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MONDAY  
OCTOBER 21, 2002

FIFTY CENTS

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## Lab, DOE to fight N.M. over cleanup

► *Lawsuit contests  
state's order to require  
cleanup of LANL  
contaminants*

By **JEFF TOLLEFSON**  
The New Mexican

Los Alamos National Laboratory is asking a federal judge to throw out a state cleanup order and severely limit the state's ability to require cleanup of a host of contaminants at the laboratory.

The University of California, which contracts with DOE to manage the laboratory, filed the lawsuit challenging the New Mexico Environment Department's draft cleanup order along with the state's determination that pollution at the laboratory might represent an "imminent and substantial endangerment" to human health or the environment.

The lawsuit also initiates a four-pronged attack on the state's cleanup authority. If successful, the lawsuit could prevent the state of New Mexico from requiring cleanup of everything from waste dumps — containing both hazardous and nuclear materials — to groundwater, canyon bottoms, explosives sites and such toxins as polychlorinated biphenyls.

"Los Alamos National Laboratory is trying to get out of any kind of governance whatsoever in the state of New Mexico," said Ruth Prokop, an attorney in Washington, D.C., who consults for the Los Alamos Study Group. "Everybody seems to be bowing their heads and ignoring the fact that this is happening."

For Prokop, a former White House attorney who served as general counsel of the U.S. Department of Housing and Urban Development, the lawsuit represents a substantial threat to state oversight. She notes that DOE won a lawsuit using similar arguments regarding state regulation of nuclear materials at a uranium enrichment plant in Padu-

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## LANL

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cah, Ky.

The issue has been brewing for years.

Citing the 1954 Atomic Energy Act, DOE asserts sole jurisdiction over all nuclear materials from cradle to grave. Alternatively, state officials claim authority under the 1976 Resource Conservation and Recovery Act, or RCRA, for not only hazardous wastes but also "mixed wastes" buried at various nuclear waste dumps where hazardous materials are mixed with plutonium and other radioactive materials every bit as dangerous as those shipped to the Waste Isolation Pilot Project today.

"The DOE feels that they are right, and NMED feels that they are right," said Scott Gibbs, deputy associate director for operations. "And so the appropriate way in our democracy to sort this out is to go to the legal branch."

U.S. District Judge Martha Vasquez will hear the case. No hearing date has been set.

In the suit, the lab challenges the Environment Department's underlying determination that pollution at the lab might represent an "imminent and substantial endangerment" to human health or the environment. Environment Department officials say that determination laid the legal groundwork for the cleanup order.

The lab asks for an injunction halting state intervention on any radioactive waste issues. Moreover, the lawsuit claims the draft cleanup order is in many cases illegal even with regard to hazardous wastes because the state's efforts to regulate the hazardous waste portion of mixed waste would interfere with the lab's management of radioactive materials.

But the lawsuit doesn't stop there. UC argues that the state has no legal authority to require investigations or cleanup of any pollution that originated in liquid-waste discharges — stemming to 1948. Aside from solid rubble that was dumped over hillsides, much of the pollution in the groundwater and canyon bottoms throughout the laboratory stems from liquid discharges.

Because the U.S. Environ-

mental Protection Agency issues permits for such discharges under the Clean Water Act, the lab argues that EPA must be responsible for cleanup of pollution caused by such discharges.

The lawsuit also contends the state cannot regulate munitions-related waste, including contamination from explosives at Technical Area 16 and other sites.

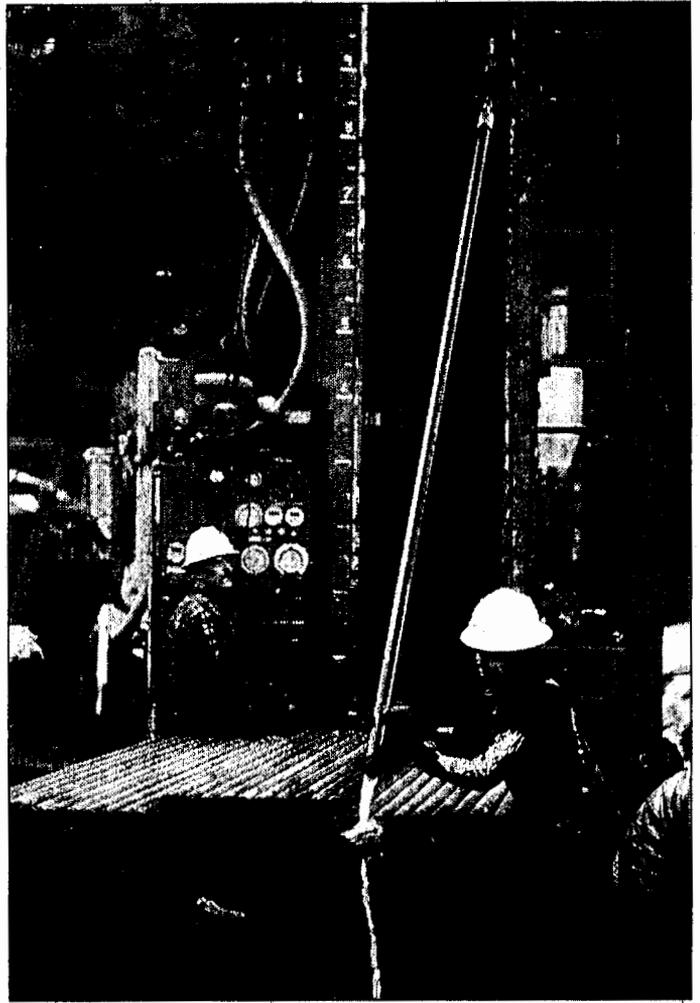
Additionally, PCBs and perhaps other chemicals are the sole responsibility of the EPA and are thus exempt from state regulation, according to the lab's complaint. PCBs cause numerous health problems and are suspected carcinogens. The chemicals were once common in a variety of industrial processes but the United States stopped using them in 1977.

Although the laboratory has answered questions and in some cases followed orders regarding contaminants, the lawsuit asserts that the lab did so voluntarily in the spirit of cooperation. Facing the Environment Department's cleanup order, however, the lab is invoking its legal privileges.

The Environment Department is preparing to release the final cleanup order in coming weeks. Department counsel Paul Ritzma said the state is aware that certain materials might fall outside the state's jurisdiction, most notably radioactive materials. Nonetheless, he said, hazardous-waste laws require regulators to consider "cumulative" impacts, which means the radioactive portion of contamination should not be separated from other toxins.

"I don't know that it does anybody any good to divide those out," Ritzma said, noting that the DOE agreed to treat all waste coming WIPP in Carlsbad as mixed waste rather than argue about the contents of each individual waste drum. "I would think that would be the way the lab would ultimately want to go."

Ironically, in some instances the lab and the Los Alamos Study Group have voiced similar criticisms of the draft cleanup order. Both say the state's "cleanup order" is actually a revision to the lab's general hazardous-waste permit. The process for permit modifica-



New Mexican file photo

**Larry Thoren, left, and Daryl Kadmas of Dynatech Drilling help with a groundwater study earlier this year at the Los Alamos National Laboratory.**

tions includes hearings, where citizens and the lab alike can object or make official comments. Under the process, which incorporated an unofficial public comment period, no such hearings were held.

Both the lab and the study group also argued that the state's order contains too much investigation and not enough cleanup. The lab would need to spend \$207 million to comply with the investigation requirements in the cleanup order — before cleanup of the legacy waste sites could begin, according to James Holt, the lab's associate director for operations.

On the other hand, the lab claims that the state's proposed cleanup requirements are overly cumbersome; cleanup standards for water and soil are too stringent and do not allow for a "risk-based" approach. Risk-based remediation allows more con-

Act, which EPA enforces, the state can regulate sites where PCBs are mixed with hazardous wastes, said Rich Mayer, EPA's senior environmental project manager for the laboratory.

Although EPA issues discharge permits to the laboratory under the Clean Water Act, the state can regulate the same chemicals if they become pollutants in soil or groundwater, Mayer said. This supports the state's position that it can require cleanup of contaminants in soils and groundwater stemming all the way back to the Manhattan Project that started during World War II.

The issue is a little more complex with regard to munitions testing sites, which the lab has used to test various explosives over the decades. Although EPA policy grants a waiver to federal testing sites that remain active, those sites remain under state regulatory control once they close, according to Mayer.

Even as far as radioactive materials are concerned, Mayer said, the state is not without authority in cleanup under the Resource Conservation and Recovery Act.

"RCRA does have a provision in it called the omnibus provision, which basically says you can do anything to protect human health and the environment," Mayer said. "When we are doing a risk assessment of a cleanup, our policy is that we do have to take into account ... cumulative effects of the radiation constituents and the chemical constituents. And the state has been doing that."

On the other hand, the lab argues that the state's efforts to regulate mixed wastes conflict with requirements under the Atomic Energy Act. Because the latter supersedes the former, any state requirements, including those that target hazardous wastes, are null and void, the lawsuit said.

For some nuclear watchdogs, the lawsuit also should be targeted at lab's hazardous-waste permit, which acts as a general operating permit for all hazardous-waste facilities at the 43-square-mile facility, and ultimately the waste dump at Area G. The Environment Department is preparing to issue a hazardous-waste permit as soon as next month.

In the case of the gaseous diffusion plant at Paducah, state regulators had required DOE to submit a waste characterization plan before placing radioactive materials in a new landfill. DOE successfully argued in federal court that the state of Kentucky did not have the legal authority to place any requirements on the DOE regarding radioactive materials. The Sixth Circuit Court of Appeals upheld the ruling.

Siding with the study group, the New Mexico attorney general believes the lab has been illegally operating its waste dump at Area G, which has never received permits for hazardous wastes. Environment Department officials say the upcoming permit will address Area G and set requirements for closure of the hazardous-waste portion of the site.

Today, the lab says it is no longer dumping hazardous wastes at Area G. In all, Area G contains 39 pits, of which four are active, and 139 vertical shafts, of which 16 are active, according to the lab. Of those, the lab maintains that only one pit and one shaft at Area G contain hazardous materials that could be regulated by the state, but Environment Department officials aren't ready to concede the point.

Everybody agrees that the hazardous-waste portions of Area G need to close, said James Bearzi, chief of the department's Hazardous Waste Bureau. "It's unlined. It's unmonitored. Something like that would never get permitted today. Because of that, they have to close it."

But the records are so poor that it's tough to tell what kind of waste went where, he said. If hazardous wastes were buried in other pits and shafts, then the state will have a hand in how those are handled, too. Moreover, the state could assert authority over an investigation and potential cleanup at Area G if hazardous wastes are found in the vapor plume that has polluted the ground at Area G.

Gibbs, deputy associate director for operations, says the lab is waiting to see what the state does before making a decision to expand the lawsuit to include the hazardous waste permit.

tamination to be left in the ground under the assumption that contaminated areas will be used for industrial purposes — as opposed to residential housing, schools or day-care centers.

In place of the state's cleanup order, the lab proposes to replace it with its own cleanup plan. A product of a departmentwide plan to overhaul and expedite cleanup throughout the national nuclear complex, the lab's Performance Management Plan would complete cleanup of legacy waste by 2015, the lab states.

Local nuclear activist groups, however, say even less cleanup would take place under the lab's proposal, which was pushed through with no public involvement.

Although it will be up to a court to decide, regional EPA officials support the state in most of its legal arguments.

While PCBs alone fall under the Toxic Substances Control