



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

May 13, 2016

Kathryn Roberts, Director
Resource Protection Division
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, NM 87505

Dear Ms. Roberts:

Thank you for notifying the Environmental Protection Agency (EPA) Region 6 of the draft Resource Conservation and Recovery Act (RCRA) Compliance Order on Consent (draft Order) for the Los Alamos National Laboratory (LANL). We also appreciate the clarifications on the draft Order that you provided via phone on April 22, 25 and 29, 2016. We understand that you have also had individual meetings with different interested groups, and you have had numerous public and open house type meetings to discuss this draft Order. Our general comments on this draft Order are provided below, and more specific comments and recommendations are provided as an enclosure.

Under RCRA, EPA is responsible for ensuring that the state program is as stringent as the Federal Program. Our oversight is at the program level, and we typically do this via select permit reviews and mid and end of year reviews of the entire state program. Because this draft Order functions in many ways as a corrective action permit, we have considered the structure and function of the draft Order much like we would in a permit review. With this in mind, we want to be sure that the connections between the permit and the order are clear and ensure that the public has an effective level of participation. Therefore, the permittee should be asked to submit a permit modification request as soon as changes are complete to ensure the appropriate Order is referenced in the permit.

Under the Clean Water Act (CWA), we are responsible for issuing National Pollution Discharge Elimination System (NPDES) storm water permits in New Mexico. The draft storm water permit currently in process identifies several Solid Waste Management Units (SWMUs) and Areas of Contamination (AOCs) that are not covered by the RCRA permit or draft Order. Our goal is to make certain that there are no gaps in regulatory coverage between the RCRA permit or draft Order and the storm water permit. Please reflect EPA's responsibility to determine coverage for SWMUs and AOCs in the individual NPDES storm water permit.

We share your goal to expedite clean up at LANL, using the most efficient and effective processes available to fulfill our responsibilities to protect human health and the environment. We look forward to working with you to ensure that our RCRA and CWA roles are well coordinated and are transparent to the public we serve.

Sincerely,


for Susan Spalding, Associate Director
Hazardous Waste Branch (6MM-R)

Enclosure

GENERAL

1. Consider adding a provision to the Consent Order addressing new or emerging contaminants.
2. Consider requiring DOE to prepare, implement and maintain a public involvement plan addressing corrective action solely performed under the Consent Order. The EPA recognizes that both NMED and DOE perform routine public outreach (e.g. at NNM CAB Board Meetings); however, a formal plan may assist in building public confidence in the proposed campaign approach and annual planning process, both of which NMED highlights as key enhancements of the Consent Order. The EPA believes that modifications to Appendices A, B and C will be of substantial interest to the general public, NGOs and tribes.

SPECIFIC

1. **I.C. Jurisdiction (page 3):** There is a statement in the order "In the event DOE asserts that it cannot comply with any provisions of this Consent Order under RCRA based on an alleged inconsistency between the requirements of RCRA and the AEA, as amended, it shall provide the basis for the inconsistency assertion in writing." There needs to be sentence included in the order indicating that NMED will respond to this assertion.
2. **III.C. Definitions (page 6):** Area of Contamination - consider citing applicable EPA Guidance (e.g. March 13, 1996 EPA memo, "Use of the Area of Contamination Concept During RCRA Cleanups").
3. **III.O. Definitions (Page 8):** Facility – Are other sites (e.g. TA-57 Fenton Hill) that are not on land presently owned by DOE considered to be part of the Facility?
4. **III. Definitions:** Consider adding a definition for "Presumptive Remedy", including applicable citations to EPA Policy/Guidance.
5. **VII.C Relationship to Permits (page 23):** Suggest modifying the first sentence as follows: "The Parties enter this Consent Order based on their understanding that, *for NMED's purposes*, this Consent Order shall be..." (emphasis added to indicate suggested change).
6. **VII.D. Relationship to Permits (page 24):** As corrective action complete (CAC) determinations are accumulated, the DOE is encouraged to periodically request permit modifications reflecting proposed changes to the tables in Permit Attachment K. This will provide concrete demonstrations of cleanup progress, allow NMED and DOE to receive credit for completing corrective action at parts of the facility and provide opportunities for public comment. If, as NMED anticipates, cleanup is accelerated under the Consent Order, waiting an extended period of time to process permit modifications for CAC may place an undue burden on NMED and the public.
7. **VII.H.2. Relationship to Permits (page 25):** Insert "and EPA" after DOE.
8. **IX.E. Cleanup Objectives and Cleanup Levels (page 31):** The Consent Order references RAGS Volume 1, Part A (1989). Newer parts of RAGS (notably Parts E (dermal exposure) and F (vapor inhalation) are also applicable and should be cited. This applies to other locations where RAGS Part A is referenced.
9. **X. Newly Discovered Releases (page 35):** The Consent Order specifically addresses "newly discovered SWMUs and AOCs" and indicates they will be added to the Consent Order. It is not clear if this section also intended to address newly discovered releases from existing SWMUs and AOCs.
10. **XII.E. Groundwater Monitoring (page 38):** Suggest clarifying the language to indicate that if long-term monitoring is required by NMED, such a request *shall* (not "may") be included in a permit modification request, consistent with section VII.A.3.
11. **XII.F. Groundwater Monitoring (page 39):** Per section VII.A.3., it seems that this requirement is unequivocal and a permit modification is necessary. Suggest using the word "shall" or "must" instead of the word "may".
12. **XIV. Areas of Contamination (page 41):** If not added to the definition in Section III, consider citing applicable EPA policy and/or guidance relating to the use of Areas of Contamination.
13. **XV.E. Interim Measures/Emergency Interim Measures (page 42):** In the case of an emergency interim measure, consider also requiring LANL to notify NMED by phone (to the appropriate NMED contact person, or the DAM).
14. **XIX.B and C. Accelerated Corrective Action and Presumptive Remedies (page 48):** DOE should be required to notify NMED that they plan to undertake accelerated corrective action.
15. **XIX.E. Accelerated Corrective Action and Presumptive Remedies (page 48):** If not added to the definitions (Section III), presumptive remedy should be defined and citations to applicable policy/guidance provided.

16. **XIX.E.1. Accelerated Corrective Action and Presumptive Remedies (page 49):** Clarify what is meant by “most bounding alternative.” The EPA understands this to be the most conservative remedy (e.g. excavation and disposal); however, the Consent Order presently lacks clarity on this matter.
17. **XIX.E. Accelerated Corrective Action and Presumptive Remedies (page 49):** NMED must ensure the CME/remedy selection process is not inappropriately bypassed. If the presumptive remedy is intended to be the final remedy for a site, the scope of the CME (or Remedy Implementation Plan) can be significantly streamlined; however, it does not obviate the need for the regulatory agency to follow the process articulated in Section XVII.
18. **XIX.E.2. Accelerated Corrective Action and Presumptive Remedies (page 49):** Although NMED may choose not to require prior approval, DOE should at least notify NMED that a presumptive remedy is being undertaken.
19. **XX. At Risk Work (page 49):** While seemingly obvious, describe/define “at risk work” and explain the potential consequences of DOE proceeding at risk.
20. **XXI. Certification of Completion of Corrective Action (page 50):** The EPA understands that the DOE desires formal recognition from NMED that corrective action is complete and NMED will issue acknowledgements, as appropriate. However, the EPA considers the permit to be the appropriate mechanism where this determination can officially be made (through modifying the tables in permit Attachment K), requiring a class 3 permit modification and consideration of public input. Clarify the language in this section to be consistent with the required process.
21. **XXI.F. Certification of Completion of Corrective Action (page 51):** Modification or removal of institutional and/or physical controls from a previously granted certificate of completion is a change in remedy and will eventually require a class 3 permit modification.
22. **XXVI.C. and D. Quality Assurance/Data Management/Data Review (page 61):** The requirements of these sections should be consistent with permit section 11.3.1.1. While presently very similar, inconsistencies should be addressed in a future permit modification.
23. **XXVI.D.3. Quality Assurance/Data Management/Data Review (page 61):** NMED tap water screening levels also seem relevant and should be included. This comment may also apply to XXVI.D.5.
24. **XXXV. Stipulated Penalties (page 68):** Will NMED consider potential DOE proposals to perform Supplemental Environmental Projects (SEPs) in lieu of stipulated penalties? If so, suggest identifying this possibility. The March 10, 2015 Memo from EPA Assistant Administrator Cynthia Giles regarding the 2015 Update to the EPA Supplemental Environmental Projects Policy represents EPA’s most recent update on SEPs.
25. **XXXV.A.8. Stipulated Penalties (page 69):** Are technically deficient documents subject to stipulated penalties?
26. **XXXVII.B. Termination (page 71):** Is termination of the Consent Order subject to public notification?
27. **Appendix A:** Approximately 28 SWMUs/AOCs are identified as being in a campaign called “other.” No “other” campaign was identified in Appendices B or C. Clarify the campaign status of these sites.
28. **Appendix A:** Six sites having a status of “RFI or Field Work Rpt Submitted to NMED” are not assigned to a campaign. Clarify the campaign status of these sites.
29. **Appendix A:** The Consent Order references SWMUs and AOCs where work plans are approved but not yet implemented (pages 40 and 48) and where documents are disapproved but not yet resubmitted (page 53). Consider modifying Appendix A to reflect the status for these sites.
30. **Appendix E:** Consider providing a template for CMI Work Plans and CMI Reports.
31. **Appendix F:** The verb “should” is used throughout Appendix F when describing actions or activities that are to be performed during investigations, suggesting that the described activity is optional. While this may be true in certain cases, in many instances it seems preferable to replace the word “should” with “shall” or “must”, thereby removing ambiguity and increasing the likelihood that DOE submits work products consistent with NMED expectations.