



# LOS ALAMOS COUNTY

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*Harry Burgess*

May 27, 2016

Kathryn Roberts, Director  
Resource Protection Division - New Mexico Environment Department  
P.O Box 5469  
Santa Fe, NM 87502-5469  
**Sent via e-mail: [kathryn.roberts@state.nm.us](mailto:kathryn.roberts@state.nm.us)**

Reference: Draft LANL Consent Order

Dear Ms. Roberts,

The Incorporated County of Los Alamos, NM submits the attached comments to the Draft LANL Consent Order between NMED and DOE. We appreciate the hard work that went into this Order and ask that, as a major stakeholder, our comments be adopted and incorporated into the Order.

I am available to discuss these matters with you at your convenience.

Sincerely,

Harry Burgess  
County Manager  
Los Alamos County, New Mexico

cc: Secretary Ryan Flynn, NMED  
Monica Regalbuto, Assistant Secretary EM  
Rick Reiss, Chair, Los Alamos County Council  
Los Alamos County Council  
Brian Bosshardt, Deputy County Manager  
Seth Kirshenberg, Kutak Rock LLP

## Attachment A

The Order involves significant history of the cleanup and consent orders and is an attempt to create a "collaborative" but enforceable process to address the non-radioactive contamination at the Facility, as that term is defined in the Order. There is no specific provision for applicability of the Order beyond the boundaries of LANL or "the Facility", such as where contaminants have migrated off-site.

### **County "Seat at the Table"**

The Order should include provision for a role for the County in the cleanup process, at the County's option. The Order does not adequately recognize the governmental responsibility of the County for the protection of human health and the environment nor does it adequately reflect the historic relationship of the County to the DOE mission at LANL. There is no provision for involvement of the County as a participant in the process of achieving the substantive or procedural objectives of the Order. Further, the Order lacks specificity with respect to a public process.

Although the County, NMED and DOE have very good relationships and communications between the governmental entities are clear, that has not always been the case. In the past NMED or DOE has not included the County in key decisions or declined to release certain information and the proposal language will ensure that the County can participate in future issues impacting the County. We suggest that NMED add the following language to the Consent Order:

*"DOE shall afford the Incorporated County of Los Alamos with the opportunity to participate in the planning and selection of the remedial action, and the development of studies, reports, and action plans, including but not limited to the review of all applicable data as it becomes available to DOE (including draft documents)."*

### **Use of Balancing Criteria**

The County supports the use of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA, 42 U.S.C. §9601, *et seq.*) nine (9) remedy selection criteria ("CERCLA Criteria") for the selection of the remedy to be implemented even though the Order's jurisdictional predicate is the State's statutory authority (New Mexico's Solid Waste Law, Sections 74-4-10, 74-9-36(D), and 74-9-34) and pursuant to the delegated authority of the Resource Conservation and Recovery Act (42 U.S.C. §6901 *et seq.*). Application of these criteria assure that all relevant matters affecting human health and the environment are considered in the decision-making process, thereby precluding selection of the least expensive remedy at the expense of other factors and including the community acceptance criterion of the CERCLA Criteria.

### **Public Process Issues**

We note that Section XXXIII of the Order provides that 40 CFR 270.42 is deemed inapplicable to the modifications of the Order. This provision is objectionable, as it has the effect of anticipatorily denying by fiat, public notice and involvement in changes to the Order without any attempt to distinguish between those modifications of import and public concern and those that merely pertain to housekeeping issues. This sweeping provision of the Order defeats the intent of the CERCLA Criteria, and is not consistent with certain aspects of the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. 6901 *et seq.*). We suggest that only very minor (*de minimis*) items should change without a public process while a public notice should be published in all cases.

The Order identifies that it is, in part, settlement of a prior claim (section IV A (7)). RCRA, 42 USC §6973(d) provides for public process in the case of settlement and covenants not to sue (see section XXXIV of the Order). Since DOE is acting on behalf of the United States, it would appear that the public process requirement is triggered and the opportunity to review and comment is being provided in the promulgation of the Order. But that is a one-time event. The Order alludes to public process in several places (Section XVII B, Power Point # 10), suggesting that it is an on-going requirement. But neither the Order nor the attachments discuss the process with any specificity. It would be an improvement if there were a discussion of what events will trigger public process, how it will be performed (public meeting, media notice, internet posting, review and comment, et cet.), and how the public's input will be considered and incorporated in the decision-making process. Given the history and sensitivity of the environmental issues at the Facility, the County's involvement as a public entity would be well served with more public process specificity. Such a process should be incorporated into the Order, establishing public involvement as a "requirement" for purposes of Section XXXVI, in which event it will be enforceable by consent of the Parties. This will also become enforceable through institution of a citizens suit pursuant to 42 USC §6972(a), although it appears that DOE may not have agreed to the applicability of that provision of law, as evidenced by the language in XXXVI B of the Order ("The State maintains that Citizens may sue...").

Several times in the past the County has requested that LANL cleanup or address a solid waste management unit ("SWMU") or a specific area based upon perceived risk, economic development or other reasons. The Order should permit the County to propose to NMED and DOE a re-prioritization of the cleanup or risk assessments of certain sites and require that NMED and DOE respond to the County's request. While matters of imminent endangerment would always take precedence in allocating resources, many of the projects involving investigation and corrective action do not rise to that level, in which case reasonable accommodation of the County's proposals would be both reasonable and appropriate.

#### **Narrow DOE's ability to Claim its inability to Comply with the Order is Beyond its Control – When Contracting is actually within DOE's Control**

The *force majeure* clause is too broad and permits DOE to avoid the consequences of its own failure to move forward with contracting and performance obligations. For example, if DOE delays compliance with the Order which delay is caused by "... compliance with applicable statutes or regulations governing contracting, procurement, or acquisition procedures despite the exercise of reasonable diligence," DOE is excused from the delay. This implies that if the United States cannot implement a contracting or procurement action because it is not following the requirements established by law, DOE's failure to meet legal requirements constitutes an excusable delay in compliance with the Order. A self-inflicted delay should not constitute an excusable delay. Even with the language of "exercise of reasonable diligence," this overly broad and objectionable. We suggest that the Order replace "despite the exercise of reasonable diligence" with "to the extent that is beyond the control of the United States government" We do appreciate the clause that states "Provided NMED agrees with the justification for the length of the delay, NMED shall grant an extension pursuant to Section XXVIII (Extensions)." This should allow the parties to negotiate a claim and its justification.

#### **County Supports DOE and NMED Finalizing the New Consent Order**

The County strongly supports the amended Consent Order, as it promotes the use of cleanup funds for actual cleanup work. With the expectation that DOE will continue to move forward and meet the milestones, the County is encouraged by the terms and conditions of this Consent Order and applauds both DOE and NMED for working collaboratively to create an atmosphere of collaboration and mutual interest.