

8/10/98
Generator

STATE OF NEW MEXICO
ENVIRONMENT DEPARTMENT



IN THE MATTER OF
THE UNITED STATES DEPARTMENT OF ENERGY
AND THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
LOS ALAMOS, NEW MEXICO
NM0890010515

COMPLIANCE ORDER
HRM - 98-02 (C0)

ANSWER TO ADMINISTRATIVE COMPLIANCE ORDER

Respondent the Regents of the University of California (UC or Respondent) hereby submits the following as its Answer to Compliance Order 98-02 (Order).

FINDINGS

1. Respondent admits the findings contained in Paragraphs 1, 2, 3, 4, 5 and 6.
2. With regard to the findings contained in Paragraph 7, Respondent admits that at times it has generated more than 1000 kilograms of hazardous waste in a month and that it has accumulated in excess of 6000 kilograms of hazardous waste on-site at Los Alamos National Laboratory (LANL), but Respondent objects to the phrase "at all material times" as being vague, ambiguous, and without clear indication of the intended scope of the intended time frame and therefore denies that the findings contained in Paragraph 7 occurred "at all material times". Except as specifically admitted above, the findings contained in Paragraph 7 are denied.
3. Respondent admits the findings contained in Paragraph 8.
4. With regard to the findings contained in Paragraph 9, Respondent admits that the Hazardous Waste Permit identified in Paragraph 8 of the Order (Permit) authorizes the incineration, treatment and storage of wastes identified in Attachment G to the Permit in accordance with conditions specified in the Permit, but denies that the Permit applies to or governs Respondent's generation of hazardous waste or Respondent's accumulation of hazardous waste in satellite accumulation areas (SAAs) or less than 90 day storage areas (<90 day SA). Respondent affirmatively states that its generation and its accumulation of hazardous waste in SAAs or <90 day SAs is governed by and subject to 20 N.M.A.C. 4.1.300, which incorporates by reference 40 C.F.R. Part 262.
5. With regard to the findings contained in Paragraph 10, Respondent affirmatively states that with regard to the hazardous waste treatment or storage units to which the Permit applies, the conditions of the Permit govern. To the extent that the findings in Paragraph 10 are inconsistent with or contrary to the affirmative statements contained in the preceding



sentence, these findings are denied. Respondent further affirmatively states that the Permit does not govern or apply to Respondent's generation of hazardous waste or Respondent's accumulation of hazardous waste in SAAs or <90 day SAs, which are governed by 20 N.M.A.C. 4.1.300., which incorporates by reference 40 C.F.R. Part 262.

6. With regard to the findings contained in Paragraph 11, Respondent admits all of these findings, but Respondent affirmatively states that no such noncompliance with the terms of the Permit has occurred as alleged by Complainant in the Order.
7. Respondent admits the findings contained in Paragraph 12, but Respondent denies that the requirements of the Permit apply with regard to Respondent's management of the "at least 156 gas cylinders" referred to in Paragraph 32 of the Order. Hereinafter "gas cylinders" in this Answer shall refer to the "at least 156 gas cylinders" referred to in Paragraph 32 of the Order, subject to and incorporating by reference the denials and affirmative statements contained in Paragraph 27 of this Answer with respect to this phrase. Respondent affirmatively states that even if the requirements of the Permit did apply to its management of the gas cylinders, which Respondent specifically denies, Respondent met the Permit requirements referred to in Paragraph 12 of the Order.
8. With regard to the findings contained in Paragraph 13, Respondent admits that as to the hazardous waste treatment and storage units governed by the Permit, the Permit requires the permittees to follow the procedures for waste analysis described in the Waste Analysis Plan, which is attached to the Permit as Attachment A, but denies that the Waste Analysis Plan, attached to the Permit as Attachment A, applies to waste that is accumulated in SAAs or <90 day SAs at the LANL facility. Respondent affirmatively states that its management of some of the gas cylinders at TA-21, upon the determination that such gas cylinders were to be discarded as waste, was in a SAA and was subject to 20 N.M.A.C. 4.1.300., which incorporates by reference 40 C.F.R. Part 262.
9. With regard to the findings contained in Paragraph 14, Respondent admits that the Permit requires Respondent to comply with the requirements of 40 C.F.R. § 264.17 with regard to ignitable, reactive or incompatible wastes, but Respondent denies the Permit applies to its management of the waste gas cylinders while in an SAA and affirmatively states that even if these Permit requirements did apply, which Respondent specifically denies, Respondent met such requirements. Respondent further denies that at the time of issuance of the Permit, 20 N.M.A.C. 4.1.500 was in existence. Respondent affirmatively states that such regulation could not and did not incorporate 40 C.F.R. § 264.17 by reference in 1989. Respondent further affirmatively states that HWMR-5 as amended in 1989 applies to specified portions of the permit and incorporates the version of 40 C.F.R. § 264.17 by reference in existence at the time of permit issuance, and that these regulations contain requirements with respect to ignitable, reactive, or incompatible wastes. To the extent that the findings in Paragraph 14 are inconsistent with or contrary to the affirmative statements contained in the preceding sentence, they are denied. Respondent further denies that 40

C.F.R. § 264.17 as it existed in 1989 and as incorporated by reference by HWMR-5, applied to Respondent's management of the gas cylinders in an SAA, and affirmatively states that such management was subject to 20 N.M.A.C. 4.1.300., which incorporates by reference 40 C.F.R. Part 262.

10. Respondent admits the findings contained in Paragraph 15, except that Respondent denies that the Permit applies to its management of gas cylinders containing product or gas cylinders containing a hazardous wastes being managed in an SAA. Respondent further denies that any noncompliance with the Permit, which Respondent specifically denies with respect to it handling of the gas cylinders, endangered human health or the environment. Respondent affirmatively states that the 24 hour and 5 day reporting requirements only apply to the occurrence of such an endangerment.
11. With regard to the findings contained in Paragraph 16, Respondent admits that the Permit contains an authorization to store gas cylinders containing hazardous wastes identified in the Permit at the Technical Area 54, Area L permitted storage area but denies that the Permit applies to the accumulation of hazardous waste in gas cylinders in SAAs or in <90 day SAs, and further denies that the provisions of the Permit prohibit the accumulation of hazardous waste in gas cylinders in other locations if such other locations are SAAs or <90 day SAs.
12. With regard to the findings contained in Paragraph 17, Respondent admits that the Permit identifies in Permit Attachment G the hazardous wastes which the Permittee is allowed to store in permitted units and prohibits storage of hazardous waste not identified in Permit Attachment G in such permitted units, but Respondent denies that such Permit prohibition applies to SAAs or <90 day SAs.
13. With regard to the findings contained in Paragraph 18, Respondent affirmatively states that the Permit requires Respondents to manage containers as required by Attachment F to the Permit and by 40 C.F.R. § 264.173, as incorporated by reference by HWMR-5 as amended in 1989. To the extent that the findings contained in Paragraph 18 are inconsistent with or contrary to the affirmative statements contained in the preceding sentence, they are denied. Respondent further denies that the Permit requirement stated in Paragraph 18 applies to hazardous wastes accumulated in SAAs or <90 day SAs. Respondent further affirmatively states that the management of the gas cylinders in an SAA was subject to 20 N.M.A.C. 4.1.300., which incorporates by reference 40 C.F.R. Part 262.
14. With regard to the findings contained in Paragraph 19, Respondent admits that NMED inspected LANL in 1992 and issued Respondent and the United States Department of Energy (DOE) a compliance order that assessed civil penalties. Respondent also admits that violations as described in this Paragraph were alleged by NMED in the referenced compliance order, and that a number of these violations were or may have been admitted

- by Respondent or DOE or both Respondent and DOE. Respondent, however, denies that all of the violations alleged by the referenced compliance order were admitted by Respondent or DOE or both of them, or that all of the alleged violations constituted actual violations. Respondent further affirmatively states that the civil penalties actually paid in settlement of the alleged non-compliance were less than the amount originally assessed in the referenced compliance order.
15. With regard to the findings contained in Paragraph 20, Respondent admits that NMED inspected LANL in 1993 and issued Respondent and DOE a compliance order that assessed civil penalties. Respondent also admits that violations as described in this Paragraph were alleged by NMED in the referenced compliance order, and that a number of these violations were or may have been admitted by Respondent or DOE or both Respondent and DOE. Respondent, however, denies that all of the violations alleged by the referenced compliance order were admitted by Respondent or DOE or both of them, or that all the alleged violations constituted actual violations. Respondent further affirmatively states that the civil penalties actually paid in settlement of the alleged non-compliance were less than the amount originally assessed in the referenced compliance order.
 16. With regard to the findings contained in Paragraph 21, Respondent admits that NMED inspected LANL in 1994 and issued Respondent and DOE a compliance order that assessed civil penalties. Respondent also admits that violations as described in this Paragraph were alleged by NMED in the referenced compliance order, and that a number of these violations were or may have been admitted by Respondent or DOE or both Respondent and DOE. Respondent, however, denies that all of the violations alleged by the referenced compliance order were admitted by Respondent or DOE or both of them, or that all of the alleged violations constituted actual violations. Respondent further affirmatively states that the civil penalties actually paid in settlement of the alleged non-compliance were less than the amount originally assessed in the referenced compliance order.
 17. With regard to the findings contained in Paragraph 22, Respondent admits that NMED inspected LANL in 1995 and issued Respondent and DOE a compliance order that assessed civil penalties. Respondent also admits that violations as described in this Paragraph were alleged by NMED in the referenced compliance order, and that a number of these violations were or may have been admitted by Respondent or DOE or both Respondent and DOE. Respondent, however, denies that all of the violations alleged by the referenced compliance order were admitted by Respondent or DOE or both of them, or that all of the alleged violations constituted actual violations. Respondent further affirmatively states that the civil penalties actually paid in settlement of the alleged non-compliance were less than the amount originally assessed in the referenced compliance order.
 18. With regard to the findings contained in Paragraph 23, Respondent admits that NMED inspected LANL in 1996 and issued DOE a letter of violation. Respondent also admits that violations as described in this Paragraph were alleged by NMED in the referenced letter

of violation. Respondent, however, denies that all of the violations alleged by the referenced letter of violation were admitted by DOE or Respondent or both of them, or that all the alleged violations constituted actual violations.

19. With regard to the findings contained in Paragraph 24, Respondent admits that the referenced compliance orders and letter of violation when taken together alleged violations similar to those described in Paragraph 24. Respondent denies, however, that each such compliance order or letter of violation contained every alleged violation described in Paragraph 24 and denies that every such alleged violation constituted an actual violation.
20. With regard to the findings contained in Paragraph 25, Respondent affirmatively states the following:
 - a. Technical Area 21 at LANL has a number of subareas, one of which constitutes DP East and another of which constitutes DP West; these two areas are completely segregated and fenced off from each other.
 - b. DP West was the site of former Defense Project work and this site was continuously occupied until a major portion of it was placed in safe shutdown in October, 1997.
 - c. The DP West facility consisted of a main corridor which ran from Building 210 at the West End to Building 150 on the East End. Four main buildings ran north and south off of the main corridor and these included Building 2, Building 3, Building 4 and Building 5. These four main buildings were further subdivided into north and south: buildings north of the main corridor were referred to as N; buildings to the south of the main corridor were referred to as S.
 - d. The structures designated Building 2S, Building 3S, Building 4S, Building 5N and Building 5S were not used as laboratories after a decontamination effort over the 1978-81 time frame.
 - e. DP West is the area in which the gas cylinders addressed in the Order were kept.

To the extent that the findings contained in Paragraph 25 are inconsistent with or contrary to the above affirmative statements, they are denied.

21. With regard to the findings contained in the first sentence of Paragraph 26, Respondent objects to the clause "the laboratory buildings were designated for decommission and demolition some time in the 1970's" on the grounds that such clause is vague and ambiguous and therefore denies same; Respondent admits that different buildings in the DP West Area have been decommissioned and demolished at different times. With regard to

the findings contained in the second sentence of Paragraph 26, Respondent objects to these findings on the grounds that they are vague and ambiguous inasmuch as material time frames are not identified and therefore denies same. With regard to the findings contained in the two sentences of Paragraph 26, Respondent affirmatively states as follows:

- a. In 1977-78 plutonium operations were transferred from DP West to Technical Area 55. During 1978-81 significant portions of DP West underwent decontamination. A major portion of these decontaminated facilities continued to be used after the decontamination.
- b. During 1993-94, Buildings 3S and 4S were decommissioned and demolished.
- c. In December 1993, research work ceased in Building 4N.
- d. In May 1995, research work ceased in Building 3N.
- e. Removal and relocation of materials, laboratory equipment, apparatuses, chemicals and gas cylinders (sometimes referred to hereinafter as "materials") from Buildings 3N and 4N occurred over an extended period of time and was completed by February, 1996.
- f. Some of the removed materials from Buildings 3N and 4N were taken directly to facilities in other technical areas at LANL for continued use; some of the removed materials were discarded as waste to appropriate waste disposal facilities; some of the removed materials were staged in other buildings at DP West, including Building 5S, for future relocation and use.
- g. Buildings 3N and 4N were demolished in 1996 and 1997.

To the extent the findings in Paragraph 26 are inconsistent with or contrary to the affirmative statements above, they are denied.

22. With regard to the findings contained in Paragraph 27, Respondent affirmatively states that based on direction by DOE, Respondent submitted a plan for relocation of operations of a substantial portion of the DP West facility on June 12, 1993, calling for cessation of operations in Building 4N by the end of December of 1993 and in Building 3N by the end of 1994. Respondent further affirmatively states that the cessation of operations in Building 3N was subsequently extended by agreement of DOE and Respondent until May, 1995. Respondent further affirmatively states that one purpose of the relocation out of substantial portions of DP West was to have the facilities in a state of readiness for decontamination and decommissioning. To the extent that the findings contained in Paragraph 26 are inconsistent or contrary to the preceding affirmative statements in this paragraph, they are denied.

23. With regard to the findings contained in Paragraph 28. Respondent affirmatively states that the occupants of Building 4N had ceased research work by the end of December 1993, and that relocation of materials from Building 4N continued through February of 1996. Some portion of the materials to be relocated was staged in other buildings in DP West, including Building 5S. To the extent that the findings contained in Paragraph 28 are inconsistent with or contrary to the preceding affirmative statements in this paragraph, they are denied.
24. With regard to the findings contained in Paragraph 29, Respondent affirmatively states that the occupants of Building 3N had ceased research work by the middle of May, 1995, and the relocation of materials from Building 3N continued through February of 1996. Some portion of the materials to be relocated was staged in other buildings in DP West, including Building 5S. To the extent that the findings contained in Paragraph 29 are inconsistent with or contrary to the preceding affirmative statements in this paragraph, they are denied.
25. With regard to the findings contained in Paragraph 30, Respondent affirmatively states that experiments in Buildings 3N and 4N continued until all research work ceased and that various gases were maintained in cylinders in these buildings both before and after research work ceased. Some of these gas cylinders were taken from Buildings 3N and 4N after research work had ceased in these buildings and were used for ongoing experiments at other locations at LANL, including Building 5 and Building 150 at DP West. To the extent that the findings in Paragraph 30 are inconsistent with or contrary to the preceding affirmative statements in this paragraph, they are denied.
26. With regard to the findings contained in Paragraph 31, Respondent affirmatively states that some of the gases used in Buildings 3N and 4N and later elsewhere were synthesized by the occupants in these buildings, that some other gases were synthesized elsewhere at LANL, and that some other gases were purchased from commercial vendors. To the extent that the findings contained in Paragraph 31 are inconsistent with or contrary to the preceding affirmative statements in this paragraph, they are denied.
27. Respondent denies all of the findings contained in Paragraph 32, except that Respondent admits that the gas cylinders were moved in batches from Building 3N and 4N to a staging area in Building 5S over a time period extending from the time research work ceased in each building (December, 1993 for Building 4N and May, 1995 for Building 3N) through February 1996. Respondent further admits that in August of 1996 a decision was made to discard some of the gas cylinders and a SAA was set up in the staging area of Building 5S, to be administered by the assigned waste management coordinator and the facility management team who were responsible for removing occupants and their materials so that decontamination and decommissioning could proceed. Respondent objects to the use of the phrase "at least 156 cylinders" on the grounds that it is vague, ambiguous and utterly open ended. Respondent further objects to the use of the term "vacating" as it is vague and ambiguous. Respondent admits that in an attachment entitled "Chronological Sequence of Events" attached to a letter to Benito Garcia from G. Thomas Todd of DOE and Dennis

Erickson of UC, dated March 6, 1997 (hereinafter "Attachment 1"), a total of 155 gas cylinders are referred to (37 unknowns, 118 knowns) and that attached to the same letter are 5 pages of spreadsheets identifying 193 gas cylinders (hereinafter "Attachment 2") that were then being managed at Building 5 at DP West. Respondent denies, however, that all of the 155 gas cylinders referred to in Attachment 1 constituted solid waste or hazardous waste and denies that all of the 193 gas cylinders identified in Attachment 2 constituted a solid waste or a hazardous waste.

With regard to the findings contained in Paragraph 32, Respondent affirmatively states as follows:

- a. While the cylinders were located and managed in Buildings 3N and 4N, no decision had been made by the researchers who used the gas cylinders to discard them as they constituted a useful commercial chemical product and further use was contemplated. Pursuant to 40 C.F.R. § 261.2, as incorporated by reference by 20 N.M.A.C. 4.1.200, the gas cylinders did not constitute a solid waste or a hazardous waste.
 - b. During the time the gas cylinders were staged in an area in Building 5S and before the decision was made to discard some of them as waste in August 1996 (hereinafter, the "staging period"), the gas cylinders constituted a useful commercial chemical product and further use was contemplated. Pursuant to 40 C.F.R. § 261.2, as incorporated by reference by 20 N.M.A.C. 4.1.200., the gas cylinders did not constitute a solid waste or a hazardous waste.
 - c. During the staging period, a number of gas cylinders were taken by researchers from the staging area in Building 5S for further use. Moreover, not all gas cylinders that were in the staging area in Building 5S were placed into the SAA in August 1996 for discard as waste.
28. Respondent denies the findings contained in Paragraph 33. Respondent affirmatively states that while the gas cylinders were in Buildings 3N and 4N, they constituted a useful commercial chemical product. Respondent further affirmatively states that the gas cylinders located in Buildings 3N and 4N were moved in batches to the staging area in Building 5S and that such movement was completed by the end of February of 1996.
29. With regard to the findings contained in Paragraph 34, Respondent denies that numerous gas cylinders under the Hazardous Waste Act (HWA) were discarded and abandoned in Buildings 3N and 4N. Respondent further denies that the alphabetized list in Paragraph 34 identifies gas cylinders abandoned at Buildings 3N and 4N. Upon information and belief Respondent denies that all of the gas cylinders included in the alphabetized list constituted hazardous wastes, or if some did so constitute hazardous wastes, denies that such hazardous wastes are accurately identified in the alphabetized list.

30. Respondent's response to Paragraph 35 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer. Respondent affirmatively states with regard to the findings contained in Paragraph 35 that waste generation with respect to the gas cylinders first occurred in August, 1996, when the decision was made by the former occupants of Buildings 3N and 4N with the facility management team and the waste management coordinator to discard some of the gas cylinders as waste. Respondent denies that the gas cylinders were subject to regulation as either solid wastes or hazardous wastes prior to the August 1996 decision to discard some of the gas cylinders. Simultaneous with Respondent's decision to discard the gas cylinders, the gas cylinders were placed in the SAA in Building 5S. Respondent admits that, after the August 1996 decision to discard the cylinders, some of the gas cylinders in the Building 5S SAA were hazardous wastes, but denies that all of the cylinders were hazardous wastes. Respondent affirmatively states that some of the gases in the Building 5S SAA had been previously synthesized by the occupants in Buildings 3N and 4N, that some other gases had been synthesized elsewhere at LANL, and that some other gases were purchased from commercial vendors. To the extent that the findings contained in Paragraph 35 of the Order are inconsistent with or contrary to the preceding affirmative statements, they are denied. Respondent further denies that the gas cylinders were ever left alone or deserted by Respondent and affirmatively states that the cylinders were under the control of Respondent until shipped to treatment and/or disposal facilities for treatment and/or disposal.
31. Respondent denies all of the findings contained in Paragraph 36. Moreover, Respondent affirmatively states that even if the Permit Attachment G did apply to the management and storage of the gas cylinders in the SAA in Building 5S, which Respondent specifically denies, wastes bearing the Hazardous Waste Code D003 are allowed to be stored in units subject to the provisions of the Permit. Similarly, while wastes bearing the Hazardous Waste Code number P086 are not allowed to be stored in units subject to the provisions of the Permit, Complainant has incorrectly identified a waste bearing the Hazardous Waste Code number P076 as P086. Wastes bearing the Hazardous Waste Code number P076 are allowed to be stored in units subject to the provisions of the Permit.
32. Respondent's response to Paragraph 37 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer. With regard to the findings contained in Paragraph 37, Respondent admits that hazardous wastes were accumulated from time to time in SAAs in Buildings 3N and 4N prior to February 1996, and some of which wastes were accumulated for periods longer than 90 days. Respondent denies, however, that such SAAs contained the gas cylinders identified in Paragraph 34 of the Order. Respondent affirmatively states that these gas cylinders were managed as described in Paragraphs 27 and 30 of this Answer. Respondents further affirmatively state that while these gas cylinders were in Buildings 3N and 4N, they did not constitute a solid waste or a hazardous waste.

33. Respondent's response to Paragraph 38 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer. Respondent admits the findings contained in Paragraph 38, except that Respondent denies that while the gas cylinders were kept in Buildings 3N and 4N, they were a solid waste or a hazardous waste. Respondent affirmatively states that interim status or permit authorization was not required for the gas cylinders stored in Buildings 3N and 4N because such gas cylinders did not constitute solid wastes or hazardous wastes.
34. Respondent admits the findings contained in Paragraph 39 as this finding applies to the keeping and accumulation of the gas cylinders in Buildings 3N, 4N, and 5S. Nevertheless, Respondent affirmatively states that such an extension beyond a 90 day period was not necessary during the period prior to August 1996, because all gas cylinders in 3N and 4N, and in 5S during this period were not a solid waste or a hazardous waste. Moreover, following the August 1996 decision to discard a portion of the cylinders, an extension beyond the 90 day period was still not necessary for some or all of the gas cylinders because this waste was being accumulated in a SAA, and/or some of the gas cylinders were not a hazardous waste. Respondent affirmatively states that one < 90 day SA in DP West was established in 1997 and upon information and belief did apply for and receive an extension of 30 days from NMED for storage of hazardous waste beyond the 90 day period.
35. Respondent objects to the findings contained in Paragraph 40 inasmuch as the findings identify no material time frame or specific location for any such inspections of the gas cylinders. Respondent denies the findings contained in Paragraph 40 to the extent that the findings apply to the gas cylinders that were declared to be waste and that were placed in a SAA. Respondent affirmatively states that until some of the gas cylinders were determined to be waste, no inspection requirement applied to such gas cylinders at the locations where they were being kept, and after the cylinders were declared to be waste, no inspection requirements applied to the SAA.
36. With regard to the findings contained in Paragraph 41, Respondent objects to the use of the phrase "at all material times" as such phrase is vague, ambiguous and without clear indication of the intended scope of the time frame and therefore denies that the findings contained in Paragraph 41 occurred "at all material times." Respondent further denies that any accumulation start date was required to be placed on any product gas cylinder or on any waste gas cylinder for the period when the gas cylinder was in the SAA. Respondent further affirmatively states that an accumulation start date was clearly marked on each hazardous waste gas cylinder on the date that the gas cylinder was shipped from the SAA to TA-54 and that such accumulation start date was the date of such shipment.
37. With regard to the findings contained in Paragraph 42, Respondent objects to the use of the phrase "at all material times" as such phrase is vague, ambiguous and without clear indication of the intended scope of the time frame and therefore denies that the findings

contained in Paragraph 43 occurred "at all material times." Respondent admits that not all gas cylinders that were in the SAA in Building 5S were marked as "hazardous waste," and affirmatively states that 40 C.F.R. § 262.34(c)(1)(ii), as incorporated by reference by 20 N.M.A.C. 4.1.300, allows for wastes accumulated in SAAs to be labeled with the words "Hazardous Waste" or with labels indicating their contents. Respondent affirmatively states that the gas cylinders that were in the SAA were labeled as to their contents thus meeting the requirement of 40 C.F.R. § 262.34(c)(1)(ii), and that the SAA itself was identified with a LANL SAA sign, and as to those gas cylinders whose contents were unknown or not fully known, these were placed in an overpack in August 1996 in the near vicinity of the SAA until full characterization could occur. Once characterization of these gas cylinders occurred, many were disposed of as empty and others bearing labels of their contents were placed in the SAA.

38. Respondent denies the findings contained in Paragraph 43. Respondent affirmatively states that while the gas cylinders were in Buildings 3N and 4N, they did not constitute a solid waste or a hazardous waste. Respondent further affirmatively states that at all times during which the gas cylinders were in the DP West facility, a fully operable fire protection system was in place and that the facility was routinely inspected for compliance with environment, safety and health protection standards.
39. With regard to the findings contained in Paragraph 44, Respondent objects to the phrase "at all material times" as being vague, ambiguous, and without clear indication of the intended scope of the time frame and therefore denies that the findings contained in Paragraph 44, including the alphabetized subparagraphs, occurred "at all material times." Respondent further denies that the gas cylinders when in Buildings 3N and 4N constituted solid wastes or hazardous wastes. Respondent affirmatively states that during the time frame that the gas cylinders were in Buildings 3N and 4N as useful products, during the staging period in Building 5S, and during the time frame when some of the gas cylinders were accumulated in the SAA in Building 5S, equipment of the type described in the subparagraphs of Paragraph 44 was not required under the provisions of HWA and its implementing regulations to be available to each of these areas, but was in fact available to each of these areas. With regard to the findings contained in the alphabetized subparagraphs of Paragraph 44, Respondent in response to each subparagraph incorporates all of its denials and affirmative statements in this main paragraph, and in corresponding alphabetized subparagraph states as follows:
 - a. Respondent denies that Buildings 3N, 4N and 5S were not equipped with such equipment. Respondent affirmatively states that the DP West facility was equipped with a public address system which could be accessed from any phone in the buildings. The facility had a fully operational fire protection system which included audible alarms that could be activated by using pull stations located throughout the facility.

- b. Respondent denies that Buildings 3N, 4N and 5S were not equipped with such equipment. Respondent affirmatively states that each laboratory area and office in the DP West facility was equipped with at least one operational phone. In addition, members of the facility staff, including the facility manager, facility coordinator, waste management coordinators and others had cell phones and pagers with them at all times during working hours. Respondent further affirmatively states that there were two Sitewide Alert Notification System radios (SWANS) at the site which provided for Laboratory wide emergency communication.
 - c. Respondent denies that Buildings 3N, 4N and 5S were not equipped with such equipment. Respondent affirmatively states that fire extinguishers and spill control equipment were located in all laboratories in the DP West facility. With regard to the SAA in Building 5S, there was located nearby a portable fire extinguisher.
 - d. Respondent denies that Buildings 3N, 4N and 5S were not equipped with such equipment. Respondent affirmatively states that the entire DP West facility was equipped with a fire protection system that included fire alarm panels, pull stations, and fire suppression water sprinklers that furnished water at adequate pressure and volume from two large above ground water tanks located at the east and west ends of DP West. A fire hydrant was located in the immediate vicinity and to the south of the SAA in Building 5S.
40. With regard to the findings contained in Paragraph 45, Respondent denies that the equipment described in this paragraph was necessarily required under the provisions of the HWA and its implementing regulations, and denies that any equipment described in this Paragraph 45 of the Order that was located at the DP West facility was not tested and maintained as necessary to assure its proper operation. Respondent affirmatively states that facility communications and alarm systems, fire protection equipment, spill control equipment and decontamination equipment were located at the DP West facility and were routinely tested and maintained as necessary to assure their proper operation in time of emergency.
41. Respondent's response to Paragraph 46 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer, which responds to Paragraph 34 of the Order. With regard to the findings contained in Paragraph 46 of the Order, Respondent denies that the gas cylinders constituted solid waste or hazardous waste when in Buildings 3N and 4N or when in Building 5S during the staging period, and affirmatively states that some of the gas cylinders were determined to be waste and were placed in an SAA in building 5S in August 1996. Respondent objects to the use of the phrase "at all material times" as being vague, ambiguous, and without clear indication of intended scope of time frame and therefore denies that the findings contained in Paragraph 46 occurred "at all material times." Respondent further denies that the arrangements referred to in Paragraph 46 and its subparagraphs were necessarily required under the

provisions of the HWA and its implementing regulations, but affirmatively states that Respondent had made such arrangements. With regard to the findings contained in the alphabetized subparagraphs of Paragraph 46, Respondent in response to each such subparagraph incorporates all its denials and affirmative statements in this main paragraph, and in corresponding alphabetized subparagraphs states as follows:

- a. Respondent denies the findings contained in this subparagraph and affirmatively states that all such arrangements referred to in this subparagraph were made by or coordinated with the LANL Emergency Management and Response Group (EM&R), which is the LANL entity responsible for implementing, together with the DOE, the LANL Emergency Management Plan, which applies to the entire LANL facility, including DP West. The EM&R Group possessed a hazard assessment of TA-21 and were aware of the risks at the DP West facility. The EM&R Group in time of emergency works with the DOE in responding to an emergency and in coordinating efforts with outside emergency responders through established written agreements with those responders.
 - b. Respondent denies the findings contained in this subparagraph and affirmatively states that the LANL Emergency Management Plan, which applies to the entire LANL facility, including DP West, and which is implemented by the LANL EM&R Group and the DOE, contains specific chain of command provisions which specify the primary emergency authority and the agreements which are made with off-site emergency responders.
 - c. Respondent denies the findings contained in this subparagraph and affirmatively states that the LANL Emergency Plan, which applies to the entire LANL facility, including DP West, and which is implemented by the LANL EM&R Group and the DOE, references agreements with the appropriate non-LANL emergency responders, including any such State emergency response teams, emergency response contractors, if any, and equipment suppliers, if any.
 - d. Respondent denies the findings contained in this subparagraph and affirmatively states that the LANL Emergency Plan, which applies to the entire LANL facility, including DP West, and which is implemented by the LANL EM&R Group and the DOE, addresses the arrangements described in the findings contained in this subparagraph.
42. Respondent objects to the form of the finding in Paragraph 47 as it assumes a fact not established to be in existence, i.e., that a refusal to enter into an arrangement occurred. Respondent further objects to the use of the phrase "at all material times" as being vague, ambiguous, and without clear indication of the intended scope of time frame and therefore denies the findings contained in Paragraph 47 occurred or did not occur "at all material times." Respondent affirmatively states that no such refusal by State or local authorities to enter into the arrangements described in Paragraph 46 of the Order has occurred and

further affirmatively states that no documentation of any such refusal was placed in the facility operating record because no such refusal occurred. Respondent denies that any such requirement necessarily applies to Respondent's handling of gas cylinders at the DP West facility.

43. Respondent's response to Paragraph 48 of the Order is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer which responds to Paragraph 34 of the Order. With regard to the findings contained in Paragraph 48, Respondent affirmatively states that the LANL facility has a facility wide contingency plan that addresses all sub-facilities at the LANL facility, including DP West, and that this facility wide plan has been submitted to all local police departments, fire departments, hospitals and State and local emergency response teams that may be called upon to provide emergency services. Respondent further affirmatively states that such contingency plan was not required to be kept in Buildings 3N and 4N during the time frame that the gas cylinders were there because such gas cylinders did not constitute solid waste or hazardous waste. Respondent further affirmatively states that Buildings 3N, 4N and 5S were not required to have copies of the contingency plan because such plan must only be maintained in permitted and interim status treatment, storage or disposal units or <90 day SA and no such units existed at these buildings during 1995 and 1996.. To the extent that the findings contained in Paragraph 48 are inconsistent with or contrary to the preceding affirmative statements in this Paragraph 43, they are denied. Respondent affirmatively states that a copy of the contingency plan was kept in Building 5S, beginning on February 19, 1997, when a <90 day SA was set up in building 5S.
44. Respondent's response to the findings contained in Paragraph 49 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer which responds to Paragraph 34 of the Order. With regard to the findings contained in Paragraph 49, Respondent denies that the gas cylinders in Buildings 3N and 4N constituted either a solid waste or a hazardous waste, as such gas cylinders were a useful product, and denies that a chemical and physical analysis of the contents of the gas cylinders was required. Respondent affirmatively states that in their product state most of the gas cylinders were located in cylinder racks and their contents were known on the basis of location within the rack, or on the basis of labeling on the outside of the cylinder. When the product gas cylinders were removed from the storage racks in Building 3N and 4N and taken to the staging area in Building 5S, the information about the contents of some of the cylinders was lost due to the absence of locational information. Respondent further affirmatively states that use of knowledge of process to determine whether and what hazardous wastes may have been generated is consistent with the requirements set forth in 20 N.M.A.C. 4.1.300, which incorporates by reference 40 C.F.R. § 262. Respondent further affirmatively states that proper characterization of those gas cylinders determined to be waste occurred in August 1996 when the gas cylinders were placed in the SAA in Building 5S, except that for those gas cylinders whose contents were determined to be unknown or not fully known, these gas cylinders were placed in an overpack in August

1996 in the near vicinity of the SAA until full characterization could occur. Once characterization of these gas cylinders occurred, many were disposed of as empty and others bearing labels of their contents were placed in the SAA.

45. Respondent's response to the findings contained in Paragraph 50 is subject to and incorporates the denials and the affirmative statements contained in Paragraphs 29 and 30 of this Answer, which respond to Paragraphs 34 and 35, respectively, of the Order. With regard to the findings contained in Paragraph 50, Respondent denies that following a written waste analysis plan was required while the gas cylinders were in Buildings 3N and 4N as such gas cylinders were a useful product, and denies that timely following of such a plan was required for such product gas cylinders. Respondent affirmatively states that in their product state and while in Buildings 3N and 4N, the contents of the gas cylinders were known by the researchers who used these gas cylinders. Respondents further affirmatively state that the characterization of the waste gas cylinders was not required to follow a written waste analysis plan, but rather was governed by 40 C.F.R. § 262.11, which is incorporated by reference by 20 N.M.A.C. 4.1.300.
46. With regard to the findings contained in Paragraph 51, Respondent denies that the gas cylinders that were useful product in Buildings 3N and 4N constituted either solid wastes or hazardous wastes. Respondent denies that these gas cylinders were ignitable and/or reactive under the provisions of the HWA and its implementing regulations, as the HWA and its implementing regulations do not apply the terms "ignitable" and/or "reactive" to products, but to solid wastes.
47. With regard to the findings in Paragraph 52, Respondent objects to the use of the phrase "At all material times" as such phrase is vague, ambiguous and without clear indication of the intended scope of the time frame and therefore denies that the findings contained in Paragraph 52 occurred "At all material times." Respondent further objects to the lack of any specificity as to the locations to which the findings in this Paragraph apply. Respondent denies all of the findings contained in Paragraph 52. Respondent affirmatively states that (i) no smoking was allowed indoors in TA-21, including DP West, and (ii) no Spark and Flame permits were issued in areas in the immediate vicinity of the SAA. Accordingly, Respondent affirmatively states that it took all appropriate precautions to eliminate all potential sources of ignition. Respondent further affirmatively states that documentation for the taking of the precautions described in the findings contained in Paragraph 52 were not required for a SAA. Respondent further affirmatively states that the gas cylinders were segregated according to compatibility while in the SAA in Building 5S.
48. With regard to the findings contained in Paragraph 53, Respondent objects to the use of the phrase "at all material times" as such phrase is vague, ambiguous and without clear indication of the intended scope of the time frame and therefore denies that the findings contained in Paragraph 53 and its subparagraphs occurred "at all material times."

Respondent further denies that the gas cylinders that were useful product in Buildings 3N and 4N and later during the staging period in Building 5S constituted solid waste or hazardous waste and so Respondent denies that such gas cylinders were required to be included in a written operating record of hazardous waste storage. Respondent affirmatively states that a record was kept of the existence of the SAA in and its location in Building 5S. Respondent further affirmatively states that no such written operating record of hazardous waste storage is required for a SAA. With regard to the findings contained in the alphabetized subparagraphs of Paragraph 53, Respondent in response incorporates all of its denials and affirmative statements in this main paragraph to each such subparagraph, and in corresponding alphabetized subparagraph states as follows:

- a. Respondent denies that this finding applies to the gas cylinders when in 3N and 4N and staged in 5S as useful product, and affirmatively states that a written inventory, describing the contents and the volume of each gas cylinder, was maintained for the gas cylinders, including the gas cylinders accumulated in the SAA in Building 5S, and that no accumulation date was placed on individual waste cylinders as this is not required for waste accumulated in a SAA. An iteration of this inventory was provided to NMED as Attachment 2 in the March 6, 1997 letter to Benito Garcia from G. Thomas Todd and Dennis Erickson ("Letter").
- b. Respondent denies the findings contained in this subparagraph and affirmatively states that records of hazardous waste and its quantity were kept by Respondent for the DP West facility.
- c. Respondent denies the findings contained in this subparagraph and affirmatively states that records and results of waste analyses and waste determinations performed were kept by Respondent for the gas cylinders at the DP West facility.
- d. Respondent denies the findings contained in this subparagraph and affirmatively states that if the contingency plan were implemented, Respondent would keep summary reports and details of all incidents requiring implementation of the contingency plan.
- e. Respondent denies the findings contained in this subparagraph and affirmatively states that it did maintain records of inspections, but that not all inspections of the SAA in Building 5S were memorialized in written documentation. Respondent further affirmatively states that inspections of SAAs are not required.
- f. With regard to the findings contained in this subparagraph, Respondent denies that a requirement to maintain a written record of monitoring or testing applies to any of the gas cylinders which were a useful product, or when they were discarded as waste and some were put into a SAA and others were discarded as empty. Respondent affirmatively states that the reporting requirements contained in 40 C.F.R. § 264.73(b)(9) as incorporated by reference by 20 N.M.A.C. 4.1.500, do not apply to

accumulation of wastes in SAAs or to containers of less than 0.1 cubic meter. Respondent affirmatively states that it did maintain a written record of the analytical data obtained from analysis of the waste gas cylinders that were analyzed for waste characterization purposes. To the extent that the findings contained in subparagraph f. of Paragraph 53 of the Order are inconsistent with or contrary to the preceding affirmative statements, they are denied.

- g. With regard to the findings contained in this subparagraph, Respondent denies that such written certification applies to an SAA or < 90 day SA and upon information and belief affirmatively states that such a requirement, if it applies at all, applies to the LANL facility, not to specific subunits.
49. With regard to the findings contained in Paragraph 54, Respondent deny that they did not submit a biennial report to NMED's predecessor in interest by March 1, 1986 and affirmatively state that such biennial report did not and could not have referenced the gas cylinders that were discarded as waste from Building 5S, as the date of such biennial report antedated the generation of such gas cylinders as waste. Upon information and belief, if the intended date in this first line of Paragraph 54 is March 1, 1996, Respondent likewise affirmatively state that such biennial report to NMED did not and could not have referenced the gas cylinders that were discarded as waste from Building 5S as the date of such biennial report antedated the generation of such gas cylinders as waste. With regard to the finding concerning the biennial report for 1998, Respondent affirmatively states that such biennial report did include the gas cylinders discarded as waste from the Building 5S SAA, and Respondent further affirmatively state that in its 1997 Hazardous Waste Report Instructions and Form, OMB#: 2050-0024, the United States Environmental Protection Agency (EPA) removed the waste minimization questions from the identification and Certification form and the Generation and Management form and so responses on waste minimization were not required for such biennial report. Respondent further affirmatively states that the gas cylinders referred to in the Order were not generated wastes nor stored wastes while they were managed in Buildings 3N and 4N and so the findings in Paragraph 54 do not apply to such gas cylinders. To the extent that the findings contained in Paragraph 54 of the Order are inconsistent with or contrary to the preceding affirmative statements in this Paragraph 49, they are denied.
50. Respondent's response to Paragraph 55 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer which responds to Paragraph 34 of the Order. With regard to the findings contained in Paragraph 55, Respondent objects to the use of the phrase "at all material times" as being vague, ambiguous, and without clear indication of intended scope of time frame and therefore denies that the findings contained in Paragraph 55 occurred "at all material times." Respondent further denies that the requirement to have a written closure plan applies to product, which the gas cylinders were while in Buildings 3N and 4N, or to the SAA in

Building 5S. Respondent further denies that the gas cylinders were hazardous waste in Buildings 3N and 4N.

51. Respondent denies all the findings contained in Paragraph 56 and affirmatively states that no such noncompliance with the Permit occurred. Respondent affirmatively states that wastes other than gas cylinder wastes were accumulated in SAAs in 3N and 4N, but such accumulation was not in noncompliance with Permit conditions, as the Permit conditions would not apply to a SAA.
52. Respondent denies all the findings contained in Paragraph 57 and affirmatively states that the gas cylinders were not hazardous wastes while in Buildings 3N and 4N.
53. With regard to the findings contained in Paragraph 58, Respondent admits that it did not report a noncompliance with the Permit in accordance with the time frame described in this finding, but denies that any noncompliance with the Permit occurred, and denies all other findings contained in this Paragraph 58..
54. With regard to the findings contained in Paragraph 59, Respondent admits that representatives of DOE and Respondent met with representatives of NMED to advise the latter of its management of some hazardous materials at TA-21 on February 12, 1997, and that the Letter was sent by DOE and signed by representatives of DOE and Respondent. Respondent denies the remaining findings in Paragraph 59.

CONCLUSIONS

Respondent incorporates all denials and affirmative statements contained in Paragraphs 1-54 of this Answer as part of its response to the Conclusions contained in the Order to the extent that any Conclusion is based upon, relies upon or is related in any way to a Finding or Findings in the Order.

55. Respondent admits the conclusions contained in Paragraphs 60, 61, 62 and 63.
56. Respondent admits the conclusions contained in Paragraph 64, except that Respondent denies that Respondent engages in the disposal of hazardous waste on-site. Respondent further denies that it engaged in treatment or disposal of the gas cylinders on-site. Respondent affirmatively states that the gas cylinders containing waste were shipped to TA-54 for storage in accordance with the Permit and applicable regulations.
57. With regard to the conclusions contained in Paragraph 65, Respondent admits that some wastes were generated in the process of moving materials, as this term is defined in Paragraph 21 of this Answer, out of Buildings 3N and 4N at Technical Area (TA) 21 of LANL and either placed in SAAs in such Buildings or immediately sent offsite as waste,

but Respondent denies that the gas cylinders described in Paragraph 34 of the Order were solid or hazardous wastes at the time they were moved out of Buildings 3N and 4N.

58. Respondent denies the conclusions contained in Paragraph 66, except that Respondent admits that 40 C.F.R. §§ 262.11 and 262.10(c) are incorporated by reference into 20 N.M.A.C. 4.1.300.
59. Respondent's response to Paragraph 67 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer, which responds to Paragraph 34 of the Order. Respondent denies the conclusions contained in Paragraph 67, except that Respondent admits that some materials were discarded as waste in accordance with applicable regulatory requirements directly from Buildings 3N and 4N or were placed in SAAs in 3N and 4N and that some of such solid wastes constituted hazardous wastes, but denies that such hazardous wastes included the gas cylinders described in Paragraph 34 of the Order. Respondent further admits that 40 C.F.R. § 261.2 is incorporated by reference into 20 N.M.A.C. 4.1.200.
60. Respondent's response to Paragraph 68 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer, which responds to Paragraph 34 of the Order. Respondent denies the conclusions contained in Paragraph 68, except that Respondent admits that those materials that were discarded as wastes and placed into SAAs in Buildings 3N and 4N or discarded directly as wastes from Buildings 3N and 4N were solid wastes as defined in N.M.S.A. § 74-4-3(M) and 40 C.F.R. § 261.2, but denies that such solid wastes included the gas cylinders described in Paragraph 34 of the Order. Respondent further admits that 40 C.F.R. § 261.2 is incorporated by reference into 20 N.M.A.C. 4.1.200.
61. Respondent's response to Paragraph 69 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer, which responds to Paragraph 34 of the Order. Respondent denies the conclusions contained in Paragraph 69, except that Respondent admits that some materials that were discarded as hazardous waste directly from Buildings 3N and 4N or placed in SAAs in Buildings 3N and 4N constituted hazardous wastes as defined in N.M.S.A. § 74-4-3(I) and 40 C.F.R. Part 261, but denies that such hazardous wastes included the gas cylinders described in Paragraph 34 of the Order. Respondent further admits that 40 C.F.R. Part 261 is incorporated by reference into 20 NMAC 4.1.200.
62. Respondent's response to Paragraph 70 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer, which responds to Paragraph 34 of the Order. Respondent denies the conclusions contained in Paragraph 70, except that Respondent admits that it accumulated hazardous wastes on-site in containers in Buildings 3N and 4N in SAAs for periods longer than 90 days without having obtained a permit or interim status authorization for such accumulation, but denies that such

authorization was required for such SAAs and further denies that such SAAs contained the gas cylinders referred to in Paragraph 34, as these gas cylinders were useful products and were not waste at the time they were in Buildings 3N and 4N,

63. Respondent's response to Paragraph 71 is subject to and incorporates the denials and affirmative statements contained in Paragraph 29 of this Answer, which responds to Paragraph 34 of the Order. With regard to the conclusions contained in Paragraph 71, Respondent admits that it did not meet the requirements for <90 day SAs for the wastes that were accumulated in the SAAs in 3N, 4N and 5S but denies that such requirements apply to wastes accumulated in SAAs. Respondent admits that it did not place an accumulation start date on each waste at the time the waste was placed into an SAA, but denies that such requirements apply to wastes accumulated in SAAs. Respondent further admits that it did not label each container of hazardous waste in an SAA with the words "Hazardous Wastes," but denies that this is the sole required method of labeling wastes that are placed in SAAs. Respondent affirmatively states that wastes in SAAs may be labeled, if hazardous, with the words "Hazardous Waste" or with a label indicating their contents. Respondent further admits that 40 C.F.R. § 262.34 and 40 C.F.R. Part 265, Subpart I are incorporated by reference into 20 N.M.A.C. 4.1.300 and 4.1.600, respectively. All other conclusions contained in Paragraph 71 are denied. Respondent affirmatively states that some of the gas cylinders that were identified in Paragraph 34 were placed in the SAA in Building 5S as waste in August 1996 and that these gas cylinders were labeled as to their contents; some other of these identified gas cylinders whose contents at the time were unknown were placed in an overpack until full characterization could occur, at which time those that were not empty were labeled as to their contents and were placed in the SAA; and some other of these identified gas cylinders were placed in a separate overpack for retention as a useful product.
64. With regard to the conclusions contained in Paragraph 72, Respondent denies that with respect to the waste gas cylinders it operated a hazardous waste storage unit requiring either a permit or interim status and denies that the requirements applicable to interim status or permitted storage units applied to the management of hazardous wastes at the DP West facility. Respondent affirmatively states that it basically complied with the requirements applicable to such storage units, even though such provisions do not apply to SAAs, including requirements regarding waste analysis, ignitable, reactive and incompatible wastes, maintenance of a written operating record, preparedness and prevention, and contingency plan in its management of the DP West facility, including its management of the SAAs, as described in Paragraphs 35 through 54 of this Answer, which respond to Paragraphs 40 through 59 of the Order, respectively.
65. Respondent denies all of the conclusions contained in Paragraph 73 and affirmatively states that it took appropriate measures to protect human health and the environment in its handling of the gas cylinders at DP West. Respondent further affirmatively states that it voluntarily informed Complainant in February and March of 1997 of its handling of the

gas cylinders and of the measures it was taking to ensure protection of human health and the environment, even though such reporting was not required by the Permit or by the HWA and its implementing regulations.

66. With regard to the conclusions contained in Paragraph 74, Respondent affirmatively states that these conclusions are conclusions of law which are denied.

FIRST AFFIRMATIVE DEFENSE

Respondent's Answer and each denial and affirmative statement contained therein constitutes Respondent's first affirmative defense.

SECOND AFFIRMATIVE DEFENSE

Many, if not all, of Complainant's Findings and Conclusions are bare allegations without adequate foundation and for which Complainant cannot provide a direct evidentiary basis. Complainant's findings, lacking the necessary foundation, are inadequate to support its conclusions.

THIRD AFFIRMATIVE DEFENSE

Many of Complainant's Findings and Conclusions are based upon information and belief and lack the necessary foundation for the allegations they contain. As to these findings and conclusions, Respondent states that any associated alleged violations and assessed penalties contained in Complainant's Order should be dismissed.

FOURTH AFFIRMATIVE DEFENSE

Any gas cylinders referred to in Paragraphs 32, 33 and 34 of the Order and referenced thereafter throughout the Order did not constitute a solid waste or a hazardous waste while in Buildings 3N and 4N, as such cylinders were a useful product and were considered valuable group assets by the research groups maintaining them. These gas cylinders were moved to a staging area in Building 5S, where they were kept as a useful product, pending relocation to other laboratories at the LANL facility. In August of 1996 a decision was made to discard most of the gas cylinders, and these cylinders were placed in a SAA where they were managed as waste, in accordance with 40 C.F.R. § 262.34, which is incorporated by reference by 20 N.M.A.C. 4.1.300.

FIFTH AFFIRMATIVE DEFENSE

Respondent states that Complainant lacks jurisdiction over the subject matter contained in the Order.

SIXTH AFFIRMATIVE DEFENSE

As to the gas cylinders that were product, as to the gas cylinders that were empty, and as to the gas cylinders that were to be discarded as waste and that were stored in the SAA in Building 5S, the Permit provisions did not apply. All findings and conclusions based on allegations that describe Permit conditions or that reference or rest upon Permit conditions and that do not have a regulatory basis independent of the Permit should be dismissed.

SEVENTH AFFIRMATIVE DEFENSE

Many of the gas cylinders referred to in Attachment 1 to the Letter, identified in Attachment 2 to the Letter, referred to Paragraph 32 of the Order, itemized in the subparagraphs of Paragraph 34 of the Order and referenced thereafter, at the point in time that they constituted solid wastes due to the decision to discard them, were not hazardous wastes.

EIGHTH AFFIRMATIVE DEFENSE

Even if the Permit conditions described, referred to, referenced or relied upon in the Order did apply to the gas cylinders and materials that were determined to be waste, which Respondent specifically denies, Respondent states that it did basically comply with these Permit conditions in its management of such wastes.

NINTH AFFIRMATIVE DEFENSE

The gas cylinders and other materials that were determined to be waste on the basis of the decision to discard them, were properly accumulated, characterized and shipped off as waste.

TENTH AFFIRMATIVE DEFENSE

Respondent states that the Permit provision II.K.2. provides in material part that the Permittee shall report to the Director any noncompliance with the Permit which may endanger human health or the environment. Any such information shall be reported orally within 24 hours from the time the Permittee becomes aware of such circumstances. Respondent states that this Permit condition does not apply to the management of wastes in SAAs, and that no time frame is specified for such notifications with respect to SAAs. If this Permit provision were to apply to the management of the waste gas cylinders and materials, which Respondent specifically denies, Respondent states that no such noncompliance which may have endangered human health or the environment occurred.

ELEVENTH AFFIRMATIVE DEFENSE

Respondent states that any noncompliance that may have occurred under the Permit, which Respondent specifically denies, did not endanger human health or the environment.

TWELTH AFFIRMATIVE DEFENSE

As to the waste materials managed at DP West that were not gas cylinders, those wastes that were determined to be hazardous wastes were properly managed in SAAs or <90 day SAs in accordance with 40 C.F.R. § 262.34 and to these wastes the Permit conditions did not apply. If the Permit conditions did apply to these wastes, which Respondent specifically denies, then Respondent states that Respondent's management of these wastes basically complied with the Permit conditions.

THIRTEENTH AFFIRMATIVE DEFENSE

Respondent states that many of the gas cylinders referred to or identified in the Letter and in Attachments 1 and 2 to the Letter were not hazardous wastes, as they constituted empty containers under the applicable regulations.

FOURTEENTH AFFIRMATIVE DEFENSE

Respondent states that many of the gas cylinders referred to or identified in the Letter and in Attachments 1 and 2 to the Letter were not solid waste or hazardous waste.

FIFTEENTH AFFIRMATIVE DEFENSE

With regard to the civil penalties proposed by the Order, Respondent asserts the following defenses:

- a. NMED failed to consider the good faith efforts of Respondents to comply with the alleged applicable requirements, pursuant to 74-4-10.B. N.M.S.A. 1978;
- b. NMED failed to consider the seriousness of the alleged violations, pursuant to 74-4-10.B. N.M.S.A. 1978;
- c. NMED failed to adhere to the Hazardous Waste Penalty Policy adopted by NMED on September 4, 1992;
- d. NMED failed to consider that Respondent self-reported this situation and as a result should be provided a reduction or elimination of civil penalties;
- e. NMED's imposition of penalties is arbitrary, capricious, unlawful, and without substantial basis in law or in fact; and
- F. NMED improperly imposed penalties for alleged violations of law which did not occur.

The Compliance Order contains in Paragraph 76 a Schedule of Compliance and an ordered action requiring Respondent to provide final proof of final disposition of all wastes discarded and

abandoned at TA-21, Buildings 3 and 4 North, which demonstrates that all wastes have been transported to one or more appropriate, authorized facilities for the treatment, storage and/or disposal of hazardous wastes. Respondent has sought and obtained clarification from Complainant that the wastes referred to in this Schedule of Compliance are the gas cylinders that were initially identified and referred to in the Letter.

Notwithstanding any previous or future response on the part of Respondent to Paragraph 76, Respondent states (i) that in the event that the ordered action is deemed complete by Complainant, Respondent does not admit the underlying finding or conclusion contained in any numbered Paragraphs of the Order that may be related to the ordered action, unless specifically admitted in this Answer; (ii) that it reserves the right to contest and dispute any underlying finding or conclusion related to the ordered action, unless the underlying finding or conclusion has been specifically admitted in this Answer; and (iii) that Respondent denies on both substantive and procedural grounds NMED's basis for requiring Respondent to complete the ordered action contained in Paragraph 76, and hereby place at issue all aspects of the ordered action unless Respondent has admitted both the underlying finding and underlying conclusion contained in the related numbered Paragraph in the Order.

FACTS PLACED AT ISSUE

Respondent hereby places at issue all facts denied in this Answer.

REQUEST FOR HEARING

Respondent reiterates its request for a hearing filed with the Hearing Clerk on July 14, 1998, to address the matters raised by the Administrative Compliance Order 98-02 and this Answer pursuant to Section 74-4-10 of the New Mexico Hazardous Waste Act, N.M.S.A 1978 and 20 N.M.A.C. 1.5.200.

WHEREFORE. Respondent the Regents of the University of California, requests that Complainant, the New Mexico Environment Department, rescind Administrative Compliance Order 98-02 in its entirety, or in the alternative, that the appropriate adjudicatory body determine that Respondent did not commit the violations alleged by the Complainant. In the event that a violation is determined to have occurred, which Respondent specifically denies, Respondent prays that any proposed civil penalty for any such violation be reduced, that the Schedule for Compliance in this Order be denied, and that any other such relief to which Respondent shows itself entitled be granted.

I hereby affirm my belief that the information contained herein is to the best of my knowledge true and correct.

The Regents of the University of California

BY: Joseph B. Rochelle

Mr. Joseph B. Rochelle

Los Alamos National Laboratory

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Telephone (505) 667-3766

**STATE OF NEW MEXICO
ENVIRONMENT DEPARTMENT**

**IN THE MATTER OF
THE UNITED STATES DEPARTMENT OF ENERGY
AND THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
LOS ALAMOS, NEW MEXICO
NM0890010515**

**COMPLIANCE ORDER
HRM - 98-02 (C0)**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was hand-delivered on the 10th day of August, 1998, to the following individuals:

Nick Persampieri
General Counsel
New Mexico Environment Department
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Santa Fe, NM 87505

Hortense Haynes
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Joseph B. Rochelle, Esq.