

# Los Alamos

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**DOCKETED**  
BY THE HEARING CLERK

SEP 14 1994

NO. \_\_\_\_\_  
BEFORE THE SECRETARY OF ENVIRONMENT

September 14, 1994

Ms. Kim Martinez, Acting Hearing Clerk  
P.O. Box 26110  
1190 St. Francis Drive  
Harold Runnels Building 8-4100  
Santa Fe, New Mexico 87502

~~CONFIDENTIAL~~

Dear Ms. Martinez:

Please find enclosed the Answer and Request for Hearing of the Department of Energy and the University of California in connection with Compliance Order NMHWA94-12.

Sincerely,



for Joseph B. Rochelle

JBR/las

Enc.: a/s

Cy: Lisa Cummings, LAAO  
Joseph Vozella, ESH, LAAO  
Alan McMillan, ESH-DO, MS F690  
LC/GL Records Room  
File (2)

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NM ENVIRONMENT DEPARTMENT  
OFFICE OF THE SECRETARY



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STATE OF NEW MEXICO **DOCKETED**  
ENVIRONMENT DEPARTMENT BY THE HEARING CLERK

IN THE MATTER OF  
U.S. DEPARTMENT OF ENERGY  
AND THE REGENTS OF THE UNIVERSITY  
OF CALIFORNIA, LOS ALAMOS NATIONAL  
LABORATORY, LOS ALAMOS, NEW MEXICO,  
RESPONDENTS

SEP 14 1994  
COMPLIANCE ORDER  
NO. NMHWSA 94-12  
BEFORE THE SECRETARY OF ENVIRONMENT

ANSWER TO ADMINISTRATIVE ORDER REQUIRING  
COMPLIANCE AND PROPOSING TO ASSESS A CIVIL PENALTY

Respondents the Department of Energy (DOE) and the Regents of the University of California (UC) hereby submit this joint answer to Compliance Order 94-12 (Order).

FINDINGS

1. Respondents admit the findings contained in Paragraph 1.
2. Respondents admit the findings contained in Paragraph 2.
3. Respondents admit the findings contained in Paragraph 3.
4. Respondents admit the findings contained in Paragraph 4.
5. As to the findings contained in Paragraph 5, Respondents admit and state as follows:

In late April and May, 1994, the subcontractors of Respondents placed soils from the excavation of SWMU 3-010(a), located near Building 30 at Technical Area (TA) 3, into Pit 37 in Area G of TA 54. Pit 37 is a low level radioactive solid waste landfill. The soil was removed as part of the remediation of this SWMU.

As part of their initial sampling effort and in response to a request by Surface Water Quality Bureau personnel, Respondents had samples taken in August, 1992, of suspected

contaminated soils and these samples were analyzed by a laboratory which found trace levels of volatile organics, i.e., 1,1,1-trichloroethane (TCA) and acetone. As the level of these contaminants was far below screening action levels (SALS) for remediation, their presence did not affect regulatory compliance-based decisions. Personnel of both the Surface Water Quality Bureau and the Hazardous and Radioactive Materials Bureau of the New Mexico Environment Department (NMED) were aware of the presence of traces of these volatile organics and approved a version of a sampling and remediation plan as early as January, 1993, that did not address sampling of or further action upon volatile organics, due to the minute levels at which these volatile organics were present.

The soils were taken out of the SWMU in a number of lifts and the soils at issue were taken out after all mercury-containing soils had been removed. At the time of the disposal of the soil at issue in Pit 37, additional samples were taken of this soil and analyzed and traces of TCA and trichloroethylene (TCE) were observed in the soil. The source of the trace levels of these contaminants in the soil was unknown. Subsequent interviews with former employees of the nearby pump shop indicated that solvents may have been used to clean the pumps. Accordingly, Respondents suspected that the soil might have been contaminated with solvent-containing wastes.

To the extent that the findings in the first sentences of Paragraph 5 of the Order are inconsistent with or contrary to the above statements of Paragraph 5 of the Answer, they are denied by Respondents. Respondents admit the findings contained in the second sentence of Paragraph 5 of the Order, except that Respondents deny that the soil had been characterized as being "contaminated" with mercury and affirmatively state that the soil had been

characterized as "containing" mercury. Respondents deny the finding in the third and fourth sentences of Paragraph 5 of the Order.

Respondents admit the findings contained in the fifth sentence of Paragraph 5 of the Order, except that Respondents deny that the first lift of the soils was found to contain "gross mercury contamination," and affirmatively state that the first lift of soils was found to "contain" mercury.

Respondents deny the findings contained in the sixth sentence of Paragraph 5 of the Order, except that Respondents admit that the soils containing mercury were containerized and handled as low-level radioactive waste.

6. Respondents admit the findings contained in Paragraph 6, except that Respondents deny that the soils were mercury "contaminated," but admit that the soils "contained" mercury.

7. Respondents admit the findings contained in Paragraph 7.

8. Respondents admit the findings contained in Paragraph 8, except that Respondents deny that samples were taken " to determine the level total petroleum hydrocarbons (TPH)." Respondents affirmatively state that samples were taken to determine the mercury and BTEX constituents, if any, in the mineral oil suspected of being present at the soil/tuff contact. Respondents admit the findings contained in the second sentence of Paragraph 8, subject to the insertion of the phrase "of these samples" between the number "1994" and the word "indicated." Thus, the sentence would read: "Analyses received by Respondents on May 13, 1994, of these samples indicated the presence of volatile organic constituents."

With regard to the findings contained in the third sentence in Paragraph 8, Respondents admit that the further analysis of samples of the soil that was placed in Pit 37 confirmed the presence of trace amounts of volatile organics, i.e., 1,1,1-trichloroethane (TCA) and trichloroethylene (TCE), which when discarded, may constitute listed hazardous wastes, but deny that the presence of the trace amounts of these two constituents in the soil necessarily rendered the soil a hazardous waste. With regard to the findings contained in the fourth sentence of Paragraph 8, Respondents admit that based on the analytical results of the soil at issue, Respondents contacted Complainant by phone on May 20, 1994, and informed Complainant that soils containing trace amounts of TCA and TCE had been placed into Pit 37, that further investigation and inquiry would occur as to whether or not the soils constituted hazardous wastes, and that Respondent DOE provided by way of letter dated June 1, 1994, to Benito Garcia, Chief of the Hazardous and Radioactive Materials Bureau, a copy of which is attached hereto as Attachment 1, official notification of the placement of the soil in Pit 37 and of Respondents' determination that the soil placed in Pit 37 was not a RCRA hazardous waste. Respondents deny the findings contained in the fourth sentence of Paragraph 8 to the extent such findings are inconsistent with or contrary to the admissions contained in this sentence.

9. With regard to the findings contained in the first sentence of Paragraph 9, Respondents deny that the soils were hazardous/mixed waste contaminated, but admit the remaining findings contained therein. With regard to the findings contained in the second sentence in Paragraph 9, Respondents admit that they have not applied for a permit to treat, store, or dispose of hazardous/mixed waste at Pit 37. Respondents deny any other findings contained

in Paragraph 9 to the extent such findings are inconsistent with or contrary to the admission contained in Paragraph 9 of this Answer.

10. With regard to the findings contained in Paragraph 10, Respondents deny that they have failed to notify the Environment Protection Agency (EPA) that LANL is a transporter of hazardous waste. Respondents affirmatively state that the EPA was notified by Respondents that LANL was a transporter of hazardous wastes by way of submittal of EPA Notification Form 8700-12, dated August 13, 1980. Respondents assert that Complainant or its predecessor in interest was notified in 1980 of the fact that LANL was a transporter and therefore denies this finding. A copy of the August 13, 1980, notification is attached hereto as Attachment 2.

#### CONCLUSIONS

1. Respondents admit the conclusions contained in Paragraph 1.
2. Respondents admit the conclusions contained in Paragraph 2, but deny that they fulfill the terms of the referenced definition of generator with respect to the soil that was placed in Pit 37.
3. Respondents admit the conclusions contained in Paragraph 3, but deny that they generated "mixed waste" as described by the words in Paragraph 3 with respect to the soil that was placed in Pit 37.
4. Respondents admit all of the conclusions contained in Paragraph 4, except that Respondents deny that the soil that was placed into Pit 37 was "hazardous waste" as described by the terms of the referenced definition.
5. Respondents admit the conclusions contained in Paragraph 5.

6. Respondents admit all of the conclusions contained in Paragraph 6, except that Respondents deny that they engage in the disposal of hazardous waste onsite.
7. Respondents admit the conclusions contained in Paragraph 7.
8. Respondents admit all of the conclusions contained in Paragraph 8, except that Respondents deny that they fulfill the terms of the referenced definition of transporter with respect to the soil that was placed in Pit 37.
9. Respondents admit all of the conclusions contained in the first sentence of Paragraph 9, except that Respondents deny that the referenced regulations apply to Respondents with respect to the soil that was placed in Pit 37 and deny that they have violated regulations in Part 262 as specified thereafter in the Order. Respondents admit all of the conclusions contained in the second sentence of Paragraph 9, except that Respondents deny that the referenced regulations apply to Respondents with respect to the soil that was placed in Pit 37 and deny that they have violated regulations in Part 270 as specified in the remainder of the Order.
10. Respondents deny all the conclusions contained in the first and second sentences of Paragraph 10, except that Respondents admit that Section 301 of HWMR-7 incorporates by reference federal regulation 40 C.F.R. 262.20(a).
11. Respondents deny all the conclusions contained in the first and second sentences of Paragraph 11, except that Respondents admit that Section 901 of HWMR-7 incorporates by reference federal regulation 40 C.F.R. 270.10.

12. Respondents deny all of the conclusions contained in the first and second sentences of Paragraph 12, except that Respondents admit that Section 301 of HWMR-7 incorporates by reference federal regulation 40 C.F.R. 262.12 (a).

13. Respondents deny the conclusions contained in the first paragraph numbered 13.

14. Respondents deny the conclusions contained in the second paragraph numbered 13, except that if conclusion 12 is determined to be a violation, which Respondents specifically deny, then Respondents admit that such violation, if any, is not a high priority violation.

#### FIRST AFFIRMATIVE DEFENSE

Respondents' Answer and each denial contained therein constitutes Respondents' first affirmative defense.

#### SECOND AFFIRMATIVE DEFENSE

Complainant's findings, conclusions, proposed penalties, ordered actions and any and all other relief sought in Complainant's Order are barred by the doctrine of estoppel inasmuch as personnel employed by Complainant approved Respondents' Sampling and Remediation Plan which proposed management of the soil at issue as a nonhazardous waste and Respondents relied on such approval.

#### THIRD AFFIRMATIVE DEFENSE

Complainant's findings, conclusions, proposed penalties, ordered actions and any and all other relief sought in Complainant's Order are barred by the doctrine of estoppel inasmuch as personnel employed by Complainant approved Respondent's management of the soil at issue as a nonhazardous waste.

#### **FOURTH AFFIRMATIVE DEFENSE**

Complainant's findings, conclusions, proposed penalties, ordered actions and any and all other relief sought in Complainant's Order are barred by the doctrine of ratification inasmuch as personnel employed by Complainant approved Respondents' Sampling and Remediation Plan. Complainant's approval of the Sampling and Remediation Plan serves to confirm as proper Respondents' management of the soil at issue as nonhazardous waste containing only trace quantities of volatile organics in the soils.

#### **FIFTH AFFIRMATIVE DEFENSE**

Based on the discussion contained on pages two and three of Respondent DOE's official letter of notification to Benito Garcia, Chief, Hazardous and Radioactive Materials Bureau, dated June 1, 1994 (Attachment 1), which explains the basis for Respondents' determination that the soil disposed of in Pit 37 was not a hazardous waste, Respondents maintain that this soil was not a hazardous or mixed waste.

#### **SIXTH AFFIRMATIVE DEFENSE**

Based on Respondents' determination and belief that the soil transported to Pit 37 was not a hazardous or mixed waste, Respondents state that the manifest requirement contained in 40 C.F.R. 262.20(a), adopted by reference by Section 301 of HWMR-7, was not applicable to the transportation of the soil.

#### **SEVENTH AFFIRMATIVE DEFENSE**

If it is finally determined by the adjudicatory process that the soil transported to Pit 37 was a hazardous or mixed waste, which Respondents specifically deny, then Respondents

state that the manifest requirement contained in 40 C.F.R. 262.20(a), adopted by reference by Section 301 of HWMR-7, did not require use of the EPA uniform manifest form for transport of the soil from TA-3 to TA-54, because the soil was transported onsite within the meaning of regulation 40 C.F.R. 260.10, adopted by reference by Section 101 of HWMR-7, and was not transported for "offsite treatment, storage, or disposal" as required by the terms of 40 C.F.R. 262.20(a).

#### EIGHTH AFFIRMATIVE DEFENSE

If it is finally determined by the adjudicatory process that the soil transported from TA-3 to Pit 37 in TA-54 was a hazardous or a mixed waste, which Respondents specifically deny, then Respondents state that as indicated in LANL's Hazardous Waste Facility Permit, Permit Number 0890010515-1, issued November 8, 1989 (Permit), the term "onsite" is defined to include TA's 3 and 54 and thus the transport of the soil occurred and remained onsite. Respondents state that if it is finally determined by the adjudicatory process that the soil transported from TA-3 to Pit 37 in TA-54 was a hazardous or mixed waste, which respondents specifically deny, the soil should have been transported with the use of LANL's Chemical Waste Disposal Request Form (CWDR), which functions as an internal manifest form, as referenced in Attachment A (Waste Analysis Plan and Waste Segregation Procedures) and Attachment F (Container Management) of LANL's Hazardous Waste Facility Permit. Respondents admit that the CWDR was not used in transporting the soil, as it was not known at the time of transport that the soil might be construed to be a hazardous or mixed waste.

### NINTH AFFIRMATIVE DEFENSE

If it is determined in the adjudicatory process that the soil disposed of in Pit 37 was neither a hazardous or a mixed waste, which is the position of Respondents, then any disposal of the soil in Pit 37 was legally permissible and no violation of Section 901 of HWMR-7, which incorporates by reference 40 C.F.R. 270, occurred, as no hazardous or mixed waste would have been placed in an unpermitted landfill.

### TENTH AFFIRMATIVE DEFENSE

As admitted by Complainant in the Order, Respondent DOE self-reported the disposal of the soil in Pit 37, and followed up with an official written notification of the incident. In this notification Respondent DOE (1) admitted that there was room for regulatory interpretation concerning the character of the soil, (2) offered a well reasoned interpretation for why the soil should not be construed to be a hazardous waste, and (3) indicated, in the event that it was determined that the soil was a hazardous waste, that Respondents were prepared to remove the soil from the pit. Complainant's response to these actions was to issue the Order against Respondents. Respondents expression and exercise of good faith should lead to the reduction if not elimination of any civil penalty determined to be appropriate by the Hearing Officer or the Secretary.

### ELEVENTH AFFIRMATIVE DEFENSE

With regard to the civil penalty proposed by Complainant, Respondents assert the following defenses:

- a. Complainant failed to consider the good faith efforts of Respondents to comply with alleged applicable requirements, pursuant to 74-4-10.B. NMSA 1978;

b. Complainant failed to consider the seriousness of the violation, pursuant to 74-4-10.B. NMSA 1978;

c. Complainant failed to adhere to the Hazardous Waste Penalty Policy adopted by Complainant on September 4, 1992;

d. Complainant improperly imposed penalties for violations of law which did not occur; and

e. Complainant's imposition of penalties is arbitrary, capricious and without substantial basis in law or in fact.

f. Complainant's imposition of penalties is barred by the doctrine of estoppel.

#### FACTS PLACED AT ISSUE

Pursuant to the stated requirement on page 6 of the Order, Respondents state that they place at issue all facts denied in this Answer.

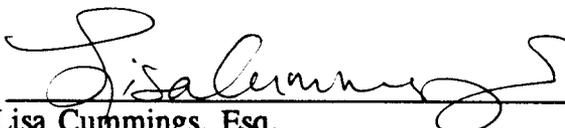
#### REQUEST FOR HEARING

Pursuant to Section 74-4-10.H. NMSA Respondent hereby requests a hearing.

WHEREFORE, Respondents request that the determination be made that Respondents did not violate Section 301 of HWMR-7, which incorporates by reference 40 C.F.R. 262.20 and 40 C.F.R. 262.12(a), and did not violate Section 901 of HWMR-7, which incorporates by reference 40 C.F.R. 270.10, that the civil penalty proposed by Complainant be denied,

that the schedule of compliance and the actions thereunder ordered by Complainant be denied, and that other such relief as the Hearing Officer deems just and proper be granted.

UNITED STATES DEPARTMENT OF ENERGY

By:   
\_\_\_\_\_  
Lisa Cummings, Esq.  
Los Alamos Area Office  
Los Alamos, New Mexico 87544  
(505) 667-4667

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

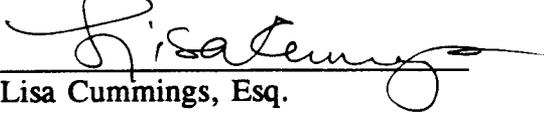
By:   
\_\_\_\_\_  
for Joseph B. Rochelle, Esq.  
Post Office Box 1663  
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(505) 667-3766

**Certificate of Service**

I hereby certify that a copy of the foregoing Answer was hand-delivered on the fourteenth day of September, 1994 to the following individuals:

**Kathleen M. Sisneros, Director  
Waster and Waste Management Division  
New Mexico Environment Department  
Post Office Box 26110  
Santa Fe, New Mexico 87502-6110**

**Susan McMichael, Esq.  
Assistant General Counsel  
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\_\_\_\_\_  
**Lisa Cummings, Esq.**