

~~May~~ May 28, 2016

Ms. Kathryn Roberts, Director  
Resource Protection Division  
New Mexico Environment Department  
Post Office Box 5469  
Santa Fe, New Mexico 87502-5469

Via email to: *kathryn.roberts@state.nm.us*

Re: Public Comments about the Proposed 2016 LANL Consent Order

Dear Ms. Roberts:

The cleanup of Los Alamos nuclear waste is a huge priority for the citizens of northern New Mexico. The threat of air and water contamination from Los Alamos is very real, and it only gets harder to deal with as time goes on.

I urge the New Mexico Environment Department (NMED) to withdraw the proposed 2016 Compliance Order on Consent, or Consent Order, for Los Alamos National Laboratory (LANL), which was released for public comment on March 30, 2016. It creates serious problems to ensuring cleanup: it limits public participation opportunities; it reduces enforceability by the Environment Department; it puts the Department of Energy (DOE) in the role of regulator; and it does not have a final compliance/completion date. The proposed 2016 Consent Order represents a giant step backwards to achieving genuine cleanup at LANL.

The Environment Department must retain the existing Consent Order that went into effect on March 1, 2005, with a final deadline of December 6, 2015. Section XII of the 2005 Consent Order established dozens of mandatory deadlines for the completion of corrective action cleanup tasks, including completion of investigations at individual sites, installation of groundwater monitoring wells, submittal of groundwater monitoring reports, evaluation of remedial alternatives for individual sites, and completion of final cleanup remedies. These deadlines are enforceable under Section III.G of the 2005 Consent Order.

I urge the Environment Department to conserve taxpayer resources, withdraw the proposed 2016 Consent Order, and modify the 2005 Consent Order with an update of the Section XII cleanup schedules and a realistic final compliance/completion date.

I formally request that NMED hold a public hearing on the revised Section XII cleanup schedules and new final compliance/completion date as required by the 2005 Consent Order, the New Mexico Hazardous Waste Act (NMSA 1978, §§ 74-4-1 to 14) and the federal Resource Conservation and Recovery Act (RCRA) (40 CFR §270.42, Appendix

I.A.5.b.). In the alternative, I request a public hearing on a proposed 2016 Consent Order.

DOE is in the process of hiring a new cleanup contractor for LANL and recently issued a Request For Proposals (RFP), which states:

The total estimated value of the contract is approximately \$1.7B [billion] over the prospective ten-year period of performance, including option periods.

The ten-year contract amount would average out to \$170 million per year, well below the current proposed budget of \$189 million for Fiscal Year 2017 (which begins October 1, 2016). Before a contract is even signed, the proposed 2016 Consent Order fails to increase the LANL cleanup budget. The new cleanup contract is set up to fail from the beginning under either the 2005 Consent Order or a proposed 2016 Consent Order.

Further, there is no mechanism in the proposed 2016 Consent Order to increase, or to even maintain, a stable annual cleanup budget.

#### GENERAL COMMENTS

~~The following general comments support my position that NMED should withdraw the proposed 2016 Consent Order and revise the 2005 Consent Order to update the Section XII cleanup schedules and provide a realistic final compliance/completion date.~~

#### ~~NMED Must Add Los Alamos National Security, LLC (LANS), the Management Contractor at LANL, as a Party~~

~~The proposed 2016 draft Consent Order omits naming the management contractor at LANL, the Los Alamos National Security, LLC (LANS), a limited liability corporation, as a Party to the Order.~~

#### ~~NMED, DOE and LANS Propose to Eliminate the Public's Due Process Rights in the proposed 2016 Consent Order~~

~~The 2005 Consent Order explicitly protects procedural due process rights available to the public under the hazardous waste laws. The proposed 2016 Consent Order explicitly removes these protections. For example, Section VII.G states:~~

~~The Parties [NMED and DOE] agree that the rights, procedures and other protections set forth at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42), 20.4.1.901 NMAC, and 20.4.1.902 NMAC, including, but not limited to, opportunities for public participation, including public notice and comment, administrative hearings, and judicial appeals, *do not apply* to modification of the Consent Order itself. [Emphasis added.]~~

~~Thus, as proposed in the above language, the Parties have inappropriately agreed to remove the due process rights, procedures and other protections provided to the public under the Resource Conservation and Recovery Act (RCRA), the New Mexico Hazardous Waste Act and the 2005 Consent Order. This provision must be stripped from the proposed 2016 Consent Order.~~

**~~NMED Must Provide the Public with the Opportunity to Comment on All Drafts of the proposed 2016 Consent Order~~**

~~In 2002, NMED released a draft Consent Order for public review and comment. Following the 18 months of closed door negotiations between NMED, DOE, the University of California (the predecessor of LANS), and the New Mexico Attorney General, a final 2004 draft Consent Order was released for public comment. NMED should follow the established precedent and provide for public review and comment for all future drafts of the proposed 2016 draft Consent Order.~~

**~~The Environment Department Must Respond in Writing to All Public Comments~~**

~~The Environment Department must reply individually to each and every comment submitted made by the public and DOE and LANS.~~

~~NMED must require that all DOE and LANS comments and NMED's response to comments be made public through LANL's Electronic Public Reading Room at <http://epr.lanl.gov/oppic/service>.~~

**~~All Documents Must Be Posted to LANL's Electronic Public Reading Room~~**

~~The Environment Department, DOE and LANS must make all communications between them, including all documents, submittals, approvals, notices of deficiencies and denials submitted as required by the 2005 Consent Order or a proposed 2016 Consent Order must be made readily and electronically available to the public through LANL's Electronic Public Reading Room.~~

~~DOE and LANS must notify individuals by e-mail of all submittals through the Electronic Public Reading Room.~~

**~~NMED Must Update the Public about the Current State of Cleanup Activities under the 2005 Consent Order~~**

~~NMED must promptly provide the public with a concise document about the current status of every site listed in the 2005 Consent Order, including a scheduled completion date or verification that the cleanup work has been completed.~~

~~All documents submitted by DOE and LANS, or their predecessors, under the 2005 Consent Order, along with NMED's response, must be incorporated by reference into a proposed 2016 Consent Order.~~

### **~~All Cleanup Work Must Have Enforceable Deadlines; The Cleanup Schedule Must Drive Funding, Not as Proposed—Funding Does Not Drive Cleanup~~**

~~The proposed 2016 Consent Order eliminates all the deadlines for completing cleanup as required by the 2005 Consent Order. It replaces the deadlines with an open-ended and vague scheduling process, with limited enforcement opportunities.~~

~~The proposed 2016 Consent Order proposes a “campaign” approach with limited enforceable cleanup deadlines for work scheduled only for that year, thereby ensuring that the campaign approach would be open-ended without a final compliance/completion date.~~

~~Campaign deadlines would be negotiated each year through a closed “Annual Planning Process” between NMED, DOE and LANS with no public participation, no opportunity to comment on the proposed deadlines, nor a required public hearing.~~

~~The proposed 2016 Consent Order’s annual schedule would be left to DOE’s discretion. The 2005 Consent Order’s fundamental approach is that the schedule drives the funding appropriated by Congress—not the funding driving the schedule as mandated in the proposed 2016 Consent Order.~~

~~Any Consent Order must ensure that all scheduled cleanup work has mandatory completion dates, which must be enforced by NMED.~~

### **~~The Consent Order Cannot Be Open-Ended~~**

~~The proposed 2016 Consent Order would indefinitely extend the final compliance date for completing corrective cleanup action at LANL, without the opportunity for a public hearing with formal testimony and cross-examination of witnesses.~~

~~Any Consent Order for LANL cleanup must have a final compliance date to which NMED, DOE and LANS agree to and are so bound.~~

~~NMED must provide a 60-day public review and comment period, in addition to an opportunity for a public hearing, about schedule changes to Section XII in the 2005 Consent Order and the new final compliance date as required by state and federal regulations. See 40 CFR §270.42, Appendix I.A.5.b.~~

### **~~NMED Must Not Give DOE and LANS a “Get Out of Jail Free” Card—Existing Violations Must Not Be Waived~~**

~~Section II.A of the proposed 2016 Consent Order states, “This Consent Order supersedes the 2005 [Consent] Order and settles any outstanding alleged violations under the 2005 Consent Order.” This is a “get out of jail free” card for DOE and LANS.~~

~~Knowing that this provision may be available to them, DOE and LANS may encourage NMED to investigate “alleged violations” so that, if and when a new Consent Order is issued, they might have immunity from alleged violations under the 2005 Consent Order.~~

~~The Environment Department is abdicating its responsibility to protect human health and the environment as required by the federal RCRA and the New Mexico Hazardous Waste Act.~~

~~NMED must not surrender its regulatory and enforcement powers.~~

### ~~**New Mexico Attorney General Approval Must Be Obtained**~~

~~The 2005 Consent Order was signed by the Attorney General of New Mexico for purposes of the Section III *Covenant Not to Sue* and the *Reservation of Rights* provisions.~~

~~The proposed 2016 Consent Order provides the State of New Mexico with a covenant not to sue DOE on behalf of the State of New Mexico, not merely on behalf of the Environment Department.~~

~~Nevertheless, there is no signature line for the New Mexico Attorney General in the proposed 2016 Consent Order.~~

~~The Attorney General was an active participant, representing the People of New Mexico, in the 2005 Consent Order administrative process.~~

~~The Environment Department must ensure that the New Mexico Attorney General is consulted, and his approval obtained, before any Consent Order is finalized.~~

### ~~**Cleanup Levels Must Remain Strict**~~

~~Section IX *Cleanup Objectives and Cleanup Levels* of the proposed 2016 Consent Order would allow DOE to “develop site specific ecological cleanup levels” to mitigate unacceptable ecological risk due to release of site related contaminants.~~

~~There is no mention of NMED’s role in this process. DOE and LANS would be allowed to demonstrate to NMED that any particular “cleanup objective is impracticable.”~~

~~The unacceptable criteria for DOE and LANS to determine whether a cleanup is “impracticable” include technical difficulty, the cost of the project, hazards to workers or to the public, and any other basis that may support a finding of impracticability.~~

~~If NMED approves the impracticability request, DOE and LANS may then propose alternative cleanup methods using site specific risk assessments. All of the decision-making could take place behind closed doors, as there are no public participation requirements in this section.~~

~~NMED must specify the applicable cleanup levels that will be used and when and where they will be applied.~~

~~**New Mexico Deserves Better**~~

~~In closing, the New Mexico Environment Department's proposed 2016 Consent Order allows the federal government to leave Northern New Mexico contaminated forever if DOE believes that cleanup is too difficult or costly—a sorry situation indeed for a nuclear weapons facility that receives over \$2 billion in taxpayer money a year.~~

~~For all the reasons stated above, I urge the New Mexico Environment Department to withdraw the proposed 2016 Consent Order.~~

~~The New Mexico Environment Department should implement revisions to the 2005 Consent Order in Section XII for cleanup schedules and include a final compliance/completion date. The schedules and final date should be realistic, aggressive and enforceable.~~

~~The State of New Mexico must remain in the driver's seat. NMED should not abdicate its power to DOE and LANS at LANL. Cleanup of LANL is essential to protect human health and the environment. Cleanup would permanently protect the environment and our precious water resources while creating hundreds of high paying cleanup jobs. It would be a real win-win for New Mexicans.~~

~~Thank you for your careful consideration of my comments~~

Sincerely,

*Name*

*City*

*Email (if you would like to be informed about next steps)*

Susan E. Trujillo

HC 78 Box 10315

Ranchos de Taos, NM 87557

hmo@taosnet.com

~~The proposed 2016 Consent Order is available at  
<https://www.env.nm.gov/HWB/lanlperm.html#COOC>~~

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~~NMED's public notice for the draft Consent Order is available at  
[https://www.env.nm.gov/HWB/documents/PublicNotice\\_\\_English.pdf](https://www.env.nm.gov/HWB/documents/PublicNotice__English.pdf)~~

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~~The public comment period ends 5:00 pm mountain daylight time (MDT) on Tuesday, May 31, 2016.~~

~~Comments should be submitted to [kathryn.roberts@state.nm.us](mailto:kathryn.roberts@state.nm.us)~~

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