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**Brief Notes to the Administrative
and Legal Processes Underway
which Affect the Continuing
Disposal of Nuclear Waste at Los
Alamos and the Prospects for
Cleaning Up Contaminated Sites
there.**

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These matters are difficult to fully understand. The following represents only a partial understanding and we welcome discussion on it. Feel free to call or write.

1. The New Mexico Environment Department (NMED) Issued a Finding of Imminent and Substantial Endangerment (Finding) on May 2, 2002 for Los Alamos National Laboratory (LANL).

This Finding is in itself a good thing and it is very strong both factually and legally. It is based, however, on a section of the New Mexico Hazardous Waste Act, NMSA §§ 74-4-10.1, which has no provision for public participation, no specific right of public appeal, and provides no authority to order actual cleanup. It was not at all necessary to base an order to clean up the site on this particular law, which has these serious limitations. In effect, NMED's exclusive choice of this legal basis is equivalent to saying that the \$701 million spent so far investigating the site over a 12-year period provides too little basis for any actual cleanup decisions.

NMED's Finding does not say that there actually is any imminent and substantial endangerment to human health and the environment, but that there may be such endangerment, which is the legal standard in this particular part of the statute. It is this distinction, between what is and what might be, which leads to authority in this law for investigation but not for an actual cleanup order.

Historically, this limitation in federal hazardous waste law (the Resource Conservation and Recovery Act, or RCRA)



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was widely recognized in the early 1980s and led to passage of the federal Hazardous and Solid Waste Amendments of 1984 (HSWA). We can thus liken the choice of this particular legal basis for the Corrective Action Order (CAO; #2, below) to “turning back the RCRA clock” to before HSWA and, at this site, to before all the expensive work that has been done pursuant to HSWA at Los Alamos. The CAO asks for LANL to summarize this prior work, but does not use the facts already known to order any actual reduction of risk, i.e. cleanup. It is as if NMED can't, or won't, use the roomful of reports it has already been given.

2. NMED issued a Corrective Action Order (CAO) consequent to the Finding, also on May 2, 2002.

The CAO is an order to do a great deal of investigative work at LANL over a period of several years. To oversimplify, the great bulk of the work is oriented toward risk assessment and is largely irrelevant to remedy selection.

DOE has estimated that the work ordered in the CAO would cost about \$65 M the first year, and presumably a comparable amount in subsequent years. DOE also estimates that LANL will get a total of \$76 M next year as a result of the Letter of Intent (LOI; #3 below), or just a little more than DOE originally estimated would be necessary to do the work required by the order. The work to be done under the CAO will therefore supersede essentially all other cleanup activity at the site, making any but a very small amount of actual cleanup fiscally impossible for the foreseeable future.

It is likely that the work required in the CAO will continue throughout much if not all of the coming gubernatorial administration – and therefore tie the hands of that administration. On the national level, performance of the work ordered in the CAO will probably occupy all of the current administration and some of the next, leaving time for superficial capping and final “completion” by 2008, as the DOE timetables and budgets developed to support

the LOI show.

It should be emphasized that the CAO and the LOI are two sides of one coin. The LOI provides money to the site (and the NMED) to do the work described in the CAO. The CAO in turn is palatable to DOE and UC because it supports the vision described in the LOI, and will become more supportive through DOE/UC/NMED negotiation. The final result of this negotiation may be “fixed” by being recorded in a court as a settlement (#s 4 and 5, below).

It must also be emphasized that there is no requirement for NMED to consider any public comment whatsoever as it finalizes the CAO. There is also no explicit and specific public right of appeal for the final CAO.

The defects of the CAO have been described in greater detail in the Study Group 5/8/02 press release.

3. The Letter of Intent (LOI) was signed by all parties on or about May 30, 2002.

The LOI has been described in greater detail elsewhere (i.e. in b and c above). It is the master document loosely governing all the processes listed here. Formally, it means little. Practically, it – and the several tens of millions of dollars that go with it – mean a great deal. It is, quite possibly, determinative.

In the LOI, NMED agrees to DOE’s overall cleanup plan – to expediting TRU disposal, to DOE’s approach to risk analysis, to a secret decision-making process, and other substantive matters. As a result, NMED gets paid by DOE an unstated but large amount more than it already receives from DOE, under a new protocol defined by the LOI and any related or supporting documents, which may or may not be public. This new payment will be, according to DOE, approximately \$700,000 for FY03.

DOE is taking this and other LOIs to Congress and using them as evidence of state “buy-in” to gain final congressional approval for the idea of an “accelerated cleanup fund,” probably with guidelines that Congress must

impose, and to secure funding for it. DOE can then use this fund next year and in subsequent years to exert leverage on the states – to “buy down” cleanup standards, humble the regulators, and streamline decisionmaking processes in ways that sandbag any opposition.

4. On June 2, 2002, the University of California (UC) filed a lawsuit in U.S. court (not yet served on defendant NMED as of this writing) seeking declaratory and injunctive relief against the Finding and the associated Corrective Action Order.

This lawsuit is clearly being used as a negotiating tool – a hammer – and may be dropped or settled if NMED does what UC wants NMED to do. It could also help NMED save face after these negotiations when the day is done.

The most important part of this lawsuit may be the claim that the Finding and CAO (which UC claims are inseparable) violate both procedural and substantive due process obligations under RCRA, since they appear to be modifications of the LANL RCRA operating permit, specifically the HSWA (corrective action) portion of it. (The other claims made by DOE do not seem as important or meritorious at this time, at least at first glance, although their sweeping nature create high stakes for NMED and the public, should a struggle along those lines be joined. This, and especially the work involved, is why they are an effective threat.)

This due process argument appears to have considerable merit, to say the least. In a meeting with the Study Group on 7/5/02, NMED officials Maggiore, Ritzma, Lewis, and Will admitted that HSWA corrective action, and also RCRA closure and post-closure care under the permit, were indeed the content and purpose of the CAO. They even said that the CAO might be – subsequent to being finalized, we must presume, without public hearings – incorporated into the permit. The hearing process used for the permit would then “bless” and legitimize the CAO without



actually providing a substantive hearing of the issues involved. (NMED has agreed, in the LOI, to avoid such uncertain processes.)

This lawsuit could also be a means to solidify or “fix” the outcome of decisions and place them beyond the reach of the public by recording them as an official settlement of the case. Or, if the public process were going “badly,” the lawsuit could be served and another, higher, negotiating forum opened up – one with a high cost of admission that can keep out the rabble.

Interestingly, DOE is not party to this lawsuit, although DOE will pay for it on a cost-plus basis (i.e. at no charge to UC). Some of the arguments appear too explosive or ill-founded to be made by DOE or DOJ, in all likelihood. For staging a harassing action like this one, UC has more freedom than DOE.

5. On June 2, 2002, DOE and DOJ have appealed the Finding and associated CAO in state court.

This lawsuit is also inactive at this time. It helps preserve DOE’s interests against NMED vis-a-vis the CAO – which is to say, the entire cleanup agenda at LANL for the foreseeable future) – and also against UC’s federal lawsuit, i.e. UC itself.

6. A heretofore-secret process for closure and post-closure plan submittal and review, covering areas G, H, and L at TA-54, is now underway at NMED.

On April 25, 2002, DOE and UC submitted proposed closure plans for the three TA-54 hazardous waste disposal sites G, H, and L, pursuant to a process formally begun in secret by NMED in December of 2001. After letters from the New Mexico Attorney General, more than 2,000 individuals, and 27 environmental organizations requesting closure of Area G, it is very strange that none of these people and organizations were notified that this process had begun, and that very substantive decisions were being made in it.

The plan submitted for Area H is based

on HSWA corrective action requirements (which are very vague) rather than more specific RCRA closure requirements, which was done in response to a (also secret) NMED go-ahead given on ??[2001]. This was a substantive and very significant permit decision. There was no public knowledge or input, let alone a hearing.

This Area H “clean-up” is expected (by both NMED and DOE) to set a precedent for remedies at all other disposal sites at LANL, and is for this reason DOE has made it the subject of a “high-performing team” (see #7, below), as well as a (separate, public-relations-contractor- led) “focused stakeholder involvement” process. In other words, the RCRA public participation requirements are being violated at what both NMED and DOE managers consider the bellwether site.

Months ago, both NMED and DOE officials told the Study Group orally that no decisions were being made in the meetings organized by the PR contractor regarding Area H. This appears to be belied by the correspondence record between these parties. NMED never replied to our letter of protest about this process.

NMED senior management told us on 7/5/02 that the closure plans for these sites – G. L. and possibly they meant H as well – could not be approved in their current form. They also said, however, that they have not advised LANL in detail as to what approvable plans should contain. A second notice of deficiency has been sent (May 2, 2002); a revised set of plans is reportedly due from LANL on August 15.

In theory, this would set the stage for a “train wreck” this fall, when the draft permit is to be released for comment, because any approved permit must have an approved closure plan, and the preparation of a final, solid closure plan from the present level of effort (as evidenced by the April LANL drafts) would probably take not less than a full year, if not much more. (Los Alamos has been required to have binding closure plans on file since – sit down now – 1980.)

The way NMED proposes to side-step

this train wreck – and sandbag all the public interest expressed in the Study Group “Can-Paign” and elsewhere – is by issuing a closure plan that sets up what senior NMED officials call a “process” for writing a closure plan. The first step, the one to be taken this fall, is to approve a framework for studying background issues at the site, a step prior (if related at all) to the investigations needed to propose alternative remedies for the site. And that framework will be, as they said to us, the CAO! Thus the CAO will substitute for not just for the HSWA part of the LANL permit, but for the closure and post-closure plans as well. It will be, as NMED said to us on 7/5/02, “the first step in closure.” Thus, NMED will approve “a plan for a plan.”

Since the work required by the CAO will take years, it won’t be concluded when Area G reaches full capacity and ceases operation, probably within about 4 years. In this way, the question of whether Area G needs to actually close will be delayed until it is moot. One can’t implement a closure plan that is only a research program, aka the CAO. Nuclear waste disposal will, by that time, be in full progress at another site – one without any known exposure to RCRA regulation. And the next gubernatorial administration will be over.

In effect, the CAO will take the closure of Area G out of the hands of the next governor for his entire term.

In its April closure plans, DOE asserts, in defiance of NMED so far, that only one shaft and one pit at Area G have received regulated hazardous waste and need close, and therefore that “Area G” is not the site operationally known as Area G. Really.

7. “High-Performance Teams” (HPTs) are now meeting and making various preliminary (but likely to be permanent) decisions.

There are three or four, or possibly more, HPTs, composed of the regulators and regulated, meeting privately to vet the range of possible corrective actions and closure remedies for various sites. “Any decision

made [in one of these groups] would then be brought into the public notice and comment process,” said Greg Lewis on 7/5/02. This is the private process to which NMED is committed by means of the LOI (#3, above). These HPTs reportedly include teams for the “Airport Landfill,” for “TA-16,” and for “Material Disposal Areas” generally, of which “Area H” is a subset. It is to prevent this kind of decision-making that open-government laws have been enacted in our society.

8. A draft RCRA operating permit for LANL (Permit) will be issued by NMED circa October 1, 2002

It will include a corrective action (HSWA) module. It may include the CAO by reference, quite possibly the product of a negotiated (private) settlement between UC and NMED, because of the lawsuits filed in 4. and/or 5. above. The annual installation work plan (IWP) is already in place (no public hearings were held on the IWP in this or any year); the work plan of the CAO will almost certainly replace this portion of the permit.

There will be public notice and hearings during this process, as the law requires, but the main decisions on cleanup and closure will have already been made under items 2, 3, 4, 5, 6, 7, and possibly 11, and what is not already fixed may be approved as a “process,” something which can be defined as time and research go on, provided DOE fully funds the project. Those who fund the work will largely determine the nature of the work, both at LANL and at NMED, which is becoming more and more of a “consulting firm” to LANL as a result of these processes.

Actions constrained by items 4 and 5 may be firmly fixed, i.e. fixed beyond the legal reach of third parties who are not parties to the litigation and appeal. In this way the product of UC/DOE/NMED negotiations, which includes part of the outcome of the HPT process (item 7) could become “frozen” beyond the reach of the public.

Meanwhile the range of remedies for

HSWA corrective action and closure/post-closure would, according to DOE, be gravely constrained by item 9, should it pass and become law.

9. The Environmental Covenant Act (ECA)

The ECA was originally proposed for passage last year, but was withdrawn and recast instead as a memorial which simply endorsed the ideas of the law and called for NMED to draft it. It was defeated (largely by the Los Alamos Study Group and allies), but the act is quite likely to be resubmitted to the legislature again this coming year.

The ECA is a means to at least two ends. First, the ECA will establish a new exit clause for corrective action requirements under most, if not all, New Mexico environmental laws, namely “technical infeasibility.” For such sites, it will enshrine alternative land use, or restrictive zoning – i.e. regulation of the public, rather than the polluters – as a remedy option for essentially any site. Thus DOE would have statutory relief from residential and agricultural cleanup standards.

Second, for many contaminated sites, it will grant an pollution “easement” to the NMED, in effect making the NMED the owner of a real property interest in – pollution! NMED would be responsible for maintaining any environmental treatment works on the property and for enforcing land use (zoning) restrictions. This would be helpful in removing liability for any contamination on the large amounts of excess property DOE wishes to give away to local government and tribes, some of which is contaminated.

10. Performance Assessment (PA) process for Area G

This is a non-RCRA process, but the work done in it will underlie the RCRA choices made at this site. Under DOE Order 435.1 [ck], DOE must undertake an internal “licensing” process for its nuclear waste disposal sites, in some ways comparable to the formal licensing provided by the Nuclear Regulatory Commission (NRC) for

commercial low-level waste (LLW) sites. (A question arises as to whether there is a legal standard DOE must meet (e.g. “substantially the same” as the NRC process, perhaps in the Atomic Energy Act or another statute.) A team composed of DOE managers reviews a technical risk assessment for the site, called a Performance Assessment (PA). The current PA is known to be badly deficient. A new PA is to be released in early 2004, near the date when Area G is supposed to close (!). Substantively, the new PA will be largely applicable to the new disposal site, which is likely to be directly adjacent to Area G. Area G, for all its problems, is likely to be a better, possibly a significantly better, nuclear waste disposal site than any other site at LANL. It was well-chosen among the possible sites at LANL.

11. The “annual unit audit” process

NMED assesses hazardous waste fees based on the number of regulated “units” at a facility. Up to last year at least, LANL always asserted that Area G is one unit. Now LANL seeks to close a small portion of Area G, and leave the rest open as another unit, or several other units, for all we know. LANL asserts in its closure plan that it is in negotiations related to the annual unit audit process that the identity of Area G – the portion requiring closure – will be decided, rather than in an open permitting process. NMED officials tell us this is not the case.

NMED will probably receive more fees if Area G is split into many units, potentially giving NMED a serious negative incentive to “wholistic” closure of the site.

12. NMED enforcement actions at LANL

These exist but I do not have details about them. Each will create a separate negotiating forum at which a localized solution is found to the disputed regulatory finding in question, forums in which the public has not been involved. In theory, we could be. If not protested in a timely manner, these settlements will stand, and will bind NMED’s future choices, and will not be revisited in future permit hearings.



13. Permit modifications

A number of permit modifications have been written and approved for LANL, none of which has gone to public hearing with the possible exception of the incinerator in the mid-1990s. It will be difficult to “undo” any of these past decisions.

It should be repeated that, upon information and belief, and other than the incinerator hearing and the initial hearings conducted by EPA in 1989 (and then only on the HSWA module of the permit?) no public hearing has ever been convened for the LANL permit.

Upon information and belief, the LANL RCRA permit was issued, modified many times, ran its course, expired, and is now “continued” in some fashion pending NMED approval of a new permit, all without a single hearing ever having been held by NMED. Amazingly, even the expired permit has been modified several times, of course without a public hearing.

It is in the formal permit modification process that NMED could enforce cleanup requirements on LANL. Permits, including their modifications, are explicitly open to citizen lawsuits to compel compliance.