

General

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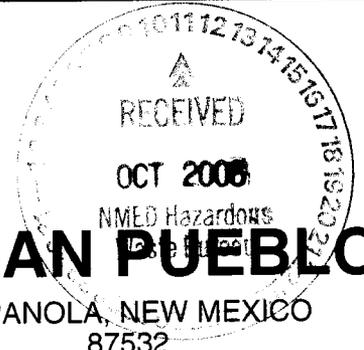
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# INDIAN PUEBLO

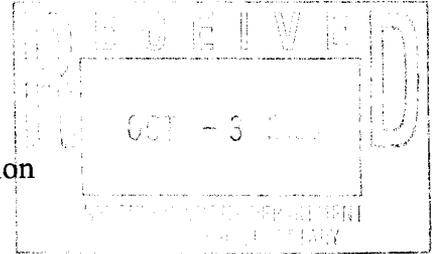
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OFFICE OF GOVERNOR



September 28, 2006

Ms. Elizabeth Withers  
EIS Document Manager  
U.S. Department of Energy - National Nuclear Security Administration  
Los Alamos Site Office  
528 35<sup>th</sup> Street  
Los Alamos, NM 87544 - 2201



Re: **Santa Clara Pueblo's Comments on the Draft Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, Los Alamos, New Mexico**

Dear Ms. Withers:

Santa Clara Pueblo submits the following comments on the draft Site-Wide Environmental Impact Statement ("SWEIS") regarding the next five years of operations at the Los Alamos National Laboratory ("LANL"). In accordance with your letter to me dated September 19, 2006, we trust these comments still are considered timely.

Although the draft SWEIS states that the agency proposing the actions discussed therein is the National Nuclear Safety Administration ("NNSA"), because that agency is part of the U.S. Department of Energy ("DOE") for which Santa Clara Pueblo enjoys a formal government-to-government relationship, the comments here reference DOE rather than any agencies that work under the umbrella of the DOE. The comments, of course, apply in full force to the NNSA as well.

Santa Clara Pueblo appreciates the enormity of the task of describing the potential scenarios for the next five years of operations for LANL. Santa Clara Pueblo also appreciates the efforts to date by the DOE to improve its government-to-government relationship with the Pueblo. However, Santa Clara Pueblo has significant concerns about both the process used for, and the substance of, the draft SWEIS. Some of these concerns can only be alleviated through the issuance of a revised draft SWEIS. Other concerns need to be specifically addressed through mitigation measures for Santa Clara Pueblo outlined as part of a record of decision for any final SWEIS.



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Since Santa Clara is barely even referred to by name in the draft SWEIS's almost 2,000 pages, the Pueblo's comments first begin with a brief background description of Santa Clara Pueblo. Then, we include a discussion about the draft SWEIS' lack of compliance with various laws, policies, and executive orders, followed by a discussion of impacts to Santa Clara. We conclude with a discussion of remedies to address the impacts to Santa Clara Pueblo.

## **I. Overview regarding Santa Clara Pueblo**

The modern-day boundaries of Kha' Po Oweengeh, or Santa Clara Pueblo, includes over 53,000 acres of land. This acreage figure includes some of our traditional lands that we have fought to regain but does not encompass all of our aboriginal territory. The Pajarito Plateau contains many areas of importance to our people. While we strive at Santa Clara Pueblo to be both proactive and innovative in our approach to working with others, at our core, the people of Santa Clara Pueblo are deeply rooted to our traditions.

Because of the importance of our traditions, in many respects our lifestyles are similar to what our ancestors enjoyed. We maintain cultural practices that pre-date the Manhattan Project by centuries and that will continue in perpetuity. To assist in understanding impacts to the Pueblo, we highlight a few such practices here. Santa Clarans grow crops with natives seeds passed down for generations and dry many traditional foods outside for later use in the colder months. We collect and utilize numerous wild plants and herbs for medicinal and other cultural purposes. When we harvest elk or deer, we fully utilize these gifts. Not only the meat is consumed. We also consume the bone marrow, the organs, and the blood. The clays and sands of the region are used by our world-famous artists and craftspeople. The pigments that are applied to the pottery made by Santa Clarans come from the soils too and are often applied using brushes made of natural materials. It is not uncommon for our artists to lick the brushes to rewet them while in the process of creating their pottery. In addition, the water we consume from surface sources and springs for our traditional practices comes directly from those sources and is not filtered.

The importance of protecting and maintaining our traditional practices cause us to look carefully at the draft SWEIS for any potential impacts to the air, soils, and water upon which we and the plants and animals depend. Those impacts are described throughout these comments. We believe all three alternatives described in the draft SWEIS impact Santa Clara Pueblo but we are especially concerned with the impacts associated with the expanded operations alternative.

As you review the remainder of these comments, please bear in mind that prior to the Manhattan Project, the Pajarito Plateau was pristine. The people of Santa Clara Pueblo are deeply connected to this area. It is because of the Pueblo's connection to the natural world that we submit these comments to ensure procedures for describing impacts are followed to the fullest. The Pueblo hopes that these comments will promote better understanding between the DOE and Santa Clara

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Pueblo regarding impacts to the Pueblo so that we are able to work together to prevent or alleviate impacts to an environment upon which the cultural survival of Santa Clara Pueblo depends.

**II. The draft SWEIS does not comport with the mandates of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(d), and its implementing regulations ("NEPA")**

A. NEPA procedures were not properly followed to ensure that the public was fully informed.

(i) *The scoping process was incomplete.*

The purpose of the NEPA scoping process is to determine the range of issues to be addressed in the NEPA analysis and to identify the significant issues related to the proposed action. 40 C.F.R. §§ 1501.7 and 1508.25. Draft environmental impact statements are to be prepared "in accordance with the scope decided upon in the scoping process." *Id.* at § 1502.9(a). In January 2005, the DOE sought scoping comments for a supplement to the SWEIS that was issued in 1999. The Notice of Intent for that supplemental SWEIS did not include any discussion of increasing the production of plutonium pits beyond currently authorized levels. *See* 70 Fed. Reg. 807 (Jan. 5, 2005). Subsequently, the DOE decided to prepare a new SWEIS instead of supplementing the 1999 version. *See* draft SWEIS at 1-2. However, no additional scoping opportunities were provided to the public even though the current draft SWEIS discusses operations, including the increased production of plutonium pits, that were not identified in the original proposed action that was scoped in 2005.

While Santa Clara Pueblo commends the DOE for preparing an entirely new SWEIS rather than supplementing the outdated 1999 version, the failure to conduct additional scoping for the draft SWEIS is improper. By failing to issue a revised Notice of Intent and by failing to conduct additional scoping regarding the actual range of issues to be included in the proposal, the public was denied an opportunity to identify significant issues related to the proposal. As will be evidenced below, this resulted in an analysis that did not fully comport with the DOE's responsibilities for protecting tribal trust resources.

(ii) *Background materials were not made readily available to the public.*

The Council on Environmental Quality ("CEQ") has issued regulations and other guidance materials interpreting NEPA. CEQ regulations state that NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Those regulations also state that "NEPA procedures must ensure that environmental information is available to public officials and

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citizens before decisions are made and before actions are taken.” *Id.* at § 1500.1(b). While CEQ regulations also instruct that environmental impact statements should be as concise as possible and avoid excess paperwork, *see id.* at §§ 1500.4 and 1502.2 c), it is still vitally important that background information regarding an environmental impact statement be readily available to the public for review. This requirement was not met for the draft SWEIS.

The draft SWEIS and the appendices contain lists of background documents used as the basis for the draft SWEIS. Some of the references are simply, and somewhat mysteriously, referred to as “Data Call Materials.” It is Santa Clara Pueblo’s understanding that these materials were only available in reading rooms in Santa Fe and Albuquerque. None of the reference materials could be accessed through the DOE’s on-line version of the draft SWEIS. As discussed below, this is also an environmental justice issue.

- B. The range of alternatives considered in the draft SWEIS was inadequate and the manner in which the alternatives were described confused and skewed the impact analysis.

CEQ regulations detail the environmental review process that must be followed in the preparation of an environmental impact statement. The regulations generally follow federal court decisions indicating that, to be adequate, an environmental impact statement requires a “full and fair discussion of significant environmental impacts.” 40 C.F.R. §1502.1. CEQ regulations refer to the discussion of alternatives as the “heart” of any environmental impact statement. *Id.* at §1502.14. While, generally, the alternatives discussed in an environmental impact statement should reasonably relate to the purpose of the federal action, the analysis of the actual impacts resulting from the alternatives will be influenced by an agency’s choice of the range of alternatives it considers. NEPA’s environmental “full disclosure” mandate cannot be met, however, if an agency is too restrictive in the range of alternatives it considers.

There is no magic formula regarding the range of alternatives necessary for an environmental impact statement. The range should be reasonable. What is reasonable depends upon “the nature of the proposal and the facts in each case.” Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations* (Mar. 16, 1981) at §1(b). Based upon the facts here, the draft SWEIS has an inadequate range of alternatives and the alternatives, as currently formulated, skews the analysis of environmental impacts.

There are two separate but related issues that need to be remedied. The expanded operations alternative should be broken out into two separate alternatives – one that analyzes the more controversial aspects of new contemplated operations (increased plutonium production and increased waste production and storage) and another that addresses all the sorts of activities solely related to refurbishment and upgrades to modernize buildings to ensure continuation of

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existing activities. In addition, all of the alternatives for the SWEIS, not just the expanded operations alternative, must include as an assumption clean-up that is already mandatory for LANL pursuant to the March 2005 "Compliance Order on Consent" between the New Mexico Environment Department ("NMED") and DOE/NNSA and its then-current operator, the University of California ("NMED Consent Order"). The NMED Consent Order "requires a site-wide investigation and cleanup to be conducted at LANL pursuant to stipulated procedures and schedules." Draft SWEIS at 2-9. It is a mandatory part of how LANL pursues its next five years of operations regardless of the alternative ultimately chosen as the preferred alternative in the SWEIS.

The expanded operations alternative in the draft SWEIS has too much loaded into it for the public to be able to ascertain which impacts relate to which portions of the activities described in that alternative. The expanded operations alternative includes "relocation of existing operations, reinvestment and refurbishment of existing facilities, and new operations or levels of operations." Draft SWEIS at 5-55. It is described in the draft SWEIS as the alternative that "would operate LANL at the highest levels of activity currently foreseeable, including full implementation of the mission assignments." *Id.* at iii. Even though the draft SWEIS indicates that not every activity described in the expanded operations alternative will necessarily be adopted by DOE, it is still difficult for the public to parse out impacts associated with the myriad activities for the expanded operations alternative discussed in the draft SWEIS.

It is also unclear why new plutonium pit production levels are even included in the draft SWEIS since the document states that decisions about LANL's future are contingent upon a "new Complex strategy direction" that is separate from the SWEIS process. *Id.* at 1-22. The draft SWEIS also indicates that there is a separate NEPA process still occurring with respect to the potential to build a Modern Pit Facility at LANL for plutonium pit production. *See id.* at 1-16 and 1-32. Even though this Modern Pit Facility is supposedly not part of the draft SWEIS, it is referenced many times throughout the document and it is extremely difficult for the layman reviewing this voluminous document to ascertain which portions of the infrastructure activities discussed in the expanded operations alternative relate specifically to the proposed increase of plutonium pits from 20 to 80 and which infrastructure activities would be necessary only to pave the way for the often-cited Modern Pit Facility.

In addition, although compliance with the NMED Consent Order is necessary regardless of the alternative ultimately chosen by DOE, and the draft SWEIS admits as much (*see, e.g.* draft SWEIS at 1-24), the potential impacts of clean-up activities related to the NMED Consent Order were only included in the expanded operations alternative. *See id.* at 1-12. This is improper. This, combined with the overly broad number of activities included in the expanded operations alternative, skews the analysis regarding the impacts of each alternative. Because the expanded operations alternative combines activities such as replacing aging office buildings that were not

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built up to current safety codes with all of the activities necessary to increase plutonium pit production along with the only analysis of mandatory remediation activities for the contaminated sites at LANL, it sometimes produces the absurd result wherein the alternative that includes increasing plutonium triggers and increasing waste generation and storage is described as being more beneficial for the environment than the “no action” alternative. This appears to be the case especially with respect to discussion of soil contamination impacts from legacy waste and discussion of impacts to the quality of both surface and ground water. . *See, e.g., id.* at 5-36 (surface water impacts), 5-24 (legacy waste soil contamination), and 5-41 (groundwater impacts). Because clean-up of such legacy waste is part of the NMED Consent Order mandates, that clean-up must be completed regardless of which SWEIS alternative DOE pursues. However, because that clean-up is only discussed in the expanded operations alternative, the draft SWEIS indicates that expanded operations produces the cleaner results for the water and soil. This is misleading.

As is stated in the draft SWEIS, the “alternatives provide the basis for analysis of potential impacts” in the SWEIS. *Id.* at 3-1. That is precisely why the breakout of alternatives needs to be remedied. Breaking out the expanded operations alternative into two separate alternatives and ensuring analysis of the NMED Consent Order impacts is not tied to any one alternative in the SWEIS would still be consistent with the purpose and need for the SWEIS and would remedy these NEPA violations.

### **III. The draft SWEIS does not comport with the environmental justice Executive Order or with the DOE's own Indian policies**

#### **A. CEQ guidance on environmental justice was only partially cited and even the parts cited were not followed for the impact analysis in the draft SWEIS.**

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994), provides that “[e]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” The Executive Order makes clear that the provisions apply fully to Native Americans. In 1997, CEQ issued a guidance document regarding environmental justice that “interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898.” Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* (Dec. 10, 1997), <[ceq.eh.doe.gov/nepa/regs/ej/justice.pdf](http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf)> (“CEQ Environmental Justice Guidance”) at 21. The draft SWEIS only selectively refers to the CEQ Environmental Justice Guidance but then does not appear to analyze environmental justice impacts to Santa Clara Pueblo in accordance with the few provisions it selectively cites.

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- (i) *CEQ Environmental Justice Guidance includes three factors each for analyzing disproportionately high and adverse human health impacts and disproportionately high and adverse environmental impacts.*

The CEQ Environmental Justice Guidance states that when determining whether environmental effects are disproportionately high and adverse, agencies are to consider three factors:

- (a) Whether there is or will be an impact on the natural or physical environmental that significantly (as employed by NEPA) and adversely affects a[n] . . . Indian tribe. Such effects may include ecological, cultural, human health, economic, or social impacts on . . . Indian tribes when those impacts are related to impacts on the natural or physical environment; and
- (b) Whether environmental effects are significant (as employed by NEPA) and are or may be having an adverse impact on . . . Indian tribes that appreciably exceeds or is likely to appreciably exceed those on the general population or other appropriate comparison group; and
- (c) Whether the environmental effects occur or would occur in a[n] . . . Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.

CEQ Environmental Justice Guidance at 26-27.

Similarly, the CEQ Environmental Justice Guidance breaks out the analysis of whether human health effects are disproportionately high and adverse into three separate parts: (1) whether health effects, in terms of risks and rates, exceed generally accepted norms; (2) whether the risk or rate of hazard exposure appreciably exceeds that of the general population; and (3) whether health effects occur due to cumulative or multiple adverse exposures from environmental hazards. *See id.* at 26.

The draft SWEIS only cites some of these factors in Chapter 4 (*see* draft SWEIS at 4-150) and then does not appear to follow most of the factors in its analysis in Chapter 5. As a result, the environmental justice analysis is incomplete.

- (ii) *The draft SWEIS does not analyze environmental justice impacts to Santa Clara Pueblo in accordance with the factors set forth in the CEQ Environmental Justice Guidance.*

The environmental justice analysis in the draft SWEIS states that "DOE expects few high and

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adverse impacts from the continued operation of LANL under any of the alternatives, and, to the extent impacts may be high and adverse, DOE expects the impacts to affect all populations in the area equally." Draft SWEIS at 5-156. To back up this disturbing statement, the draft SWEIS goes on to explain that a study was completed for the 1999 SWEIS where assumptions were made about special pathways "that took into account the levels of contaminants in native vegetation (pinon nuts and indian tea [Cota]), crops, soils and sediments, surface water, fish, and game animals on or near LANL." *Id.* at 5-157. Based upon this and more recent monitoring results, the draft SWEIS states that the overall risk rate for cancers for a traditional user of these "special pathways" is not high, and that previous radiological releases from LANL, not current operations, are the likely culprit of any radionuclide concentrations found. Therefore, the DOE concludes, "special pathways" receptor populations (*i.e.* the tribes) would not be expected to suffer any disproportionately high and adverse human health impacts. *See id.*

The environmental justice analysis in the draft SWEIS thus appears to focus solely on only one of the three factors needed to analyze whether human health effects are disproportionately high and adverse. The analysis appears centered upon conclusions that the health effects, in terms of risks and rates, do not exceed generally accepted norms. The draft SWEIS reaches this conclusion even though the document only summarizes recent state and county data regarding cancer incidence and mortalities without citing or comparing that data to any Pueblo-specific statistics. *See id.* at 4-95.

There are additional reasons why even the conclusions for this one very limited portion of the required environmental justice analysis is of concern to Santa Clara Pueblo. As discussed more fully below in section III B, Santa Clara Pueblo leadership was not consulted about the assumptions used to determine "special pathways." We believe the assumptions were not necessarily complete enough to fully analyze the effects on Santa Clara. In addition, we have concerns about the reliability of statements in the draft SWEIS regarding analysis of human health effects of LANL operations on the general populace (to which the specific effects on Santa Clara are being compared). For instance, the draft SWEIS cites an April 2005 report of the Agency for Toxic Substances and Disease Registry ("ATSDR") for its conclusion that cancer rates in the Los Alamos area are not higher than other communities. *See id.* at 4-94. Yet, upon further investigation, it appears that the ATSDR study relied upon in the draft SWEIS was never finalized, and, in fact, was criticized by the Environmental Protection Agency. *See* Letter from Cheryl Overstreet, Toxicologist, EPA, to Aaron Borrelli, ATSDR (July 27, 2005)(on file with the Pueblo).

Importantly, the CEQ Environmental Justice Guidance states that the analysis must go farther than just comparing health risk rates for Santa Clara to those rates generally accepted as being risky. The CEQ guidance instructs that the analysis should also answer these questions: Are the impacts to the tribe significant? Do the risks/exposure rate exceed those of the general

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mainstream population? Is the tribe affected by cumulative or multiple adverse exposures to environmental hazards? See CEQ Environmental Justice Guidance at 26. This required discussion was not included in the environmental justice analysis in the draft SWEIS.

It appears from what can be ascertained of the technical discussion in Appendix C that, indeed, the radionuclide exposure rates for the more traditional "special pathways" user of natural resources and wildlife does, in fact, exceed that of the general population. It appears that the radionuclide exposure estimated would be more than twice as high for the "special pathways" user than for the general populace living offsite of LANL. See draft SWEIS at C-39 (offsite resident estimated to receive dose of 2.7 millirem per year compared to "special pathways" receptor dose of 4.5 millirem per year). Even with our concerns about the limited assumptions used for the "special pathways," this result clearly reveals an impact. CEQ Environmental Justice Guidance instructs that, to be included in the environmental justice analysis, the impact must be "significant" in accordance with NEPA. NEPA regulations defining "significantly" instruct that significance can refer to the intensity of an impact which can include the degree to which the possible effects on the quality of the human environment are likely to be highly controversial and the degree to which possible effects on the human environment are uncertain. See 40 C.F.R. at §1508.27. The draft SWEIS is clear that some of the effects of contaminant migration are still unknown and are being monitored and studied. See, e.g., draft SWEIS at 5-190. Consequently, even though the assumptions used in the analysis of "special pathways" were too limited and underestimated potential impacts, even with those limited assumptions the study completed in Appendix C shows a significant impact to Santa Clara that should be acknowledged in the draft SWEIS in accordance with the CEQ Environmental Justice Guidance. This did not occur.

Unfortunately, the majority of the environmental justice analysis in the draft SWEIS is simply incomplete. The draft SWEIS does not appear to take into account any of the three factors regarding discussion of disproportionate impacts to the environment found in the CEQ Environmental Justice Guidance. Additional environmental impacts that should have been more specifically analyzed for Santa Clara Pueblo as part of the environmental justice review are discussed in section III.C below.

The draft SWEIS also does not include any analysis of cumulative or multiple adverse exposures to environmental hazards in contravention of the CEQ Environmental Justice Guidance. This matter is of particular concern to Santa Clara Pueblo since the draft SWEIS admits that most of the risk of toxicity and carcinogenicity attributable to those using "special pathways" is due to "existing levels of contamination" resulting in part from past practices of LANL. Draft SWEIS at 5-92; see also *id.* at 5-157. Santa Clara's traditional practices have not changed through the generations and will not change despite LANL operations. The extent of bio-accumulation over multiple generations at the Pueblo due to past, present, and future contemplated LANL activities

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thus is of particular concern to us. This is an issue that should be analyzed in accordance with Executive Order 12898 but the methods and scope of the analysis needs to be determined through government-to-government consultation with the Pueblo in accordance with DOE's specific agreements with the Pueblo and DOE's own Indian policies.

B. DOE failed to consult with Santa Clara Pueblo regarding its assumptions about "special pathways" for the draft SWEIS environmental justice analysis.

The DOE in its *American Indian and Alaska Native Tribal Government Policy*, DOE Order 1230.2 ("DOE Indian Policy") states that "[t]he DOE will seek to determine the impacts of Departmental-proposed legislation upon Indian nations, in extensive consultation and collaboration with tribes." DOE Indian Policy at § I. That same policy indicates that "interacting with tribal governments with regard to the impact of Departmental programs" in order "to protect American Indian . . . traditional and cultural lifeways, natural resources, . . . and other federally recognized and reserved rights" is part of DOE's trust responsibility. *Id.* at Definitions (see definition of "Trust Responsibility"). In the *Accord between the Pueblo of Santa Clara, a Federally-Recognized Indian Tribe and the Department of Energy* (Dec. 15, 1992) ("1992 Accord"), the DOE agreed that the DOE would "consult with the Pueblo to assure that tribal rights, responsibilities, and concerns are addressed prior to the DOE taking actions, making decisions, or implementing programs that may affect the Pueblo."

Various interactions with staff at Santa Clara Pueblo notwithstanding, government-to-government consultation did not occur with Santa Clara Pueblo regarding the assumptions DOE used for its draft SWEIS to describe "special pathways." This is unfortunate since the draft SWEIS states that "special pathways" users are "[a]ssumed to have traditional Native American or Hispanic lifestyles and diet" and since the "special pathways" analysis appears to be the cornerstone of the DOE's environmental justice analysis. Draft SWEIS at C-29 (table C-21); *see also id.* at 5-156 through 5-157.

While it appears that some of the "exposure pathway components" assessed for the "special pathways" user do correspond to some practices at Santa Clara Pueblo, the assumptions about consumption patterns and pathway components do not include many animal and plant products that are used by Pueblo members in the areas near LANL. In addition, because the "special pathways" analysis appears focused only on radioactive contaminants, the full scope of concerns for Santa Clara Pueblo was not addressed in the analysis. For instance, the evaluation of human health impacts in Appendix C of the draft SWEIS states that:

[c]ontaminants known to have been released to the environment from site operations include nitrates and perchlorate, as well as various high explosives and organics. These materials are present in groundwater and surface water on or near

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LANL, and therefore represent a potential direct impact on the health of the current population from past LANL operations.

*Id.* at C-41.

These sorts of contaminants do not appear to have been included, however, as part of the analysis of how those using "special pathways" may be affected.

Thus, the analysis for environmental justice concerns in the draft SWEIS as it relates to Santa Clara Pueblo's interaction with the natural world appears woefully inadequate. This, we believe, is due in part to the fact that the Pueblo was not consulted by the DOE at the leadership government-to-government level regarding the Pueblo's views about how interrelated cultural factors may amplify the natural and physical environmental effects of the proposed agency action for Santa Clara.

C. Additional impacts to Santa Clara Pueblo for activities discussed in the draft SWEIS for which government-to-government consultation with DOE did not occur.

In the 1992 Accord, DOE agreed that it "will consult with the Pueblo about the potential impacts of proposed actions on the Pueblo and its cultural, religious, and environmental resources and will avoid unnecessary interference with traditional practices." In this section, Santa Clara Pueblo highlights some concerns in addition to those previously discussed herein that also were not addressed in the environmental justice section of the draft SWEIS.

(i) *Air quality impacts*

Increased emissions as they relate specifically to Santa Clara Pueblo, were not analyzed in the draft SWEIS. Santa Clara Pueblo is downwind of LANL. Monitoring at the Pueblo shows that the prevailing winds come from the southwest and that there is an indication of contaminant transport from LANL to the Pueblo via particulate. Thus it appears radionuclide emissions from LANL can disperse over Pueblo lands and must be closely monitored. The draft SWEIS states that the Los Alamos Neutron Science Center or LANSCE, which is used to produce neutrons and other subatomic materials, accounts for more than 90% of all radionuclide air emissions from LANL. *See* draft SWEIS at 3-59. Consequently increases in LANSCE activities resulting from refurbishment planned under the expanded operations alternative has the potential to increase such emissions specifically to Santa Clara Pueblo.

Emissions can also result from engine exhaust due to increased traffic on State Road 30. It appears that all three alternatives discussed in the draft SWEIS result in increased traffic, but that

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the expanded operations alternative would cause the greatest increase in traffic. *See id.* at 5-199. State Road 30 passes directly through the middle of the Pueblo, separating two major Pueblo housing areas. Santa Clara Pueblo already has letters on file from NNSA Manager Edwin Wilmot and LANL Director Robert Kuckuck confirming that much of the current vehicular traffic utilizing State Road 30 is generated by LANL employees living in the Española Valley and commuting to and from LANL. This is not only a safety concern for the Pueblo but raises concerns regarding air pollution as it affects all of the traditional practices that we described in the introduction to these comments.

Emissions, be they radionuclide or simply engine exhaust, settle on the soils and, as evidenced by the soil erosion after the Cerro Grande fire, infect surface water runoff, all of which cause impacts to our traditional practices. As discussed above, the full spectrum of those practices and potential pathways do not appear to have been included in the "special pathways" analysis, thus underestimating impacts to Santa Clara.

(ii) *Surface water quality impacts*

Toxic contaminants from LANL operations have already been found in surface waters near LANL. *See, e.g., draft SWEIS* at 4-39. Storm water runoff contributing to surface water pollution is a large concern especially because of the topsoil erosion resulting from the Cerro Grande fire. *Id.* at 4-56. Although surface flows in the canyons by LANL empty in the Rio Grande below Santa Clara, surface water contamination does impact Santa Clara because of the Pueblo's cultural practices. Wildlife that consume those surface flows are used by Pueblo members as part of our own traditions. The whole animal is utilized in Pueblo traditions far more than in the general population (and far more than was recognized in the "special pathways" analysis) making contamination effects more serious for Santa Clara. Many more herbs and plants that depend upon those surface flows are collected and utilized by Pueblo members than were taken into account in the "special pathways" analysis. In addition, contamination of surface supplies for neighboring downstream Pueblos also affects Santa Clara because of the Pueblo tradition of attending feasts of, and consuming traditional foods grown by, the other Pueblos.

The CEQ Environmental Justice Guidance instructs that "[a]gencies should recognize that the question of whether agency action raises environmental justice issues is highly sensitive to the history or circumstances of a particular community or population . . . ." CEQ Environmental Justice Guidance at 8. That same guidance indicates that agencies should take into account "the nature and degree of impact on the physical and social structure of the community." *Id.* at 9. These sorts of impacts to surface water quality are difficult to describe in a technical model, but as described here, very much relate to the social fabric of all of the Pueblo people including Santa Clara.

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(iii) *Ground water quality impacts*

As the draft SWEIS admits, toxic contaminants resulting from LANL activities, such as tritium and perchlorate, have already reached the deep regional aquifer. See draft SWEIS at 4-63 through 4-64. Just a few weeks ago, the NMED issued a rather large civil penalty against LANL for violating the NMED Consent Order by failing to report for many months the discovery of toxic hexavalent chromium contamination in one of the groundwater monitoring wells at LANL. See John Arnold, *Lab Faces \$795K Fine for Delayed Chromium Report*, ALBUQUERQUE JOURNAL NORTH (Sept. 16, 2006) at <[http://www.abqjournal.com/north/493500north\\_news\\_09-16-06.htm](http://www.abqjournal.com/north/493500north_news_09-16-06.htm)>. The regional aquifer underlying LANL is also the source of supply of drinking water for Santa Clara Pueblo. Thus, deep groundwater contamination, regardless of the speed in which it may occur, ultimately impacts Santa Clara Pueblo.

Santa Clara Pueblo has learned that on September 20, 2005, the DOE Inspector General, in reviewing 32 existing LANL wells that could be used for monitoring the regional aquifer as part of the NMED Consent Order, stated that the manner in which existing LANL monitoring wells were constructed masked detection of radionuclide contamination and could "compromise the reliability of groundwater contamination data." U.S. Department of Energy Office of Inspector General, *Inspection Report: Characterization Wells at Los Alamos National Laboratory* (DOE/IG-0703) (Sept. 2005) at 4. Until this problem is completely remedied, the extent of potential groundwater contamination cannot be known. Groundwater must therefore be accurately and carefully monitored at Santa Clara Pueblo for any contaminants from LANL.

(iv) *Water quantity impacts*

The draft SWEIS states that the expanded operations alternative, if fully implemented, could exceed LANL's water rights. See draft SWEIS at 3-77. This is extremely disturbing considering that the draft SWEIS also contains a statement indicating that DOE has an agreement with Los Alamos County that allows LANL to withdraw "an equivalent of about 5,541 acre-feet . . . per year . . ." as well as to purchase some of the County's allocation of 1,200 acre-feet per year of San Juan-Chama Project water. *Id.* at 4-128. If, in fact, LANL truly has access to over 6,000 acre-feet of water per year for use solely at LANL, then LANL already has access to an enormous quantity of water. We question the accuracy of the statement in the draft SWEIS. Regardless, LANL as a junior water user must live within its means. To contemplate growth that exceeds LANL's water budget is simply irresponsible and of great concern to Santa Clara Pueblo.

In any event, the draft SWEIS downplays this potential impact by stating that Los Alamos County, the current operator of the Los Alamos Water Supply System from which LANL now gets its water, is trying to secure use of additional water through converting its San Juan-Chama Project allocation contract into a permanent contract. See *id.* at 4-128. In fact, Los Alamos

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County's contract allocation for 1,200 afy of San Juan-Chama Project water became permanent as of September 20, 2006. See Russell Max Simon, *Area's Water Future is Flush*, ALBUQUERQUE JOURNAL NORTH (Sept. 20, 2006) at <[http://www.abqjournal.com/north/494268north\\_news.09-20-06.htm](http://www.abqjournal.com/north/494268north_news.09-20-06.htm)> The draft SWEIS indicates that this additional water from the San Juan-Chama Project contract would alleviate concerns about LANL exceeding its current water budget.

However, there are additional impacts associated with use of the San Juan-Chama Project water allocation which are not addressed in the draft SWEIS. At this juncture, regardless of the permanent nature of the contract for those water rights, it seems speculative for the draft SWEIS to state that the San Juan-Chama Project water may actually be piped up into the canyon from the Rio Grande for use at LANL. See draft SWEIS at 4-128. Initial feasibility studies notwithstanding, the costs of construction may be prohibitive regardless of technical feasibility. More likely, the San Juan-Chama Project water rights would be used in the Los Alamos area by increasing groundwater pumping in the existing Los Alamos wellfield in the deep regional aquifer while releasing the actual San Juan-Chama Project water from Heron reservoir to alleviate the effects of the increased groundwater pumping on the surface flows of the Rio Grande. The current Los Alamos County water production system which supplies water now to all of the County and LANL consists of 14 deep wells connected to distribution lines, pump stations, and storage tanks. *Id.* at 4-127. This more likely possibility of utilizing existing infrastructure was not discussed in the draft SWEIS.

Such increased pumping of the regional aquifer by LANL in order to utilize the additional San Juan-Chama Project rights through the existing Los Alamos County wellfield will result in cumulative effects over time on Santa Clara's own utilization of the groundwater of the regional aquifer for its own drinking water source. Such impacts would not necessarily be alleviated by releases of San Juan-Chama Project water into the Rio Grande because releases into the Rio Grande would not necessarily address LANL groundwater pumping impacts on regional groundwater supplies underlying Santa Clara Creek (which is Pueblo's most pristine source for future drinking water supplies). In addition, monitoring would be needed to ensure that the increased pumping does not adversely affect any surface flows within Santa Clara Pueblo lands, including surface flows of Santa Clara Creek. This is necessary to protect the Pueblo's senior surface water rights from the effects of pumping by LANL, a junior user.

(v) *Waste generation, storage, and removal impacts*

The increase in waste generation at LANL resulting from expanded operations, including the additional plutonium pit production, is a critical issue for the Pueblo. The expanded operations alternative appears to increase both onsite and offsite storage issues. Santa Clara Pueblo is already concerned about how Area G, LANL's radioactive waste dump, is managed. Area G

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already has thousands of drums of waste stored in fabric tents awaiting transport to the Waste Isolation Pilot Plant ("WIPP") while lower level radioactive waste continues to be disposed of in unlined shallow pits. Santa Clara is thus distressed to learn that the expanded operations alternative would cause the most significant increase in low level radioactive waste generation and also would result in transuranic waste levels that exceed the quantities that WIPP is allowed to take. *See* draft SWEIS at 5-196 and 5-197. Until DOE can get a better handle on cleaning up legacy waste, it is irresponsible to agree to undertake additional activities that generate additional waste, especially if that waste has no known disposal path.

Waste remediation creates a "catch-22" situation for Santa Clara Pueblo. Capping and leaving such wastes at LANL is already causing problems as evidenced by LANL contaminants found in surface and ground waters nearby. However, the "removal option" also raises safety concerns for the Pueblo since transport off the hill implicates having such waste traveling through Santa Clara Pueblo lands. Both processes impact the Pueblo and those impacts can and must be mitigated as DOE contemplates future operations under any scenario.

(vi) *Safety impacts*

There a number of way in which safety issues are implicated by LANL activities, some of which have not been fully analyzed in the draft SWEIS.

The draft SWEIS admits that DOE has not yet completed all of the necessary calculations regarding probable seismic hazards. The draft SWEIS indicates that a "comprehensive review and reanalysis of seismic hazard" is planned but will not be completed until the end of 2006. Draft SWEIS at 4-25. It is thus premature to assess important safety impacts associated with seismic hazards since the study is not yet complete.

As mentioned above, there also are a number of safety issues associated with waste storage at LANL and waste transport away from LANL. As recently as September 13, 2006, area newspapers reported that fines were issued for multiple safety violations at LANL including "two separate 2005 contamination events." *See* John Arnold, *UC Fined for LANL Safety Violation*, ALBUQUERQUE JOURNAL NORTH (Sept. 13, 2006) at <[http://www.abqjournal.com/north/492148.north\\_news09-13-06.htm](http://www.abqjournal.com/north/492148.north_news09-13-06.htm)> Moreover, in the discussion of health concerns associated with on-site waste storage, the draft SWEIS indicates that a fire in waste storage domes at Area G, which under the expanded operations alternatives could double the amount of waste stored, presents one of the greatest public health risks associated with LANL operations. *See* draft SWEIS at S-53. Of course, this is a safety issue too.

The other major safety issue looming large is the risk of terrorist acts against LANL, especially in the event that LANL expands its development of plutonium triggers.

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While at first glance, these issues may not appear to implicate Santa Clara Pueblo, in fact all of these sorts of potential safety failures directly affect the Pueblo. That is because Santa Clara Pueblo would be amongst the first responders for any safety failures that lead to evacuations of LANL.

(vii) *Other impacts to traditional practices and cultural resources*

While Santa Clara Pueblo appreciates the efforts made by the DOE to work with Santa Clara Pueblo through the foundational processes set forth in the 1992 Accord, and while we believe that we have made good progress together on the trails management program and on addressing concerns regarding Rendija Canyon, we must emphasize the need for the DOE and the new managers of LANL to continue to work with the Pueblo to protect cultural resources as cultural resource issues may be implicated by every aspect of LANL operations going forward. Also, we urge the DOE to never assume that Santa Clara Pueblo is fine with any contemplated activity unless direct and proper communications about cultural resources have occurred. As a result of the Cerro Grande fire, many more cultural sites have been exposed. Given that so many more sites have been exposed, and since the range of activities covered in the draft SWEIS, even for just the "no action" alternative, is enormous, it is virtually impossible for the Pueblo at this juncture to identify all such potential areas with cultural properties that may be impacted by LANL activities.

We are concerned, however, when we read statements in the draft SWEIS such as the following:

Most actions associated with implementing the Security-Driven Transportation Modifications Project would have little or no impact on cultural resources since no known cultural sites are located within any of the areas to be disturbed.

Draft SWEIS at 5-107.

Although the same paragraph goes on to state that proper LANL procedures will be followed if previously unknown cultural resources are identified, Santa Clara Pueblo still has concerns about when and how the identification process will take place.

This issue is of central importance to Santa Clara Pueblo since cultural resources do not just preserve our traditions, they are our traditions and are necessary to our practices. It is important to remember that traditional cultural properties need not be characterized by some physical evidence of human activity and thus can be overlooked by those who are not privy to knowledge about our practices.

Therefore, it is imperative that a more complete process for consultation be established in

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accordance with the foundation set forth in our 1992 Accord prior to a final SWEIS and record of decision thereto in order to ensure proper communication occurs before any land disturbance for any activity contemplated in any of the alternatives discussed in the draft SWEIS. Given recent changes in management of LANL, it is important to revisit these issues and to ensure that DOE and the Pueblo are on the same page regarding all aspects of this process. The process should include how Santa Clara Pueblo will be given access to classified areas affected by activities discussed in the draft SWEIS. There are members of the Santa Clara Pueblo who already have the proper clearances for classified areas.

As is recognized in the 1992 Accord, cultural sensitivity goes beyond identification and protection of cultural resources. Traditional practices also can be affected by LANL activities. Santa Clara Pueblo has already gone on record objecting to the practice of conducting explosives testing during ceremonial dances at the Pueblo. This impact, which of course goes beyond just a "noise" impact, was not addressed in the draft SWEIS.

- D. The draft SWEIS does not meet Executive Order 12898's standard to provide an understandable analysis that is readily accessible to the public.

To the extent that DOE reviewers of these comments conclude that Santa Clara did not fully synthesize or accurately portray the environmental justice or other analyses in the draft SWEIS or failed to fully parse out analysis of potential impacts, such conclusions only underscore our point here. The document is very long with key issues discussed in multiple places and contains language in parts of the document that is extremely difficult for the public to comprehend. Executive Order 12898 requires that "[e]ach Federal agency shall work to ensure that public documents . . . relating to human health or the environment are concise, understandable, and readily accessible to the public." Executive Order 12898 at § 5-5c).

The draft SWEIS fails to meet these standards for understandability and community access. As mentioned in section II.A(ii) above, all of the underlying materials were not made readily available on the DOE/LANL website for review. It is difficult to believe that all of the underlying background documents could not be linked on a DOE website when DOE is, through the draft SWEIS, claiming that its preferred alternative is to expand its production of key components for nuclear weapons. In other words, if DOE wants to the public to believe it can handle the complexities of nuclear physics, at a minimum DOE should be able to ensure that public documents relating to the health of the surrounding communities are made readily accessible on the internet.

In addition, especially when the analysis relates to environmental justice issues, DOE needs to ensure that the underlying documents are available and the analysis is understandable in order to meet the requirements of Executive Order 12898. There are portions of Appendix C, upon which

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DOE bases most of its conclusions regarding environmental justice concerns, which are incomprehensible to anyone not familiar with the technical model used for that study. It is difficult, for instance, for Santa Clara Pueblo to ascertain the underlying assumptions in the following description:

Radionuclides emitted to the air and subsequently ingested through food crops is one pathway of exposure used by CAP-88. CAP-88 uses average agricultural productivity data for New Mexico based on the address of LANL when determining the agricultural data. The EPA Food Source Scenario used in CAP-88 was the rural setting.

Draft SWEIS at C-14.

How can Santa Clara Pueblo determine, through the description quoted above, what was, in fact, modeled for ingestion of food crops? Santa Clara has no access to this technical model or the underlying documentation for it. Yet, an understanding of that very issue appears essential to understanding the assumptions made about environmental impacts of the proposed action on Santa Clara Pueblo. This is simply one example which underscores the point that the level of technical discussion in the draft SWEIS relating to environmental justice issues combined with the lack of access to underlying documentation has hindered the ability for the Pueblo to fully assess such impacts and develop specific comments regarding the substance of various underlying assumptions used in the analysis. This contradicts the content and intent of Executive Order 12898.

#### **IV. A revised draft SWEIS must be circulated in order to comply with NEPA**

CEQ regulations regarding NEPA provide that environmental impact statements "shall be supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. §1502.1. NEPA also requires that agencies prepare a draft environmental impact statement with the same general thoroughness as it will its final impact statement:

Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process . . . . The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in [NEPA]. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion . . . .

40 C.F.R. §1502.9(a).

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As these comments illustrate, the current draft SWEIS did not follow all of the NEPA requirements or the requirements for environmental justice review. The result is a document that precludes meaningful analysis. Thus, DOE must recirculate a revised draft SWEIS fixing these defects (especially with respect to environmental justice after consultation with the Pueblo leadership) and allow the Pueblo another opportunity to review and comment.

#### **V. Mitigation of impacts to Santa Clara Pueblo must be addressed**

Either through the issuance of a revised draft SWEIS or the finalization of the current draft SWEIS and for any record of decision related to the SWEIS, mitigation of impacts to Santa Clara Pueblo must be addressed and mitigation measures identified through direct government-to-government consultation with Santa Clara Pueblo. Such consultation should occur before any final SWEIS is issued.

Mitigation measures as defined in the CEQ regulations for NEPA include avoiding or minimizing environmental impacts, rectifying the impact by repairing, restoring, or rehabilitating the affected environment, reducing or eliminating the impact over time through preservation or maintenance, or compensating for the impact by providing substitute resources. 40 C.F.R. § 1508.20 (a)-(e).

DOE Indian Policy clarifies that the DOE will first try to avoid impacts to tribal trust resources but, if that is not possible, the Department will work with the affected tribe regarding corrective measures:

The DOE will be diligent in fulfilling its federal trust obligations to American Indian . . . governments in policy implementation and program management activities. The DOE will pursue actions that uphold . . . federally recognized and reserved rights of the Indian nations and peoples. The Department . . . will, to the extent of its authority, protect and promote these . . . trust resources and resource interests, and related concerns in these areas.

When internal policies, regulations, and statutes, or other barriers prohibit or hinder the DOE trust protection actions . . . the Secretary will direct the agency to seek corrective protection measures, and tribal government program inclusion.

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As appropriate, the DOE will provide delivery of technical and financial assistance related to DOE-initiated regulatory policy . . . . The DOE will continue to conduct a dialogue with Indian nations for long and short term decision-making

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when DOE actions impact Indian nations.

DOE Indian Policy at §§ I and III.

The CEQ Environmental Justice Guidance clarifies that the identification of a disproportionately high and adverse human health or environmental effect on an Indian tribe does not preclude a proposed agency action from going forward. Instead, it should “heighten agency attention to alternatives . . . , mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.” CEQ Environmental Justice Guidance at 10.

Also with respect to compliance with Executive Order 12898, on the same day the order was issued, President Clinton issued a separate memorandum regarding the executive order “to underscore certain provisions of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment.” *See Memorandum for the President to the Heads of Departments and Agencies*, Comprehensive Presidential Documents No. 279 (Feb. 11, 1994) <[http://www.epa.gov/fedfac/documents/executive\\_order\\_12898.htm](http://www.epa.gov/fedfac/documents/executive_order_12898.htm)>. The President’s memorandum accompanying Executive Order 12898 included the specific directive that mitigation measures identified as part of an environmental impact statement or record of decision should, whenever feasible, address significant and adverse environmental effects of proposed federal actions on Indian tribes and that those potential effects and mitigation measures should be identified by the federal agency in consultation with the affected tribe. *See id.*

As our comments illustrate, the LANL activities outlined in the draft SWEIS, including but not limited to those discussed in the expanded operations alternative, have significant and adverse environmental effects on Santa Clara Pueblo. Some of those adverse environmental impacts are disproportionately high when viewed in light of the CEQ Environmental Justice Guidance criteria.

The draft SWEIS describes various types of potential mitigation measures, including continued implementation of the 1992 Accord with Santa Clara Pueblo, but then states that the description of various mitigation measures “does not constitute a commitment to undertake any of these measures. Any such commitments would be reflected in the ROD [Record of Decision] following this SWEIS, with a more detailed description and implementation plan in a Mitigation Action Plan following the ROD.” Draft SWEIS at 5-204.

In accordance with DOE Indian Policy, the Executive Order 12898 Presidential directives, and the CEQ Environmental Justice Guidance, Santa Clara Pueblo seeks and expects direct government-to-government consultation regarding mitigation measures to address impacts to the Pueblo. While we appreciate the reference to the 1992 Accord, referencing this protocol does not

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complete DOE's mitigation duties. It is important to understand that public notices or requests for information sent to the Santa Clara Governor's office, as well as the distribution of lengthy pre-draft review documents or discussions with staff at the Pueblo, do not constitute government-to-government consultation. Government-to-government consultation involves direct discussions between the leadership of both governments which should occur early in the process in order to establish a common understanding about the framework for how to move forward with the details. This did not occur in developing the draft SWEIS but should occur prior to issuance of a revised draft SWEIS and the finalization of either the current, or a revised, draft SWEIS. Listed below are mitigation measures related to Santa Clara Pueblo for inclusion in a mitigation plan as part of the record of decision. This is not meant to be an all-inclusive list but is intended to assist the DOE in preparing for consultation with the Tribal Council. Mitigation of impacts to Santa Clara Pueblo should be mutually agreed to by both governments for the record of decision. Such mitigation measures should include:

1. Ensuring procedures are established with the Pueblo regarding any assumptions related to or about the Pueblo to be used in any on-going or future studies about public health that may relate to fulfillment of Executive Order 12898 and the CEQ Environmental Justice Guidance.
2. Establishing, or updating as appropriate, communication protocols between Santa Clara Pueblo and the DOE clarifying, among other things, different levels of communication (*i.e.*, briefings versus meetings versus government-to-government consultation) and appropriate processes to ensure proper communication.
3. Rehabilitating existing LANL regional aquifer monitoring wells that were improperly completed (as indicated by the DOE Inspector General Report) and replacing those improperly completed wells that cannot be rehabilitated.
4. Ensuring Santa Clara Pueblo has the proper resources to establish a regional aquifer monitoring well or wells at a strategic location or locations at Santa Clara Pueblo to monitor the effect of increased groundwater pumping by LANL. Should monitoring reveal impacts to the surface or ground water resources of the Pueblo, additional mitigation measures would be necessary.
5. Increasing controls to ensure all monitoring wells are installed and operated properly.
6. With the 1992 Accord as the foundation, establishing more detailed procedures regarding access by the Pueblo to LANL property (including classified areas) prior to any land disturbance activities to ensure traditional cultural properties are protected and regarding procedures to ensure that traditional ceremonies at the Pueblo are not disturbed by LANL

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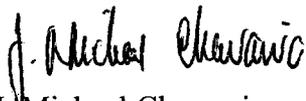
activities.

7. Ensuring Santa Clara Pueblo has the proper resources to increase sampling and monitoring of air emissions at the Pueblo.
8. Establishing an updated cooperative agreement between DOE and Santa Clara Pueblo regarding evacuation of LANL due to contamination or other safety reasons.
9. Ensuring Santa Clara Pueblo has the proper resources (including protective equipment and transportation vehicles) and training to address any emergency or evacuation issues resulting from operations, be they continued operations or expanded operations, at LANL.

Santa Clara Pueblo looks forward to working directly with the DOE to resolve the concerns expressed in these comments prior to the finalization of the SWEIS.

Thank you for considering these comments.

Sincerely,



J. Michael Chavarria  
Governor

cc: Members of the Santa Clara Tribal Council  
Joseph M. Chavarria  
Jessica Aberly  
Secretary James Rispoli  
Ambassador Linton Brooks  
CEQ Chairman James Connaughton  
Senator Pete V. Domenici  
Senator Jeff Bingaman  
Representative Tom Udall  
Representative Heather Wilson  
Governor Bill Richardson  
NMED Secretary Ron Curry