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JUDITH M. ESPINOSA
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August 30, 1993

Mr. Joel Dougherty
RCRA Enforcement Branch (6H-CS)
Environmental Protection Agency
1445 Ross Avenue Suite 1200
Dallas, Texas 75202-2733

Re: Comments on the draft Federal Facilities Compliance Agreement

Dear Mr. Dougherty:

The New Mexico Environment Department (NMED) has reviewed the draft Federal Facility Compliance Agreement negotiated by EPA, Region 6 and the Los Alamos Area Office of the Department of Energy (DOE) and appreciates the opportunity to comment. NMED has several concerns with the draft FFCA as proposed and is submitting the enclosed comments for your consideration.

Should you have any questions regarding these comments, please contact Ms. Susan McMichael, Assistant General Counsel, Office of General Counsel, or Ms. Stephanie Stoddard, Hazardous and Radioactive Materials Bureau, at (505) 827-0127 and (505) 827-4308 respectively.

Sincerely,

Judith M. Espinosa, Secretary
New Mexico Environment Department

Enclosure

xc with enclosure:

- Kathleen M. Sisneros, Division Director, Water & Waste Management, NMED
- Tracy Hughes, General Counsel, NMED
- Joe D. Winkle, Acting Regional Administrator, EPA Region 6
- Thomas McCall, Deputy Assitant Administrator, Federal Facility Enforcement, EPA Region 6
- Jerry L. Bellows, Director, Los Alamos Area Office, DOE
- Michael Bara, Associate, Regional Counsel, EPA Region 6



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Bruce Jones, Assistant, Regional Counsel, EPA Region 6

COMMENTS TO DRAFT FFCA

INTRODUCTION

The draft Federal Facility Compliance Agreement (FFCA) addresses EPA's notice of noncompliance (NON) issued to DOE, effective September 30, 1992, concerning certain LDR violations. The agreement also broadly encompasses and addresses the treatment of all mixed waste currently stored at LANL, as well as future and unidentifiable waste streams which are outside the scope of EPA's notice. Subsequent to EPA's notice, the Federal Facilities Compliance Act ("the Act") was amended, effective October 5, 1992. The Act requires DOE to submit to the proper regulatory authority, either the state or EPA, a site-specific plan for treatment of mixed waste. The plan may be waived if DOE and the regulatory authority enter into an agreement addressing the treatment of mixed waste. States are authorized under the Act to review and approve these plans if they have authority under state law to (i) prohibit land disposal of mixed waste until the waste has been treated and (ii) regulate the hazardous components of mixed waste and authorization from EPA to regulate the hazardous components of mixed waste. Under Section 102(B) of the Act, DOE may invoke sovereign immunity after expiration of the three-year grace period (October, 1995) so long as DOE is compliance with a plan submitted to and approved by the "proper regulatory authority."

GENERAL COMMENTS

1. Regulatory Authority Under the Federal Facilities Compliance Act. NMED is not a signatory to the draft FFCA and has not consented to the terms and provisions therein. Although NMED previously participated with EPA and DOE during negotiations of the draft FFCA, it did not submit formal comments. Therefore, NMED is not bound by the draft FFCA from exercising it's full regulatory authorities under the Federal Facility Compliance Act, New Mexico Hazardous Waste Act, and the Hazardous Waste Management Regulations (HWMR-7).

It is NMED's position that the Federal Facility Compliance Act clearly requires DOE to obtain state approval of any proposed FFCA to treat mixed waste at LANL because NMED is the proper regulatory authority under the Act. Although NMED does not have an approved LDR program from EPA, NMED has authority under state law to prohibit LDR waste and regulate the hazardous component of mixed waste. The State received final authorization from EPA to regulate mixed waste, as stated under Section VI(10) of the draft FFCA, on July 25, 1990. Further, the Act does not require that a State have an approved LDR program from EPA.

The draft FFCA recognizes DOE's obligation under the Act to either (1) submit a site-specific treatment plan for mixed waste at LANL to NMED, or (2) enter into an agreement with NMED addressing the

treatment of mixed waste at LANL. FFCA, Section I(8). NMED fully agrees with these provisions. However, NMED is concerned that DOE may assert that EPA, not NMED, is the proper regulatory authority under the Act, and as such, EPA approval of the draft FFCA is sufficient to allow DOE to invoke sovereign immunity after the three-year grace period expires on the ground that the draft FFCA has been approved by the "proper regulatory authority."

For these reasons, NMED urges EPA to amend Section I(8) of the draft FFCA clarify that (1) EPA's approval of the agreement, and DOE's compliance with the terms of the agreement, cannot be used by DOE to invoke sovereign immunity under the Act; (2) NMED does not consent to the terms or conditions of the draft FFCA; and (3) the draft FFCA cannot be used as a substitute for the Act's requirement to obtain state approval of a site treatment plan for mixed waste at LANL.

2. Anti-Deficiency Act. The draft FFCA asserts that "any requirement for payment or obligation of funds by DOE established by the terms of this Agreement shall be subject to the availability of appropriated funds and may not constitute a violation of the Anti-Deficiency Act." FFCA, Section XX(1). The draft FFCA also sets forth stipulated penalties for DOE's failure to comply with the terms of the draft FFCA.

NMED asserts that such language is unlawful, contrary to RCRA and would seriously infringe upon EPA and the State's enforcement powers. NMED believes that the limitations on spending set forth in Section 1341 of the Anti-Deficiency Act are inapplicable to RCRA consent agreements and agreements, as here, addressing DOE's obligations to comply with RCRA and setting forth penalties for the failure to comply. The purpose of the Anti-Deficiency Act is to preclude the federal government from entering into agreements obligating funds "except as authorized by law", where such obligation is contingent upon Congressional funding. (citations omitted). Under RCRA and the Federal Facility Compliance Act, as amended, the obligation of DOE to comply with RCRA, and the right of the State and EPA to assess civil penalties, is required by law and clearly not contingent upon Congressional funding. Congress enacted the Federal Facility Compliance Act to place federal facilities on an equal footing with private companies, municipalities, state agencies and individuals who violate RCRA.

The draft FFCA expressly creates an agreement contingent upon congressional funding, and thus, could trigger an Anti-Deficiency Act defense which would not otherwise exist. Indeed, DOE could not raise an Anti-Deficiency Act defense but for an agreement. NMED requests that the draft FFCA be revised to make clear that DOE's obligation to comply with RCRA, including payment of stipulated penalties, is not contingent upon congressional funding. NMED fully believes that DOE should be able to raise lack of funding as

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draft
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a condition, such as force majeure, which would enable it to extend the timelines for obligations under the draft FFCA. See FFCA, Section XIII(4)(a). However, it would be inappropriate for the EPA to enter into an agreement which, by its own terms, creates an Anti-Deficiency defense and, contrary to RCRA, establishes DOE's obligations to comply with RCRA as contingent upon Congressional funding. The effect of such language would be to seriously undermine EPA's enforcement authority as it exists under RCRA and the Federal Facility Compliance Act, as amended.

SPECIFIC COMMENTS

1. NMED would like EPA to clarify that approval of deliverables by EPA under the draft FFCA does not constitute approval by NMED, and EPA-approved deliverables may or may not satisfy State requirements. Thus, any actions taken by DOE to implement EPA-approved deliverables, whether developed by DOE or EPA, are taken at DOE's risk. NMED may require DOE to take additional, dissimilar, or separate actions in timeframes other than what is approved in the draft FFCA.

2. The draft FFCA imposes certain programmatic requirements upon NMED. Without funding, NMED lacks personnel resources to conduct these requirements necessary to accomplish scheduled activities. Therefore, NMED requests EPA to amend the draft FFCA to provide assurance that adequate funding will be available for NMED, either from EPA or DOE.

3. Section XVIII, Creation of Danger. NMED requests that EPA amend this portion to state that compliance with this provision of the draft FFCA does not relieve DOE/LANL from any other obligations under the New Mexico Hazardous Waste Act, HWMR-7, or their RCRA Operating Permit.

Further, NMED would like to clarify that implementation of the draft FFCA does not infringe upon the State's authority to require DOE to stop any activities that have caused or may cause a release or threat to human health or the environment and direct DOE to undertake any action which the State determines is necessary to abate such releases or threat. NMSA 1978, §§ 74-4-13 and 74-4-10.1 (Repl. Pamp. 1993). In the event that EPA directs DOE to stop further implementation for reasons stated within this section, notification by EPA to NMED should be made.

4. Appendix A, Waste Categories. NMED requests a clarification of the purpose of Appendix A with regard to Attachment A of Appendix B and provisions of the draft FFCA which state that it may be modified to add wastes currently not covered. Appendix A lists five compounds which are not immediately evident in the Attachment A to Appendix B: Mercury (elemental), Dioxins, Photographic Fixer, Plutonium, and Lead Stringers.

5. Appendix B Compliance Plan.

Part
B
called in

- a. Section I (C) (3) states that "LANL is currently operating under interim status for mixed waste." NMED would like EPA to clarify that this statement does not pertain to interim status state law, and that NMED has not reached an agreement with LANL as to whether LANL has interim status (requiring compliance with 40 CFR 265 standards) for mixed waste under state or federal law.
- ✓ b. Section II (B) (1). The provisions of 40 CFR Part 270.72, Changes Under Interim Status, do not apply for upgrades to container storage pads.
- ✓ c. Section II (D) states that the formal plan to set priorities for treatment development and implementation will be based, in part, on the availability of "applicable treatment facilities". NMED believes this is ambiguous and would like EPA to clarify.
- ? d. Section I(C) (3) states that a Part B permit application was submitted for the TA-53 surface impoundments. LANL has since decided to close two of the three impoundments and may withdraw the permit application.
- e. Section II(C) (2) (e). The LDR Waste Minimization Work Plan should be cited as "WM-200".

6. The New Mexico Hazardous Waste Management Regulations (HWMR-6), which are referred to throughout the draft FFCA, are no longer in effect. The Environmental Improvement Board adopted new Hazardous Waste Management Regulations "HWMR-7", which became effective November 20, 1992. NMED requests the draft FFCA be revised to reference HWMR-7.

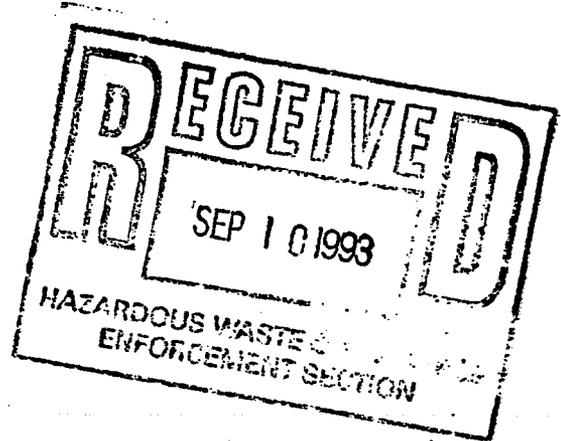


CCNS

Concerned Citizens for Nuclear Safety

September 7, 1993

Mr. Joel Dougherty
RCRA Enforcement Branch (6H-CS)
Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733



Dear Mr. Dougherty,

Enclosed are Concerned Citizens for Nuclear Safety's comments on the Federal Facility Compliance Agreement between the Department of Energy and the Environmental Protection Agency regarding land disposal restriction requirements at Los Alamos National Laboratory.

I want to take the opportunity to thank you and EPA Region VI for graciously extending the period for public comment.

Sincerely,

Jay Coghlan,
LANL Project Director
Concerned Citizens for Nuclear Safety

Comments to the
Environmental Protection Agency
Region VI
and the
Department of Energy
on the
Federal Facility Compliance Agreement
Regarding
Land Disposal Restriction Requirements
at the
Los Alamos National Laboratory

September 7, 1993

Submitted by
Jay Coghlan, LANL Project Director
for
Concerned Citizens for Nuclear Safety (CCNS)

The heart of the proposed Federal Facilities Compliance Agreement (FFCA) between EPA Region VI and the DOE Los Alamos Area Office (LAAO) regarding land disposal restriction requirements at LANL lies in the Compliance Plan. The FFCA states that the intent of the Compliance Plan is to bring LANL into compliance as soon as practical with Executive Order 12088 as amended by the Solid Waste Disposal Act, the Resource Conservation and Recovery Act, the Hazardous and Solid Waste Amendments of 1984, and the Federal Facility Compliance Act of 1992. CCNS has a number of concerns with the Compliance Plan as formulated in this proposed FFCA.

1. Will the Compliance Plan achieve the degree of compliance required by law?

If the intent is to bring LANL into full compliance, the proposed FFCA is destined to be a failure in advance. The Compliance Plan is not a compliance plan

at all; it is instead a compliance study plan that neither guarantees nor enforces real compliance. As enforceable milestones, it essentially substitutes studies for real corrective actions. CCNS fears that this will create a situation whereby LANL can achieve, with EPA's endorsement, compliance through the completion of studies rather than the compliance required by law.

CCNS does not argue against the need for careful study. However, **studies clearly do not constitute compliance.** EPA should refrain from characterizing the present Compliance Plan as anything other than an initial step towards achieving full compliance. EPA should turn to the task of creating a meaningful compliance plan that requires concrete actions as its enforceable milestones. Any disadvantage from a possible delay in executing a compliance agreement is far outweighed by the opportunity to institute an agreement that drives genuine compliance. Any lesser plan could well be a hindrance to full compliance in the future.

The deliverables marked as milestones in the current plan create the possibility that a predetermined certification of compliance is built into the "compliance" process. Appendix C of the FFCA outlines a series of related plans and schedules that culminate in the issuance of certifications of compliance. There is a failure in the proposed FFCA to explicitly link the formulation of plans and schedules to concrete corrective measures. CCNS finds this to be a grievous omission which undercuts the intent of a meaningful compliance agreement. **CCNS requests that EPA incorporate into the FFCA language that explicitly links plans and schedules to concrete corrective actions.** Mere "compliance on paper" by LANL is not acceptable to the public.

2. Future compliance is built on uncertainties and questionable assumptions.

EPA is appropriately cautious regarding the initiation of operations of the Controlled Air Incinerator (CAI) at LANL. The public opposition expressed during the course of the State of New Mexico's RCRA Hazardous Waste permitting process for the CAI prompted the state to assert its right to monitor the facility's emissions. A federal court has upheld the state's position. The New Mexico Environment Department (NMED) may prepare additional regulatory requirements specific to radioactive waste incineration which could curtail LANL's ability to operate the CAI. The NMED Secretary is on record as having stated that she views an Environmental Impact Statement performed by DOE as being essential for the CAI's future operation. Congressman Richardson (D-NM) has intervened in the past to legislate a moratorium on the CAI's completion schedule and has recently reiterated

his unfavorable view of radioactive waste incineration. All of these elements make the CAI's future operation uncertain.

Despite this, a central component of the Compliance Plan is the formulation of a work-off plan for low-level mixed waste to be treated in the CAI as a milestone towards achieving compliance. Out of the 44 categories of waste streams described in the plan, fourteen categories are marked for future incineration at the CAI. The Compliance Plan states that combustible transuranic wastes can also be burned at the CAI if required by the final WIPP Waste Acceptance Criteria. All of this indicates a predisposition on the part of the Compliance Plan to assume that the future operation of the CAI will be successfully initiated. To create a credible Compliance Plan, EPA cannot assume the CAI's future operation. EPA must consider how LANL will achieve compliance in the event that the Lab cannot initiate operations at the CAI.

In addition, a number of issues regarding the future operation of the CAI should be addressed in any work-off plan for that facility. LANL's incineration history needs to be carefully examined. According to a 1988 DOE LANL Preliminary Environmental Audit, one incinerator reportedly never operated properly over its 27-year life which subsequently led to plutonium and americium contamination. Recently, a number of documents have become available that detail significant failure rates for HEPA filters across the DOE complex in general and, specifically, for LANL. Furthermore, one DOE facility (Lawrence Livermore National Laboratory) has found that, as a principle, the incineration of radioactive waste violated the cardinal rule of radioactive waste management by gradually dispersing radionuclides rather than containing them.

3. The Future of Land Disposal Sites for LANL's Waste Streams

LANL's current land disposal site (Area G at TA-54) is also the site for the interim storage of mixed low-level and transuranic wastes slated for eventual disposal at a yet to-be-determined, off-site facility and at WIPP. LANL estimates that Area G will reach its capacity for the disposal of low level waste within a year and has proposed Area G's expansion. This proposal will certainly arouse public and Pueblo objections. This can have the indirect effect of threatening LANL's continuing use of Area G for interim mixed waste storage. The situation is aggravated by Area G's close proximity to Tsherige, a major Pueblo ruins. It is predictable that San Ildefonso Pueblo will seek greater access to its ancestral home in the future. Should LANL not be successful in its efforts to expand Area G and that site becomes slated for closure, the continuing interim storage of low-level and

transuranic mixed wastes can become questionable. EPA cannot simply assume the continuing existence of Area G as a interim storage site for RCRA wastes.

In the case of low-level mixed wastes, the Compliance Plan also assumes that an off-site facility will be found for the eventual disposal of those wastes. LANL's present inability to secure such a facility demonstrates that this assumption cannot be made in advance and incorporated as an integral part of the Compliance Plan. CCNS questions the credibility of the Compliance Plan without the determination of a disposal site for low-level mixed wastes.

With respect to the eventual disposal of LANL's transuranic wastes, the Compliance Plan is appropriately cautious regarding the future of WIPP as the designated disposal facility for TRU wastes. Despite that caution, a work-off plan for LANL's TRU-mixed wastes to be shipped to WIPP is listed as a deliverable milestone in the Compliance Plan. This carries the implicit assumption of WIPP's future operation as a method of achieving compliance at LANL. Because of WIPP's long delayed opening, EPA cannot assume the eventual opening of WIPP. EPA must seriously consider how LANL will achieve long-term compliance for TRU mixed-waste disposal in the event that WIPP never opens.

4. Waste Minimization

The proposed FFCA states that LANL committed, in March 1991, to an overall waste minimization goal of a 20% reduction in waste streams by FY 1994. This is, in CCNS' view, a laudable step towards bringing the Laboratory into compliance with land disposal restrictions. Source waste reduction is the only possible "cure all" solution and would receive strong public support. However, a 20% reduction in waste stream generation for LANL does not go far enough. EPA, as the regulating entity, should insist on greater levels of reduction. Such an effort on the part of EPA would result in a win-win situation for everybody. CCNS believes that LANL is fully capable of achieving levels of reduction that would have been unthinkable in the recent past. For example, the DOE/LAAO Manager stated at an August 25, 1993, meeting with a dozen representatives of Pueblos and environmental organizations that DOE/LAAO was for the first time considering the possibility that waste streams from TA-55 could realistically begin to approach zero. This is remarkable given that LANL's primary plutonium facility is located at TA-55. This is the type of thinking by DOE/LAAO and LANL managers that should be strongly encouraged by EPA. CCNS recommends that EPA question DOE/LAAO over the degree of waste

reduction possible before the FFCA goes into effect, with the intent of obtaining drastic reductions in waste generation.

The end of the Cold War has stripped away any rationale for the Lab to assign waste minimization a low priority. Today, the Lab is in a position to develop waste minimization practices and technologies that would first enable it to better achieve compliance and then to benefit the country by helping to transfer those practices and technologies to industry. CCNS strongly believes that as a prerequisite EPA must act as the regulatory driver towards truly ambitious waste generation reduction levels. EPA must not passively accept LANL's 20% goal. EPA should instead make an effort to independently determine what reduction levels are possible and then incorporate those findings into the Waste Minimization Plan with corresponding milestones.

5. EPA's Role in LANL Environmental Oversight

CCNS believes that EPA, in general, and Region VI, in particular, must display greater vigilance in its environmental oversight of LANL. First, LANL's general environmental record, and the attitude that that record displays towards environmental compliance, needs to be weighed. Although not directly relevant to this FFCA, EPA should consider LANL's chronic noncompliance with regulations of the Clean Water Act (unidentified, uncharacterized, unpermitted outfalls; inadequate quality assurance programs; etc.) and the Clean Air Act (substantive deficiencies in its Radioactive Air Emissions Monitoring Program and exceeding the NESHAP ten millirem standard in 1990). LANL continually displays gross disregard for the provisions and intent of the National Environmental Policy Act as well (project completions prior to NEPA approval, use of an outdated site-wide EIS for the tiering of NEPA considerations, etc.). All of this demonstrates a disregard for environmental law at LANL. EPA has the ultimate responsibility of ensuring appropriate changes in institutional behavior. Towards that end, EPA must guarantee that this compliance agreement is substantive, has full compliance as the ultimate goal, and holds LANL fully accountable.

Conclusion

CCNS views the proposed FFCA regarding land disposal restriction requirements between EPA and DOE/LAAO as being seriously flawed. Its defects arise from a lack of emphasis on real corrective measures that could allow LANL to achieve compliance on paper while forgoing or delaying the degree of compliance required

by law. The FFCA predicates much of its Compliance Plan on the initiation of operations at facilities with uncertain futures. This is clearly an unsound method for achieving compliance. While EPA is not responsible for the many uncertainties in future waste disposal techniques and policies, the agency should nevertheless be forward looking enough to consider alternative methods for achieving LANL's long-term compliance. EPA Region VI should be more aggressive in its environmental oversight of LANL, in general, and within the context of this FFCA, ensure that the compliance agreement has real substance and accountability. Finally, EPA, as the regulating entity, should do all in its power to obtain from LANL massive reductions in its waste generation for the sake of ensuring compliance and as an example to the nation.



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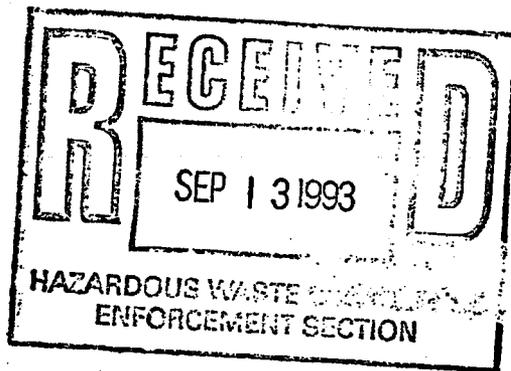
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September 9, 1993

Mr. Joel Docherty
Environmental Scientist
RCRA Enforcement Branch
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202



Dear Mr. Docherty:

I write to comment for the Pueblo of San Ildefonso on the proposed Federal Facility Compliance Act Agreement dated June 25, 1993, between the U.S. Environmental Protection Agency and the U.S. Department of Energy concerning the Los Alamos National Laboratory located in Los Alamos, NM.

The Pueblo of San Ildefonso enjoys a strong and very cooperative relationship with the EPA Region 6. To foster and strengthen our cooperation, I request that our comments be given careful review by the EPA, and incorporated in full. I have also written separately to Mr. Allyn Davis, Director, Hazardous Waste Management Division, to convey our concerns.

I look forward to meeting you in the future, and to the growth of our cooperative efforts.

Sincerely,

Gilbert Sanchez

Enclosures

COMMENTS ON THE FEDERAL FACILITY COMPLIANCE AGREEMENT REGARDING LAND DISPOSAL RESTRICTION REQUIREMENTS AT THE LOS ALAMOS NATIONAL LABORATORY BETWEEN THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) REGION 6 AND THE U.S. DEPARTMENT OF ENERGY (DOE) LOS ALAMOS AREA OFFICE

Introduction

The Pueblo of San Ildefonso (Pueblo) is concerned about the proposed Federal Facility Compliance Act Agreement (Agreement) because of its impact on the Pueblo, its members, and their land, air, and water. The Pueblo is located at the base of the mesa on which Los Alamos National Laboratory (LANL) is situated, and shares a common boundary with LANL. There is also ongoing litigation between the Pueblo and the federal government regarding land now considered within LANL's property, but which is part of the aboriginal land claimed by the Pueblo. It is conceivable that this land will be eventually returned to the Pueblo. The Pueblo has prepared a report which discusses waste management problems at LANL from the Pueblo's perspective. The report is provided as an attachment to this document. The report details some of the problems created by LANL's land disposal of wastes; and highlights discrepancies between various reports published by LANL. The disposal of wastes by LANL has adversely affected and will continue to adversely affect the Pueblo in a variety of ways. Therefore, it is imperative that the Agreement recognize the sovereign status of the Pueblo, and be crafted in a manner which restricts any further releases from the land disposal waste sites within LANL, while the sites are brought into compliance with existing regulations.

Cultural Impacts

The use of land by LANL for waste disposal adversely affects sites used by Pueblo members for religious and ceremonial purposes. For example, a major focus of the proposed Agreement is LANL's waste facility in Technical Area 54 known as Area G. As the Department of Energy's 1991 draft Environmental Assessment for the expansion of that facility points out, the proposed expansion would adversely affect Anasazi pueblo sites that are eligible for inclusion in the National Register of Historic Places (Expansion of Area G draft Environmental Assessment, December 1991, Revision 1, page 17). The Department of Energy proposed in that Assessment to mitigate that adverse impact by data recovery, but it neither acknowledged that those sites include sites of cultural and religious significance for the Pueblo of San Ildefonso nor proposed any measures to address that cultural and religious significance (*Id.*). The Superfund Memorandum of Agreement which exists between the Pueblo (and other member Pueblos of the All Indian Pueblo Council) and the U.S. EPA Region 6 recognizes that restrictions on impacts to the Pueblo's cultural resources are considered enforceable requirements at waste disposal sites.

Environmental Impacts

The disposal of waste by LANL affects the Pueblo's land, air and water. For example, as is set forth in detail in the enclosed copy of the Pueblo's comment on the proposed National Elimination Discharge System permit NM0028355 for LANL, Area G is a point source that discharges waste water contaminated with tritium. This tritium may be accelerator-produced, and as such is governed by the EPA's regulations. The nature and extent of these discharges have not been fully determined, but it is known that they carry contaminants into surface water and that the contaminated surface water reaches the Pueblo's land and water. It is also likely that any discharge from Area G into ground water will adversely affect the Pueblo, since that Area is located adjacent to Pueblo land. These considerations apply as well to LANL's disposal of waste in facilities other than Area G. Air releases from waste disposal and treatment facilities also impact the Pueblo, as many of these facilities are located within a few hundred feet of the Pueblo, and the prevailing wind patterns are oriented towards the Pueblo.

Pre-1980 Wastes

Wastes disposed of prior to 1980 are not governed by the Agreement, unless LANL moves the wastes. The Agreement should require that there should be no further off-site releases from such pre-1980 waste disposal sites, and that such sites should be thoroughly assessed for their potential and actual threat to human health and the environment as required by the Comprehensive Environmental Responsibility Compensation and Liability Act (CERCLA), as amended by the Superfund Reauthorization and Amendments Act (SARA).

There should be no expansion allowed of a waste disposal facility which is already known to be a problem site, until the facility is fully assessed and brought into complete compliance.

Recognition of Pueblo Sovereignty and Inclusion into the Agreement

Because of its proximity to LANL, the Pueblo will be adversely affected more directly than any other party by LANL noncompliance with the Federal Facility Compliance Act and other applicable laws in its waste disposal operations. Despite that, the Pueblo was not involved in the development of the Agreement that is designed to ensure compliance with those statutes, nor does the Agreement propose to involve the Pueblo in the process by which LANL achieves compliance. That is not appropriate. It is also not appropriate to rely on the State of New Mexico to represent the interests of the Pueblo or to speak for the Pueblo concerning the proposed Agreement. The Pueblo is a sovereign nation, and the Resource Conservation and Recovery Act does not authorize the State to regulate Native Americans on their lands.

The proposed Agreement therefore should be modified to include the Pueblo in the process by which LANL achieves compliance. This involves several specific changes to the Agreement. First, sections III and XIX should provide that the Pueblo has authority to

enforce the Agreement. Second, the Department of Energy should be required by section IX to submit to the Pueblo all deliverables developed pursuant to the Agreement, and that section should provide for approval or disapproval of those deliverables by the Pueblo. Third, sections X and XI of the proposed Agreement should mandate that the Department of Energy notify the Pueblo in the same manner that notice is to be given to the Environmental Protection Agency. The Pueblo should also be involved as an equal party in the dispute resolution mechanism established in section XII, the determination of danger process set forth in section XVIII, and the procedure under section XXI for imposition of penalties. Seventh, the Pueblo's approval should be required for any extensions granted in accordance with section XIII, any modifications sought pursuant to section XIV, and termination under section XV. Finally, the Pueblo should have access to documents and data in accordance with section XVI.

Compliance with Pueblo Regulations

The proposed Agreement should also be modified to ensure compliance with present and future Pueblo regulations. The Pueblo is considering adoption of its own water quality standards in accordance with the Clean Water Act, and its own air quality control regulations in accordance with the Clean Air Act. The Agreement should provide that it and any plans prepared pursuant to the Agreement will be reviewed and reopened if that is necessary in order to achieve compliance with any standards that are adopted by the Pueblo. At every instance in the document in which compliance with Federal and State regulations is mandated, appropriate compliance with the Pueblo's regulations should also be required. For instance, a waste disposal or treatment facility may be located on the State of New Mexico's lands, requiring compliance with State regulations. However, air releases and other discharges from such a facility will be governed by the Pueblo's regulations, as they will impact the Pueblo's environment.

Issues Related to the Anti-Deficiency Act

The provision in paragraph one of section XX of the proposed Agreement that makes compliance subject to the Anti-Deficiency Act should be eliminated. This provision would have the effect of making the Department of Energy's compliance with the Agreement dependent upon funding for that compliance, a condition that is not authorized by the Anti-Deficiency Act and violates the requirements of the Resource Compliance Act. The Anti-Deficiency Act prohibits federal officials from committing funding that is not authorized by law, but the proposed Agreement does not involve any such commitment. Moreover, there is no provision in either the Resource Conservation and Recovery Act or the Federal Facility Compliance Act that compliance with those statutes is required only if sufficient funding is provided. Finally, the Anti-Deficiency Act does not supersede the Federal Facility Compliance Act and make application of the latter statute dependent upon sufficient appropriations. The Federal Facility Compliance Act was enacted after the Anti-Deficiency Act became law. Congress was aware of the former statute when it enacted the latter and could have provided that the Federal Facility Compliance Act would apply only in situations in which sufficient appropriations were provided. Congress did not do that, however, and the provision of appropriations therefore is not a condition to compliance with the Federal

Facility Compliance Act. The proposed Agreement therefore should not depend on appropriations.

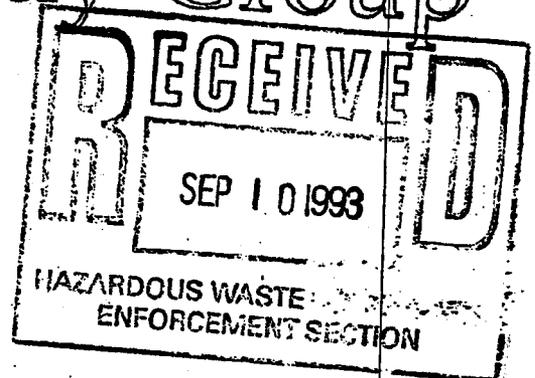
Conclusions

In conclusion, the Pueblo wishes that its sovereign powers be recognized in the Agreement, and that compliance with present and future Pueblo regulations be required. No further off-site releases from waste disposal facilities should be allowed; and no expansion of problem facilities should be allowed until all existing problems have been addressed. Wastes deposited prior to 1980, as well as off-site contamination, should be thoroughly assessed through the Superfund process, and the waste sites remediated. The proposed Agreement should not depend on appropriations.

Los Alamos Study Group

September 10, 1993

Joel Dougherty
RCRA Enforcement Branch (6H-CS)
Environmental Protection Agency
1445 Ross Avenue Suite 1200
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BY FACSIMILE

Dear Mr. Dougherty:

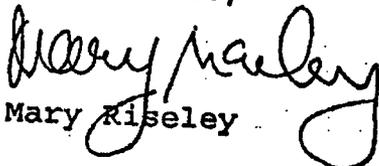
We have read the Federal Facility Compliance Agreement regarding Land Disposal Restriction Requirement at the Los Alamos National Laboratory, whose final draft is dated 6/25/93. We have not had a chance to examine this document in close detail.

The compliance plan outlined in this agreement is predicated upon the opening of the WIPP, the operation of the Controlled Air Incinerator, on the planning, funding, construction and operation of a Hazardous Waste Treatment Facility and other hypothetical means of disposing of radioactive and/or otherwise hazardous wastes. None of these can be counted upon to come into existence as there are serious environmental and public relations difficulties each has already or certainly will face here in northern New Mexico. Curiously, nowhere mentioned is LANL's proposed Mixed Waste Disposal Facility about which many questions have also been raised. Why are no contingency plans delineated in the case that any or all of these be derailed or cancelled?

We also would question the utility of an agreement which will automatically be terminated when the State of New Mexico has issued a compliance order or DOE and NM have made another agreement.

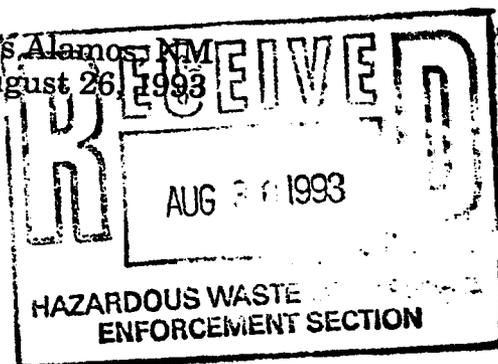
Thank you for the opportunity to comment belatedly on this document.

Best wishes,


Mary Riseley

Joel Dougherty
RCRA Enforcement Branch (6H-CS)
Environmental Protection Agency
1445 Ross Avenue Suite 1200
Dallas, TX 75202-2733

Los Alamos, NM
August 26, 1993



Dear Mr. Dougherty,

This letter is in response to your request for public comments regarding the Federal Facility Compliance Agreement between the Department of Energy (DOE) and your organization. I should point out to you that I understand that I place myself at risk by offering any comments at all. The Los Alamos National Laboratory (LANL) has the reputation of retaliating against anyone who is the least bit critical of the operations at LANL or who are critical of the DOE.

My comments can be divided into three sections. The first regards the number of parties to the agreement which I believe need to be expanded. The second section regards the three versions of the site treatment plans. The third section addresses the creation of danger in carrying out the plan.

The signatures listed on the agreement are Jerry Bellows, Area Manager, DOE-Los Alamos and Allyn M. Davis, Director, Waste Management Division, EPA-Region 6. These are only two of the four entities which are directly involved in the agreement. The two missing entities are the University of California (UC) and the New Mexico Environment Department (NMED). The agreement will be unworkable without those two being parties to the agreement. DOE and UC have a contract which specifies that UC will be the operator of LANL. The draft agreement refers to DOE as the co-operator of LANL. This is in conflict with the present DOE-UC contract which states "DOE authorizes the university to manage and operate the Los Alamos National Laboratory on DOE's behalf." Contract W-7405-ENG-36, Article III C2.2(a). The DOE cannot on the one hand make UC the operator of LANL and then become a co-operator of LANL for the purposes of the compliance agreement.

In a similar fashion the EPA on January 25, 1985, granted the State of New Mexico final authority to administer a hazardous waste program equivalent to the federal program. (page 12 of the draft agreement). The EPA cannot, without cause, withdraw that authorization and independently negotiate an agreement with DOE.

To summarize the first section, the draft compliance agreement is a legal nightmare because two key parties, UC and NMED, are left out of the agreement.

The second section of my comments is very brief. The agreement refers to three site treatment plans; a conceptual plan, a draft plan, and a final proposed plan. It would be much simpler and more manageable to have just a draft plan which evolves into a final plan.

The third section of my comments deals specifically with the mixed waste which is currently in TRU-waste Storage Pads 1, 2, and 4, TA-54, Area G. The agreement states that this waste is in violation of RCRA because it cannot be properly inventoried, identified, or assessed for compliance. The RCRA regulation involved was designed for hazardous waste and is being applied to mixed waste without considering the radioactive hazards involved. Specifically there has been no comparative risk assessment comparing the risk of radiation exposure to workers and the public with the present storage situation and the proposed solution. I contend that these risks are much higher if the waste is uncovered, inspected, sorted and placed in an inspectable configuration. In the present configuration the main exposure risk is from radioactive material infiltrating into the aquifer. If the proposed solution is followed the main risk is from accidental releases from the barrels and crates as they are handled or later when they are stored above ground in buildings. A cursory risk assessment shows much higher risk in the second case. In fact the TRU waste stored in the past two years in an inspectable configuration presents a much higher risk to the public than the earth covered close-packed barrels and crates which are in technical violation. The present draft agreement therefore leads to a much higher risk condition than the present storage configuration.

The draft agreement does contain language which covers the situation. On page 32 it states "If EPA determines that activities set forth in the Compliance Plan, even though carried out in compliance with this Agreement, have caused or may cause a release of hazardous waste, hazardous constituents, or a pollutant or contaminant, or a threat to public health or to the environment, EPA may direct DOE to stop further implementation of this Agreement--". I suggest that it would be wiser to stop the agreement before it starts because the danger is already built into the agreement, that is, there will be a danger from uncovering the TRU mixed waste and storing it in the "approved" configuration.

I would be happy to discuss the actual risks of exposure with your representatives or the DOE any time.

Sincerely,


G. Beery

PO Box 4712

Los Alamos, NM 87544

Aug. 24, 1993
box 351 El Prado, new mex 87529

to: Joe & Dougherty
regarding the Facilities Compliance Agreement with EPA, Region 6

I got your announcement and regret not having gotten out to read ~~it~~ but of course I must question the content of the Five-Year Strategic plan and many other standards and values on which ~~is~~ this compliance is based. Am glad to hear that LANL is found in non-compliance, because that means a mutual awareness that a problem may exist and common desire to make corrections. However the suggestion that building some big new structure to facilitate permanent interment seems relatively sane compared to the lunacy and insanity of incineration proposals. The fact that air disperses rapidly off that windy mesa must make your neighbors very concerned. I wonder what this "Compliance Agreement" says and how close it comes to mandating either incineration or interment, or both. If the reference to "obtaining operating permits" reflects Controlled Air Incineration restart intentions, then you must know that the public will make a huge stink and you will have a hard time. It would be environmentally wiser and politically more savvy to forget the incineration scheme and stick to on-site retrievable storage units like the ones we toured in Area G.

We all agree that the Labs should be in compliance but the means and methods to get to that end are debatable. And a thorough acceptance that all parties in this discussion deserve respect. The brilliant scientists who created Los Alamos as we know it, did not seem to consider the future problems with which we now grope. And it is important that we have more for-sight and wider consideration than those founding fathers, geniuses that they were.

Any agreement that doesn't respect public concerns and common wisdom in favor of politico-socio-bamboozalomentis not acceptable and I question the content not the concept. We all want LANL (and all the earth) clean and healthy for all God's creation and any program that propagates poison must stop until it can re-gear to environmentally sound operations (including LANL, DOE DOD facilities NASA et al).

And what of vague plans to move the entire US nuclear weapons production program to Los Alamos, how will such work impact these land disposal agreements. Certainly they will effect the waste production at the lab and should not be considered some loose end to be tied in later. If this is what you want, you should plan around it, and if this agreement includes such an agenda, this should be made clear. Actually heard the Lab had shut down some shops til non-toxic proceses were found, but curiously there are stacks burning which go unmonitored, so who can tell how toxic they may be?

I wish there were a way to get better info on these issues. Spent last weekend with Lab employees and more in Glorieta but did not hear this Agreement explained or expounded upon.

Have no idea what to say except that if this Agreement in any way condones the re-start of the Incineration of hazardous or mixed waste, it is not a good Agreement and should not be approved!!

If, on the other hand, the Agreement is merely a statement of principle with fines for non-compliance perhaps??? Well perhaps this is good enough to explain the parameters of my agreement.

Hope this agreement is not a commitment charge on blingly...

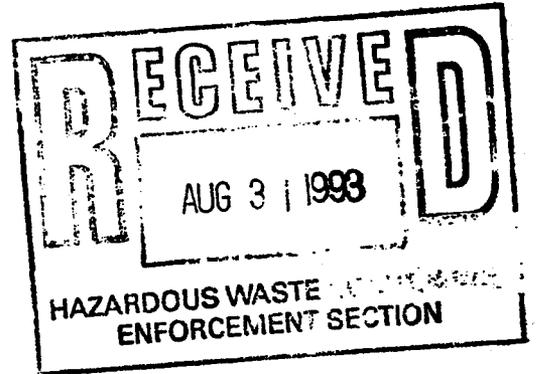
/Thanks for considering the folks downwind,

Yours in peace, Bonnie Bonneau - Legions of Living Light

Bonnie Bonneau

Aug. 20, 1993

Joel Dougherty.
RCRA Enforcement Branch (6H-C5)
EPA
1445 Ross Avenue Suite 1200
Dallas, Texas 75202-2733



Dear Mr. Dougherty.

Regarding the non-compliance with land disposal
restriction storage prohibitions of Section 3004 by the Los Alamos
National Laboratory, my opinion is that no more hazardous
or radioactive wastes should be produced by the laboratory
until they can be properly disposed of or properly stored.

To set a date of the year 2000 for the laboratory to
meet compliance standards is setting a precedent of leniency
which negates the purpose of Resource and Recovery Act.

If a citizen disobeys the law, when it is discovered,
the citizen is not allowed to operate in disobedience of
the law for seven years before meeting the standards
of the law. Laws are made to protect the individual,
the community and the State and all of us, including
institutions, corporations or government agencies should be
responsible to them.

Sincerely,

Thomas B. French
Thomas B. French