

Permit



STATE OF NEW MEXICO

ENVIRONMENTAL IMPROVEMENT DIVISION

P.O. Box 968, Santa Fe, New Mexico 87504-0968

(505) 827-0020

TONEY ANAYA
GOVERNOR

DENISE FORT
DIVISION DIRECTOR

MEMORANDUM:

TO: Denise Fort, Director

THRU: Richard Holland, Deputy Director
Ernest Rebeck, Chief, GW/HW Bureau
Peter H. Pache, Program Manager, HW Section

FROM: Jack Ellvinger, Env. Supervisor, HW Section

DATE: May 9, 1986

RE: Explanation of the current LANL situation. How we got here and where do we go from here.

It has come to my attention that there is a lack of concensus on how to proceed in the LANL matter. It is my understanding that this current state of affaires is due to the HW Section not filing a briefing on this situation with a specific recommendation concerning the appropriate path to take. Because of that I would like to provide the following information in an effort to clarify this situation and hopefully bring it to a conclusion so that the limited resources of this section can be applied to other cases.

BACKGROUND INFORMATION:

On August 14, 1985 I submitted to the Legal Bureau the information contained in Attachment I. This attachment includes both a legal referral and a case summary. This format was recommended by the Legal Bureau after they had been informed of the situation at LANL. This information was requested by the Legal Bureau in preparation to filing a court case.

It is noteworthy that Attachment I was not the first discussion on the legal situation that existed at LANL. For well over two years the Division has been trying to bring this facility into compliance with HWMR-2. Initially it was a struggle to get LANL to recognize that it was subject to HWMR-2. After that it was a constant battle to get LANL to provide us with the necessary information to assess its state of compliance. All through these difficult negotiations the Legal Bureau and the Office of the Director were involved. All people involved were feeling a sense of fustration at the seemingly stubborn position of LANL not being cooperative in this matter and playing a very seceretive game.

This period of time can be characterized as a period of posturing. LANL would make a statement or claim and the EID would take steps to counter it. For instance, LANL was claiming that for reasons of national security EID could not be made privy to certain information that had a bearing on the HW issue. To counter that move EID made efforts to get a number of its employees security cleared.

The case study supplied in Attachment I does not reveal all the meetings and letters that were held or exchanged. It deals solely with the issue of the violation concerning the inspection schedules and logs. The previously described history is important to understand the mood and the need on the part of the EID to show that it ment business in the enforcement of HWMR-2.

The filing of a CO/CS is the last step in the administrative process of bringing a violator into compliance. It is a step that this section does not take lightly. In this case the facility (LANL) participated in the development of the CO/CS. It was a mutually agreed to document developed to give LANL the necessary time to comply with HWMR-2. A great deal of time had transpired since the notification of HW activity in November of 1980 till the time when the CO/CS was issued. The HW Section as well as the EID felt that it had taken all the steps necessary, and more, to bring LANL into compliance and now it was necessary to take the final step. LANL was well aware of the severity of the issuing of a CO/CS. This can be seen by reviewing their comments on the various meetings and the final issuance of the document. Additionally, the arrival of LANL's July 14, 1985 letter (see Attachment II) admitting to being in violation of that document almost immediately after the inspection demonstrates that they recognize the seriousness of violating the CO/CS.

Several issues have surfaced since the legal referral was submitted. One of the points of contention hovers around a letter drafted by this section for Denise's signature (see Attachment III). This letter is the standard issue sort of letter. It is routinely sent out once all documentation is received in response to an enforcement action.

The point of contention revolves around the May 7, 1985 CO/CS items number 18 & 19. These items each deal with two points. One point each is to develop the paper work necessary to have a viable inspection program. That means that a inspection schedule and a inspection log format had to be developed. Secondly, it required that each of those documents be implemented. The order part of the CO/CS required that a copy of the paper work be submitted by a specific date and that it be certified that it (the paper work) was implemented. Each of these things were done by the required time (May 1, 1986).

The July 22, 1985 letter simply acknowledges the receipt of the documentation from LANL. At that point without going up to inspect the facility again it would be impossible to tell if the documentation would be implemented. It is understood that if the CO/CS is not followed and the facility in question does not uphold its part of the agreement that at the next inspection if the same violation is observed it will be in violation of the CO/CS and not considered a new violation to be treated under a NOV.

It is the purpose of the enforcement strategy to bring facilities into compliance and to keep them in that state. For that reason it is necessary to treat the repeat violators in a strict straight forward method. It does no good to have a facility in compliance one day for the purpose of an inspection and to be out of compliance

the next day because the inspector is not going to be present. The programs resources are too few to participate in a game such as that. It is that reason that requires that repeat offenders be treated as designated by the Act.

LANL was found to have a deficient inspection program in 5/22/84 when it was inspected by Greg Mello. LANL's response to the subsequent NOV was also deficient in the area of the inspection program. Several meetings held over the remainder of the year did not resolve the issue of the suitability of their inspection program. Finally a meeting was arranged with LANL to develop a CO/CS in March 1985. The result of that meeting was the development of the May 7, 1985 CO/CS. Their submittal was received and so noted. Shortly after that the facility was inspected again and at that time the inspection program was found in place but it was not being implemented.

LANL had had over one full year under the NM HW Program to develop and implement the inspection program. In addition the facility had had since November 8, 1980 under the Federal RCRA program to develop and implement the same program of inspections. The EPA obviously did not enforce on this or any other Federal facility in this state but that did not relieve the facility of the responsibility of complying with these regulations. In total time, **LANL had over four years and seven months to bring this inspection program on line.** It is not difficult to see that this facility was a repeat violator and recalcitrant in coming into compliance.

DESCRIPTION OF THE PROPOSED LEGAL ACTION

It was the initial position of the HW Section to pursue the fine of \$10,000 dollars per day for each violation. This was purposed in the initial referral to the Legal Section in the last line. We were later informed that LANL had provided arguments to this that convinced the Legal Bureau that seeking a fine would be long, arduous and would require the expenditure of a lot of legal resources. It would also extend into the next administration for which there was no feeling whether this issue would be supported.

It was at this point that LANL proposed a horse-trade of sorts. They would provide the EID with some services in lieu of paying a fine. My comments at that time (December 13, 1985) were (and still are) that I question the legality of pursuing an alternate to a fine when only a fine is provided for in the HW Act (see Attachment IV).

It was contented then, and it still is, that the EID ought to go ahead and seek a dollar penalty as provided in the Act.

IMPORTANCE OF THE PROPOSED ACTION

It is felt that the seeking of a monetary penalty in this case is of great importance by the HW Section. This is so for a number of reasons:

1. LANL is a recalcitrant violator and repeat offender. According to our signed MOU with EPA, NM will pursue this type of violation with a civil referral. In some cases (knowing violation of regulations) this could be upgraded to a criminal action.
2. NM is a state that consists of about 16 TSDF's. The large majority of these facilities (approximately 9) are federally owned and/or operated. If we back down from this challenge from LANL on this issue, EID will be sending a signal

to these facilities that we are as impotent as the EPA in dealing with violations that exist at federal facilities.

3. This is the first major test of the HW's enforcement strategy. It is necessary that the Division pursue this action with intensity. If it is not, then, dangerous precedents will be set that we will regret and be tied to in the future.
4. There is no point in conducting a enforcement program in any program area if it does not have teeth and the backing of the Division.
5. In recent months there has been several articles that have come across my desk addressing this issue. Some other states have gotten there backs up over federal facilities not complying with state statutes and have been seeking relief in the courts. It is not unheard of and not impossible. EID must take a stand on this issue or quit wasting its time and resources.

TIMETABLE

It is impossible for me to identify a timetable in this matter. It should be noted that nothing has been done in eight months that is visible. For that reason the courts may look on this as EID not taking it very seriously. It would seem reasonable to me that this issue should recieve a very high priority now, due to its longevity or that it should be dropped. As mentioned earlier the dropping of an action against a federal facility would have far reaching repercussions on the HW program down the line.

Attachment I

REQUEST FOR LEGAL SERVICES

Request made by: JACK Ellvinger (Name) ENV. Super. (Title)

Date of Request: 8/13/85

Person Attorney should contact: JACK Ellvinger Telephone No. X270

Priority: Emergency (explain) _____
 Normal
 Low

RECEIVED

AUG 14 1985

- Nature of Request:
- Referral of matter to legal bureau for enforcement EID: LEGAL BUREAU
 - Assign attorney to advise in licensing matter
 - Assign attorney to represent Division in a matter before the EIB, WQCC, or OHSRC
 - Legal opinion
 - Review enforcement letter for legal adequacy
 - Review submittal to federal or state government agency for legal adequacy
 - Review draft contract or agreement for legal adequacy
 - Obtain inspection order in District Court
 - Status report
 - Other (please specify) _____

Please fill in as applicable:

Name of case Los Alamos Scientific Lab - Haz. Waste - CO follow up
Attorney assigned to case Duff Westbrook

To Be Completed by Chief Attorney Arden Smith
This matter has been referred to ~~Duff Westbrook~~ on 8/14/85
with the following instructions mtg w/ Arden Smith / Duff

Internal # 211-85

J. Van Zeyenout
Chief Attorney

Date Completed _____

REQUEST FOR LEGAL SERVICES

Request made by: JACK Ellvinger (Name) ENV. Super. (Title)

Date of Request: 8/13/85

Person Attorney should contact: JACK Ellvinger Telephone No. X270

Priority: Emergency (explain) _____
 Normal
 Low

Nature of Request:

- Referral of matter to legal bureau for enforcement
- Assign attorney to advise in licensing matter
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- Legal opinion
- Review enforcement letter for legal adequacy
- Review submittal to federal or state government agency for legal adequacy
- Review draft contract or agreement for legal adequacy
- Obtain inspection order in District Court
- Status report
- Other (please specify) _____

Please fill in as applicable:

Name of case Los Alamos Scientific Lab - Hg. Waste - CO follow up
Attorney assigned to case Duff Westbrook.

To Be Completed by Chief Attorney

This matter has been referred to _____ on _____

with the following instructions _____

Internal #. _____

Chief Attorney

Date Completed _____

Attachment I

August 14, 1985

LANL Case Summary

- 1) LANL inspected on 5/22/84 by Hazardous Waste Staff.
- 2) NOV issued to LANL on 6/26/84 identifying deficiencies in their inspection schedule, log and summaries along with other issues.
- 3) A review of LANL's submittals in response to 6/26/84 NOV revealed seven issues not in compliance. Included in the seven were the inspection schedule, log and summaries.
- 4) EID held a meeting on 2/5/85 to discuss the remaining seven violations. A meeting was scheduled 3/7/85 to finalize a compliance order.
- 5) The 3/7/85 meeting discussed the seven issues still not in compliance and subsequently developed a compliance schedule.
- 6) On 5/7/85 EID issued a compliance order addressing the seven areas of non-compliance. In that order LANL was directed to implement a complete inspection program as defined by Section 206.B.5. of HWMR-2 by 5/1/85.
- 7) LANL met the deadlines imposed in the CO by submittal prior to its issuance. They actually were aware of the CO contents from the 3/7/85 meeting and had started working on its provisions at that time.
- 8) LANL was inspected for compliance with interim status standards on 7/10/85 and 7/11/85.
- 9) The inspection paperwork was there and available but it had not been implemented.
- 10) LANL is therefore in violation of the 5/7/85 CO as well as the interim status standards.
- 11) The Hazardous Waste section's enforcement strategy ends the seeking of voluntary compliance at this point. It requires that the section pursue penalties as set down in the Hazardous Waste Act.
- 12) 74-4-12 provides for a civil penalty of up to \$10,000/day per violation.

Attachment II

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

AUG 14 1985

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ms. Denise Fort
Environmental Improvement Division
P. O. Box 968 - Crown Building
Santa Fe, New Mexico 87501-0968

Dear Ms. Fort:

We have recently noted that the Department of Energy's (DOE) June 7, 1985 response to the Compliance Order/Schedule - Docket Number NMHWA 001007, did not completely address Items 18 and 19 that appear on page 4. With the submittal of this letter we certify that the attached inspection schedule and forms were in place as of August 9, 1985.

The attached written schedule and site specific inspection forms for each hazardous waste facility at Los Alamos National Laboratory complement the on-place inspection forms supplied to the Environmental Improvement Division (EID) in DOE's Resource Conservation and Recovery Act (RCRA) Part B Application. Also, reflected in this submittal are some revisions to the inspection forms that appeared in DOE's Part B Application. These revisions and additional information reflect comments that EID staff made during their recent hazardous waste inspection of the Los Alamos National Laboratory on July 10 & 11, 1985.

Both the Laboratory and DOE feel the inadvertent omissions of these inspection forms and schedule did not in anyway create a potential for environmental harm. Laboratory personnel associated with the handling, storage, treatment, and disposal of hazardous waste have maintained facilities throughout the Laboratory complex.

If you have any questions, please call me at (505) 667-5105.

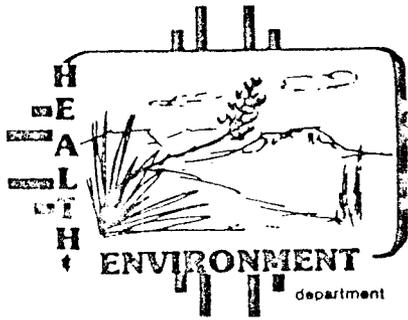
Sincerely,


Harold E. Valencia
Area Manager

1 Attachment
as stated

P. Pache, EID, Santa Fe, NM, w/att.
D. Kerr, Director, LANL, MS A100
C. Adams, Jr., ADTS, LANL, MS A120
J. Aragon, HSE-DO, LANL, MS P228
T. Gunderson (HSE8-85-952), HSE-8, LANL, MS K490
A. Drypolcher, HSE-8, LANL, MS K490
C. Garcia, Director, ESHD/AL

Attachment III



STATE OF NEW MEXICO

ENVIRONMENTAL IMPROVEMENT DIVISION

P.O. Box 968, Santa Fe, New Mexico 87504-0968

(505) 984-0020

TONEY ANAY/
GOVERNOR

DENISE D. FOLLOMER/
DIRECTOR

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

July 22, 1985

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

Dear Mr. Valencia:

This is in response to your June 7, 1985 letter pertaining to the Environmental Improvement Division's (EID) Compliance Order/Schedule, Docket Number NMHWA001007 and the meeting which was held between EID, DOE and UC representatives on July 2, 1985 in Santa Fe. This Compliance Order pertained to the hazardous waste activities at Los Alamos National Laboratories.

We have carefully reviewed all of your comments and suggestions and offer the following response to the four points in your June 7 letter:

1. your input at the March 7, 1985 meeting was solicited and accepted, but not required; EID has the responsibility, under our existing statutory authority, to select what we feel are appropriate dates of compliance;
2. Compliance Order Paragraphs 18 through 20: we accept this comment as these items were delivered, as due, May 1, 1985;
3. Compliance Order Paragraph 24: we do not feel that eight (8) months for data analysis and interpretation and two (2) months for report preparation are unrealistic. It is not our intent to jeopardize the quality or completeness of your total effort; however, the timeframes appear realistic and attainable; and
4. Compliance Order Paragraph 25: the comments applicable to 3 above are germane here as well.

Attachment ~~10~~

Harold Valencia

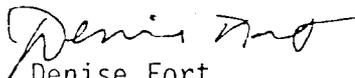
Page 2

July 22, 1985

We are in sympathy with your budgetary constraints; however we do not feel that any of our timeframes are either unrealistic or will threaten to the quality of work performed. The amounts of time given for the various tasks are similar to other Compliance Orders/Schedules issued by the Hazardous Waste Section to other New Mexico federal facilities. We are, therefore, not willing to change the dates/milestones are presented within our Compliance Order/Schedule of May 7, 1985.

We look forward to your forthcoming submittals and appreciate the sincere efforts which we feel Los Alamos is making toward hazardous waste management.

Sincerely,



Denise Fort,
Director

cc: Pat Hull, EPA, Region VI
Tito Madrid, EID, District II

Attachment IV

MEMO:

To: Denise Fort, Director, EID

From: Jack Ellvinger, Environmental Supervisor, Hazardous Waste Section

Re: **List of Alternatives for the LANL Penalty**

Date: December 13, 1985

LANL has agreed in principle to provide training for members of the EID and do "other" things in lieu of paying a fine that could be sought by the Division for violations of the Compliance Order issued by the Hazardous Waste Section. This memo sets forth several possibilities to fill the "other" category and to expand on the training issue.

The following is a "shopping list" in order of priority to the Hazardous Waste Section. The "list" was developed after consultation with various members of the of the Division as-well-as several Bureau Chiefs.

1. Provide the population of the Northern Rio Grande Valley with a weekend service to remove and dispose of household and small quantities of hazardous waste in several communities in the northern Rio Grande Valley. The Hazardous Waste Section feels this sort of project will benefit the State, aid the Division in spreading the word about proper disposal of hazardous wastes by small quantity generators and also give the Division and LANL some good press.

The proposal is for LANL to set up for one weekend in Taos, one in Espanola, one in Santa Fe and open up their doors for Los Alamos on another weekend. At each location LANL will supply personnel and containers for packing, shipping and filling out of manifests. They will take in all household amounts and small quantities of hazardous wastes and prepare them for shipment and / or proper disposal. Hazardous Waste staff members should be present at each location to provide technical assistance, provisional ID numbers, distribute information on the Hazardous Waste Program and generally oversee the operation.

The city of Albuquerque recently conducted a similar program for that city and the Bernalillo County area. Donna La Combe, 766-7434, provided us with the following figures:

- \$12,000 - development and distribution of materials (all public education);
- \$75,000 - collection and disposal of materials by Hazardous Waste contractor; * and,
- \$50,000 - \$60,000 - in-kind costs (staff time, etc.).

*LANL's cost on this issue will be considerably less because they have the facilities and the manpower to carry out this aspect rather than having to contract it out.

2. Provide the Division with the information necessary to draw conclusions concerning the presence / absence of Radon gases in residential structures in New Mexico. The information for this proposal is attached and was provided by the Radiation Protection Bureau. All questions concerning this study should be addressed to that Bureau.
3. A proposal for LANL to make various training opportunities available to EID and other state agencies. The EID and the various "responsible" state agencies, as defined in the Emergency Management Act, are in need of training. These needs span a broad range of topics. LANL being connected with the University of California, and having the expertise that goes with a research and development facility, has the capabilities to present a varied program of training courses.

At this point in time it is unknown what training is currently available through LANL. It is known that the Lab is required by statute to train their hazardous waste handlers. This training includes training in areas of familiarization with the hazardous waste regulations; how to handle emergency situations that involve the spill of hazardous materials; actual handling practices; and procedures for the labeling, marking and manifesting of shipments of hazardous waste.

It is proposed that LANL submit to EID a list of training opportunities, that it can make available to the state either through the Lab or through the University of California, in the area of environmental protection. From that point the Division may then choose what courses are best suited for its program personnel.

Some of the Hazardous Waste Section's training needs are as follows:

- Regulation (RCRA) familiarization;
- Ground-water modeling;
- Siting for hazardous waste disposal facilities;
- Pro/Cons of Land Disposal of Hazardous Waste;
- Incineration of Hazardous Waste;
- Surface Impoundments / Liners -- Compatibility with Hazardous Waste;
- Unsaturated Zone Monitoring;
- Fitting Personnel with Respirators (leak tests); and,
- RCRA 1984 amendments.

Some of the "Responsible State Agency's" training needs are as follows:

- A first responders course;
- Crisis management;
- Hazard recognition;
- Container recognition;
- Hazardous substance incident response procedures;
- Site management at a hazardous material incident;
- Containment, control, and cleanup at a hazardous material incident site;
- Decontamination of personnel resulting from the spill of hazardous materials or a radioactive material; and,
- Regulation (DOT) familiarization.

Attachment IV

4. A proposal for LANL to do an indoor air pollution study. Millie Eidson from the Office of Epidemiology is currently preparing an outline on this subject. She projects that it will be presented to Richard Holland on Monday 12/16/85. Any questions concerning this topic should be addressed to her.

The point was brought up while talking to Sam Rogers that if a fine was levied against the Lab it would go to the General Fund. All fines are a result of a legal action by the Division. In this case the options (the fine) which are chosen are the penalties levied against the Lab. The proceeds from it (the benefits) are directly attached by this Division. Is this legal?

The topic of LANL doing an abestos study was discussed. It was dropped as a result of a discussion with OHS personnel. In that discussion it was mentioned that the results of such a study would be used in a law suit against the abestos producing industry. LANL would not want to be involved in a law suit of that nature. Being a part of that study would put LANL in the uncomfortable position of being on possibly both sides of that issue.