



# New Mexico Environment Department

## Modifications to the LANL 2016 Compliance Order on Consent

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# 2016 Compliance Order on Consent Modifications

- Agreement between the State of New Mexico Environment Department (NMED) and the U.S. Department of Energy (DOE) for Los Alamos National Laboratory
  - Signed by both parties in June 2016
- 2016 Consent Order superseded the 2005 Compliance Order on Consent
  - Encompasses all scope within the 2005 CO
- Scope fulfills the requirements for corrective action and compliance with the Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act (HWA)
  - 1) corrective actions for releases of hazardous waste or hazardous waste constituents
  - 2) corrective actions for releases of groundwater contaminants, toxic pollutants and explosive compounds
  - 3) groundwater monitoring, groundwater characterization and groundwater corrective action activities
  - 4) additional groundwater monitoring information required in Part B permit applications



# Purpose and Scope of CO

- 1) Provide a framework for current & future actions to implement regulatory requirements
- 2) Establish an effective structure for accomplishing work on a priority basis through cleanup campaigns with achievable milestones and targets
- 3) Drive toward cost-effective work resulting in tangible, measurable environmental clean-up
- 4) Minimize duplication of work and documentation
- 5) Set structure for establishment of additional cleanup campaigns and milestones as new information becomes available and campaigns are completed
- 6) Facilitate cooperation, exchange of information, and participation
- 7) Provide for effective public participation
- 8) Define and clarify relationships to other regulatory requirements



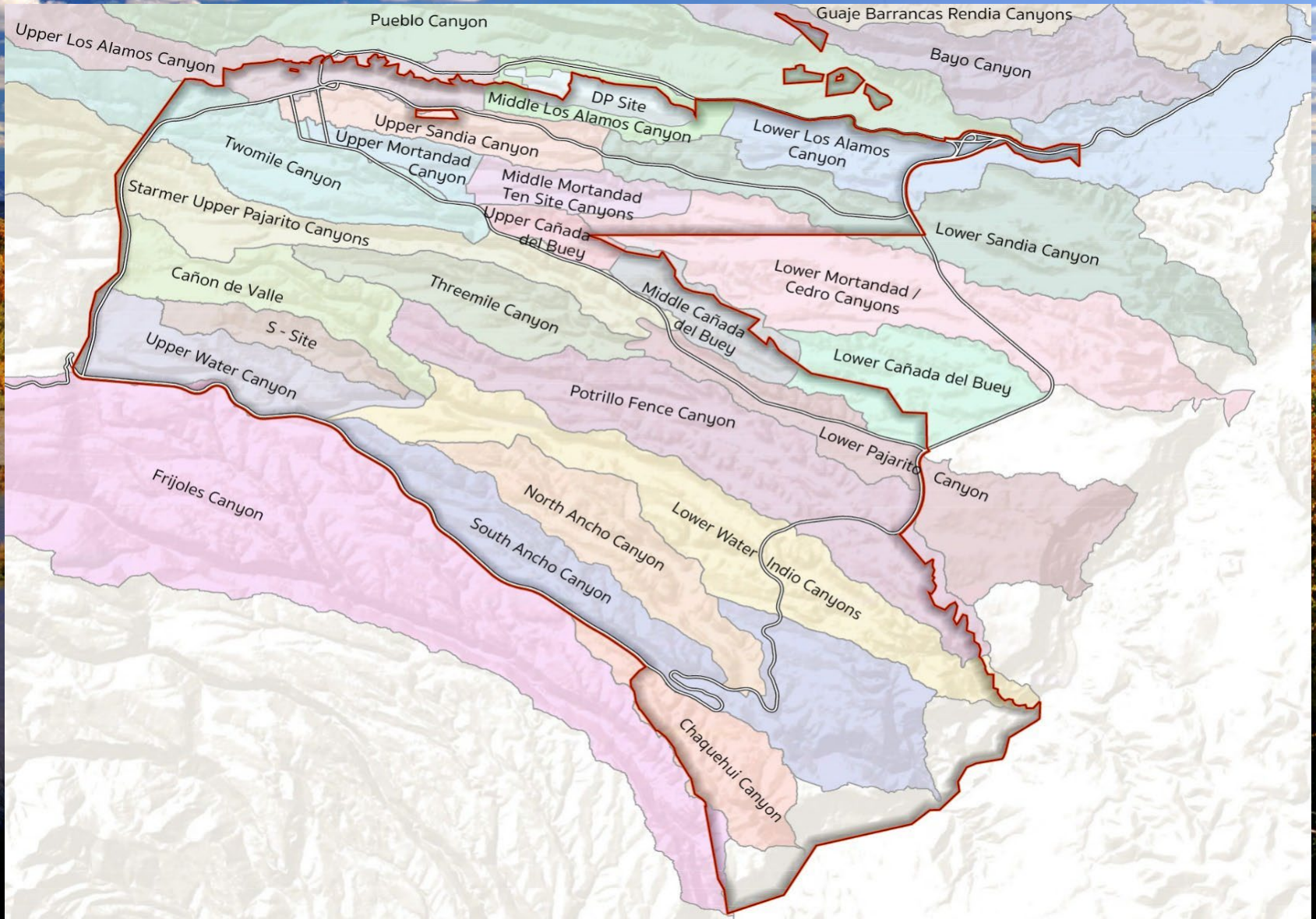
# Unmodified Campaign Approach

- ❑ To facilitate prioritization and completion of corrective action required by the CO, the clean-up is organized into campaigns
  - ▣ Based on a risk-based approach to grouping, prioritizing and accomplishing activities at Solid Waste Management Units (SWMUs) and Areas of Concern (AOCs)
  - ▣ Campaigns can be one or more projects
  - ▣ Campaigns are then further organized by aggregate area
- ❑ Campaigns, projects, tasks and deliverables are subject to two deadlines
  - ▣ Milestones are enforceable
  - ▣ Targets are not enforceable





# Map of the Aggregate Areas





# Initiation of Litigation in 2021

## Annual Planning

- ❑ DOE is required to provide an update to Appendix B annually
  - ▣ Lists milestones for current FY and targets for the next two FYs
- ❑ For the submission in FY21, NMED found the annual planning to be deficient
  - ▣ Few milestones
  - ▣ Many not based on FY+1 targets

## Dispute Resolution

- ❑ NMED invoked dispute resolution for the deficient FY21 planning
  - ▣ NMED concerns were not addressed adequately in subsequent proposed revisions
- ❑ Negotiations occurred following process in the CO
  - ▣ Elevated through Tier 1 and Tier 2 officials
  - ▣ Agreement was not reached



# Litigation History

- After unsuccessful dispute resolution, NMED utilized statutory authority to enforce the CO by seeking judicial relief and penalties
  - NMED filed a civil complaint against DOE in February 2021
  - NMED alleged that DOE did not comply with the CO
  - Requested that the Court
    - Require the FY21 Appendix B be revised to fully address NMED concerns and access civil penalties
    - Or order the Parties to enter court-supervised negotiations of a new CO
    - And impose a monetary penalty for non-compliance
- DOE removed the complaint to United States District Court in March 2021
- DOE answered the complaint in May 2021
  - Denied that it did not comply with the CO and denied that NMED was entitled to relief sought



# Initiated CO Modifications

- NMED and DOE moved for a stay of litigation in October 2021
  - ▣ To engage in direct settlement negotiations, including possible revisions to the CO
- NMED and DOE have had ongoing settlement negotiations since this initial stay
  - ▣ The Parties have communicated regularly to negotiate revisions to key sections in the CO
- Both parties aimed to resolve the claims without further litigation
  - ▣ Goal was to ensure NMED concerns for maintaining appropriate regulatory oversight be addressed in the modifications and to hold DOE accountable for non-compliance
- Court ordered negotiations resulted in this revised CO and settlement agreement





# Settlement Agreement

The settlement agreement satisfies the claims alleged by NMED without further litigation.

Neither is considered the prevailing party.

- The Parties agree:
  - Within 30 days of the Settlement Agreement, NMED and DOE shall execute the revised CO
  - Within 15 business days of execution of the revised CO, the parties shall file a joint stipulation of dismissal for the litigation with prejudice
  - Within 90 days after filing the joint stipulation of dismissal, DOE shall remit \$333,000 to NMED



# Settlement Agreement

- Requires NMED to complete the review of the requests submitted by DOE for Certificates of Completion with the provided schedule
  - List of requests is included in Attachment B
    - Total of 221 sites needing review
  - Minimum of 50 COC requests completed within 90 days
  - Additional 50 COC requests within 180 days
  - Additional 50 COC requests within 270 days
  - All COC requests completed within 365 days
  - Prioritization first to the Supplemental Investigation Reports Campaign
- NMED can issue approvals or disapprovals of the COC requests
  - Disapprovals may require DOE provide additional information and/or resubmit documents
  - Automatic approvals will not occur if review times are not met



# Key Modifications to the CO

- ❑ **Reevaluated the campaign classification and organization**
  - ❑ Involves revisions to Appendix A, Appendix B and Appendix C in addition to the body of the CO
- ❑ **Increased public participation**
  - Including required conferral for changes that may affect the priorities of the Pueblos and local governments
- ❑ **Accountability for continued evaluation of deferred status sites**
  - Public notification and opportunity for comment
  - Conference with Pueblos and local governments for deferral
  - Annual updates by DOE to state efforts to move site from deferred status
- ❑ **Dispute resolution procedures revised to allow for more effective solutions**
  - Includes the designation for technical vs. non-technical disputes
- ❑ **Increased accountability for timely review of documents**
  - Revised the review schedule for corrective action documents submitted under the CO
  - New requirements for NMED communication when longer review times are needed



# Revised Campaigns

## Class A Campaigns

- ❑ Campaigns in which the Parties agree that completion dates can be established
- ❑ Has an expanded schedule to provide better oversight over activities to reach timely completion

## Class B Campaigns

- ❑ Campaigns in which completion dates cannot yet be established
- ❑ Are reclassified as Class A upon NMED approval of the CMI Plan
  - TA-21 D&D is reclassified after all deactivation and decommissioning work





# Campaign Completion

- Completion dates can extend beyond the schedule in Appendix B
  - DOE will develop successive or rolling five-year schedules until the completion date is within the five-year schedule
- Parties can agree to specify key assumptions underlying the completion date
  - If assumptions proves to be incorrect, then Parties may agree to new completion date
- DOE will submit a campaign completion letter to NMED after corrective action activities are done
  - NMED must respond within 30 days

Rather than an overall CO completion date, we now have campaign completion dates for all Class A campaigns.

Overall completion date will be the campaign completion date of the last one to be completed



# Appendix B Modifications

## Class A Campaigns

- ❑ Expanded five-year schedule
- ❑ Milestones are established for two years (FY and FY+1)
  - Milestones and campaign completion dates are enforceable and subject to stipulated penalties

## Class B Campaigns

- ❑ Maintains the three-year schedule
- ❑ Milestones are established for the current FY
  - Are enforceable and subject to stipulated penalties
- ❑ Targets for two years (FY+1 and FY+2)



# Appendix C Modifications

- ❑ Revised to clarify which campaigns are Class A and Class B
- ❑ Includes a five-year schedule for each Class A campaign
- ❑ Adds campaign completion dates for each
- ❑ Now includes an explanation for the ordering of the campaign
- ❑ Language is included to expand Pueblo and local government involvement in Appendix C changes
  - ▣ Allows opportunity for comment on new proposed ordering of campaigns



# Deferred Sites

A deferred site is a SWMU or AOC for which corrective action activities are suspended due to circumstances discussed in the CO

- ❑ Four circumstances for a SWMU or AOC to be deferred:
  - ❑ Located within testing hazard zones of active firing sites and LANL
  - ❑ Associated with active operations
  - ❑ Sites are on, or require access to, property not owned or controlled by DOE and that DOE is unable to obtain access
  - ❑ If NMED approves an RFI work plan or report in which DOE proposes to delay investigation of a site





# Deferred Sites Cont.

- Expanded requirements for notification if DOE intends to change a status to deferred using one of the first two circumstances
  - Notify NMED in writing of the status change at least 30 days prior to the change
  - Must confer with representatives of the Four Accord Pueblos and any municipality, county, or pueblo that shares a common border with LANL and allow opportunity to comment if such deferral may potentially affect the priorities
  - Notify the public by publication on DOE and NMED websites at least 20 days prior to the status change
- Now requires annual written updates to NMED that includes an explanation of actions undertaken to move each site out of deferred status
  - Requires annual certification that imminent and substantial endangerment to health or the environment has not resulted and will not result from continued deferral



# Expanded Public Participation

- Maintains all previous public participation and added new requirements
  - Annual public meetings regarding changes to Appendices A, B, and C
  - Public comment period and opportunity for public hearing on Statements of Basis issued by NMED
  - Maintain a publicly accessible database for all data from analysis of environmental media (Intellus)
  - An opportunity to receive email notifications concerning groundwater analytical data
  - Quarterly public meetings hosted by DOE regarding CO actions
  - An email address for the public to submit comments to DOE on the CO
  - Public input for, and access to, independent third-party audits
- Added a mandatory 10-year review
  - Parties agree to review and evaluate the CO every 10 years to determine efficacy and consider if modifications are warranted
    - Review utilizes results of any independent audits conducted



# Increased Pueblo and Municipality Participation

- Added requirements to discuss key changes with Pueblos and local governments
  - Future proposed modifications to the CO
  - Changes in campaign prioritization in Appendix C
  - If a site is proposed for deferred status change following the first two circumstances
- Parties must now confer with representatives of municipalities, counties, and Pueblos if changes to the ordering of campaigns may affect the priorities of such
  - Any municipality, or county, or pueblo that shares a common border with LANL
  - Includes the Four Accord Pueblos
    - Cochiti Pueblo
    - Pueblo de San Ildefonso
    - Santa Clara Pueblo
    - Jemez Pueblo
- Comments will be considered when determining modifications



# Dispute Resolution Procedures

- Parties can now agree that a dispute constitutes a technical dispute
  - Will concern only scientific or engineering matters
  - Attempts to first resolve the dispute through Tier 1 officials
    - NMED Resource Protection Division Director
    - DOE EM-LA Office of Quality and Regulatory Compliance Director
    - Period of negotiations shall not exceed 30 days
- If resolution is not achieved with Tier 1 officials, the Parties agree to use an expert to resolve the dispute
  - Expert is jointly agreed to by the Parties within 30 days of the conclusion of Tier 1 negotiations
    - Cost of expert is shared between the Parties
    - Cooperate fully in expeditious delivery of documents, records, and personnel required by the expert
  - Expert will issue a draft report and allow the Parties 10 days to comment
    - Will endeavor to resolve the dispute no later than 60 days after their appointment
  - Expert decision is final and binding on the Parties





# Dispute Resolution Procedures

Procedures for non-technical disputes been modified by utilizing an

- **NMED and DOE will use best efforts to resolve the dispute with informal negotiations**
- **If unsuccessful, the dispute is elevated to Tier 1 officials**
  - **Meet to resolve dispute for a period not exceeding 30 days**
- **Elevates dispute to Tier 2 officials**
  - **NMED Deputy Secretary of Operations**
  - **Manager of Office of Environmental Management, Los Alamos Field Office**
  - **Negotiate for a period up to 30 days**
- **If unable to resolve dispute through Tier 2 officials, resolution is sought through non-binding mediation**
- **If non-binding dispute resolution fails, the dispute will be referred to a third-party adjudicator to decide the matter**
  - **Both parties must agree to the adjudicator, presumptively a former judge or magistrate**
  - **Cost shared equally**
  - **Decision of the adjudicator will be the final action**
  - **Judicial review of the adjudicator decision is allowed**



# Approval Timeline Changes

Increased NMED's accountability for meeting the CO review timelines to facilitate expeditious cleanup.

- Revised Appendix D that provided review timeframes
  - Contains the list of all documents subject to NMED approval under CO
- The Secretary of NMED may grant an extension of time for good cause
  - The extension shall not be for a number of days greater than the number of days in Appendix D
  - The need for additional time to resolve informal comments may qualify as good cause for an extension
- NMED shall notify DOE in writing within 10 days after the deadline to communicate that the timeframe was not met
  - Must provide the reasons and a new deadline that NMED will meet to approve or disapprove
- NMED is required to post the written notice on our website for the public



# New Independent Audits

- A pilot audit is required within one year of the CO
  - After the pilot audit, Parties will meet to discuss the benefits and burdens found during the audit, and the feasibility of future audits
- An independent third-party audit shall evaluate the effectiveness of the CO
  - Will evaluate the performance of each Party, including whether the Parties are adhering to the general purposes and principles of the CO
  - The cost will be shared equally
  - Will also include public scoping meetings and will incorporate public feedback provided during these meetings to develop lines of inquiry for the audit
  - Will prepare a report that documents opportunities for improvements, recommendations and best practices
    - Parties agree to publish reports on the respective websites
- Audits would not be conducted more than once every 4 years
  - Last audit must be completed at least 1 year before the 10-year review



# Summary

- Settlement agreement and revised CO provide increased responsibility for both Parties
  - NMED is held accountable for facilitating effective cleanup through timely review of documents required by the CO
  - DOE is held accountable for ensuring that the cleanup of legacy waste contamination is conducted efficiently and transparently
- Additional provisions provide NMED and the public the opportunity to impact the cleanup conducted under the CO
- Significant improvements were made ensuring that cleanup is accelerated and enforceable to protect human health and the environment in the future





# Questions?

