@kirtland.af.mil

36. A party may change the name, title, address, telephone number or fax number of a contact person identified above by providing written notice to the other party. Such a change shall not constitute a material modification for the purpose of Section XVIII (Integration and Modification).

**XXI. EFFECTIVE DATE AND TERMINATION OF AGREEMENT**

37. The effective date of this Agreement shall be the date on which the Secretary signs and enters the Stipulated Final Order (“Effective Date”).

38. This Agreement shall remain an enforceable order of the Department from the Effective Date until:

a. KAFB submits a petition to the Department stating that: KAFB has completed all of the environmental projects listed in Section V (Environmental Projects) and

submitted the certificates of completion in accordance with paragraph 16 of Section V (Environmental Projects); and

- b. The Department does not notify KAFB of its objection in writing to the petition within ninety (90) days after receipt of the petition (“Objection Notice”).
- c. If the Department issues an Objection Notice, then this Agreement shall remain an enforceable order of the Department until:
  - (i) After consultation with KAFB, the Department withdraws the Objection Notice; or
  - (ii) KAFB submits another petition to the Department demonstrating that KAFB has complied in all material respects with each requirement identified in the Objection Notice, and the Department does not issue another Objection Notice within ninety (90) days after receipt of the subsequent petition.

39. This Article shall not affect the Department’s covenant not to sue and release of all liability described in Section XIII (Effect of Settlement), each of which shall survive the termination of this Agreement.

## **XXII. HEADINGS**

40. Section and paragraph headings in this Agreement are provided solely as a matter of convenience to the reader and shall not be construed to alter the meaning of any provision of this Agreement.


**XXIII. SIGNATORIES AND ASSIGNMENT**

41. The undersigned representatives of the Parties certify that they are fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind the Parties to this document.

**XXIV. COUNTERPARTS**

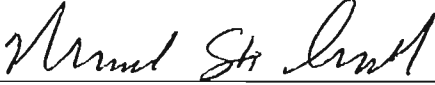
42. This Agreement may be signed in counterparts.

NEW MEXICO ENVIRONMENT DEPARTMENT  
WATER AND WASTE MANAGEMENT DIVISION

  
\_\_\_\_\_  
Marcy Leavitt  
Division Director

Date: 9/25/09

KIRTLAND AIR FORCE BASE

  
\_\_\_\_\_  
MICHAEL S. DUVALL, Colonel, USAF  
Commander

Date: September 24, 2009

**APPENDIX A**

**NMED DRAFT COMPLIANCE ORDER ISSUED ON MAY 22, 2009**



**STATE OF NEW MEXICO  
SECRETARY OF ENVIRONMENT**

IN THE MATTER OF  
UNITED STATES AIR FORCE  
KIRTLAND AIR FORCE BASE

HWB-09-\_\_\_\_\_ (CO)

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**COMPLIANCE ORDER**

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The Water and Waste Management Division (Division) of the New Mexico Environment Department (Department) issues this Administrative Compliance Order (Order), pursuant to the New Mexico Hazardous Waste Act (HWA), NMSA 1978, §74-4-10, to the United States Department of the Air Force, Kirtland Air Force Base (KAFB) to require corrective actions and assess a civil penalty for violations of hazardous waste management regulations and permits at KAFB. The Secretary of the Department has delegated authority to issue this Order to the Director of the Division.

**INTRODUCTION**

1. The United States Air Force owns and operates KAFB located in Bernalillo County, New Mexico.
2. KAFB is a large quantity generator of hazardous waste, conducts treatment of hazardous waste, is a small quantity handler of universal waste, and is an operator of permitted open burn (OB) and open detonation (OD) hazardous waste treatment units.
3. Since July 1995, KAFB has been authorized to operate an open burn unit pursuant to an Open Burn Hazardous Waste Facility Permit (OB Permit) No. NM9570024423-OB.

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4. Since 1994, KAFB has been authorized to operate an open detonation unit pursuant to an Open Detonation Hazardous Waste Facility Permit (OD Permit) No. NM9570024423-OD.

5. The Department conducted hazardous waste compliance evaluation inspections of KAFB on July 14, 15, and 16, 2008.

### **FIRST CLAIM**

#### **20.4.1.300 NMAC, incorporating 40 CFR §262.11 – Hazardous Waste Determination**

6. Paragraphs 1 through 5 are realleged and incorporated by reference herein.

7. Subpart C, 40 CFR §262.11, states that a person who generates a solid waste, as defined in 40 CFR §261.2, must determine if that waste is hazardous waste.

8. Subpart C, 40 CFR §261.2(a)(1) defines “solid waste” as any discarded material that is not excluded by 40 CFR §261.4(a) or that is not excluded by a variance. §261.2(b)(3) states that a material is a solid waste if it is abandoned by being “accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.”

9. From 1985 to June 2006, KAFB placed waste water from dewatering JP-8 jet fuel product tanks #2420 and #2424 into evaporation tanks #22 and #23. From approximately June 19, 2006 to the present, KAFB placed waste water from JP-8 jet fuel product tanks #2420 and #2424 into above ground storage tanks.

10. The waste water contaminated with JP-8 jet fuel product stored in evaporation tanks #22 and #23 and the above ground storage tanks constitutes solid waste pursuant to 40 CFR §261.2(a)(1). The jet fuel contaminated water is not excluded by 40 CFR §261.4(a) and

KAFB did not obtain a variance from making a hazardous waste determination on this solid waste.

11. KAFB accumulated, treated, and stored this solid waste material prior to disposing of the waste water.

12. On October 24, 2006 KAFB shipped this waste water off-site as hazardous waste under Uniform Hazardous Waste Manifests #000592735, #000374429 and #000374430. The manifests identified the waste as “waste flammable liquids, toxic” and assigned hazardous waste codes D001 and D018.

13. KAFB violated 20.1.4.300 NMAC, incorporating 40 CFR §262.11, by failing to make a hazardous waste determination on the waste water removed from jet fuel storage tanks during the dewatering process from 1985, when the evaporation ponds were first installed, until October 24, 2006 when the waste water was for the first time designated by KAFB as hazardous waste on three hazardous waste manifests.

## **SECOND CLAIM**

### **20.4.1.900 NMAC, incorporating 40 CFR §270.1(c) – Treatment Permit Requirement**

14. Paragraphs 1 through 13 are realleged and incorporated by reference herein.

15. Subtitle C of the Solid Waste Act, as amended by the Resource Conservation and Recovery Act (RCRA), at 42 U.S.C. §6925(a) prohibits the treatment, storage, or disposal without a permit of any hazardous waste identified or listed as a hazardous waste in RCRA once implementing regulations are in effect.

16. The implementing regulations at Subpart A, 40 CFR §270.1(c) require a permit for the treatment, storage, and disposal of any hazardous waste identified or listed in 40 CFR §261. Owners and operators must have permits for the active life of the unit.

17. Subpart B, 40 CFR §260.10 defines “treatment” as “any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous.”

18. From 1985 to June 2006, KAFB pumped waste water from JP-8 jet fuel product tanks #2420 and #2424 into uncovered 4000-gallon evaporation tanks #22 and #23. KAFB reported to NMED that the waste water was added to the evaporation tanks on a weekly basis.

19. On October 14, 1998, Assaigai Analytical Laboratories reported that the JP-8 contaminated waste water in evaporation tank #22 contained a diesel range organics of 28,000 mg/kg (dissolved phase fuel/water blend) and 1,100,000 mg/kg in evaporation tank #23 (floating fuel).

20. On September 6, 2007, Clean Harbors Waste Material Profile #CH273063B, which was certified as correct by KAFB on September 7, 2007, reported that the waste water from the JP-8 fuel product tanks had a flash point between 101-140 degrees Fahrenheit and contained benzene at 36,000 milligrams per liter, which constitutes a characteristic hazardous waste carrying hazardous waste codes D001 and D018, pursuant to 40 CFR §§ 261.21(a) and 261.24.

21. KAFB treated the hazardous waste by allowing the waste water in the tanks to evaporate to the atmosphere without a permit.

22. KAFB violated 20.4.1.900 NMAC, incorporating 40 CFR §270.1(c), by failing to obtain a permit for treatment of hazardous waste in evaporation tanks #22 and #23 between 1985 and June 2006.

### THIRD CLAIM

#### 20.4.1.900 NMAC, incorporating 40 CFR §270.1(c) – Storage Permit Requirement

23. Paragraphs 1 through 22 are realleged and incorporated by reference herein.

24. Subpart A, 40 CFR §270.1(c) requires a permit for the treatment, storage, and disposal of any hazardous waste identified or listed in 40 CFR §261. Owners and operators must have permits for the active life of the unit.

25. Subpart B, 40 CFR §260.10 defines “storage” as “the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere.”

26. On June 16, 2006 KAFB installed above ground storage tanks next to JP-8 product tanks #2422 and #2420. The above ground storage tanks have been used to store waste water that exhibits the hazardous waste characteristic of ignitability (less than 140 degrees Fahrenheit) and the toxicity characteristic for benzene (greater than or equal to 0.5 milligrams benzene per liter), hazardous waste codes D001 and D018, as defined by subpart C of 40 CFR §261.

27. From June 19, 2006 to the present, KAFB has stored hazardous waste in two 4,000-gallon above ground tanks without a permit.

28. From August 24, 2006 to October 30, 2007, KAFB stored hazardous waste in two 16,800-gallon above ground tanks without a permit.

29. KAFB violated 20.4.1.900 NMAC, incorporating 40 CFR §270.1(c), by failing to obtain a permit for the storage of hazardous waste in two 16,800-gallon storage tanks located next to JP-8 product tanks #2422 and #2420 from August 24, 2006 to October 30, 2007. KAFB violated, and continues to violate, 20.4.1.900 NMAC, incorporating 40 CFR §270.1(c), by failing

to obtain a permit for the storage of hazardous waste in two 4,000-gallon storage tanks located next to JP-8 product tanks #2422 and #2420 from June 19, 2006 to the present.

#### **FOURTH CLAIM**

##### **20.4.1.1000 NMAC, incorporating 40 CFR §273.13(d)(1) - Universal Waste Management**

30. Paragraphs 1 through 29 are realleged and incorporated by reference herein.
31. 40 CFR §273 establishes standards for universal waste management.
32. Subpart A, 40 CFR §273.9, defines “universal waste handler” as a generator of universal waste, which includes lamps as described in §273.5.
33. Subpart A, 40 CFR §273.9, defines “small quantity handler of universal waste” as a universal waste handler who does not accumulate 5,000 kilograms or more of universal waste (batteries, pesticides, mercury-containing equipment, or lamps, calculated collectively) at any time.
34. KAFB is a small quantity handler of universal waste.
35. Subpart B, 40 CFR §273.13(d)(1), states that a small quantity handler of universal waste must manage lamps in a way that prevents releases of any universal waste or component of a universal waste to the environment. Lamps must be contained in containers or packages that are structurally sound, adequate to prevent breakage, and compatible with the contents of the lamps. Such containers must remain closed and must lack evidence of leakage, spillage, or damage that could cause leakage under reasonably foreseeable conditions.
36. On July 16, 2008, two containers of universal waste lamps located at Shopette Class Six service station and one container of universal waste lamps located in Building #619, Room 11, were not properly closed. Spent lamps were placed in boxes with open ends.

37. KAFB violated 20.4.1.1000 NMAC, incorporating 40 CFR §273.13(d)(1), by failing to manage lamps located at Shopette Class Six service station and in Building #619, Room 11, in closed containers to prevent release of the lamps to the environment.

#### **FIFTH CLAIM**

##### **20.4.1.1000 NMAC, incorporating 40 CFR §273.14(e) - Labeling Universal Waste**

38. Paragraphs 1 through 37 are realleged and incorporated by reference herein.

39. Subpart B, 40 CFR §273.14(e), states that each lamp or a container or package in which such lamps are contained must be labeled or marked clearly with one of the following phrases: “Universal Waste - Lamp(s),” or “Waste Lamp(s),” or “Used Lamp(s).”

40. On July 16, 2008, two containers of universal waste lamps located at Shopette Class Six service station were not labeled or marked clearly with any one of the following phrases: “Universal Waste-Lamps,” “Waste Lamps” or “Used Lamps”.

41. KAFB violated 20.4.1.1000 NMAC, incorporating 40 CFR §273.14(e), by failing to label or mark clearly two separate containers of universal waste lamps stored at Shopette Class Six service station.

#### **SIXTH CLAIM**

##### **20.4.1.1000 NMAC, incorporating 40 CFR §273.15(c) - Accumulation Time Limit**

42. Paragraphs 1 through 41 are realleged and incorporated by reference herein.

43. Subpart B, 40 CFR §273.15(c), states that a small quantity handler of universal waste who accumulates universal waste must be able to demonstrate the length of time that the universal waste has been accumulated from the date it becomes a waste or is received. The regulation provides six methods for making the demonstration.

44. On July 16, 2006, KAFB did not demonstrate the length of time universal waste lamps contained in one box located at the Shopette Class Six service station had been accumulating.

45. KAFB violated 20.4.1.1000 NMAC, incorporating 40 CFR §273.15 (c), by failing to demonstrate the length of time that universal waste lamps contained in one box located at the Shopette Class Six service station had been accumulating.

### **SEVENTH CLAIM**

#### **20.4.1.1000 NMAC, incorporating 40 CFR §273.15(a) - Accumulation Time Limit**

46. Paragraphs 1 through 45 are realleged and incorporated by reference herein.

47. Subpart B, 40 CFR §273.15(a), states that a small quantity handler of universal waste may accumulate universal waste for no longer than one year from the date the universal waste is generated, or received from another handler, unless the requirements of paragraph (b) of this section are met.

48. Subpart B, 40 CFR §273.15(b), states that a small quantity handler of universal waste may accumulate universal waste for longer than one year from the date the universal waste is generated, or received from another handler, if such activity is solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal. However, the handler bears the burden of proving that such activity is solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal.

49. On July 14, 2008, a container of universal waste lamps dated April 23, 2006 and another container of universal waste lamps dated April 30, 2006 were located in the 90-day storage area at Building 5205.



50. KAFB did not provide any information indicating that accumulating these universal wastes was solely for the purpose of accumulating such quantities as necessary to facilitate proper recovery, treatment, or disposal.

51. KAFB violated 20.4.1.1000 NMAC, incorporating 40 CFR §273.15(a), by accumulating two containers of universal waste lamps in the 90-day storage area of Building 5202 for more than one year.

### **EIGHTH CLAIM**

#### **20.4.1.1002 NMAC, incorporating 40 CFR §279.22(c)(1) - Used Oil Storage**

52. Paragraphs 1 through 51 are realleged and incorporated by reference herein.

53. Subpart C, 40 CFR §279.20(a), states that a used oil generator is any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation.

54. KAFB is a used oil generator.

55. Subpart A, 40 CFR §279.1, defines “used oil” as any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

56. Subpart C, 40 CFR §279.22(c)(1), requires used oil generators to label or clearly mark containers and above-ground tanks used to store oil at generator facilities with the words “Used Oil”.

57. On July 15, 2008, a thirty (30) gallon black metal drum containing used motor oil located at IAP #246 in Building #66048 was not labeled or marked with words “Used Oil.”

58. The used oil in the container described in paragraph 55 above is a used oil as defined by 40 CFR §279.1.

59. KAFB violated 20.4.1.1000 NMAC, incorporating 40 CFR §279.22(c)(1), by failing to label or clearly mark a thirty (30) gallon metal drum of used motor oil located at IAP #246 in Building #66048, with the words “Used Oil.”

#### NINTH CLAIM

##### **OB Permit and 20.4.1.300 NMAC, incorporating 40 CFR §262.34 – Ash Management**

60. Paragraphs 1 through 59 are realleged and incorporated by reference herein.

61. The OB Permit, Module III, Section L, *Ash Management Procedures*, at paragraph L.1, requires KAFB to manage ash/residues from the open burning treatment unit.

62. The OB Permit, Module III, Section L, *Ash Management Procedures*, at paragraph L.2, requires KAFB to police the OB device or treatment unit within 24 hours after each treatment event and dispose of hazardous and non-hazardous wastes as appropriate under RCRA.

63. The ash in the open burning treatment unit is a characteristic hazardous waste as defined by 20.4.1.200 NMAC, incorporating 40 CFR §261.24.

64. Subpart C, 40 CFR §262.34, allows generators to accumulate hazardous waste on-site for 90 days or less provided that the waste is placed in containers and the generator complies with the applicable requirements of 40 CFR §265, Subpart I.

65. On May 21, 2008, KAFB conducted a burn in the open burning treatment unit.

66. On July 14, 2008, ash residue from the May 21, 2008 burn event was still in the open burning treatment unit.

67. KAFB violated OB Permit, Module III, Section L, and 20.4.1.300 NMAC, incorporating 40 CFR §262.34, by failing to dispose of ash residue from the open burning treatment unit in appropriate containers from a burn event on May 21, 2008.

## TENTH CLAIM

### OB Permit – Protection of Environmental Media

68. Paragraphs 1 through 67 are realleged and incorporated by reference herein.
69. The OB Permit, Module III, Section J, *Site Characteristics, Risk Assessment, and Protection of Environmental Media*, at paragraph J.3, requires KAFB to cover the OB treatment unit “with a cover that is water resistant and tied down. When the OB treatment is not in use a cover shall be placed over the top to keep any wind out, thus preventing any ash from spreading between burns.”
70. On May 21, 2008, KAFB conducted a burn in the open burning treatment unit.
71. On July 14, 2008, there was no cover on the open burning treatment unit and KAFB reported that the unit had been uncovered since the burn event on May 21, 2008.
72. KAFB violated OB Permit, Module III, Section J.3 by failing to cover the open burning treatment unit between May 21, 2008 and July 14, 2008.

## ELEVENTH CLAIM

### OB Permit – Proper Maintenance

73. Paragraphs 1 through 72 are realleged and incorporated by reference herein.
74. The OB Permit, Module I, Section E, *Proper Operation and Maintenance*, at paragraph E.6, requires KAFB to “at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittee to achieve compliance with the conditions of this Permit.”
75. Between May 21, 2008 and July 14, 2008, KAFB failed to maintain the open burning treatment unit in compliance with OB Permit, Module III, Section J. KAFB reported

that the rails on which the cover slides had been damaged and not repaired since the burn event on May 21, 2008.

76. KAFB violated OB Permit, Module I, Section E by failing to at all times properly maintain the cover rails of the open burning treatment unit, which are related appurtenances of the treatment system, between May 21, 2008 and July 14, 2008.

## **TWELFTH CLAIM**

### **OB Permit – Facility Inspection Plan**

77. Paragraphs 1 through 76 are realleged and incorporated by reference herein.

78. The OB Permit, Attachment C, and 40 CFR §264.15 (d) require KAFB to record and keep inspections records, including notations of observations, to note discrepancies and to take corrective actions made in accordance with 40 CFR §264.15(d).

79. An item on the OB unit inspection checklist directs the inspector to record whether the “facility is clear of waste, covered, and serviceable.” The checklist also provides a space for comments to be recorded.

80. KAFB OB unit inspection records for June 24 and July 2, 2008 failed to note that ash and other burn residues remained in the bottom of the OB unit, that the OB unit was not covered, and that the cover rails were bent causing the cover to be inoperable.

81. KAFB violated OB Permit Attachment C and 40 CFR §264.15(d) by failing to record observations made during June 24 and July 2, 2008 inspections that ash and other burn residues remained in the OB unit, that the OB unit was not covered, and that the cover rails were bent causing the cover to be inoperable after the May 21, 2008 burn event.

### CORRECTIVE ACTION

82. The HWA, §74-4-10.A, authorizes the Secretary to issue a compliance order requiring compliance with a regulation or permit.

83. KAFB is ordered to take the following corrective actions:

a. Third Claim, Storage Permit. Within 30 days of receipt of this Order, notify NMED of KAFB's intention to submit a permit application for the two 4,000-gallon storage tanks receiving waste water from JP-8 product tanks #2422 and #2420, or to bring the tanks into compliance with 20.4.1.300 NMAC, incorporating 40 CFR §262.34, as 90-day hazardous waste accumulation tanks. Such notification shall include a proposed compliance schedule.

b. Ninth to Twelfth Claims, Permit Compliance. Within 30 days of receipt of this Order, conduct training for all personnel who work at the OD/OB units on permit compliance, inspections, reporting, and other requirements.

### CIVIL PENALTY

84. The HWA, §74-4-10.B, authorizes the Secretary to issue a compliance order assessing a civil penalty for a violation of a regulation or permit.

85. The HWA, §74-4-10.B, authorizes the Secretary to assess a civil penalty of ten thousand dollars (\$10,000.00) per day of noncompliance for each violation of a regulation or permit.

86. The Department assesses a civil penalty of four million two hundred twenty-three thousand and eight hundred sixty dollars (\$4,223,860). The penalty amounts are calculated pursuant to the Department's HWA Civil Penalty Policy. The civil penalty amount is assessed as follows:

<u>Penalty No.</u>	<u>Nature of Penalty</u>	<u>Amount</u>
Penalty 1	Failure to properly manage universal waste (Claims 4 through 7)	\$ 1,560
Penalty 2	Failure to properly manage used oil (Claim 8 )	\$ 750
Penalty 3	Failure to properly manage permitted OB unit (Claims 9 through 12)	\$ 117,600
Penalty 4	Failure to make a hazardous waste determination (Claim 1)	\$ 16,000
Penalty 5	Failure to obtain a permit for treatment of hazardous waste (Claim 2)	\$ 1,587,800
Penalty 6	Failure to obtain a permit for the storage of hazardous waste (Claim 3)	\$ 2,500,150

87. Respondent shall make payment to the *State of New Mexico* by electronic transfer, certified check, bank draft, or other guaranteed negotiable instrument. The instrument of payment or verification of the electronic funds transfer shall be sent to James Bearzi, Chief, Hazardous Waste Bureau, New Mexico Environment Department, 2905 Rodeo Park Drive East, Building 1, Santa Fe, New Mexico 87505.

**NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING**

88. Pursuant to the HWA, §74-4-10.H, and the Department’s adjudicatory procedures, 20.1.5.200 NMAC, KAFB may request a hearing by filing a written request for a public hearing with the hearing clerk no later than thirty (30) days after receipt of this Order. The request for hearing shall include an Answer:

- a. Admitting or denying each alleged finding of fact. Any alleged finding of fact which is not specifically denied shall be deemed to be admitted. KAFB may assert that it has insufficient knowledge of any alleged finding of fact, and such finding shall be deemed to be denied;

b. Asserting any affirmative defense upon which KAFB intends to rely. Any affirmative defense not asserted in the Answer, except an affirmative defense asserting a lack of subject matter jurisdiction, shall be deemed to be waived;

c. Signed under oath or affirmation that the information contained therein is true and correct to the best of the signatory's knowledge; and

d. Attaching a copy of this Order.

89. This Order shall become final upon KAFB's receipt of the Order unless KAFB files a Request for Hearing and Answer as set forth above. KAFB may file a Request for Hearing and Answer at the following address:

Hearing Clerk  
New Mexico Environment Department  
P.O. Box 26110  
Santa Fe, New Mexico 87502-6110

90. The public hearing shall be governed by the Department's Adjudicatory Procedures, 20.1.5 NMAC (copy attached).

#### **SETTLEMENT CONFERENCE**

91. KAFB may confer with the Division regarding settlement at any time, but a settlement conference or request for a settlement conference shall not extend or waive the deadline for filing a Request for Hearing or Answer. KAFB may appear at a settlement conference *pro se* or through counsel. The Director of the Division shall execute any settlement as a Stipulated Final Order. A Stipulated Final Order shall resolve all issues raised in this Order, shall bind all parties to this Order, and shall not be appealable. To confer regarding settlement, contact:

Leslie Barnhart  
Office of General Counsel  
New Mexico Environment Department  
P.O. Box 26110  
Santa Fe, New Mexico 87502-6110  
Telephone: (505) 827-0293  
Facsimile: (505) 827-2836

**TERMINATION**

92. Compliance with the requirements of this Order does not relieve KAFB of its obligation to comply with all applicable laws and regulations. This Order shall terminate when KAFB certifies that all requirements of the Order have been completed and the Department has approved such certification, or when the Secretary approves a Stipulated Final Order.

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Marcy Leavitt, Director  
Water and Waste Management Division**



**CERTIFICATE OF SERVICE**

I certify that on \_\_\_\_\_, 2009 this **COMPLIANCE ORDER** was mailed,  
certified mail - return receipt requested, to the following:

Col. Robert E. Suminsby, Jr.  
377 ABW/CC  
Kirtland Air Force Base  
2000 Wyoming Blvd., SE  
Kirtland AFB, NM 87117-5663

J. Barry Shupe  
377th ABW/JAV  
2000 Wyoming Blvd., SE  
Kirtland AFB, NM 87117

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## **APPENDIX B**

### **DESCRIPTION OF KAFB NEW FUEL TANK SYSTEM**

The Defense Logistics Agency (DLA) contracted to renovate and replace the aging bulk fuel storage facility located at KAFB. Although originally programmed as a \$14.8 million dollar project, DLA selected a bid of approximately \$10.5 million dollars. This project requires the contractor to repair the pumphouse, replace fuel unload facility, and replace the fuel storage tanks.

The first aspect of this project requires the contractor to repair the pumphouse. In order to repair the liquid fuel pump station, the contractor will inspect and replace valves, filters, pumps, piping, electrical motor control center, and tie into oil water separator. Further, the project includes demolition of offload risers, lead-based paint removal, cleaning and slurry fill of existing transfer pipeline.

Simultaneously, the contractor shall replace the fuel unload facility. This aspect of the project requires the contractor to construct a fuel unload facility, including four unload headers, pumps, above ground piping and pipe in trench, electrical distribution, and control systems. The contract also provides concrete spill containment structures, oil-water separator, and storm drainage piping. Finally the contractor will improve roads to allow trucks to safely access and exit this facility.

Finally, the bulk of the contract involves replacing the fuel storage tanks. This requires the contractor to construct two state of the art 40,000-barrel (BL) aboveground steel storage tanks for jet fuel. The contractor will provide above ground tank issue and receipt piping to the existing pumphouse. The site work includes secondary containment dikes and basins, access pavements, lighting, drainage improvements, site utilities, and a cathodic protection system. Further, the contract provides for secondary containment structures for four refueler truck positions and three ground-product storage tanks and unload/fill stations.

After completion of the two new tanks, the contractor will demolish two storage tanks of 50,000-BL and 100,000-BL capacities. The contractor will also demolish tank foundations, pavement, earth dikes, fuel lines, clean and slurry fill 16 inch fuel lines. As part of the demolition, the contractor will excavate, stockpile, test and dispose of contaminated soil.

This project is scheduled to be completed by September 30, 2011. The project brings the entire system to a standard well above state and federal requirements.