

**STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT**

**NEW MEXICO ENVIRONMENT DEPARTMENT,**

**Complainant,**

v.

**No. [FILED VERSION – 02/24/2021]**

**U.S. DEPARTMENT OF ENERGY,**

**Respondent.**

**COMPLAINT FOR ENFORCEMENT OF COMPLIANCE ORDER ON CONSENT**

The New Mexico Environment Department ("NMED"), files this complaint seeking enforcement of a June 2016 Compliance Order on Consent ("2016 Consent Order"), attached as NMED Exhibit 1, issued pursuant to NMSA 1978, Section 74-4-10, and agreed and consented to by NMED and the U.S. Department of Energy ("DOE" or "the Respondent"), which addresses the cleanup of legacy hazardous and mixed waste at and around Los Alamos National Laboratory ("Facility"), located in Los Alamos, New Mexico. Respondent has yet to comply with the requirements of the 2016 Consent Order for the current annual planning period, despite attempts by NMED and DOE to reach agreement through dispute resolution. This failure by the Respondent has been a continuing pattern during the five years since the 2016 Consent Order came into force, and even prior to that, during the term of the prior (2005) Consent Order. This ongoing failure means that hazardous and radioactive substances continue to exceed standards and pose health risks to adjacent communities, that contaminated groundwater continues to pose a long-term threat to New Mexico's drinking water sources, that tribal communities are unable to engage in longstanding cultural uses of their lands, and that recreational and economic activities in the area

are at continued risk. Therefore, NMED requests a judicial order to address the continuing pattern of delay and noncompliance by Respondent in accordance with NMSA 1978, Section 74-4-10 and Section XXXVI of the 2016 Consent Order.

### **JURISDICTION AND VENUE**

1. NMED is an executive level state agency, established by the Department of Environment Act, NMSA 1978, §§ 9-7A-1 to -12.
2. NMED's main offices are at 1190 St. Francis Drive, Santa Fe, New Mexico.
3. Respondent DOE is a department of the United States government and is the owner and a co-operator of the Facility.
4. Venue in this court is proper under NMSA 1978, Section 38-3-1(A).

### **FACTUAL BACKGROUND**

5. The Facility currently comprises approximately 36 square miles (approximately 23,000 acres) and is located on the Pajarito Plateau in Los Alamos County in north central New Mexico, approximately 60 miles north-northeast of Albuquerque and 25 miles northwest of Santa Fe. At one point during its history, the Facility comprised up to roughly 41 square miles (26,337 acres). The Facility is surrounded by the Pueblo of San Ildefonso, Los Alamos County, Bandelier National Monument, Santa Fe National Forest, and Santa Fe County.
6. The Pajarito Plateau is dissected by 19 major surface drainages or canyons and their tributaries. These canyons drain into the Rio Grande, which flows along part of the eastern border of the Facility. Water supply wells at the Facility, in Los Alamos County, and on Pueblo of San Ildefonso property withdraw water from the regional aquifer beneath the Pajarito Plateau for drinking and other domestic purposes.
7. The Facility began operations in 1943 when the United States Army Manhattan Engineer

District was established for the development and assembly of an atomic bomb. Current and historical operations have included nuclear weapons design and testing; high explosives research, development, fabrication, and testing; chemical and materials science research; electrical research and development; laser design and development; and photographic processing.

7. As a result of operations at the Facility from approximately 1943 to the present, the Respondent has generated, treated, stored, disposed of, and otherwise handled solid wastes, including hazardous wastes, hazardous waste constituents, and mixed wastes (containing both hazardous waste and radioactive waste) at the Facility.

8. The Respondent has disposed of hazardous wastes, hazardous constituents and mixed waste at the Facility, and waste management activities at the Facility have resulted in the release of hazardous wastes, hazardous waste constituents, and mixed wastes. In addition, certain groundwater contaminants listed pursuant to NMSA 1978, Section 74-6-4 (2019) at 20.6.2.3103 NMAC, certain toxic pollutants listed at 20.6.2.7.(T)(2) NMAC, and certain explosive compounds, as defined below, are present in the environment at the Facility. The Respondent has disposed of such wastes in septic systems, pits, surface impoundments, trenches, shafts, landfills, and waste piles at the Facility. The Respondent has also discharged industrial wastewater and other waste from outfalls into many of the canyon stream systems at the Facility.

9. On August 13, 1980, the Respondent submitted to the United States Environmental Protection Agency (“EPA”) a “Notification of Hazardous Waste Activity” for the Facility pursuant to Section 3010(a) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6930(a).

10. By letter dated November 19, 1980, the Respondent submitted to EPA a Part A RCRA permit application for the Facility. The Respondent also sent a copy of the Part A application to

the Environmental Improvement Division of the New Mexico Department of Health and Environment, the predecessor to the Environment Department. The application covered hazardous waste treatment, storage, and disposal activities at Technical Area 54 (“TA-54”) and included 129 hazardous waste streams. The Respondent revised the Part A permit application several times since the November 1980 submittal, including, among other things, to notify the State that the Respondent would not seek a state permit for hazardous waste disposal activities at the Facility.

11. On January 25, 1985, EPA granted authorization to the State of New Mexico to implement its hazardous waste program under the New Mexico Hazardous Waste Act (“HWA”), NMSA 1978, §§ 74-4-1 to -14, in lieu of the Federal program. 50 Fed. Reg. 1515 (Jan. 11, 1985). EPA approved subsequent program revision applications by the State of New Mexico effective on April 10, 1990, July 25, 1990, December 4, 1992, August 23, 1994, December 21, 1994, July 10, 1995, January 2, 1996, March 10, 1997, June 13, 1998, October 1, 2003, and March 1, 2009. 40 C.F.R. § 272.1601.

12. The HWA defines “hazardous waste” as “any solid waste or combination of solid wastes that because of their quantity, concentration[,] or physical, chemical[,] or infectious characteristics may: (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of[,] or otherwise managed.” NMSA 1978, § 74-4-3(K).

13. The HWA also provides that each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste have a permit issued by NMED. On November 8, 1989, NMED’s predecessor agency issued a Hazardous Waste Facility Permit to the Respondent to operate a hazardous waste treatment and storage facility at the Facility pursuant to Section 74-4-

4.2 of the HWA. Respondent submitted its most recent Part A and Part B permit application for renewal to NMED in June 2020.

14. In the late 1980s, the Respondent identified for EPA “Potential Release Sites,” including solid waste management units (“SWMUs”) and “areas of concern” (“AOCs”), where hazardous wastes, hazardous constituents, solid wastes, or mixed wastes may have been disposed of prior to November 19, 1980. Of those sites, EPA identified over 1200 to be investigated and included on the Hazardous and Solid Waste Amendments (“HSWA”) portion (known as the “HSWA Module”) of the Facility’s RCRA permit.

15. On March 8, 1990, EPA issued to the Respondent the HSWA portion of the Facility’s RCRA Permit, effective on May 23, 1990, covering those requirements of RCRA added by the HSWA. This EPA portion of the permit required corrective action for continuing releases of hazardous waste and hazardous waste constituents at and from the Facility, pursuant to Section 3004(u) and (v) of RCRA, 42 U.S.C. § 6924(u) and (v).

16. On July 25, 1990, EPA granted authorization to the State of New Mexico to expand its hazardous waste program under the HWA in lieu of the federal program, including the authority to regulate the hazardous component of mixed waste. 55 Fed. Reg. 28397 (July 11, 1990).

17. Effective January 2, 1996, EPA granted final authorization to the State of New Mexico to implement the state’s corrective action program under the HWA. *See* 60 Fed. Reg. 53,708 (Oct. 17, 1995); 61 Fed. Reg. 2450 (Jan. 26, 1996).

18. Between 1995 and 1999, the Respondent submitted a RCRA permit renewal application to NMED for permitted and interim status storage and treatment units at the Facility. This RCRA permit, which was originally set to expire in November 1999, was administratively continued to 2010 pursuant to 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.51), which provides for

continuation of the conditions of an expiring permit when a permit application is timely submitted and administratively complete.

19. On May 2, 2002, pursuant to Sections 74-4-10.1 and 74-4-13 of the HWA, NMED issued a Determination of an Imminent and Substantial Endangerment to Health or the Environment (“Determination”) concerning the Facility, to the Respondent and the Regents of the University of California (“University”), the Facility operator prior to 2006. The Determination found that the past or current handling, storage, treatment, or disposal of any solid waste or any hazardous waste may present an imminent and substantial endangerment to health or the environment based on the documentation of waste handling and disposal practices at the Facility, analytical results from soil, sediment, surface water and groundwater sampling, and other documented information.

20. On May 2, 2002, NMED also issued a draft order pursuant to Sections 74-4-10.1 and 74-4-13 of the HWA, entitled “In Re: Proceeding Under the New Mexico Hazardous Waste Act §§ 74-4-10.1 and 74-4-13” (“Draft Order”). The Draft Order proposed a series of investigation and corrective action activities for the Respondent and the University to complete at the Facility in order to address the sources of contamination which led to the Determination.

21. On June 3, 2002, the University filed a Complaint for Declaratory and Injunctive Relief and for Review of Agency Action in the United States District Court for the District of New Mexico (No. CIV 02-637 MV/DJS) challenging the Determination. Also, on June 3, 2002, the University and the United States each filed a Notice of Appeal with the New Mexico Court of Appeals (Ct. App. Nos. 23,172 and 23,173) challenging the Determination.

22. On October 9, 2002, the United States, on behalf of the Respondent, filed a Complaint in the United States District Court for the District of New Mexico (No. CIV 02-1273-LH/RHS), challenging a September 9, 2002, Installation Work Plan Work Schedule (“Work Schedule”)

issued by NMED. The Work Schedule imposed requirements similar to those contained in the Draft Order.

23. On November 26, 2002, NMED issued to the Respondent a final order entitled “Re: Proceeding Under the New Mexico Hazardous Waste Act §§ 74-4-10.1 and 74-4-13” (“Final Order”). The Final Order incorporated the findings and conclusions of the Determination and contained a set of investigation, monitoring, and corrective action activities, and a schedule for implementation of those activities. On November 26, 2002, NMED also withdrew the Determination.

24. On December 18, 2002, the University dismissed its complaint in the United States District Court challenging the Determination because NMED had withdrawn that Determination.

25. On December 24, 2002, the United States filed an Amended Complaint, challenging both the Work Schedule and the Final Order. The United States also filed a Notice of Appeal in the New Mexico Court of Appeals (Ct. App. No. 23,693) challenging the Final Order.

26. On December 26, 2002, the University filed a Complaint for Declaratory and Injunctive Relief and for Review of Agency Action in the United States District Court for the District of New Mexico (No. CIV 02-1631 LFG/WDS), challenging the Final Order. On December 26, 2002, the University also filed a Notice of Appeal with the New Mexico Court of Appeals (Ct. App. No. 23,698) challenging the Final Order.

27. From December 2002 through December 2003 and from February through March 2004, the Parties engaged in settlement negotiations to resolve the issues raised in the United States’ and the University’s lawsuits. To facilitate the settlement discussions, the Parties agreed to stay the pending litigation during the settlement process.

28. On April 25, 2003, in a related but separate matter, NMED issued Administrative

Compliance Order HWB 03-02, alleging that the Respondent and the University failed to implement interim measures at the Airport Landfill at the Facility. The Respondent answered the Compliance Order, denying NMED's allegations. That action was also stayed during settlement negotiations.

29. On March 1, 2005, NMED, the Respondent, and the University, entered into a Compliance Order on Consent ("2005 Consent Order") intended to address legacy waste cleanup at the Facility - which had also been the focus of the Determination, Draft Order, and Final Order. In addition, as the result of the settlement negotiations and the execution of the 2005 Consent Order, NMED withdrew the Determination, the Final Order, the Airport Landfill Compliance Order, and Work Schedule. The United States and the University dismissed their lawsuits.

30. As set forth in Section III.A of the 2005 Consent Order, the purposes of the order were to fully determine the nature and extent of environmental contamination at the Facility, to identify and evaluate alternatives for cleanup of environmental contamination, and to implement cleanup. Section XII of the 2005 Consent Order set forth an agreed upon mandatory schedule for completing more than 80 specific action tasks for investigation and cleanup and a final corrective action compliance date for one area of the Facility was set for December 6, 2015.

31. Section III of the 2005 Consent Order provided for extensions of time to perform actions required under by the order. By 2012, the Respondent had made a pattern of requesting extensions for many of the action deadlines.

32. As a result of an unrelated but significant event in June 2011, the Las Conchas Fire, the Respondent and the State of New Mexico entered into a non-binding Framework Agreement in 2012 to prioritize removing non-cemented above-ground wastes from the Facility, work which had not been anticipated in the 2005 Consent Order.



33. In the course of negotiating the 2012 Framework Agreement, the Respondent acknowledged to NMED that meeting the milestones of the 2005 Consent Order was difficult, given past and anticipated funding shortfalls. As part of the 2012 Framework Agreement negotiations, the Parties agreed to discuss renegotiation of the 2005 Consent Order.

34. From approximately mid-2015 through June 2016, NMED and the Respondent negotiated the terms of a revised Consent Order, which is the subject of this complaint.

35. On June 24, 2016, NMED and the Respondent entered into the 2016 Consent Order, which was intended to continue to address legacy waste cleanup at the Facility. The 2016 Consent Order, which superseded the 2005 Consent Order, did not contain the completion deadlines nor the penalty provisions contained in the 2005 Consent Order for any failures by the Respondent to make timely progress on agreed upon annual action items. The lack of these compliance incentives in the 2016 Consent Order was controversial with many community members in the region, and led to litigation. *See Nuclear Watch New Mexico v. United States Department of Energy et al.*, No. 1:16-cv-00433-JCH-SCY (D.N.M.).

36. Three and a half years later, on January 9, 2020, at an NMED community meeting, members of the public again repeatedly expressed their concerns that the Respondent was not meeting the expectations for full funding of all DOE obligations in the 2016 Consent Order. Fourteen of the sixteen comments made at the meeting raised the issue of the lack of cleanup progress by the Respondent and the lack of compliance with completion deadlines. As one participant stated, “the 2016 [Consent Order] has removed schedule and enforceable deadlines and ... the scope of work [is] based on budget and allows DOE to determine what are priorities.”

37. A core premise of the 2016 Consent Order, contained in Section XXX(A), “is the expectation of the Parties that all obligations of DOE arising under this Consent Order will be fully

funded through Congressional appropriations. Consistent with Congressional limitations on future funding, DOE shall take all necessary steps and use its best efforts to obtain timely funding to meet its obligations under this Consent Order, including, but not limited to, the submission of timely budget requests.”

38. Section VIII(B)(3) of the 2016 Consent Order requires that corrective action activities be organized into Campaigns.

39. Pursuant to Section VIII(B)(4) of the 2016 Consent Order, “Appendix B (Milestones and Targets) [of the 2016 Consent Order] shall list milestones for campaigns, projects, tasks, and/or deliverables for the current fiscal year [FY], as well as targets for the next two years (FY+1, FY+2) for campaigns, projects, tasks, and/or deliverables planned for the next two FYs, which substantially contribute to completion of the campaigns.”

40. A “milestone” is defined in Section III(Z) of the 2016 Consent Order as “an enforceable deadline listed in Appendix B for the current FY.”

41. A “target” is defined in Section III(OO) of the 2016 Consent Order as “a non-enforceable deadline listed in Appendix B for the next two FYs (i.e., FY+1 and FY+2).”

42. Section VIII(C) of the 2016 Consent Order contains an “Annual Planning Process,” during which the Respondent shall update the milestones contained in Appendix B.

43. In accordance with Section VIII(C)(3) of the 2016 Consent Order, “[f]or purposes of the annual planning process, milestones to be listed in the current FY’s Appendix B shall be based on the FY+1 targets listed in the previous FY’s Appendix B.”

44. In July of each year, the Respondent provides to NMED a forecast indicating proposed changes to Appendix B and identifies in the forecast any foreseeable impacts that could affect the FY+1 targets to enable the Parties to account for those foreseeable impacts before the Parties

establish milestones for the next FY. *See* NMED Exhibit 1 at Section VIII(C)(3)(a). This annual planning forecast also includes a completion date, provided by the Respondent, for addressing all of the legacy waste cleanup. The Respondent included a completion date of 2036 in its FY 2019 and 2020 forecasts.

45. Upon receipt of their actual fiscal year appropriation, the Respondent provides an updated Appendix B to NMED. If deemed acceptable by NMED, it is incorporated into the 2016 Consent Order as Appendix B. If it is not acceptable, NMED and the Respondent meet to resolve NMED's concerns. NMED Exhibit 1 at Section VIII(C)(3)(b).

46. On August 7, 2020, the Respondent submitted to NMED its proposed revisions to Appendix B for federal FY 2021 ("FY21").

47. FY21 began on October 1, 2020, and concludes on September 30, 2021.

48. NMED found the proposed revisions deficient. While the proposed milestones, under the 2016 Consent Order, must be based on the FY+1 targets from the previous FY, Respondent's FY21 proposal included few milestones, and many of the milestones that were included were not based on the FY+1 targets as required. Other milestones contained little or no field work and were simply administrative reports for work completed in the previous year or monitoring data.

49. On September 3 and 24, 2020, the Respondent and NMED met to discuss the proposed revisions to Appendix B. During those meetings, the Respondent and NMED came to agreement on some items but were not able to resolve all issues. NMED asserted that the Respondent's proposal was still inadequate due to the lack of substantive and appropriate milestones and targets for the upcoming years, that such inadequacy would delay cleanup progress toward the cleanup completion date of 2036 and was contrary to the goal of protecting public health and the environment. Respondent stated that they were redirecting funding originally allocated for projects

in the 2016 Consent Order for FY21 to other projects unrelated to the 2016 Consent Order without consulting NMED.

50. Unable to come to resolution on the deficiencies in the Respondent's proposed revisions to Appendix B, on October 1, 2020, NMED invoked Dispute Resolution in accordance with Section XXV of the 2016 Consent Order.

51. Under the 2016 Consent Order, any dispute between NMED and Respondent related to work under the Consent Order is subject to the Dispute Resolution Provisions contained in Section XXV.

52. After pursuing Dispute Resolution through informal negotiations, Tier 1, and Tier 2 negotiations, with the latter concluding on January 22, 2021, the Respondent and NMED were unable to resolve the deficiencies in Respondent's proposed revisions to Appendix B.

53. Pursuant to 2016 Consent Order Section XXV(E), "[i]f the Parties are unable to resolve a dispute by [Dispute Resolution], the Parties may agree to seek to resolve the dispute through non-binding mediation or another non-binding dispute resolution method, or the Parties may pursue any available legal remedy to resolve the dispute, which may include, for NMED, bringing an enforcement action or, for DOE, petitioning a court to resolve the matter. The decision or other action forming the basis of the dispute shall be deemed final for purposes of judicial review once the Tier 2 negotiations are complete."

54. In accordance with Section XXXVI of the 2016 Consent Order, the Order is an enforceable document and NMED may use all statutory authority provided to it to enforce the Order, including but not limited to NMSA 1978, Section 74-4-10, which authorizes NMED to seek judicial relief and penalties.

55. Pursuant to NMSA 1978, Section 74-4-10(F), "...[i]f any person named in an order fails

to comply with the order, the secretary may assess, and the person shall be liable to the state for, a civil penalty in an amount not to exceed ten thousand dollars (\$10,000) for each day of noncompliance with the order.”

### **CONCLUSIONS OF LAW**

56. Respondent is a “person” within the meaning of Section 74-4-3(M) of the HWA, and the Hazardous Waste Management Regulations at 20.4.1.100 NMAC (incorporating 40 C.F.R. § 260.10).

57. Los Alamos National Laboratory is a “facility” within the meaning of the Hazardous Waste Management Regulations at 20.4.1.100 NMAC (incorporating 40 C.F.R. § 260.10).

58. Respondent is an “owner” and an “operator” of the Facility within the meaning of the Hazardous Waste Management Regulations at 20.4.1.100 NMAC (incorporating 40 C.F.R. § 260.10).

59. Respondent has engaged in the “storage,” “treatment,” and “disposal” of “hazardous waste” at the Facility, and is currently engaged in the “storage” and “treatment” of “hazardous waste” at the Facility, within the meaning of Sections 74-4-3(P), (T), (E), and (K) of the HWA, and the Hazardous Waste Management Regulations at 20.4.1.100 NMAC (incorporating 40 C.F.R. § 260.10).

60. NMED has determined that hazardous wastes and hazardous constituents have been “release[d]” from the Facility into the environment within the meaning of Section 74-4-10(E) of the HWA.

### **CLAIMS**

61. Paragraphs 1 through 60 re-alleged are incorporated herein by reference.

62. Respondent has failed to meet the terms of the 2016 Consent Order due to the following deficiencies in the FY21 Annual Planning Process:

*a. Chromium Interim Measure & Characterization Campaign*

i. Well R-71 - The Respondent delayed the submittal date for completion of R-71 and collection of first samples from January 29, 2021, to February 28, 2022, which is a delay of 13 months. NMED stated it would accept a six-month extension, due to the COVID-19 pandemic, with a revised submittal date of June 30, 2021. Respondent did not agree.

ii. Well R-72 - The Respondent pushed back a submittal date for a report documenting the completion of R-72, along with the collection of first samples, from December 18, 2020, to April 29, 2022 - a delay of over 16 months. NMED stated it would accept an extension to June 30, 2021, due to the COVID-19 pandemic. Additionally, the Respondent did not comply with the 2016 Consent Order requirement that first year targets from the previous year's Appendix B become milestones for the following fiscal year. NMED asserted that this well was required to be included as a FY21 milestone, as it was a FY+1 target in FY20. Respondent did not agree. Independent of the 2016 Consent Order dispute resolution process, New Mexico's Congressional Delegation helped secure the funding for this Well through an additional Congressional appropriation in January 2021.

iii. Well R-73 - Both Parties have agreed this additional well is necessary. NMED has stated that a drilling work plan for Regional well R-73 should be added as a FY21 milestone to be submitted by December 31, 2020, now extended to March 31, 2021, due to the lengthy dispute resolution process. Additionally, NMED has stated that completion of the well and collection of first samples should be added as a FY22 target by January 2,

2022. Respondent did not agree to either of these deadlines.

iv. Chromium Project Corrective Measures Evaluation (“CME”) - The Respondent delayed the target submittal date by more than a year from September 30, 2021, to December 16, 2022. NMED stated it would accept an extension due to the COVID-19 pandemic with a revised FY22 target submittal date of March 31, 2022. Respondent did not agree.

b. *Royal Demolition Explosive (“RDX”) Characterization Campaign*

i. Well R-74 - NMED has stated that a drilling work plan for Regional Well R-74 should be added as a FY21 milestone to be submitted by January 2, 2021, now extended to March 31, 2021, due to the lengthy dispute resolution process. NMED has stated that a report documenting completion of R-74 and first samples collected should be added as a FY22 target to be submitted by January 2, 2022. Respondent did not agree to these deadlines.

ii. Well R-75 - NMED requires a Drilling Work Plan for Regional Well R-75 to be submitted by January 2, 2021, now extended to March 31, 2021, due to the lengthy dispute resolution process. NMED stated that a report documenting completion of R-75 and first samples collected should be added as a FY22 target to be submitted by July 31, 2022. Respondent would not agree to the completion date.

c. *Technical Area (“TA”)-21 Decommissioning and Decontamination (“D&D”) and Cleanup Campaign* - The Respondent did not include a target for the Delta Prime Site Aggregate Area Progress Report that was previously scheduled to be submitted September 30, 2021, due to higher than anticipated radiological activity at or near the site. NMED

stated that an additional FY23 target should be added for the Respondent to provide an Investigation Report by March 31, 2023 to support future planning. The Respondent did not agree.

d. *MDA A & T Remedy Campaign*

i. Moisture Monitoring - The Respondent delayed the submittal date for the MDA T Moisture Monitoring Instrumentation Installation Characterization Sampling Completion and Field Summary Report from September 30, 2021, to September 30, 2022, a one-year delay. NMED stated it would accept a revised submittal date of March 31, 2022, which provides a six-month extension due to the COVID-19 pandemic. Respondent did not agree.

ii. MDA Corrective Measures Evaluation (CME) Report - The Respondent delayed the submittal date for the MDA T CME Report to November 30, 2022, from November 30, 2021, another one-year delay. NMED stated it would accept a FY22 submittal date of June 1, 2022, which provides a six-month extension due to the COVID-19 pandemic. The Respondent did not agree.

e. *Southern External Boundary Campaign* - The Respondent delayed the submittal date for the Potrillo and Fence Canyons Aggregate Area Progress Report from September 30, 2022, to September 30, 2023, a one-year delay. NMED stated that the original date of September 30, 2022, should be kept as a FY22 target. Respondent did not agree.

f. *Pajarito Watershed Campaign*

i. Twomile Canyon Aggregate Area Progress Report - The Respondent delayed the submittal date for the Twomile Canyon Aggregate Area Progress Report from September



30, 2021, to September 30, 2022. NMED stated it would accept a FY22 target date with a submittal date of March 31, 2022, providing a six-month extension due to the COVID-19 pandemic. Respondent did not agree.

ii. Twomile Canyon Aggregate Area Investigation Report - The Respondent delayed the submittal date for the Twomile Canyon Aggregate Area Investigation Report from March 31, 2022, to March 31, 2023, a one-year delay. NMED stated it would accept a FY22 target with a submittal date of September 30, 2022, which provides a six-month extension due to the COVID-19 pandemic. Respondent did not agree.

iii. Starmer/Upper Pajarito Canyon Aggregate Area Progress Report - The Respondent delayed the submittal date for the Starmer/Upper Pajarito Canyon Aggregate Area Progress Report to September 30, 2022, from September 30, 2021, another one-year delay. NMED stated it would accept FY23 target with a submittal date of March 31, 2022, which provides a six-month extension due to the COVID-19 pandemic. Respondent did not agree.

iv. Starmer/Upper Pajarito Canyon Aggregate Area Investigation Report - The Respondent delayed the submittal date for the Starmer/Upper Pajarito Canyon Aggregate Area Investigation Report from June 30, 2022, to March 31, 2023, a nine-month delay. NMED stated it would accept a FY23 target with a submittal date of January 3, 2023, which provides a six-month extension due to the COVID-19 pandemic. Respondent did not agree.

v. Lower Pajarito Canyon Aggregate Area Progress Report - The Respondent delayed the submittal date for Lower Pajarito Canyon Aggregate Area Progress Report from September 30, 2022 to September 30, 2023 - another one-year delay. NMED stated it would accept a FY23 target with a submittal date of March 31, 2023, which provides a

six-month extension because of the COVID-19 pandemic. Respondent did not agree.

vi. Lower Pajarito Canyon Aggregate Area Investigation Report - NMED stated that the Lower Pajarito Canyon Aggregate Area Investigation Report should be added as a FY23 target with a submittal date of September 30, 2023. Respondent did not agree.

g. *Upper Water Watershed Campaign*

i. Cañon de Valle Aggregate Area Progress Report - The Respondent delayed the submittal date for the Cañon de Valle Aggregate Area Progress Report from September 30, 2022, to September 30, 2023, another one-year delay. NMED stated it would accept a FY23 target a submittal date of March 31, 2023, which provides a six-month extension due to the COVID-19 pandemic. Respondent did not agree.

ii. Cañon de Valle Aggregate Area Investigation Report - NMED stated that the Cañon de Valle Aggregate Area Investigation Report should be added as a FY23 target with a submittal date of September 30, 2023. Respondent did not agree.

g. MDA-H Remedy - The Respondent delayed the submittal date for the Corrective Measures Evaluation (CME) Report for MDA-H from March 2, 2022, to March 2, 2023, again, a one-year delay. NMED stated that the original date of March 2, 2022, should be kept as a FY22 target. Respondent did not agree.

63. This extensive list of delays by the Respondent, and Respondent's unwillingness to agree to most of NMED's requested reductions in completion delays, can largely be attributed to Respondent's failure to adhere to core bases of the 2016 Consent Order: to adequately acquire the necessary appropriations or plan for the necessary acquisition of appropriations, as set forth in Section XXX(A) of the 2016 Consent Order. Specifically:

a. The Respondent has demonstrated inadequate commitment to acquire funding for targets and milestones by failing to use the Annual Planning Process to plan for project needs and instead has based its planning on an unknown and undefined appropriation amount. The Respondent has refused to include future year targets based on project needs and chose to limit the targets based on Respondent's predictions of Congressional appropriations rather than seeking to acquire funds for the proposed targets. These actions by the Respondent are contrary to the 2016 Consent Order expectation that all obligations of DOE arising under this Consent Order to be fully funded through Congressional appropriations.

b. The Respondent has diverted funds from the existing cleanup budget incorporated in the FY20 planning process to other legacy waste projects not contained within the current Appendix B, contrary to the terms of the 2016 Consent Order.

64. In aggregate, the extensive delays in completion dates and the diversion of funds to other projects are just the latest chapter in Respondent's decades-long slow and inadequate cleanup of the legacy waste at the Facility. At least since 2002, with the issuance of the Determination that documented the likelihood of imminent and substantial endangerment to the health of nearby communities and the environment, the gravity and ongoing nature of the contamination of surface water, groundwater, and the lands at the Facility has been clear. NMED has made every effort to move this cleanup forward within the bounds of the 2005 Consent Order and the 2016 Consent Order. However, the most recent proposals by the Respondent would result in continued and excessive environmental damage and harm, contrary to RCRA and the HWA, and the terms of the 2016 Consent Order.

### **REQUESTED RELIEF**

WHEREFORE, NMED respectfully requests that the Court:

- a. Enforce the 2016 Compliance Order on Consent by requiring the Respondent to remedy its FY21 Appendix B submittal to fully address all adequacy issues listed in NMED's dispute resolution statement of claim; and
- b. Assess civil penalties to the Respondent pursuant to NMSA 1978, Section 74-4-10(E), from January 22, 2021, in the amount of \$333,000; or
- c. Order the 2016 Compliance Order on Consent terminated and order the parties to enter into court-supervised negotiations to negotiate the terms of a new Compliance Order on Consent to achieve the cleanup completion date of 2036, and to include specific mechanisms to ensure Respondent's compliance with future work and annual planning commitments such as stipulated penalties and interim completion deadlines.
- d. Grant such other and further relief as the Court deems proper.

Respectfully submitted,

/s/ John Verheul

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