

1/13/97

LANL Permit Controlled Air Emission

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

CONCERNED CITIZENS FOR NUCLEAR SAFETY, INC. and PATRICK JEROME CHAVEZ, Plaintiffs,

v.

Civ. No. 94-1039 M

UNITED STATES DEPARTMENT OF ENERGY and SIEGFRIED S. HECKER, Defendants.

CONSENT DECREE

I. RECITATIONS

Whereas, the parties to this action are Plaintiffs Concerned Citizens for Nuclear Safety ("CCNS") and Patrick Jerome Chavez and Defendants United States Department of Energy ("DOE") and Siegfried S. Hecker;

Whereas, Plaintiffs filed suit against Defendants alleging that Los Alamos National Laboratory ("LANL" or "Laboratory") is not in full compliance with the national emission standard for radionuclides at DOE facilities, set forth at 40 C.F.R. §§ 61.90-61.97 ("Subpart H");

Whereas, on April 2, 1996, the Court granted partial summary judgment to Plaintiffs based upon DOE's admission that 31 of 33 "major" stacks and associated quality assurance programs were not in compliance with Subpart H at the time Plaintiffs filed their motion for partial summary judgment;



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Whereas, DOE contends that it achieved full compliance with Subpart H on or about June 3, 1996;

Whereas, DOE further contends that Congress has not waived DOE's sovereign immunity for the assessment of civil penalties against it under the Clean Air Act;

Whereas, Plaintiffs dispute DOE's claim of full compliance and non-waiver of sovereign immunity for the assessment of penalties and, furthermore, seek injunctive relief, an assessment of penalties, an order requiring the performance of environmentally beneficial projects, and recovery of their litigation costs and fees;

Whereas, the parties wish to resolve this action without additional litigation and agree that it is in the public interest to enter into this Consent Decree, without further adjudication of the issues raised in this case; and

Whereas, the parties consider this Consent Decree, when viewed together with the Settlement Agreement dated January 14, 1997 between CCNS and DOE, to be a just, fair, adequate and equitable resolution of these issues.

NOW THEREFORE, before the taking of any further testimony, without trial or further admission of any issue of fact or law, and upon the consent of the parties, it is hereby ordered adjudged and decreed that:

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to Section 304(a)(1)

of the Clean Air Act, 42 U.S.C. § 7604(a)(1), and 28 U.S.C. § 1331.

2. Venue is proper in this Court pursuant to 42 U.S.C. § 7604(c).

III. APPLICABILITY

3. This Decree shall apply to and be binding upon the Parties, their members, delegates and assigns. The undersigned representatives certify that they are authorized by the Party or Parties whom they represent to enter in to this Decree and to execute and legally bind that Party or Parties to the terms and conditions of this Decree. Signature by counsel for the Department of Justice on behalf of DOE shall bind the United States to the terms of this Decree.

IV. AGREED UPON SETTLEMENT PROVISIONS

A. DOE

4. Comprehensive Technical Audits. DOE agrees to contract for, fund and facilitate performance of the comprehensive independent technical audits described in this section.

4.1. Purpose. The purpose of the comprehensive independent technical audits is to verify whether LANL is in full compliance with the Clean Air Act radionuclide NESHAP, 40 C.F.R. § 61.90-61.97 ("Subpart H"), during the term of this Decree.

4.2. Auditor. The technical audits will be conducted by John Till, Ph.D, as the independent auditor. He will have the authority to assemble an auditing team of

appropriate, independent individuals. "Independent" means that the auditor and the members of the audit team will have had no previous significant relationship with LANL or CCNS. CCNS' retained consultants in this case, Institute for Energy and Environmental Research, will not serve as members of the audit team.

4.3 Consultation The independent technical audit team is free to consult with CCNS, DOE, or any other entity as it chooses.

4.4 Access DOE agrees to provide the independent audit team with access to facilities and raw data promptly upon request, subject to compliance with reasonable security, safety and scheduling requirements of DOE and LANL. CCNS shall be provided, without charge, with copies of all documents copied for the independent auditor. CCNS may request copies of other data reviewed by the independent auditor. In the event DOE believes the costs of a CCNS document request are not reasonable, pursuant to paragraph 26, the production of documents will be provided only after payment by CCNS of reasonable copying charges. DOE will notify CCNS of any decision to contest the reasonableness of the costs within 10 days of receipt of any request for copies. CCNS may then obtain the copies at its own expense, without waiver of its rights to seek reimbursement from DOE under paragraph 26.

4.5 Schedule of Audits. The independent technical audits will occur on the following schedule:

a. The first technical audit will commence during calendar year 1997 no later than 90 days after completion of the updated radionuclide inventory currently in progress.

b. A second technical audit will commence during calendar year 2000. An updated radionuclide inventory will be prepared prior to the commencement of this second audit. The second audit will commence no later than 90 days after completion of the updated radionuclide inventory.

c. A third technical audit will commence in calendar year 2002 if the independent auditor determines that a third technical audit should be conducted. An updated radionuclide inventory and an updated description of operations and processes at LANL that have changed since the last audit and which involve air emissions regulated under Subpart H will be prepared and provided to the auditor prior to June, 2002. The independent auditor may meet with CCNS and its consultants and with DOE prior to the auditor determining the scope and specific data to be included in the updated description of operations and processes. The independent auditor, based upon review of these documents and upon the results of the second audit, will determine whether, in his independent judgment, a third technical audit should be conducted.

d. In the event that the third technical audit identifies substantive deficiencies with compliance with Subpart H that the auditor believes require corrective actions, a fourth technical audit will commence no later than the end of

calendar year 2003. The scope of the fourth technical audit shall be limited to determining whether the necessary corrective actions identified in the third technical audit have been satisfactorily accomplished.

4.6 Scope of Audits. The scope and depth of the technical audits will be determined by the independent auditor, exercising sound scientific judgment, subject to the cost limits set forth below. The parameters of the audits may include, but are not limited to the following:

- a. analysis of the existing radionuclide monitoring systems.
- b. review of the application of the methodology used to determine the potential effective dose equivalent, including radionuclide inventory and underlying data.
- c. examination of the content and implementation of the quality assurance programs.

Prior to each audit, the auditor will submit to DOE and CCNS a proposed scope of work and budget. If the proposed budget exceeds \$100,000, then DOE must approve the budget. DOE's budget approval will not be unreasonably withheld. In the event DOE determines not to approve any submitted budget, it shall initiate the dispute resolution process set forth in Section VII below and, if unsuccessful in resolving the dispute in that forum, shall within five days of exhausting the dispute resolution process, file a motion with the Court to determine whether the

proposed budget should be funded. DOE shall pay the reasonable costs, if any, of the independent auditor incurred in any dispute resolution or Court proceeding under this section. In no event shall the cost of the first audit exceed \$300,000. In no event shall the cost of the second audit exceed \$200,000. In no event shall the cost of the third audit exceed \$150,000. In no event shall the cost of the fourth audit exceed \$50,000.

4.7 Reports. The independent auditor will issue a report at the end of each audit. Minority opinions within the audit team may be noted in the report. Within 10 days of receipt of each audit report, DOE will provide a copy to EPA Region VI, mail a copy to CCNS and place a copy in the Los Alamos National Laboratory Reading Room. The findings and results of the audits are non-binding.

4.8. Non-interference. The parties will not interfere in the timely, independent, or comprehensive completion of the audits.

4.9 Payment. Invoices from the independent auditor will be submitted monthly to both CCNS and DOE. Within 45 days of approval of each budget submitted by the independent auditor, DOE shall fund an account established and administered by the United States Department of Justice for payment of costs of the independent audit. The account shall be fully funded with the total amount of the approved budget. The reasonable charges of the independent auditor shall be submitted by DOE to the Department of Justice account administrator within 20 days of

receipt by DOE, and shall be paid promptly by the Department of Justice.

4.10 FFCA Audits. Pursuant to the Federal Facility Compliance Agreement between DOE and the United States Environmental Protection Agency, DOE is obligated to conduct certain external independent audits ("FFCA Audits") of the programs and procedures used to demonstrate compliance with Subpart H. In the event DOE arranges for FFCA Audits in addition to those provided in this Decree during the term of the Federal Facility Compliance Agreement, CCNS shall be given an opportunity to meet with the FFCA auditor during each such audit.

5. Payments to the Treasury. DOE will make a payment of \$150,000 to the Treasury of the United States in compromise of disputed claims for civil penalties in this case under the citizen suit provision of the Clean Air Act.

6. Environmentally Beneficial Projects

6.1 AIRNET In addition to the 17 AIRNET stations operated as Subpart H compliance stations pursuant to the Federal Facility Compliance Agreement between DOE and the United States Environmental Protection Agency, DOE will, for five years from the entry of this Decree :

a. continue the operation of AIRNET stations 27, 30, 34, and 36, as identified on the handwritten notations on the Structure Location maps, TA-54, provided by DOE and attached to this Decree as Exhibit 1. These stations will be operated to

the same standards as a Subpart H compliance station commencing within 30 days of entry of this Decree.

b. commencing within 6 months after entry of this Decree, operate one additional AIRNET station at TA-33 and one additional AIRNET station located in the greater Santa Fe area. The general location of these AIRNET stations will be determined jointly by DOE and CCNS. These two additional AIRNET stations will operated to the same standards as Subpart H compliance stations.

c. On a quarterly basis, raw data and analysis from the additional AIRNET stations referred to in subparagraphs a and b above shall be provided to CCNS and a copy placed in the Los Alamos Reading Room. Each quarterly data package will include air sampling data from the previous quarter.

6.2 Thermoluminescent Dosimeters.

Thermoluminescent dosimeters ("TLDs") capable of detecting gamma and thermal neutron emissions will be placed at the 17 existing compliance AIRNET stations within 60 days of entry of this Decree. In addition, TLDs will be placed as follows:

- a. Approximately 11 TLDs around the TA-53 facility, including any of its lagoons containing radioactive material.
- b. Approximately 7 Albedo TLDs on the north, east and south sides of TA-18.
- c. Approximately 16 TLDs around TA-50.
- d. Approximately 33 TLDs around TA-54.

e. Approximately 7 TLDs around TA-16, S-Site.

f. Approximately 15 TLDs around TA-15 firing sites.

These TLDs will be operated for a period of five years from entry of this Decree. For purposes of quality assurance, for a period of two years from entry of this Decree, DOE will place a second TLD at 10% of the TLD locations identified above, rotated to a different TLD site on a quarterly basis. DOE will send these quality assurance TLDs to an independent laboratory for analysis. Data generated from the TLDs and the quality assurance TLDs will be analyzed quarterly. On a quarterly basis, the TLD raw data and analyses and the quality assurance raw data and analyses will be provided to CCNS and placed in the Los Alamos National Laboratory Reading Room. Each quarterly data package will include TLD results from the previous quarter.

6.3. NewNet DOE agrees to operate through September 2002 the current northern New Mexico NewNet system. DOE will make northern New Mexico NewNet data available via a Web site on the Internet in a "near real time" manner, in English and Spanish. The data will be collected continuously and will be made available to the public on the Internet in the same form and at the same time that it is provided to DOE and LANL.

B. Siegfried Hecker

7. President's Council on National Laboratories.

Within 30 days of entry of this Decree, Siegfried S. Hecker,

while he remains director of LANL, shall use the influence of his office and his best efforts to persuade the Environment, Safety & Health Panel, which advises the University of California's President's Council on National Laboratories, to allocate one day of each annual visit to New Mexico to hear environmental issues relating to the Laboratory. If the Panel allocates time during its annual visit to hear environmental issues, LANL employees, CCNS—and other members of the public will be invited to attend. LANL staff shall be made available for follow-up as requested by the Panel.

8. Meeting with CCNS. Within 45 days of entry of this Decree, Mr. Hecker will meet with CCNS to hear CCNS's concerns and suggestions regarding the protection of employees from retaliation or harassment for voicing environmental concerns, and regarding CCNS' environmental concerns.¹

9. Community Meetings Mr. Hecker, while he is Director of the Laboratory, shall initiate a program whereby appropriate members of the Laboratory's Environment, Safety & Health technical staff will be made available for discussions relating to environmental issues with interested members of the public on a quarterly basis. These meetings will be announced in advance, and those interested in participating should give reasonable notice of the issues of concern to them so that

¹ G. Thomas Todd, in his capacity as Manager of the Department of Energy, Los Alamos Area Office, has agreed to attend this meeting.

appropriate personnel can be scheduled to attend. The first such meeting shall occur within 90 days of entry of this Decree.

V. FUNDING

10. Payments or obligations imposed upon DOE are subject to the availability of appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that DOE obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341 or any other applicable law or regulation. DOE represents that the source of funding for its obligations under this Decree shall be annual DOE appropriations for operation of LANL and that funding such obligations does not require a specific appropriation from Congress. In the event that sufficient appropriated funding is not available, the Parties will attempt to adjust any affected timetables accordingly. If funding is not received, Plaintiffs may seek available legal and equitable remedies, including termination of this Decree.

VI. INABILITY TO PERFORM

11. If DOE is or may be unable to comply with any requirement of this Decree because of a "force majeure" event, DOE may request of Plaintiffs a modification of that requirement.

12. As soon as practicable after DOE knows that any requirement of this Decree will not be met, DOE shall promptly notify Plaintiffs in writing. Such notice shall describe the cause and duration of the anticipated delay, the measures taken or to be taken to mitigate the anticipated delay, and a proposed

revised schedule for meeting the requirement. DOE may also state in such notice that it constitutes a written statement of dispute for purposes of initiating the dispute resolution process.

13. In any judicial proceeding seeking to enforce the terms of this Decree and/or to find DOE in contempt for failure to comply or for delay in compliance with such terms, DOE may raise as a defense that such failure or delay was caused by a "force majeure" event. In any such judicial proceeding, Plaintiffs may seek available legal and equitable remedies, including termination of this Decree.

14. A "Force Majeure" event is defined as any event or circumstance arising from causes beyond the reasonable control of DOE that cannot be overcome by due diligence and that causes a delay in or prevents the performance of any obligation under this Decree.

VII. RESOLUTION OF DISPUTES

15. Each Party shall exhaust the provisions of this Section VII with respect to any potential dispute between them concerning this Consent Decree prior to seeking Court resolution of the dispute.

16. To initiate Dispute Resolution, the disputing Party shall submit to the other Party a written statement setting forth the nature of the dispute, the work affected by the dispute, the disputing Party's position with respect to the dispute, and the information the disputing Party is relying upon to support its position.

17. The disputing Party shall engage the other Party in informal Dispute Resolution. During this informal Dispute Resolution period, which shall not exceed 10 working days, the Parties shall meet as many times as both deem necessary to discuss and attempt resolution of the dispute. If resolution of the dispute is not reached, either party may file a motion with this Court to resolve the underlying dispute. If this Decree places a burden on a party to seek resolution by the Court, that party shall initiate the Court proceeding.

18. The pendency of any dispute under this Section shall not extend the time allowed for performance of the work required by this Decree, except that the time period for completion of any work directly affected by a good-faith dispute shall be extended for at least a period of time equal to the actual time taken to resolve it pursuant to this Section VII. All elements of the work required by this Decree which are not directly affected by the dispute shall continue and be completed in accordance with the Decree.

19. In attempting to resolve any dispute under this section, the Parties may, by written agreement of the party obligated to perform and CCNS, modify or waive the procedures of this section as appropriate, including but not limited to an extension of the times set forth herein. Such modifications will become effective upon subsequent approval by the Court.

VIII. RELEASES AND RESERVATIONS

20. Plaintiffs hereby release, covenant not to sue and not to bring any civil, or seek any administrative action against the United States or any department or agency thereof, or any past or present officer, director, official employee, agent or contractor of the United States, or the contractor's officers, directors or employees, including the Regents of the University of California, or their successors or assigns, but not including Siegfried Hecker, with respect to all claims for violation of Subparts A and H of 40 C.F.R. Part 61, including civil penalties and injunctive relief, at LANL occurring from March 15, 1990 through the date of entry of this Decree. Plaintiffs further covenant and agree that they will not file suit for alleged violations, if any, occurring after the entry of this Decree until 90 days after the completion of the first independent technical audit described in paragraph 4.5(a) above.

21. Plaintiffs hereby release, covenant not to sue and not to bring any civil, or seek any administrative action against Siegfried Hecker, his successors or assigns, with respect to all claims which were alleged against Mr. Hecker in the First Amended Complaint.

22. Nothing in this Decree shall preclude or restrict any right or authority of the President of the United States contained in 33 U.S.C. § 1323, 42 U.S.C. § 6961, 42 U.S.C. § 7418 or 42 U.S.C. § 9620(j) to exempt LANL from any provisions of the Clean Air Act, the Clean Water Act or the Resource Conservation

and Recovery Act. Nothing in this Decree shall preclude or restrict the authority of the United States Environmental Protection Agency to enforce provisions of the Clean Air Act at LANL.

IX. USE OF DECREE

23. This Decree was negotiated and executed by the parties in good faith to avoid expensive and protracted litigation and is a settlement of claims and defenses which were vigorously contested, denied and disputed as to validity and amount. This Decree shall not constitute an admission or adjudication with respect to any allegation made by any Party. Moreover, this Decree shall not constitute an admission of any wrongdoing, misconduct or liability on the part of Siegfried S. Hecker, DOE, any of the DOE's officers, or any of the DOE's contractors. Further, this Decree shall not constitute an acknowledgement by Plaintiffs that there was no wrongdoing, misconduct or liability.

X. NOTICE

24. Whenever, under the terms of this Decree, notice is required to be given or documents to be served, the communication shall be hand-delivered or sent by first-class mail on the date it is due, to the following persons:

For Plaintiffs:

Carol Oppenheimer, Esq.
Law Office of Simon and Oppenheimer
P.O. Box 9612
Santa Fe, NM 87504-9612

For DOE:

Alan D. Greenberg
U.S. Department of Justice
999 18th Street, Suite 945
Denver, CO 80202

and

Lisa Cummings
Department of Energy
Office of Counsel
528 35th Street
Los Alamos, New Mexico 87544

For Siegfried Hecker:

Jonathan Hewes
Rodey, Dickason, Sloan, Akin & Robb
Post Office Box 1888
Albuquerque, New Mexico 87103

XI. COSTS AND ATTORNEYS' FEES

25. For any litigation costs incurred by Plaintiffs prior to the entry of this Decree, Plaintiffs reserve any right they may have to seek reasonable costs of litigation, including attorneys' and expert witness fees, against DOE pursuant to 42 U.S.C. § 7604(d). DOE reserves its right to object to the award of any such costs and fees.

26. DOE shall pay Plaintiffs' costs, including reasonable expert fees, incurred in monitoring compliance with this Decree, including monitoring the independent audits, pursuant to 42 U.S.C. § 7604(d). DOE reserves the right to contest the reasonableness of charges submitted by Plaintiffs. All bills shall be paid promptly after receipt by DOE, unless DOE

contests the charges submitted by Plaintiffs. DOE shall advise Plaintiffs in writing of any amount contested within 30 days of receipt of the charges by DOE, and shall submit for payment monthly any amounts not so contested. After exhaustion of the dispute resolution procedure set forth in Section VII, Plaintiffs may file a motion for payment with the Court, at which time the only issues for determination shall be the reasonableness of the charges. Plaintiffs shall not be entitled under this paragraph 26 to recover attorneys' fees and expert fees incurred in performing their own audit of LANL's compliance with Subpart H.

27. DOE shall pay, in the event Plaintiffs are a substantially prevailing party, pursuant to 42 U.S.C. § 7604(d): (i) Plaintiffs' reasonable costs, including reasonable attorneys' fees and expert witness fees, incurred in enforcing against violations of this Decree, and (ii) Plaintiffs' reasonable costs, including reasonable attorneys' fees and expert witness fees, incurred in other proceedings before this Court and in dispute resolution, including proceedings to interpret the provisions of this Decree, seek payment of any bill or approval of any budget.

XII. SCOPE AND RETENTION OF JURISDICTION

28. Subject to the process set out in Section VII (Resolution of Disputes):

a., this Court shall retain jurisdiction over this matter for the purposes of enabling the Parties to apply to the Court for any further orders that may be necessary to construe,

implement or enforce compliance with the terms and conditions set forth in this Decree;

b. Nothing in this Decree shall be construed to limit the right of a party to seek modification of this Decree based upon a change in applicable law or upon other appropriate showing.

29. No motion or other proceeding concerning any aspect of this Decree shall be properly filed unless all Parties have been provided with written notice at least five business days before filing same.

XIII. OPPORTUNITY FOR PUBLIC COMMENT

30. The parties agree and acknowledge that final approval and entry of this proposed Decree are subject to the requirements of Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), and the provisions of 28 C.F.R. § 50.7. Clean Air Act Section 113(g) provides that notice of this proposed decree be given to the public, that the public shall have at least 30 days to make any comments, and that the Administrator of the United States Environmental Protection Agency or the Attorney General, as appropriate, must consider those comments in deciding whether to consent to this decree. The requirements of 28 C.F.R. § 50.7 provide for a similar opportunity for public comment prior to entry of a proposed judgment. The Attorney General shall promptly complete this process.

XIII.

XIII. EFFECTIVE AND TERMINATION DATES

31. This Decree shall be effective upon the date of its entry by the Court.

32. The obligations of this Decree and this Court's jurisdiction over this matter shall terminate upon completion of all requirements of this Decree. This case shall be dismissed with prejudice after termination of this Decree, upon motion by any Party to this Decree. If all requirements of this Decree are completed, the releases set forth in paragraphs 20 and 21 shall survive the termination of this Decree.

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