



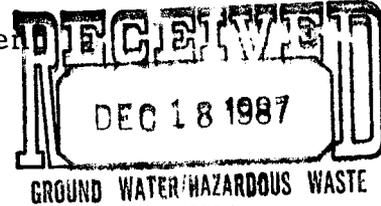
**Department of Energy**  
 Albuquerque Operations  
 Los Alamos Area Office  
 Los Alamos, New Mexico 87544

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LEGAL

Ms. Gini Nelson, Esquire  
 New Mexico Health & Environment Department  
 P.O. Box 968  
 Santa Fe, NM 87504-0968



Dear Ms. Nelson:

Enclosed for your consideration is the Department of Energy's proposal for resolving the alleged violations of the Compliance Order/Schedule for the Los Alamos National Laboratory dated May 7, 1985. This proposal is in response to the proposal submitted by the New Mexico Environmental Improvement Division (EID) on October 23, 1987.

We have rephrased the "Undertakings" section of the proposed agreement in a manner which we hope will satisfy EID's concern that the task defined is sufficient in scope and DOE's concern that the task be defined with finite limits.

After careful consideration and discussions with the Office of the General Counsel, DOE Headquarters, we have determined that the "Availability of Appropriations" section of the agreement must be stated as we have previously proposed it.

Please call me after you have had an opportunity to review the proposal.

Sincerely,

*Joyce Hester Laeser*  
 Joyce Hester Laeser  
 Counsel

Enclosure



16468

## MEMORANDUM OF AGREEMENT

This Memorandum of Agreement is made by and between the Environmental Improvement Division of the New Mexico Health and Environment Department, and the United States Department of Energy and the Regents of the University of California. This Agreement is intended to resolve all pending disputes between the parties with regard to alleged hazardous waste violations, specified hereinafter, and is made upon the following terms and conditions:

### I. Identification of Parties.

A. The United States Department of Energy [hereinafter called "DOE"] is an agency of the Federal Government. DOE owns the facility known as The Los Alamos National Laboratory [hereinafter called "LANL"] located in Los Alamos, New Mexico. As such, DOE is an "Owner" of a hazardous waste facility within the meaning of the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. Sections 6901 et seq., [RCRA], as well as within the meaning of the State Hazardous Waste Act, as amended, Sections 74-4-1 et seq., NMSA 1978, [HWA], and of the State Hazardous Waste Management Regulations, as amended [HWMR]. DOE has the authority to sue; and, to the extent the United States has waived its sovereign immunity to suit, to be sued; and to enter into contracts such as this Agreement.

B. The Regents of the University of California [hereinafter called "the University"] are a branch of the State of California equal and coordinate with the legislature, the judiciary, and the executive. The University operates LANL for DOE under Contract No. W-7405-ENG-36. As such, the University is an "Operator" of a hazardous waste facility, and is a "Generator" of hazardous waste and is engaged in "treatment," "storage," and "disposal" of such waste within the meaning of RCRA, HWA, and HWMR. The University has the authority to sue and be sued, and to enter into contracts such as this Agreement.

C. LANL is a multiprogram research and engineering laboratory owned and controlled by the United States Government. LANL is a "federal facility" within the meaning of RCRA; and, as such, is subject to regulation by EID under the provisions of HWA and HWMR, as authorized by Congress in 42 U.S.C. Sections 6961 et seq. All operations conducted at LANL are for the sole purpose of carrying out the responsibilities of DOE under the Atomic Energy Act of 1954 and the Department of Energy Organization Act. The day-to-day control and management of

operations at LANL are conducted for the DOE by the University under a cost-type, advanced-funds, non-profit, management and operating contract; although DOE retains and exercises general control and responsibility for the facility's overall operations, including approval of modifications and improvements to meet environmental requirements.

D. The Environmental Improvement Division [hereinafter called "EID"] is an agency of the State of New Mexico and has the lawful authority and duty to enforce the provisions of HWA and HWMR, as provided in Section 74-4-10 NMSA 1978. EID has general statutory authority to sue and be sued, and to enter into contracts such as this Agreement, pursuant to Section 74-1-6 NMSA 1978.

## II. Statement of Dispute.

A. Compliance Order --On May 7, 1985, EID issued to DOE and the University a Compliance Order/Schedule [hereinafter called "CO/S"] against LANL, under which LANL was required to accomplish certain specified tasks needed to remedy certain specified violations of HWMR, in accordance with specified deadlines commencing May 1, 1985, and ending on March 31, 1987. With respect to paragraphs 18 and 19 of the CO/S, dealing with inspection requirements of Section 206.B.5 of HWMR-2, LANL made submissions to EID on May 1, 1985, which satisfied some but not all of the requirements specified in paragraphs 18 and 19 of the CO/S and in Section 206.B.5 of HWMR-2. Deficiencies in LANL's May 1, 1985, submissions were discovered by EID during an on-site inspection of LANL on July 10-11, 1985, and were orally pointed out to the University by the EID. The University took further actions, which resulted in full compliance by LANL with all of the requirements of paragraphs 18 and 19 of the CO/S as of August 9, 1985.

B. Penalties for Violation of Order --Under paragraph 27 of the CO/S, EID put LANL on notice that in the event LANL should default on any provision of the CO/S, EID could seek civil penalties under the authority of the New Mexico HWA, which provides for a civil penalty of up to ten thousand dollars (\$10,000) per day for each violation of a compliance order or of the regulations.

### C. DOE and University Position:

1. DOE and the University assert that certain inadvertent administrative deficiencies, which occurred during at least a portion of the period between May 1, 1985, and August 9, 1985, may be violative of paragraphs 18 and 19 of the CO/S and of Section 206.B.5 of HWMR-2, but they dispute the number, duration, severity, and legal significance of such deficiencies. Additionally, they deny any lack of good faith, willful misconduct or

negligence, and further deny that the deficiencies constituted a threat to the public health, welfare, or the environment.

2. DOE's policy and practice is to assume responsibility for all fines, penalties, or other liabilities that are incurred by the University, as it does for other management and operating contractors, pursuant to its contract and not the result of willful misconduct or bad faith on the part of some Corporate Officer or Officers of the University or of any person acting as Laboratory Director. Therefore, DOE asserts that it is the real party in interest in this matter.

3. DOE and the University deny EID's assertions and are prepared to contest them in any enforcement action that might be brought by EID as a result of the alleged violations.

D. EID Position --EID asserts that the violations were numerous and serious, and further asserts that EID has the legal authority to impose civil penalties in substantial amounts for such violations at LANL. EID further asserts that inasmuch as RCRA imposes strict liability, it is immaterial whether the violations were the result of any lack of good faith, willful misconduct or negligence.

### III. Compromise and Settlement:

The parties to this Agreement are mutually desirous of fully and finally resolving the foregoing dispute amicably and without resort to legal action of any kind. Consequently, in consideration of the mutual benefits to be enjoyed, of the mutual undertaking expressed herein, and of the forbearance of EID to sue or otherwise to take any enforcement action against DOE or the University with respect to the alleged violations specified in paragraph II above, the parties hereby agree to carry out the following undertakings. In so agreeing, EID disclaims any intention to abandon its general legal position as to the power of EID to enforce all provisions of New Mexico law against federal facilities such as LANL, and EID hereby expressly reserves the right to seek civil penalties or any other sanction provided by New Mexico law in the event of any future violations at LANL of a CO/S or of any provision of HWMR, as amended, or other potentially applicable provisions of state law; and in so agreeing, DOE and the University hereby reserve the right to any and all defenses available under New Mexico and Federal law and hereby expressly disclaim any admission of wrongdoing.

#### IV. Undertakings.

A. Within thirty (30) days of signing this Agreement, DOE shall initiate the following activities and services calculated to protect New Mexico and its citizens from hazardous wastes and substances and improve coordination of DOE and EID Emergency Response Activities. Specifically, DOE shall provide 1800 hours of technical assistance, during the fourteen months following execution of this Agreement, to aid EID to specify an emergency preparedness program and such other related activities as EID and DOE may agree are consistent with the provisions of this agreement.

B. The focus of DOE's technical assistance shall be to identify and develop comprehensive criteria for the various functions and activities required by EID's statutory and regulatory emergency-preparedness mandates, to identify resources available to EID to fulfill such mandates, and to identify additional resources needed to fulfill such mandates. In the context of such criteria, DOE and EID shall establish protocols to achieve effective coordination of resources and activities and to facilitate cooperation between EID and DOE in responding to emergencies related to DOE's activities at Los Alamos. DOE and EID shall jointly select a technical coordinator who shall oversee the technical assistance provided under this Agreement.

C. Within thirty (30) days of concluding the effort, DOE shall submit to EID a final written emergency-preparedness-program criteria report. The final report shall be subject to EID approval; however, DOE and EID shall mutually agree on the requirements for the report at a sufficiently early time to ensure that the report can be completed and approved within the time allocated by this agreement.

D. DOE's obligations as specified herein may be carried out in whole or in part by the University or by DOE. Accordingly, any action taken by the University in fulfillment of DOE's obligations under this Agreement shall be to the same effect as if performed by DOE, and vice versa. If DOE's contract with the University is terminated or expires prior to such time as the obligations of DOE are fully satisfied hereunder DOE agrees to impose upon its successor contractor at LANL the same obligations as now imposed upon the University with respect to the satisfaction of DOE's obligations hereunder.

E. EID hereby waives any and all penalties and causes of action against DOE and the University arising out of or in connection with the alleged violations described in Section II hereof.

## V. Notice.

Whenever under the terms of this Agreement notice or information is required to be given by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice in writing which designates a different individual to receive such communications.

### DOE Designee:

H. E. Valencia  
Area Manager  
U.S. Department of Energy  
Los Alamos Area Office  
Los Alamos, New Mexico  
87544

### EID Designee:

Michael J. Burkhart  
Director  
Environmental Improvement  
Division  
P.O. Box 968  
Santa Fe, New Mexico  
87504-0968

### University Designee:

A. Tiedman  
Associate Director for Support,  
MS A120  
P.O. Box 1663  
Los Alamos, New Mexico 87545

## VI. Written Amendments Required.

No amendment to this Agreement shall be effective unless it is in writing and signed by duly authorized representatives of each of the parties hereto.

## VII. Effect upon Successors and Assigns.

The provisions of this Agreement shall apply to and be binding upon not only the contracting parties but also upon their officers, employees, agents, successors, and assigns.

## VIII. Compliance with Applicable Law.

All actions required or undertaken under this Agreement shall be in compliance with the requirements of all applicable federal, state, and local laws and regulations. Applicable Federal and State law shall govern all issues arising from or associated with the formation, performance, enforcement, and termination of this Agreement.

## IX. Availability of Appropriations.

It is understood and agreed that any obligation of DOE and the University hereunder requiring or involving the expenditure of money shall be subject to the availability of appropriations therefor, which may be lawfully spent for



For the University of California:

A. Tiedman  
Associate Director  
for Support

Date