



BRUCE KING
GOVERNOR

State of New Mexico
ENVIRONMENT DEPARTMENT
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1190 St. Francis Drive, P.O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-2850

Stephanie S. -
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file

JUDITH M. ESPINOSA
SECRETARY

RON CURRY
DEPUTY SECRETARY

June 18, 1993

Sheila Brown, Esq.
Office of General Counsel
P.O. Box 1663, Mail Stop A-187
Los Alamos, N.M. 87545

Joyce Laeser, Esq.
U.S. Department of Energy
Los Alamos Area Office
Los Alamos, N.M. 87544

Re: **Consent Agreement - Draft # 4**

Dear Ms. Laeser & Ms. Brown:

Prior to my leaving for vacation, I thought we were quite close with Consent Agreement draft # 3, which already incorporated many of your excellent and constructive suggestions, as well as making a number of concessions. You can understand my dismay when I learned from Susan of the extent of your comments on draft # 3, some of which sought revisions of ground already covered, and on which I thought agreement had been reached.

My clients feel as though we are fast reaching a point of diminishing return here. I agree with them, particularly in light of Herman Le-Doux's June 8 letter seeking to reopen the issue of the compliance schedule, an issue Susan and I in our negotiations with you had presupposed was already put to rest.

The meeting we had initially hoped to schedule for early next week prior to Sheila's departure will now have to be put off until DOE responds on the compliance schedule issue. In the hope that Mr. Le-Doux's revival of this issue does not become an impasse, I am nonetheless forwarding to you both under cover of this letter, draft # 4 of the proposed Consent Agreement. Draft 4 incorporates some of your changes, but some of the other changes being sought represent further concessions which are incompatible with NMED's retention of control over this agreement and the activities it will drive, and are thus unacceptable to my clients.

Some of your suggested changes may arise out of a misunderstanding over meaning which I, as drafter, was not present to explain at the last meeting. It may be worthwhile to try and work through some of those while we wait on the compliance schedule issue to be

JUN 21 1993



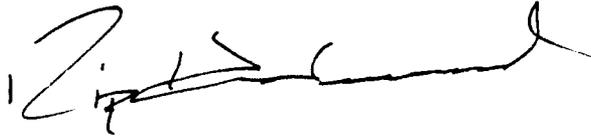
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Permit

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resolved. Please give Susan or me a call if there are particular areas of draft # 4 you feel it would be worthwhile to discuss and clear up by telephone while we await a resolution of the compliance schedule issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Ripley B. Harwood". The signature is written in a cursive style with a large initial "R" and a long horizontal stroke extending to the right.

RIPLEY B. HARWOOD
Assistant General Counsel

RBH:vmj

Enclosure

cc: Kathleen Sisneros, Division Director, Water and Waste
Management Division, NMED
Benito Garcia, Bureau Chief, Hazardous and Radioactive
Materials Bureau, NMED

NEW MEXICO ENVIRONMENT DEPARTMENT

DRAFT

IN THE MATTER OF:

THE UNITED STATES DEPARTMENT OF ENERGY)
LOS ALAMOS NATIONAL LABORATORY)
LOS ALAMOS, NEW MEXICO)
ID. No. NM 0890010515,)

and)

THE REGENTS OF THE)
UNIVERSITY OF CALIFORNIA)
LOS ALAMOS NATIONAL LABORATORY)
LOS ALAMOS, NEW MEXICO)
ID. No. NM 0890010515,)

RESPONDENTS.)

COMPLIANCE ORDERS)
NMHWA 93-01, 93-02,)
93-03 & 93-04.)

CONSENT AGREEMENT

CONSENT AGREEMENT

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CONSENT AGREEMENT

I. PREAMBLE; PURPOSE OF AGREEMENT; BINDING EFFECT.

A. This Consent Agreement, effective when the Secretary signs a final order approving it, is made and entered into by and between the United States Department of Energy ("Respondent" or "DOE"), an agency of the Federal Government, the Regents of the University of California, a public educational institution of the State of California ("Respondent" or "the University") (collectively "Respondents"); and the New Mexico Environment Department ("NMED"), an agency of the State of New Mexico.

B. The purpose of this Consent Agreement is to set forth the agreement of the parties resolving all matters related to New Mexico Hazardous Waste Act Compliance Order numbers 93-01, 93-02, 93-03 and 93-04 (hereinafter collectively "Compliance Orders"), including agreement on the penalties to be paid by the University for the violations alleged in the Compliance Orders, and including the Respondents' commitment to implement an NMED-approved remedial action plan and compliance schedule for placing ~~mixed hazardous~~ waste currently stored at the Los Alamos National Laboratory ("LANL") Technical Area 54, Area G into storage that complies with the New Mexico Hazardous Waste Act.

C. This Consent Agreement shall apply to and be binding

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upon NMED and Respondents and their respective successors and assigns. Except as provided in Section VI.A., the obligations of Respondents under this Consent Agreement shall be joint and several. Respondents' obligations under this Consent Agreement, including without limitation the payment of stipulated penalties, so long as the obligations are fulfilled, may be satisfied in whole or in part by either the University or DOE. No change in the contractual relationship between the Respondents shall in any way alter Respondents' responsibilities under this Consent Agreement. If the contract between DOE and the University is terminated or expires prior to such time as the obligations of this Consent Agreement are fully completed, DOE agrees to impose upon any successor contractor at LANL the same obligations as are now imposed upon the University.

II. BACKGROUND/HISTORY.

A. LANL is located principally in Los Alamos County, New Mexico, approximately sixty (60) miles northeast of Albuquerque and twenty-five (25) miles northwest of Santa Fe. LANL encompasses approximately forty-three (43) square miles. LANL is owned by DOE and is operated by DOE and by the University pursuant to a contract with DOE.

B. LANL was chosen in 1942 as the site for the wartime

development of the atomic bomb. The area was established as a military reservation, and operations began in 1943. Since 1943, the primary mission of LANL has been nuclear weapons research and development. In addition, the facility does work in magnetic and inertial fusion, nuclear fission, nuclear safeguards and security, laser isotope separation, and medical isotope development. In association with the activities identified above, Respondents currently generate and store mixed waste.

C. On May 4-8, 1992, NMED inspectors conducted a hazardous waste inspection at LANL.

D. As a result of that inspection, on January 28, 1993, NMED issued Compliance Orders 93-01 and 93-02 to DOE and Compliance Orders 93-03, and 93-04 to the University (~~hereinafter collectively "the Compliance Orders"~~), alleging violations of the New Mexico Hazardous Waste Act in the handling and storage of hazardous mixed waste and mixed waste at LANL.

III. JURISDICTION AND AUTHORITY.

A. NMED asserts jurisdiction and authority over the subject matter of this Consent Agreement pursuant to and including without limitation, the following statutes, regulations, and laws:

1. The Resource Conservation and Recovery Act,
2. The New Mexico Hazardous Waste Act and Regulations,

3. The New Mexico Department of Environment Act,
4. The New Mexico Environmental Improvement Act, and
5. The New Mexico statutory and common law of nuisance.

B. Respondents admit the jurisdictional allegations of the Compliance Orders and consent to the relief specified herein, including stated civil penalties to be paid by the University.

IV. DEFINITIONS.

A. ~~Advisory Group shall mean the Secretary's designee, and a designee of the Respondents.~~

B. **Compliance Schedule** shall mean the schedule set forth in Attachment "C" to this Consent Agreement.

C. **Consent Agreement** shall mean this document and any attachments incorporated by reference into this document including without limitation the Remedial Action Plan and the Compliance Schedule.

D. **Deliverable** shall mean any document required to be submitted to NMED for review or comment as set forth in the Consent Agreement.

E. **Due date** shall mean those dates designated as such in the Compliance Schedule on or before which Respondents must complete an activity or submit a deliverable to NMED, or be liable for stipulated penalties as set forth in Section VII.B.

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F. *Force majeure* shall mean any event arising from unforeseeable causes beyond the control of Respondent which could not be overcome by due diligence or contractual arrangement, and which delays or prevents performance by a date required by this Consent Agreement. *Force majeure* does not include unanticipated or increased costs of performance, changed economic circumstances including the failure of Congress to appropriate sufficient funds to carry out the obligations of this Consent Agreement, the actions or inactions of independent contractors, any solely discretionary actions authorized to be taken by NMED under this Consent Agreement, or enforcement action brought by NMED against Respondents, whether related to this Consent Agreement or not.

G. **Hazardous waste** is defined at § 74-4-3.I. of the New Mexico Hazardous Waste Act (HWA), and in New Mexico Hazardous Waste Management Regulations (HWMR) 6, § 101, which incorporates federal regulation 40 CFR § 260.10.

H. **Mixed waste** is defined as waste which contains a hazardous waste component regulated under Subtitle C of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 to 6939b, and the HWA; and a radioactive component consisting of source, special nuclear, or byproduct material regulated under the federal Atomic Energy Act (AEA) of 1954.

I. **Remedial Action Plan** shall mean the remedial action plan

set forth in Attachment "B" to this Consent Agreement.

J. **Secretary** shall mean the Secretary of the New Mexico Environment Department or her designee.

K. **Other terms** not specifically defined herein, if defined in RCRA or the HWA or regulations promulgated under those Acts, shall be accorded their meaning in those Acts or regulations. Terms not defined in those Acts or their implementing regulations shall be accorded their usual and ordinary dictionary meaning or their common meaning in usage, case law or in the applicable trade or profession.

V. **NMED's FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

As a result of NMED's May 4-8, 1992 inspection at LANL, NMED made findings of fact and conclusions of law under the New Mexico Hazardous Waste Act (HWA), NMSA 1978, § 74-4-1 through 11 (Repl. Pamp. 1990), and ~~the New Mexico Hazardous Waste Management Regulations (HWMR),~~ ~~6~~ which in part incorporate by reference the United States Environmental Protection Agency hazardous waste regulations. Those findings of fact and conclusions of law are set forth in the Compliance Orders which are incorporated by reference into this Consent Agreement. Under the legal authorities set forth above, NMED makes the following supplemental findings of fact and conclusions of law:

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A. **Supplemental Findings of Fact.**

1. HWMR-6, § 301, incorporated federal regulations 40 CFR § 262.34(c)(1)(i) requires Respondents to keep all hazardous waste containers closed at satellite accumulation points.

2. HWMR-6, § 301, incorporated federal regulations 40 CFR § 262.34(c)(1)(ii) requires Respondents to mark all containers at satellite accumulation points with the words "hazardous waste" or with other words that identify the contents of the container.

3. ~~HWMR-6, § 601, incorporated federal regulations 40 CFR § 265.16(d)(4) requires Respondents to maintain records at the facility documenting that all facility personnel have received and completed required training or job experience. Alternatively, HWMR-6, § 501, incorporated federal regulations 40 CFR § 264.16(d)(4) requires Respondents to maintain records at the facility documenting that all facility personnel have received and completed required training or job experience.~~

4. On March 15, 1993, Respondents provided written confirmation and photographic evidence acceptable to NMED that hazardous waste stored at TA 3-40 has been removed.

5. On March 15, 1993, Respondents provided written confirmation and photographic evidence acceptable to NMED that waste in those containers of the sixteen (16) exhumed at TA-54 Area G Pad #2 that were not in good condition or which were beginning to

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leak, had been transferred to containers that are in good condition.

6. On March 15, 1993, Respondents provided written confirmation acceptable to NMED in the form of copies of the signed, original manifests for hazardous waste shipments dated September 26, 1991, and September 19, 1991.

7. On March 15, 1993, Respondents provided satisfactory evidence that LDR hazardous waste containers at TA-54 Area L have been properly marked.

8. On March 15, 1993, Respondents provided satisfactory evidence that all individuals identified by NMED have undertaken or will undertake necessary training.

B. Supplemental Conclusions of Law.

1. Respondents violated HWMR-6, § 301, incorporated federal regulations 40 CFR § 262.34(c)(1)(i) for failure to keep all hazardous waste containers closed at TA-21-4-4J, a satellite accumulation point.

2. Respondents violated HWMR-6, § 301, incorporated federal regulations 40 CFR § 262.34(c)(1)(ii) for failure to properly mark all hazardous waste containers at TA-35-213-A107A, TA-21-150-607, TA-21-4-4J, TA-3-38 (west side), TA-53-1-D115, and TA-59-1-113, which are satellite accumulation points.

3. ~~Respondents violated HWMR-6, §601, incorporated~~

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~~federal regulations 40 CFR §265.171, at TA 54 Area G Pad # 2, by storing hazardous waste in containers which were not in good condition without transferring the waste in a timely manner into containers in good condition.~~

C. Respondents' do not admit any of NMED's the Department's findings of fact or conclusions of law except to the extent such facts or legal conclusions have been admitted in Respondents' answers to NMED's Compliance Orders filed on March 1, 1993.

VI. COMPROMISE AND SETTLEMENT OF COMPLIANCE ORDERS.

In compromise and settlement of violations alleged in the Compliance Orders and of penalties proposed in certain of the Compliance Orders, and without any admission of liability, Respondents agree as follows:

A. Remedial Action.

Pursuant to the terms of this Consent Agreement, Respondents agree to retrieve all mixed and hazardous waste stored in pads 1, 2, and 4 at Technical Area 54, Area G at LANL, and to place such wastes into storage meeting all applicable requirements of the New Mexico Hazardous Waste Act and Regulations. Respondents will carry out these activities in accordance with the Remedial Action Plan, Attachment "B" to this Consent Agreement, and the Compliance Schedule, Attachment "C" to this Consent Agreement.

B. Civil and stipulated penalties.

~~**C. Civil penalties for compliance order allegations.**~~

The University, on behalf of Respondents, shall make payment in a lump sum to the State of New Mexico of _____ dollars (\$____,____,____.00). Respondents represent that adequate funds or appropriations have been made and are available to cover this payment within the time frame set forth below. The payment shall be made to the State of New Mexico Hazardous Waste Emergency Fund by certified check, bank draft or other guaranteed negotiable instrument within thirty (30) days of the University's receipt of a final order approving this Consent Agreement, and mailed or hand-delivered to the New Mexico Environment Department, Office of General Counsel, Attention: Linda Romero, 1190 St. Francis Drive, Room N4084, Post Office Box 26110, Santa Fe, New Mexico 87502.

VII. STIPULATED PENALTIES.

A. General.

If Respondents or either of them fail to comply with the performance requirements of this Consent Agreement, or fail to mail or hand-deliver a deliverable on or before its due date as set forth in this Consent Agreement, they shall be liable, jointly and severally, for stipulated penalties as follows:

1. *Failure to timely submit any deliverable.*

\$_____ per day for each deliverable not received by NMED on or before its due date, from the 1st to 14th day following the due date, and \$_____ per day thereafter.

2. *Failure to complete any investigation or remediation activities in accordance with the Compliance Schedule.*

\$_____ per day for each action not completed by a due date as set forth in this Consent Agreement, from the 1st to 14th day following the due date for completion, and \$_____ per day.

B. Payment and payment procedures.

Stipulated penalties shall begin to accrue upon the passing of a due date without performance unless an extension of time to perform has been requested and granted by NMED prior to the expiration of the due date, in accordance with Section XV. Penalties shall continue to accrue as set forth above until Respondents cure their noncompliance. ~~Noncompliance shall be deemed cured when the Secretary confirms in writing that noncompliance was cured as of a specific date.~~ **The Secretary shall confirm in writing that noncompliance was cured.** Upon service of such written confirmation, penalties shall be deemed to be immediately due and payable in full. No separate written demand for payment from NMED shall be necessary. Payment shall be made by check, draft or other negotiable instrument made payable to the State of New Mexico Hazardous Waste Management Fund and mailed or

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hand-delivered to the New Mexico Environment Department, Office of General Counsel, Attention: Linda Romero, 1190 St. Francis Drive, Room N4084, Post Office Box 26110, Santa Fe, New Mexico 87502. Penalty payments not tendered within thirty (30) days after receipt by Respondents of the Secretary's letter confirming cure of noncompliance shall begin to accrue interest at the rate established by the United States Secretary of the Treasury pursuant to Section 2 of the federal Contract Dispute Act of 1978 (P.L. 95-563) and applicable at the time of the noncompliance default and as fixed by the Secretary of the Treasury thereafter until paid in full. Nothing herein shall preclude the simultaneous or overlapping assessment of separate stipulated penalties for separate instances of noncompliance with due dates. This section shall be subject to Section XI. Although the obligation to pay stipulated penalties shall be stayed in the event a penalty is disputed under the provisions of this section or in any other forum, accrual of penalties shall continue until the Secretary confirms in writing that noncompliance has been cured as set forth above.

VIII. INTERIM STATUS.

With the exception of any new construction required to take place under this Consent Agreement, and solely for purposes of this

Consent Agreement, NMED agrees that Respondents may perform the actions set forth and agreed to herein as if they had interim status under state or federal law. NMED does not admit, nor shall this Consent Agreement or any of its terms or conditions be construed or interpreted as an admission by NMED, that Respondents have met all state or federal statutory and regulatory requirements necessary to achieve interim status under state and federal law. For all new construction or modifications required under this Consent Agreement, Respondents shall apply for and obtain all permits required under state and federal law in accordance with Section XVII.

IX. DOCUMENTS, INFORMATION AND REPORTING REQUIREMENTS.

A. Exchange of Information.

Respondents agree to cooperate fully with NMED in providing requested data and information. Respondents agree to freely and routinely communicate with NMED concerning the status and progress of the project. No such communications shall alter or waive any rights or obligations of the Respondents under this Consent Agreement. No guidance, suggestions or comments by NMED shall be construed as relieving Respondents of their obligation to obtain formal approval where such approval is required by this Consent Agreement. Respondents are encouraged to confer with NMED at any

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time prior to submission of any proposals, plans, studies, reports or other documents required by this Consent Agreement.

B. Records Inspection and Copying.

Respondents shall permit NMED, its contractors, designees and agents to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, in any way pertaining to work undertaken pursuant to this Consent Agreement.

C. Reporting Requirements.

Throughout the course of activities performed pursuant to this Consent Agreement, Respondents shall submit quarterly, written progress reports to NMED. These progress reports shall include, at a minimum, the following:

1. a brief description of activities completed during the reporting period to implement the requirements of this Consent Agreement;
2. a brief description of activities scheduled for the following reporting period;
3. a description of ~~any change in project manager(s) personnel changes~~ which occurred during the reporting period;
4. a description of problems encountered during the reporting period and mechanisms used or proposed for resolving the problems;
5. tables and figures summarizing all data, sampling, and test results for the period.

Respondents shall furnish such progress reports to NMED as

soon as possible and in no event later than the 15th day of February, May, August, and November of each year this Consent Agreement remains in effect. The first progress report shall be due within sixty (60) days after the Secretary signs a final order approving this Consent Agreement. Subsequent reports shall be due as set forth above, unless the fifteenth day of a given month falls on a weekend day or a state or federal holiday, in which case the due date for the report shall be the next business day.

D. **Atomic Energy Act Requirements.**

All requirements of the Atomic Energy Act of 1954 and all applicable Executive Orders concerning the handling of unclassified controlled nuclear information, restricted data, and national security information including "need to know" requirements shall be applicable to any access to information furnished pursuant to this Consent Agreement. Respondents shall clearly identify all such documents.

X. **SITE ACCESS.**

A. Respondents shall at all reasonable times afford NMED, its contractors, designees and agents, unrestricted access to the Site, with or without prior notice. Respondents shall provide an authorized representative to accompany NMED's employees or contractors while at the Site.

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B. NMED, its contractors, designees and agents shall abide by Respondents' safety requirements and procedures for access to and while at the Site.

XI. RESOLUTION OF DISPUTES/ENFORCEMENT.

A. **General.** Except as to matters over which NMED may exercise sole discretion under this Consent Agreement, any dispute as to the obligations of this Consent Agreement shall first be subject to this Section. Matters contained within this Consent Agreement over which NMED may exercise sole discretion shall not be challengeable through this Section. As to matters for which it may be invoked, the dispute resolution procedures of this Section shall be followed and exhausted before pursuing any other legal remedy in any other forum. Exchange of documents under this Section shall be in accordance with Section XIV.

B. **Informal resolution.** Any dispute subject to this Section shall in the first instance be the subject of informal negotiation between NMED and the Respondents' project managers. The period for informal negotiation shall not exceed twenty (20) days from the time the disputing party notifies the other parties in writing that it wishes to commence informal dispute resolution, unless an extension of time is requested in writing within the prescribed twenty-day time and agreed to by NMED. The parties shall meet and

confer as necessary to attempt to resolve the dispute within the twenty-day informal resolution period.

C. **Formal Resolution by Technical Group.**

1. **Composition.** The Technical Group shall consist of the LANL Environmental Management (EM-8) Group Leader for the University, and the Los Alamos Area Office Environment, Safety and Health Branch Chief for DOE, and the Bureau Chief of the Hazardous and Radioactive Materials Bureau and a designated staff person of that Bureau for NMED.

2. **Invoking formal procedure.** In the event that the parties cannot resolve a dispute by informal negotiation, then the disputing party may invoke formal dispute resolution by submitting to the other parties and the members of the Technical Group a written Statement of Position on the matter in dispute, including, but not limited to any factual data, analysis, opinion, or documentation supporting its position.

3. **Responses.** Within fifteen (15) days of receipt of the disputing party's Statement of Position, the responding party's shall submit to the disputing party and the members of the Technical Group their Statement(s) of Position, including but not limited to any factual data, analysis, opinion, or documentation supporting that position.

4. **Technical Group Meeting.** Within fifteen (15) days

of receipt of the responding parties' Statement(s) of Position, the Technical Group shall meet to resolve the dispute.

D. **Formal Resolution by Advisory Group.**

1. The Advisory Group shall consist of the Area Manager for DOE's Los Alamos Area Office, the LANL Associate Director for **Operations Support** for the University, the Deputy Secretary of NMED and the Division Director of the Hazardous and Radioactive Materials Bureau for NMED.

2. In the event the Technical Group has been unable to resolve the dispute within the time prescribed, the disputing party shall, within fifteen days after the Technical Group's last meeting, submit to the members of the Advisory Group copies of all documents furnished to the Technical Group.

3. **Advisory Group Meeting.** Within fifteen (15) days of receipt of this documentation, the Advisory Group shall meet to resolve the dispute.

E. **Final Decision by the Secretary.** In the event the Advisory Group has been unable to resolve the dispute within the time prescribed, the disputing party shall submit a written Request for Final Decision to the Secretary. The written request shall be accompanied by all documentation furnished to the Technical and Advisory Groups. Within thirty (30) days of receipt of the written Request for Final Decision, the Secretary shall issue a final

decision, including a written statement of the reasons for the decision. The Secretary's decision shall be binding upon the parties unless timely appeal is taken. ~~in accordance with Section XII below.~~

F. **Extension of Time for Formal Dispute Resolution.** If, during the formal dispute resolution process, it appears that resolution may be achieved by an extension of time, the Technical Group may petition the NMED member of the Advisory Group, and the Advisory Group may petition the Secretary for an extension of time in which to resolve the dispute.

G. **Effect of Dispute Resolution on Respondents' Obligations.**

Neither Respondents' obligations under this Consent Agreement nor the accrual of stipulated penalties shall be stayed during the pendency of any dispute under this Section, unless an extension of the performance due date has been granted by NMED pursuant to Section XV.

H. **Incorporation by amendment.** Upon resolution of a dispute pursuant to this Section, the resolution shall be incorporated into this Consent Agreement by appropriate amendment.

XII. **COURT JURISDICTION/VENUE.**

The parties expressly waive all rights, if any, to challenge

any of the terms or conditions of this Consent Agreement or to bring any claims, ~~or defenses, or challenges to venue or jurisdiction~~ in any ~~state district court other than the New Mexico First Judicial District Court, or in any~~ federal court ~~other than~~ the United States District Court for the District of New Mexico. ~~Respondents waive the right to challenge jurisdiction or venue either in the District Court for Santa Fe County or in any other forum.~~

XIII. COMPUTATION OF TIME.

In computing any period of time prescribed in this Consent Agreement, the day of the act, event, requirement or ~~noncompliance default~~ from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or federal or State of New Mexico holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or holiday.

XIV. EXCHANGE OF DOCUMENTS.

A. Whenever the terms of this Consent Agreement require exchanges of documents, such exchanges shall be made by mail, by facsimile if followed within twenty-four (24) hours by a mailed copy, or by hand-delivery to the individuals at the addresses

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below, unless those individuals or their successors give notice in writing to the other Parties of a change in designated recipient or address. Exchanges of documents required under this Consent Agreement shall be complete upon mailing or upon hand-delivery to a designated representative of the individuals listed below:

For NMED:

BENITO GARCIA, Bureau Chief
NMED Hazardous & Radioactive Materials Bureau
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, NM 87502
(505) 827-4358
(505) 827-2836

For the U.S. Department of Energy:

Jon Mack, Project Manager
Environment, Safety and Health Branch
Department of Energy
Los Alamos Area Office
528 35th St.
Los Alamos, N.M. 87544
(505) 665-5026
(505) _____ (fax)

For the University of California:

John Krueger, Project Manager
Los Alamos National Laboratory
EM-7, MS-
Los Alamos, N.M. 87545
(505) 665-8467
(505) _____ (fax)

For the Technical Group:

BENITO GARCIA, Bureau Chief

June 18, 1993

NMED Hazardous & Radioactive Materials Bureau
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, NM 87502
(505) 827-4358
(505) 827-2836

[LANL Designee]
[ADDRESS]

[DOE Designee]
[ADDRESS]

For the Advisory Group:

Division Director
NMED Water & Wastewater Management Division
Office of the Secretary
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, NM 87502
(505) 827-2836 (fax)

Deputy Secretary
New Mexico Environment Department
Office of the Secretary
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, NM 87502
(505) 827-2836 (fax)

[DOE Los Alamos Area Manager]
[ADDRESS]

[LANL Associate Director for Support]
[ADDRESS]

XV. **TIME FRAMES; EXTENSIONS; FORCE MAJEURE.**

A. **Extensions for Good Cause.**

Before the due dates for performance of obligations or

delivery of documents as set forth in this Consent Agreement, and for good cause shown, due dates may be extended with the written permission of NMED as follows:

1. *Extensions of more than 30 days.* Any request for extension of 30 days or more shall be made in writing and received by NMED at least 30 days prior to the due date for which the extension is sought. NMED shall ~~approve~~ ~~permit~~ or deny the request in writing within 21 days after receipt of the extension request.

2. *Extensions of less than 30 days.* Any request for extension of less than 30 days shall be made in writing and received by NMED at least 7 days prior to the due date. NMED shall ~~approve~~ ~~permit~~ or deny the request before the due date either in writing or orally with written confirmation within 24 hours.

3. *Requests for extension; required content.* All requests for extension claiming good cause shall include:

- a. the due date sought to be extended;
- b. the length of the extension sought;
- c. the good cause(s) alleged to support the requested extension;
- d. a description of all related due dates that may be affected if the extension is granted.

4. The grant or denial of a request for extension of a due date based upon good cause shall be within the sole discretion

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of NMED, and shall be upheld unless it is found to be arbitrary, capricious, an abuse of discretion, or otherwise unsupported by the evidence.

B. **Extensions for Force Majeure.** Respondents agree to implement this Consent Agreement in accordance with the schedules set forth herein. Respondents further agree to adopt all reasonable measures including contractual arrangements with third parties to avoid and minimize any delays in the implementation of this Consent Agreement.

1. **Claiming force majeure.** To claim *force majeure* Respondents shall give prompt oral notification to NMED within forty-eight (48) hours after the event, with written confirmation within 24 hours. No claim of *force majeure* shall be made after the expiration of a due date claimed to be affected.

2. **Required content of written notice.** All written notifications of *force majeure* shall include:

- a. a description of the event claimed to constitute *force majeure*;
- b. an estimate of the anticipated length of delay;
- c. a description of all related due dates that may be affected, and;
- d. a plan and schedule of corrective action and, if applicable, of proposed measures to prevent

recurrence.

3. **NMED acknowledgement.** NMED shall, within 7 days after receipt of a notification of *force majeure* but in no event later than the affected due date, acknowledge or deny in writing Respondents' claim of *force majeure*. NMED denial of Respondents' claim of *force majeure* shall be subject to the dispute resolution procedures of Section XI.

C. **Waiver.** Unless Respondents have timely requested an extension for good cause or timely notified NMED of a claim of *force majeure*, failure of Respondents to timely submit a deliverable or complete an activity shall constitute a waiver of any right to dispute the due dates for such obligations. No extension of time, deferral, grant, or waiver by NMED or the Secretary as provided in this Consent Agreement shall be construed as waiver or authorization for any other delays, defaults or omissions.

D. **Impairment of Obligations.** If the suspension of obligation(s) under this Section would, in NMED's sole discretion, substantially impair or impede the satisfactory or timely completion of the overall objectives of this Consent Agreement, NMED reserves the right, notwithstanding other remedies or limitations set forth herein, to seek judicial enforcement of this Consent Agreement.

XVI. TERMINATION.

A. **Generally.** This Consent Agreement shall terminate upon satisfactory completion by Respondents of all obligations under this Consent Agreement as determined in accordance with this Section:

1. *Certification of Completion.* When Respondents determine that they have completed all the obligations of this Consent Agreement they shall submit to NMED a Request for Certification of Completion. NMED shall evaluate the request by performing an on-site inspection and reviewing all relevant documents and data. Within 90 days after receipt of Respondents' Request for Certification of Completion, NMED shall either issue a written Certification of Completion or deny the request. If NMED denies the Request for Certification of Completion, its denial shall describe all remaining obligations deemed to be incomplete. This Consent Agreement shall terminate upon the issuance of NMED's written Certification of Completion.

B. **Termination by NMED.** NMED in its sole discretion reserves the right to terminate this Consent Agreement by written notice to the Respondents if NMED at any time determines that the objectives of the Consent Agreement are not being satisfactorily met, are not being met in accordance with the terms or spirit of this Consent Agreement, or have been substantially impaired or

impeded by the actions or inactions of Respondents or others, whether foreseeable or unforeseeable, including without limitation, actions or inactions which may constitute *force majeure* under this Consent Agreement.

XVII. COMPLIANCE WITH APPLICABLE LAW.

A. **Generally.**

All activities required by this Consent Agreement shall be undertaken in compliance with the requirements of all applicable federal, state, and local laws, regulations, and ordinances. Nothing in this Consent Agreement shall be construed as relieving Respondents of any liability under, or obligation to comply with applicable laws.

B. **Anti-Deficiency Act.** Any requirement for payment or obligation of funds by DOE established by this Consent Agreement shall be subject to the federal Anti-Deficiency Act, 31 U.S.C. § 1341, if applicable. Respondents understand and agree that the obligations of this Consent Agreement, including the obligation to pay stipulated penalties when properly assessed, are joint and several and unaffected by DOE's failure to obtain adequate funds or appropriations from Congress.

C. **Permits.** This Consent Agreement is not, and shall not be construed to be, a permit issued pursuant to any federal or state

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statute or regulation. Where any portion of the work requires a federal or state permit or approval for new construction, modifications or otherwise, Respondents shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Respondents agree to act with due diligence and in good faith in seeking all legal permissions and permits which may from time to time be required in order to comply with this Consent Agreement. The failure to submit a timely and technically complete permit application required for any work to be conducted pursuant to this Consent Agreement shall bar any claims for *force majeure* alleging inability to obtain a permit, and shall constitute grounds for denial of a request for extension of a due date for the work based upon good cause as set forth in Section XV.

XVIII. HOLD HARMLESS CLAUSE.

Neither NMED nor its agents, employees or contractors shall be liable to Respondents or third parties for any injuries or damages, whether contractual, tortious or otherwise in nature, which arise directly or indirectly out of, or result directly or indirectly from, the actions required of Respondents under this Consent Agreement. Neither NMED nor its agents, employees or contractors shall be held out as a party to any contract, agreement or

understanding entered into by the Respondents in carrying out the obligations of this Consent Agreement. Specifically and without limitation, neither NMED nor its agents, employees or contractors shall be liable to Respondents or third parties for termination of this Consent Agreement by the Secretary.

XIX. GOOD FAITH PERFORMANCE.

The parties agree that they will act reasonably and in good faith at all times to accomplish the objectives of this Consent Agreement. Respondents agree to perform all evaluations and actions required by this Consent Agreement using sound scientific judgment. It is the expectation of the parties that all obligations of Respondents imposed under this Consent Agreement will be fully funded by DOE. DOE shall take all necessary steps and use its best efforts to obtain timely and sufficient funding to meet Respondents' obligations under this Consent Agreement, including without limitation, submission of timely budget requests.

XX. TIME OF THE ESSENCE.

The Parties understand and agree that time is of the essence in accomplishing the goals and objectives of this Consent Agreement. Wherever and whenever time is at issue under this Consent Agreement, but no specific time frame or due date has been

specified, this Consent Agreement shall be construed to expedite each and every condition, obligation, undertaking and provision of this Consent Agreement.

XXI. AMENDMENTS.

This Consent Agreement may be amended only by agreement of the Parties. Such amendments shall be in writing, signed by the Parties and subject to the approval of the Secretary, and shall become effective upon written approval of the Secretary.

XXII. COVENANT NOT TO SUE.

NMED agrees that as long as Respondents remain in compliance with the terms and conditions of this Consent Agreement, NMED will not initiate or pursue civil or administrative relief in any other forum which might otherwise be available under New Mexico and federal law, including without limitation the right to seek and recover damages or penalties against Respondents, their successors, assigns and employees for the allegations set forth herein or for the actions required to be performed under this Consent Agreement.

XXIII. RIGHTS EXPRESSLY RESERVED/ENFORCEMENT.

A. Reservation of rights. NMED reserves the right to pursue civil or administrative relief for any other violations of state or

federal law, past or future, which are not the subject matter of this Consent Agreement. NMED reserves the right to take emergency response action at property owned or controlled by Respondents in the event conditions pose an imminent and substantial endangerment to human health or the environment. NMED specifically retains the right to conduct other environmental studies, investigations, monitoring, or emergency activities at property owned or controlled by Respondents, and to enforce all laws, statutes and regulations NMED is authorized to enforce. NMED's failure to exercise any power, authority, or right in this Consent Agreement, or its election not to exercise such power, authority or right, shall not be construed as a waiver or relinquishment of such power, authority or right at other times or under other circumstances.

B. **Enforcement.** In the event Respondents fail to perform any obligations under this Consent Agreement, including those that have not been resolved pursuant to the dispute resolution mechanism under Section XI, this Consent Agreement shall be enforceable by NMED by the filing of a civil action either in the New Mexico District Court for Santa Fe County or in the United States District Court for the District of New Mexico.

XXIV. COSTS AND FEES.

All costs and fees arising out of ~~incurred under~~ this Consent

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~~Agreement~~ Section shall be paid by Respondents. Under no circumstances shall costs or fees arising out of incurred under this ~~Consent Agreement~~ Section be assessed against NMED, even where the Secretary's determination is overturned in whole or in part on appeal.

XXV. SEVERABILITY.

The provisions of this Consent Agreement are severable. If any provision of this Consent Agreement is declared by a court of law to be invalid or unenforceable, all other provisions of this Consent Agreement shall remain in full force and effect, unless NMED in its sole discretion determines that the objectives of this Consent Agreement are substantially impaired by the court's ruling. In that event, NMED may, in its sole discretion, elect to terminate this Consent Agreement by so notifying the Respondents in writing signed by the Secretary.

XXVI. DELEGATION.

Except with respect to final orders or decisions to terminate this Consent Agreement, NMED's powers and authorities under this Consent Agreement shall be exercised by its Deputy Secretary, its Division Director for the Water and Waste Management Division, and the Bureau Chief for the Hazardous and Radioactive

Materials Bureau as set forth herein or if not set forth in this Consent Agreement, as determined and allocated amongst them.

XXVII. MERGER & INTEGRATION.

This Consent Agreement merges all prior written and oral communications between the parties concerning this matter, and contains the entire agreement reached between the parties. This Consent Agreement shall not be altered, amended or construed by any communications whether written or oral, which are not contained herein. This Consent Agreement may only be amended in accordance with Section XXI.

XXVIII. EFFECTIVE DATE.

This Consent Agreement is effective on the day on which the Secretary signs a final order approving it.

XXIX. AUTHORITY OF SIGNATORY.

The persons executing this Consent Agreement respectively represent that they have the requisite authority to bind the U.S. Department of Energy, the University of California, and the New Mexico Environment Department to the terms of this Consent Agreement, and further agree that this representation of authority as to each such entity shall be legally sufficient evidence of

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actual or apparent authority to bind each of them to all of the terms and conditions of this Consent Agreement.

APPROVED:

Kathleen Sisneros, on behalf of the
New Mexico Environment Department

APPROVED:

'
on behalf of the United States
Department of Energy

APPROVED:

'
on behalf of the University
of California

ATTACHMENT B

REMEDIAL ACTION PLAN

ATTACHMENT C

COMPLIANCE SCHEDULE