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October 31, 2002

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Rec'd

NOV 08 2002

SUBJECT: SEPTEMBER 9, 2002 FINALIZATION OF INSTALLATION WORK PLAN AND HYDROGEOLOGIC WORKPLAN SCHEDULES

Dear Mr. Lewis:

The United States Department of Energy (DOE), National Nuclear Security Administration, and The Regents of the University of California (University) jointly request that the Secretary of the New Mexico Environment Department (NMED) withdraw unilateral modifications made by NMED on September 9, 2002, to the Los Alamos National Laboratory (LANL) Environmental Restoration (ER) Project Installation Work Plan (IWP) Work Schedule. Such modifications, to the extent they concern units, sites or tasks that are within NMED's jurisdiction under the New Mexico Hazardous Waste Act (HWA), NMSA 1978 §§ 74-4-1, *et seq.*, could only be lawfully processed as a modification to LANL's hazardous waste facility permit in accordance with the HWA, NMSA 1978 § 74-4-4.2.H, and the applicable regulations, 20.4.1.901 NMAC.

While both DOE and the University have challenged the legality of NMED's unilateral modifications to the IWP Work Schedule in federal and state court (which state court actions are presently stayed), and will continue to pursue such legal actions, we thought that a more detailed explanation of our objections to NMED's unilateral modifications would be useful to NMED in its evaluation of our request to rescind the modifications. By providing this detailed explanation below, DOE and the University are not intending to invoke and are not invoking a state administrative process in lieu of the federal court for resolution of these issues. Rather, DOE and the University are simply providing additional information and analysis that may be useful to NMED's re-evaluation of the unilateral modifications.



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I. BACKGROUND OF NMED'S UNILATERAL MODIFICATIONS TO THE LANL HAZARDOUS WASTE FACILITY PERMIT

LANL's Hazardous Waste Facility Permit (LANL Permit) was issued on November 8, 1989, by the Environmental Improvement Division of the New Mexico Health and Environment Department (now NMED), pursuant to its delegated authority under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901, *et seq.* The corrective action requirements for LANL are set forth in Module VIII of that permit (Module VIII), as amended by the United States Environmental Protection Agency (EPA) on April 8, 1994, and incorporated by NMED as part of the NMED-issued LANL permit on January 2, 1996, (when EPA delegated to NMED the responsibility for implementing the RCRA corrective action program in New Mexico). Section D of Module VIII required LANL to submit a "LANL Installation Remedial Investigation/Feasibility Study (RI/FS) Work Plan" (also called the IWP) containing the following elements:

The LANL Installation RI/FS Work Plan shall contain the programmatic elements of the RCRA Facility Investigation (RFI) Work Plan, installation-wide descriptions of the current conditions, tabular summaries (site type, type and volumes of waste, potential contaminants, potential remedial action, and annual site status) of the potential release sites (by task), prioritization of sites/tasks, and a work schedule. The task-specific RI/FS documents/process shall contain all the site-specific elements of the RFI. The LANL Installation RI/FS Work Plan shall contain outlines for the task-specific RI/FS documents to demonstrate equivalency to RFI and Corrective Measures Study (CMS) documents.

Module VIII, § D, at 13.

Section D of Module VIII requires that the LANL IWP be updated annually to reflect revised reports, tasks, milestones and other deliverables scheduled for completion and/or submission during the next five years. *Id.* Section D also specifies that "the work schedule" must be updated annually, with any scheduling changes approved by NMED to be added to the LANL Permit at that time. *Id.*, at 13-14.

LANL timely submitted its annual update to the IWP in March 2000, entitled "Installation Work Plan for Environmental Restoration Project, Revision 8" (Revision 8, LA-UR-00-1336) (March 2000 IWP Revision 8). The work schedule was attached as Appendix E to the March 2000 IWP Revision 8 and included Fiscal Years (FY) 2000 through 2004. As with all prior IWP submittals, LANL's ER Project, in the interests of addressing all impacted sites and units in a comprehensive, coordinated fashion and to utilize its resources efficiently, specified the tasks and schedules for **all** units at LANL in the March 2000 IWP Revision 8, whether they were within NMED's jurisdiction under the HWA, or beyond it. However, LANL expressly conditioned this inclusion as follows:

Certain issues of concern at the Laboratory are exempt from RCRA's definition of solid waste and are therefore not subject to the provisions of Module VIII, for example, source, by-product, and special nuclear materials (regulated under the Atomic Energy Act). The ER Project adheres to the provisions of applicable DOE

orders to implement a technically comprehensive program that covers all potentially contaminated sites not regulated under RCRA. Provisions in this IWP pertaining to subjects outside the scope of RCRA are not enforceable under the Laboratory's Hazardous Waste Facility Permit. (*Id.*, at 8.)

On March 30, 2001, LANL submitted its annual update to the IWP work schedule, entitled "LANL Environmental Restoration Work Schedule Fiscal Years 2001 through 2005" (LANL IWP Work Schedule).¹ NMED did not approve the LANL IWP Work Schedule. Instead, on December 21, 2001, NMED issued for public comment a revised version of the IWP Work Schedule with new tasks and new dates. LANL promptly objected in writing to the revised dates and tasks. Ultimately, on September 9, 2002, NMED issued as final the NMED-Revised 2002 IWP Work Schedule.²

The NMED-Revised 2002 IWP Work Schedule not only accelerated the delivery dates for various tasks, but also included additional tasks not contained within LANL's March 30, 2001, submittal. Additionally, it reflected a number of changes from the revisions proposed for public comment on December 21, 2001.

Among the modifications made unilaterally by NMED to the March 2000 IWP Revision 8 and the annually revised IWP Work Schedule submitted by LANL on March 30, 2001, were the following:

1. NMED's Unilateral Modifications To The LANL IWP Work Schedule Purported To Incorporate The Tasks And Schedule For All Sites, Including Sites Outside The Jurisdictional Scope Of The HWA, As An Enforceable Part of LANL's Permit.

NMED's September 9, 2002 unilateral revisions to the LANL IWP Work Schedule purported to incorporate the entire NMED-Revised 2002 IWP Work Schedule as part of the LANL Permit and, according to NMED's response to public comments, render the NMED-Revised 2002 IWP Work Schedule and its various elements and tasks immediately enforceable as hazardous waste facility permit conditions under the HWA.³

¹ The LANL IWP Work Schedule was submitted to NMED as an enclosure with a letter from Julie A. Canepa, Program Manager, LANL Environmental Restoration (ER) Project and Theodore J. Taylor, Project Manager, DOE, Los Alamos Area Office, to John Young, Corrective Action Project Leader, NMED Hazardous Waste Bureau, March 30, 2001, "Supplement to Installation Work Plan for Environmental Restoration (ER), Revision 8: Annual Work Schedule 2001 through 2005," reference no. ER-2001-0277.

In addition, on May 10, 2001, in another letter from Ms. Canepa and Mr. Taylor to Mr. Young, LANL notified NMED that, since submission of the LANL IWP Work Schedule on March 30, 2001, the ER Project's budget upon which the LANL IWP Work Schedule was based had been reduced by approximately 30% and that the LANL would "continue working with [NMED] to modify the work schedule once the budget allocation process has been completed." Letter from J. Canepa and T. Taylor, to J. Young, May 10, 2001, "Status of Environmental Restoration (ER), Annual Work Schedule 2001 through 2005," reference no. ER2001-0401.

² NMED notified LANL of the modifications and additions to the 2002 IWP Schedule in a letter dated September 9, 2002 from James P. Bearzi, Chief, HWB, to Dr. John Browne, Director, LANL, and Ralph Erickson, Area Manager, DOE, Los Alamos Area Office, which included an attached schedule, entitled "Los Alamos National Laboratory Work Schedule Calendar Years 2002-2006" (hereinafter, "NMED-Revised 2002 IWP Work Schedule").

³ Attachment 2 to the September 9, 2002 agency action, entitled "Installation Work Plan Schedule 2001-2005, Response to Public Notice No. 01-10," contains the following NMED response:

As LANL has made clear on numerous occasions, including in its July 31, 2002, Comments on NMED's May 2002 Draft Administrative Order, the University's First Amended Complaint for Declaratory and Injunctive Relief and for Review of Administrative Action, Civil No. 02-637 MV/DJS, and DOE's Complaint, Civil No. 02-1273 LH/WWD, respectively filed on September 30 and October 9, 2002 in the United States District Court for the District of New Mexico, NMED is without authority *under the New Mexico Hazardous Waste Act* to require any site characterization or corrective action with respect to a wide variety of materials and potential release sites (PRSs), such as radioactive materials, point source discharges, and firing ranges contaminated through the intended use of military munitions. These limitations on NMED's authority also formed part of the basis of the appeals of both the University (Ct. App. No. 23,348) and DOE (Ct. App. No. 23,496) to the New Mexico Court of Appeals of NMED's September 9 agency action, respectively filed on September 30, 2002 and October 9, 2002.

Because these important legal issues (arising from a lack of NMED jurisdiction or authority) have been fully described in the documents described above, we will not attempt to restate them here but will instead focus below on other procedural problems presented by NMED's unilateral modifications.

2. NMED's Unilateral Modifications Added New Tasks Never Before Solicited By NMED Or Proposed By LANL As Part Of The Annual IWP Update Process.

The NMED-Revised 2002 IWP Work Schedule includes a number of tasks and deliverables that were never previously solicited by NMED or proposed by LANL, as part of the LANL IWP Work Schedule. For many of these new tasks and deliverables, NMED is now requiring preparation of an "Investigation Work Plan" or "Investigation Report." These are entirely new terms, never before included in any programmatic or site-specific LANL submission and not defined in Module VIII of LANL's Permit.

Other new tasks included within the NMED-Revised 2002 IWP Work Schedule, such as the "Site-Wide Stabilization Plan" and "Site-Wide Stabilization Reports," were also never mentioned or discussed before, and are not defined by Module VIII.

The LANL IWP (including its annual revision, updating, and approval) is a requirement of LANL's HSWA Permit and not a modification and, therefore, is not subject to 40 C.F.R. §270.42 and 20.4.1.900 NMAC. Module VIII of LANL's Permit, Section Q, states that "the Permittee shall prepare a single installation-wide work plan, which shall be updated annually."

Attachment 2, comments Nos. 17 and 52, at 9 and 14, respectively. In addition, NMED's response to comments asserts that the NMED-Revised 2002 IWP Work Schedule and its various tasks and submissions are conditions of LANL's Permit subject to enforcement as such, as follows:

The revised schedule includes dates for submittal of investigation work plans and reports. The penalty for noncompliance is described in 40 C.F.R. 270.30 which states that the permittee must comply with all conditions of the permit and any permit noncompliance constitutes a violation of the appropriate Act and is grounds for enforcement, permit termination, permit revocation and reissuance, permit modification, or denial of a permit renewal application.

The new and additional tasks or deliverables included within the NMED-Revised 2002 IWP Work Schedule include the following:

- Site-Wide Stabilization Plan, due May 31, 2003, and Site-Wide Stabilization Reports, due January 31 during each of 2004, 2005 and 2006;
- Investigation Reports for the following PRSs:
 - i. TA-53 Surface Impoundments [53-002 (a, b)] due July 31, 2003;
 - ii. MDA G [54-013(b), 54-014(b-d), 54-015(k), 54-017, 54-018, 54-019, 54-020] due October 31, 2003;
 - iii. MDA L (54-006) due December 31, 2003;
 - iv. MDA C (50-009) due May 31, 2004;
 - v. MDA T [21-001, 21-010(a-h), 21-011(a, c-j), 21-016(a-c), 21-028(a), C-21-009, C-21-012] due August 31, 2004;
 - vi. Los Alamos/Pueblo Canyons due October 31, 2004;
 - vii. 16-008(a), 90s Line Pond, due November 30, 2004;
 - viii. Mortandad Canyon due January 31, 2005;
 - ix. TA-35 and Water Canyon/Canon de Valle, each due February 28, 2005;
 - x. 260 Outfall [16-021(c), 16-003(k)], for Intermediate and Regional Groundwater, due April 30, 2005;
 - xi. Sandia Canyon/Canada del Buey due August 31, 2005;
 - xii. Bayo Canyon [10-002(a, b), 10-003(a-o), 10-004(b), 10-007] due September 30, 2005;
 - xiii. MDA B (21-015) due December 31, 2005;
 - xiv. MDA U [21-017(a-c), 21-022(f)] due February 28, 2006;
 - xv. 73-002 due May 31, 2006;
 - xvi. Airport Landfill – Mesa Top [73-001(a-d), 73-004(d)] due December 31, 2006;
- Investigation Work Plans for the following PRSs:
 - i. MDA C (50-009), due January 31, 2003;
 - ii. MDA G (54-013(b), 54-014(b-d), 54-015(k), 54-017, 54-018, 54-019, 54-020), due April 30, 2003;
 - iii. MDA T (21-001, 21-010(a-h), 21-011(a, c-j), 21-016(a-c), 21-028(a), C-21-009, and C-21-012) due May 31, 2002;
 - iv. Water Canyon/Canon de Valle due June 30, 2003;
 - v. Los Alamos/Pueblo Canyons due August 31, 2003;
 - vi. 16-008(a), 90s Line Pond and 16-003(o), Fish Ladder due March 31, 2004;
 - vii. Bayo Canyon [10-002(a, b), 10-003(a-o), 10-004(b), 10-007], due June 30, 2004;
 - viii. Pueblo Canyon Aggregate Area due August 31, 2004;
 - ix. MDA U [21-017(a-c), 21-022(f)] due November 30, 2004;
 - x. MDA B (21-015) due December 31, 2004;
 - xi. Canon de Valle Watershed Aggregate due January 31, 2005;
 - xii. DP Site Aggregate due August 31, 2005;
 - xiii. Ancho/Chaquehui/Indio Canyons due September 30, 2005;
 - xiv. MDA V [21-013(b, g), 21-081(a, b)] due March 31, 2006;

- xv. Bayo Canyon Aggregate due April 30, 2006;
- xvi. MDA A (21-014) due May 31, 2006;
- xvii. TA-49 (MDA AB, Areas 1, 3, 4, 11 and 12) due July 31, 2006; and
- xviii. Upper Los Alamos Canyon Aggregate due October 31, 2006.

3. NMED's Unilateral Modifications Accelerated The Deadlines For Tasks Proposed By LANL.

The NMED-Revised 2002 IWP Work Schedule also substantially accelerates the dates by which LANL must implement and complete many of the tasks and deliverables proposed within previous IWP submittals. In many cases, these scheduling changes completely disregard the federal budgeting process, rescheduling certain tasks years ahead of their planned completion or delivery dates.

The specific completion deadline dates that were advanced for the first two calendar years of the schedule (CY 2002 and 2003) include the following:

- i. Phase I Investigation Report for Airport Landfill – Mesa Top [73-001(a-d), 73-004(d)] due September 30, 2002, scheduled for completion by LANL's ER Project by November 27, 2002; and
- ii. Voluntary Corrective Action Report for PRS 21-024(i) due March 31, 2003, scheduled for completion by the ER Project by August 31, 2003.

For the first of the items identified above, the completion date was rescheduled for September 30, 2002, which was only three weeks after NMED's issuance of the NMED-Revised 2002 IWP Schedule.

4. NMED's Unilateral Modifications Include Certain Interim Measures Never Previously Solicited By NMED Or Proposed By LANL As Part Of The Annual IWP Update Process.

The NMED-Revised 2002 IWP Work Schedule also includes requirements for submission of an interim action reports, as follows:

- i. Interim Action Report for South Fork of Acid Canyon (1-002, 45-001), due October 31, 2002.

The Interim Action Report for South Fork of Acid Canyon is not a deliverable subject to review and approval by NMED. Rather, LANL is preparing an interim action report for this site for submission to the DOE.

Additionally, as will be described in more detail below, the Site-Wide Stabilization Plan and Site-Wide Stabilization Reports included within the NMED-Revised 2002 IWP Work Schedule appear to require the implementation of certain new interim measures.

II. NMED'S UNILATERAL MODIFICATIONS EXCEED ITS REGULATORY AUTHORITY

The NMED-Revised 2002 IWP Work Schedule is contrary to law, even as it pertains to materials and PRSs over which NMED may assert jurisdiction (i.e., hazardous waste). NMED may not incorporate the NMED-Revised 2002 IWP Work Schedule and any of its contemplated site characterization and remediation activities as part of Module VIII, unless and until it conducts appropriate proceedings to approve a major agency-initiated permit modification, in accordance with the requirements of 40 C.F.R. Section 270.41 (1999), as incorporated and modified by the HWA, NMSA 1978, § 74-4-4.2 (1992) and 20.4.1.901 NMAC.

As will be discussed below, the conditions of LANL's Hazardous Waste Facility Permit and applicable law do not allow NMED to unilaterally impose any changes, other than mere scheduling changes; even for such scheduling changes, NMED is obliged to provide a period of public comment before finalizing such scheduling changes.

1. NMED's Unilateral Modifications Of The IWP Work Schedule Constitute A Major Modification Of The Existing LANL Permit, Issued In Violation Of The LANL Permit And Governing Law.

The NMED-Revised 2002 IWP Work Schedule was issued unlawfully and not in accordance with the requirements of the LANL Permit, for the following reasons:

- i. NMED's actions in issuing the NMED-Revised 2002 IWP Work Schedule constitute major permit modifications rather than a mere restatement of the existing LANL Permit.

As described above, the NMED-Revised 2002 IWP Work Schedule contains certain tasks and activities that were never identified by LANL or NMED within earlier versions of the IWP Schedule or Module VIII.

In revising the IWP Schedule to include these wholly new, additional tasks and deliverables, NMED has ventured outside the bounds of any work previously proposed or included in existing versions of the IWP Work Schedule or Module VIII. As such, NMED's actions in issuing the NMED-Revised 2002 IWP Work Schedule constitute a major permit modification.

Both Nuclear Watch of New Mexico and the New Mexico Attorney General's Office submitted comments to NMED asserting that NMED's issuance of the NMED-Revised 2002 IWP Work Schedule constituted a major permit modification that must be processed as such. NMED responded by stating, without a basis or supporting rationale that its action did **not** constitute a modification of LANL's Hazardous Waste Facility Permit and, as such, was not subject to formal permitting procedures:

The LANL IWP (including its annual revision, updating, and approval) is a requirement of LANL's HSWA Permit and not a modification and, therefore, is not subject to 40 C.F.R.

§270.42 and 20.4.1.900 NMAC. Module VIII of LANL's Permit, Section Q, states that "the Permittee shall prepare a single installation-wide work plan, which shall be updated annually."

September 9, 2002 Response to Comments, Attachment 2, comments Nos. 17 and 52, at 9 and 14, respectively.

NMED has misinterpreted the scope of the referenced Permit condition and, in so doing, implemented its authority in a manner that is unlawful and fundamentally unfair to the permittees and other public commentors. Although Section Q of Module VIII does provide that LANL must submit an annual update to the IWP Work Schedule, it does not invest NMED with the authority to unilaterally revise LANL's annual update and thereby cause additional tasks – never previously identified within the IWP or otherwise – to become enforceable permit conditions.

Rather, NMED's characterization of its September 9 actions as a mere restatement of existing permit obligations reflects a serious misstatement of the applicable law on modifications of hazardous waste permits. In an appeal of a RCRA corrective action permit, the EPA Environmental Appeals Board (EAB) distinguished a situation that would constitute "mere restatement" of existing permit obligations, from a situation that would constitute a permit modification that must be processed as such. *See In the matter of Allied-Signal, Inc. (Frankford Plant) ("Allied-Signal")*, RCRA Appeal No. 90-27, 4 Environmental Administrative Decisions ("EAD") 748, 755-57 (EAB, Jul. 29, 1993). The EAB explained that one example of the former situation is one where the EPA "Region's review of the RFI report reveals that Allied-Signal is in violation of a testing requirement already incorporated in the permit, such as a previously approved RFI work plan." *Id.*, 4 EAD at 755. Imposing additional testing requirements upon review of such report would not constitute a modification of the existing permit because "[n]o new testing is involved in this situation, since the testing requirement already exists elsewhere in the permit." *Id.*

By contrast, the EAB distinguished a very different situation, one that would require initiation of permit modification procedures:

The other situation is when the Region's review of the RFI report reveals that testing requirements not required by an existing permit provision are nevertheless necessary to achieve the goals of the corrective action process. This situation involves new testing.

Id. (internal citation omitted).

In its brief, the EPA Regional office agreed with the EAB's assessment of the second situation, explaining as follows:

[I]f EPA determines that *additional* tasks not required by the approved work plan are necessary to achieve the goals of the study at issue, EPA may only require such tasks of Permittee by the permit modification process. Such process would, of

course, provide Petitioner with the opportunity to be heard as to the appropriateness of the additional tasks.

Id. (emphasis in original).

Here, NMED has disregarded the reality that its actions in issuing the NMED-Revised 2002 IWP Work Schedule constitute much more than a mere restatement of existing permit requirements; the NMED-Revised 2002 IWP Work Plan seeks to impose upon LANL requirements to implement *wholly new tasks*, to those already submitted or planned for numerous PRSs, a prospect that is clearly beyond the current requirements of the existing provisions of Module VIII. In other words, NMED is trying to unilaterally impose new requirements as enforceable conditions of the LANL Permit; this cannot be done under HWA and RCRA permit authorities without following the requisite procedures for major permit modifications.

By doing so, NMED has done much more than merely restate existing permit obligations;⁴ it has engaged in the exact type of overreaching pointed out by the EAB in the case of *Allied-Signal*:

[A]ny requirement to perform testing that might arise from the Region's review and revision of an interim submission would flow from the Region's determination that *compliance with the existing permit requirements, such as requirements contained in an approved RFI work plan, has failed to generate the type of information necessary to proceed to the next phase of the corrective action process*. In that situation, any requirement or directive to perform testing would create a new obligation. The Region would have to implement the permit modification procedures before making the new testing requirement effective and enforceable.

Allied-Signal, 4 EAD at 756 (emphasis added).

NMED has apparently abandoned the existing Module VIII's RI/FS-equivalent process. Instead, it issued the NMED-Revised 2002 IWP Work Schedule, ordering LANL to implement a new, undefined and potentially disparate set of tasks. In so doing, NMED has attempted to

⁴ It is of no consequence that the agency has denied that its actions constitute an permit modification subject to the requirements of 40 C.F.R. 270.41. See, e.g., *In re Waste Technologies Industries*, RCRA Appeal No. 93-11, 5 EAD 646, 661 (EAB, Jan. 23, 1995), where the EAB disregarded the agency's characterization of its actions as not constituting an agency-initiated permit modification, as follows:

Region V has not characterized its decision as a modification undertaken pursuant to Section 270.41(b)(2), *but no other characterization accurately reflects the degree to which the key elements of the process were in fact orchestrated and controlled by the Region*. In sharp contrast to the usual Class 1 modification procedures, *here it was the Region, not the permittee, that provided public notice of the proposed change, and it was the Region, not the permittee, that solicited comments on the proposed change*. Most importantly, in a major departure from the usual Class 1 procedures, the Region also made clear that it would not in any way lend its approval to the proposed change until after considering comments submitted by the public. *Those actions, while strikingly at variance with the typical Class 1 procedures, are wholly consistent with an Agency-initiated modification for cause under section 270.41(b)(2)*. See 40 C.F.R. §§ 124.10 *et seq.*

Id. (emphasis added.)

impermissibly modify the existing LANL Permit without following the requisite procedures for major permit modifications.

This conclusion – that the changes and expansions in the scope of required tasks constitute "major" permit modifications – is consistent with how such proposed changes would need to be processed if LANL had itself requested such changes. *See* 40 C.F.R. 270.42, Appendix I, Item No. C.8.

- ii. Section O of the LANL Permit does not allow NMED to unilaterally modify the IWP Work Schedule.

Second, NMED's issuance of its revisions and additions to the IWP Work Schedule did not comply with the terms of the LANL Permit. NMED proposed these revisions and additions on December 20, 2001, for what it maintains was a completely discretionary period of public notice and comment.⁵ This contravenes the requirements of Section O of LANL's Hazardous Waste Facility Permit, which provides as follows:

If at any time the Administrative Authority determines that modification of the Corrective Action Schedule of Compliance is necessary, he or she may initiate a modification to the Schedule of Compliance according to the procedures of this Section.

Module VIII, Section O.1.

This provision mandates that, even for mere scheduling changes, i.e., shifts in due dates of deliverables identified in Module VIII and/or earlier versions of the LANL IWP Work Schedule, NMED *must* publish the proposed modifications for receipt of public comment; only after the close of the public comment period may it finalize the proposed revisions.

In requiring that notice of the proposed modifications be sent to all parties identified on the mailing list maintained in accordance with 40 C.F.R. 124.10(c)(1)(ix) and, further, that the notice solicit public comment and hold a public comment period prior to final issuance of the permit, Section O is analogous to the full panoply of requirements that apply to agency-initiated "compliance schedule" modifications under 40 C.F.R. 270.41(a)(4), and, at the very least, the

⁵ In Public Notice No. 01-10, accompanying NMED's proposal of the NMED-Revised IWP Work Schedule, NMED asserted the allegedly discretionary nature of public notice and comment for the proposed revisions:

NMED is providing a thirty-day comment period to give the public an opportunity to comment on the LANL proposed Work Schedule and the NMED revised schedule. NMED is providing this opportunity, at its discretion, to promote public participation in the environmental restoration process at the LANL facility, although public comment is not legally required.

Further, in the September 9, 2002 public notice addressed to "Concerned Citizen," entitled, "Notice of the Finalization of Installation Work Plan and Hydrogeologic Workplan Schedules," NMED asserted the alleged "discretionary" nature of its December 20, 2001 proposal:

At the agency's discretion, NMED provided a thirty-day comment period to give the public an opportunity to comment on our proposed schedule.

requirements that apply to a Class 2 permittee-requested modification made under 40 C.F.R. 270.42(b).⁶

In light of this notice requirement, NMED has improperly asserted that it was not legally bound to propose its revisions for a mandatory public comment period. Further, the abbreviated, terse and often non-responsive nature of NMED's September 9, 2002 Response to Comments demonstrates that NMED disregarded its obligation to adequately consider and address such comments (*see* 20.4.1.901.A.(7) NMAC). As such, NMED has failed to comply with the requirements of Section O, even with respect to those revisions to LANL's IWP Schedule that constitute mere scheduling changes to the existing Corrective Action Schedule of Compliance.

iii. Section O of the LANL Permit cannot lawfully authorize NMED's unilateral modifications to the LANL IWP Work Schedule.

Third, even if Section O of the LANL Permit on its face purported to allow NMED to unilaterally modify the LANL Permit to incorporate the NMED-Revised 2002 IWP Work Schedule and its individual elements as enforceable conditions, Section O may not lawfully be applied in that manner.

In an appeal of a RCRA corrective action permit, the EAB ordered EPA to strike a substantively *identical* provision for modifying the permit's Corrective Action Schedule of Compliance, and instead, to pursue any modification that sought to incorporate certain interim measures ordered under another section of the permit through the procedures required by 40 C.F.R. § 270.41. *See In the Matter of General Motors Corporation, Delco Moraine Division, et al., ("GMC")*, RCRA Consolidated Appeal Nos. 90-24, 90-25, 4 EAD 334 (EAB, Nov. 6, 1992).

In *GMC*, the EAB decided as follows:

Permit Condition III.H. states that the permit will be modified to incorporate the interim measures selected by the Regional Administrator according to the procedures in permit Condition III.M. (Modification of the Corrective Action Schedule of Compliance)⁷ or the modification procedures of 40 C.F.R. § 270.41.

⁶ Even permittee-requested changes to a Ground-Water Protection corrective action program must be processed in accordance with Class 2 permitting procedures. 40 C.F.R. 270.42, Appendix I, Item No. C.8.b. As discussed further below, NMED's insistence that its actions did not constitute a modification subject to the requirements of 40 C.F.R. 270.41 for agency-initiated modifications would be disregarded by an administrative or judicial tribunal. *See, e.g., In re Waste Technologies Industries*, RCRA Appeal No. 93-11, 5 EAD 646, 661 (EAB, Jan. 23, 1995), *supra* at n. 4.

⁷ The decision cites the language of the provision, which is substantively identical to the language of Section O of the LANL Permit Module VIII:

Condition III.M. provides, in part:

If at any time the Regional Administrator determines that modification of the Corrective Action Schedule of Compliance is necessary, he or she may initiate a modification to the Schedule of Compliance according to the procedures of this section. If the Regional Administrator initiates a modification, he or she shall:

1. Notify the permittee in writing of the proposed modification and the date by which comments on the proposed modification must be received;

GMC objects to the abbreviated modification procedures in permit Condition III.M. on the grounds that it does not provide for administrative review of modifications initiated and finalized by the Regional Administrator as required by the existing regulation on modifications at 40 C.F.R. § 270.41. See Petition for Review at 22-29. GMC is correct in noting that the permit's abbreviated modification procedure represents a change in existing regulatory requirements set forth in 40 C.F.R. § 270.41. Because this procedure has not been adopted by regulation, the Region must remove permit Condition III.M. from the permit and revise permit Condition III.H. to specify that Agency-initiated modifications to incorporate interim measures must proceed according to the existing modification procedures in 40 C.F.R. § 270.41.

GMC, 4 EAD at 347-48.

We note that the abbreviated procedure struck by the EAB in *GMC* and appearing at Section O of the LANL Permit is also substantively identical to a provision that appeared in EPA's withdrawn Subpart S corrective action proposal. See 55 Fed. Reg. 30798, 30847, proposing new 40 C.F.R. § 270.34 (Jul. 27, 1990) ("Subpart S"). In the preamble to Subpart S, EPA limited the permissible use of such proposed abbreviated procedure, as follows:

[T]he process will be used for modifications that are relatively routine and do not include very large additions or changes to the requirements already specified in the schedule. An example might be a requirement to increase the frequency or methods used for groundwater sampling. On the other hand, some Director-initiated modifications, because of the nature, scope or anticipated resource burden of

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2. Publish a notice of the proposed modification in a locally distributed newspaper, mail a notice to all persons on the facility mailing list *** and place a notice in the facility's information repository ***.
 - a. If the Regional Administrator receives no written comment on the proposed modification, the modification shall become effective five (5) calendar days after the close of the comment period.
 - b. If the Regional Administrator receives written comment on the proposed modification, the Regional Administrator shall make a final determination concerning the modification after the end of the comment period.
 3. Notify the permittee in writing of the final decision.
 - a. If no written comment was received, the Regional Administrator shall notify individuals on the facility mailing list in writing that the modification has become effective ***.
 - b. If written comment was received, the Regional Administrator shall provide notice of the final modification decision in a locally distributed newspaper ***.

GMC, 4 EAD at 347, n. 19

Note that the only apparent difference between Section O of the LANL Permit Module VIII and the above-cited provision struck-down in *GMC* is that Section O refers to the "Administrative Authority," whereas the provision in *GMC* referred to the "Regional Administrator," and, in Section O, the term "will" has been substituted for "shall" in a number of places.

complying with the new requirement, may be more appropriately handled as a major modification under § 270.41.

55 Fed. Reg. at 30848

Since Subpart S was never adopted by EPA, Part 270 was never amended to allow abbreviated modification procedures, even in the limited circumstances envisioned by EPA. Consequently, under the *GMC* holding and the language of 40 C.F.R. Section 270.41, NMED cannot unilaterally modify the permit to incorporate the NMED-Revised 2002 IWP Work Schedule and/or the individual tasks described therein, unless it commences and completes a major permit modification pursuant to 40 C.F.R. Section 270.41.

- iv. Section J of the LANL Permit does not authorize any NMED unilateral modifications to add interim measures.

Fourth, Section J of the LANL Permit itself provides that interim measures specified by the agency are not immediately enforceable as conditions of the permit, but rather may only be incorporated into the LANL Permit through formal permit modification proceedings:

The Administrative Authority may determine the specific measure, including *potential* permit modifications and the schedule for implementing the required measures... The Administrative Authority shall modify the Corrective Action Schedule of Compliance either according to procedures in this Module, or according to the permit modification procedures under 40 C.F.R. 270.41, to incorporate such interim measures into the permit.

LANL Permit, Module VIII, Section J, at 31-32 (emphasis added).

Section J therefore makes clear that NMED may only incorporate interim measures by initiating additional, separate permit modification proceedings; that is to say, upon issuance, such interim measures do not immediately or automatically become an enforceable part of the LANL Permit.

In the case of *GMC*, the EAB held that interim measures could not be incorporated into a permit by an abbreviated modification procedure substantively identical to Section O of the LANL Permit. *GMC*, 4 EAD at 347-48. When Section J is interpreted in light of this holding, the only lawful alternative for NMED to incorporate interim measures into the LANL Permit is the initiation and completion of formal permit modification proceedings in accordance with 40 C.F.R. Section 270.41.

In its September 9, 2002 letter,⁸ notifying LANL of its modifications to the LANL IWP Work Schedule, NMED describes many of its more significant modifications as requiring LANL to implement what may only be characterized as interim measures. The September letter provides that the NMED-Revised 2002 IWP Work Schedule "incorporates revisions that address," *inter*

⁸ See *supra* at n. 2.

alia, "interim site stabilization of solid waste management units (SWMUs) and areas of concern (AOCs)," and further explains as follows:

NMED also requires the Permittees to submit a plan that addresses assessment of SWMUs and AOCs for possible contaminant migration and, through prioritization, implements interim stabilization measures at the sites (e.g., source removal, disconnection of piping, and best management practices). The plan should include storm water monitoring and provide a maintenance and inspection plan for the best management practices at sites that require stabilization.⁹

As described in Section I above, the NMED-Revised 2002 IWP Work Schedule contains numerous items that were never previously proposed by LANL or solicited by NMED during the annual IWP-renewal process and, moreover, are not defined within the LANL Permit or any related document. These undefined items include a "Site-Wide Stabilization Plan" and numerous "Site-Wide Stabilization Reports." In the absence of any other description or definition of these items, LANL has surmised that the above quotations from the September 9 letter intend to describe some of the requirements of the Site-Wide Stabilization Plan and Reports.

However, as made clear by Section J of the LANL Permit, NMED cannot impose interim measures as enforceable conditions of the LANL Permit, without satisfying the specific requirements of 40 C.F.R. Section 270.41. Putting aside LANL's questions whether there exists sufficient reason for NMED to order the implementation of interim measures under Section J, LANL objects to NMED's unlawful attempt to circumvent the requirements set forth by the existing LANL Permit. For this reason, any requirement to implement interim measures in accordance with the "Site-Wide Stabilization Plan" and "Site-Wide Stabilization Reports" included in the NMED-Revised 2002 IWP Work Schedule is void and unenforceable under the existing LANL Permit.

- v. NMED may not resort to any alleged omnibus authority to unilaterally impose the NMED-Revised 2002 IWP Work Schedule and its individual tasks and elements as enforceable conditions of the LANL Permit.

Fifth, NMED cannot circumvent the necessary permit modification procedures by broadly invoking its omnibus corrective action authority.

In the case of *GMC*, the EAB also held that it was unlawful for EPA to apply any alleged omnibus statutory authority for the protection of human health and the environment to unilaterally modify existing permit obligations because, to do so, would abrogate the specific procedural requirements and causes identified by 40 C.F.R. Section 270.41. *GMC*, 4 EAD at 350-51. The EAB agreed with the permittee that the omnibus provision at Section 3005(c)(3) of RCRA¹⁰ did not provide the

⁹ *Id.*, at 2.

¹⁰ 42 U.S.C. § 6925(c)(3). This omnibus provision states that "[n]othing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term," and further says:

agency with the authority to unilaterally modify the permit, even where "necessary" to protect human health and the environment:

Specifically, GMC contends that the Agency does not have unlimited authority under RCRA § 3005(c)(3) to review and modify an existing permit. Rather, according to GMC, this authority is limited by the requirements of 40 C.F.R. § 270.41. We agree.

As the Board has recently noted, by promulgating 40 C.F.R. § 270.41(a) & (b), *the Agency has restricted its ability to unilaterally modify existing permits*. Thus, the Agency may not invoke § 3005(c)(3) to bypass these regulations, for it is axiomatic that the Agency must follow its own regulations.¹¹

Accordingly, NMED cannot lawfully modify the specific tasks and deliverables as it has attempted to do in the NMED-Revised 2002 IWP Work Schedule; nor may it seek to require implementation of these tasks and deliverables as enforceable conditions of the LANL Permit, unless and until NMED initiates and completes permit modification procedures to incorporate them as such, in accordance with the HWA, NMSA 1978 § 74-4-4.2, and applicable regulations, 20.4.1.901 NMAC, and 40 C.F.R. Section 270.41.

- vi. NMED Has Failed to Comply with the procedures required for major permit modification in at least five respects.

As discussed in more detail below, NMED may only modify LANL's permit on its own initiative *for cause*, and only after the modification is deemed warranted pursuant to an investigation. 20.4.1.901.B(2) NMAC; 40 C.F.R. § 270.41. Assuming that such elements exist, the specific actions that NMED must complete before issuing any such modification are as follows:

- i. preparation of a draft permit, reopening any provisions to be modified by the agency (20.4.1.901.A.(1), 20.4.1.901.B.(5)-(6) NMAC; *see also* 40 C.F.R. § 124.6);
- ii. preparation of an accompanying fact sheet (20.4.1.901.A.(3), 20.4.1.901.D. NMAC; *see also* 40 C.F.R. §§ 124.7, 124.8);

Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

Id.

¹¹ *GMC*, 4 EAD at 350-351. The EAB further clarified that its holding did not mean that EPA was prevented from undertaking permit modifications:

[T]he Region has several available options. For example, the regulations allow the Region to initiate a permit modification upon receiving new information (unavailable at the time the permit was issued) that would have justified different permit conditions at the time of issuance. 40 C.F.R. § 270.41(a)(2). Moreover, procedures exist for modifying, revoking and reissuing, or terminating a permit if any permitted activity endangers human health and the environment and can only be regulated to acceptable levels by modification or termination. 40 C.F.R. §§ 270.41(b)(1), 270.43(a)(3).

Id., 4 EAD at 351-52.

- iii. providing written public notice of the proposed modifications to all individuals, entities and public agencies identified in the mailing list maintained by the permitting authority (20.4.1.901.A.(3), 20.4.1.901.C.(3)-(4) NMAC; *see also* 40 C.F.R. § 24.10);
- iv. providing 45 days for public comment and requests for a public hearing (20.4.1.901.A.(3) NMAC; *see also* 40 C.F.R. § 124.10); and
- v. holding a public hearing, if one is requested during the comment period or the agency determines that one should be held within five days of the comment period's close (20.4.1.901.A.(5)(b) NMAC; *see also* 40 C.F.R. §§ 124.11-12). At such a public hearing, NMED must provide all interested persons a reasonable chance to submit significant data, views or arguments orally or in writing and to examine testifying witnesses (20.4.1.901.A.(5), 20.4.1.901.D.(5) NMAC). Additionally, at such a hearing, the Water and Waste Management Division has the burden of persuasion for all NMED-proposed modifications (20.1.4.400.A.(1) NMAC).

Not surprisingly, since NMED denied that its actions constituted a modification of the LANL Permit, NMED failed to follow any of these steps (except that it issued some, but not all, of its modifications for an allegedly discretionary public comment period). By failing to conduct the required proceedings, NMED's attempt to incorporate the activities contemplated within the IWP Work Schedule as enforceable conditions of LANL's Hazardous Waste Facility Permit is contrary to law.

2. NMED Has Failed To Demonstrate The Requisite Cause For Initiating Permit Modification Proceedings.

NMED may only modify LANL's permit on its own initiative *for one of four specified causes*, and only after the modification is deemed warranted pursuant to an investigation. 20.4.1.901.B.(1)-(2) NMAC; 40 C.F.R. § 270.41. However, NMED has not identified the existence of any cause that would justify modification of the LANL Permit, as required by the applicable regulations.

There are only four causes specified in 40 C.F.R. § 270.41(a) (as incorporated by 20.4.1.901.B.(1) NMAC), which allow an agency to propose modifications on its own initiative:

- 1) *Alterations*. There are material and substantial alterations to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.
- 2) *Information*. The Director has received information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance.

- 3) *New statutory requirements or regulations.* The standards or regulations on which the permit was based have been changed by statute, through promulgation of new or amended standards or regulations, or by judicial decision after the permit was issued.
- 4) *Compliance Schedules.* The Director determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy.

Neither the letter to LANL,¹² nor the Notice to concerned citizens,¹³ contains any assertion by NMED or any other evidence of the existence of the required "cause." Furthermore, modifications to the "compliance schedule" may only be made upon a determination of "good cause" (40 C.F.R. § 270.41(a)(4) (emphasis added)). However, in issuing its September 9, 2002 actions, NMED did not identify any "good cause" due to any of the events described by subparagraph (4) above. By failing to determine the existence of any of the "causes" specified by 40 C.F.R. § 270.41 with respect to each of the modifications in the NMED-Revised 2002 IWP Work Schedule, NMED has acted unlawfully and in a manner that renders all such modifications void and unenforceable.

3. The Vagueness Of Certain New Tasks Imposed By NMED In The NMED-Revised 2002 IWP Work Schedule Underscores The Need For Undergoing Permit Modification Procedures.

As described earlier, the NMED-Revised 2002 IWP Work Schedule includes a number of tasks and deliverables that were never previously solicited by NMED, much less proposed by LANL, as part of the parties' annual update to the IWP Work Schedule. These new tasks and deliverables include requirements that LANL complete an "Investigation Work Plan" or "Investigation Report" with respect to numerous PRSs, a "Site-Wide Stabilization Plan," and numerous "Site-Wide Stabilization Reports." These are entirely new requirements, never before included in any programmatic or site-specific LANL submission. Furthermore, they are described in such a vague and abbreviated fashion that LANL cannot ascertain the specific actions that must be taken to assure their timely completion.

The vague and unclear nature of these new tasks illustrates the need to subject such extensive, indeed, "major" modifications to the permitting modification process, which would allow LANL, interested citizens and public entities to insist upon further elaboration and clarification of the proposed requirements. Short of that, however, any attempt to impose such vague and undefined requirements as part of the LANL Permit violates the doctrine of fundamental fairness and renders such requirements void.

¹² See *supra* at n. 2.

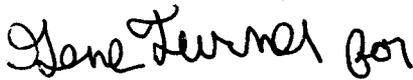
¹³ See "Notice of the Finalization of Installation Work Plan and Hydrogeologic Workplan Schedules," to "Concerned Citizen," from J. Bearzi, Sep. 9, 2002.

III. CONCLUSION

For the reasons stated above, LANL requests that NMED withdraw the unilateral modifications imposed upon LANL in the NMED-Revised 2002 Work Schedule. Such modifications, to the extent they concern units, sites or tasks that are within NMED's jurisdiction under the HWA, could only be lawfully processed as a modification to LANL's Hazardous Waste Facility Permit in accordance with the HWA, NMSA 1978 § 74-4-4.2.H, and the applicable regulations, 20.4.1.901 NMAC.

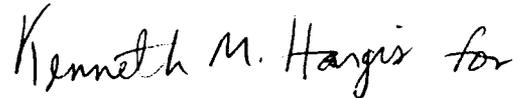
Please feel free to call us if you have any questions.

Sincerely,



Joseph C. Vozella, Acting Associate Director for
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RRES-DO Files (02-083), MS J591
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