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LANL

Lab details substantial disagreement with NMED

◆ *Formal administrative reply says the state's accusations that the laboratory is endangering the health of New Mexicans are unfair and unfounded*

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With little time to spare Wednesday afternoon, lawyers for Los Alamos National Laboratory met a 5 p.m. deadline, responding to a draft environmental clean-up order by the New Mexico Environment Department (NMED).

The rebuttal ran well over two hundred pages and took "strong exception" to a proposed administrative order, as well as to the department's finding of "imminent and substantial endangerment" upon which the order was based.

The laboratory's multi-pronged reply attacked the endangerment determination as misleading, unlawful, and defectively obtained. Answering blow for blow, the lab dismissed the state's information as inconsistent and called its solutions burdensome.

In conclusion, the laboratory asked for the finding to be withdrawn and the prospective clean-up order to vanish.

In a cover letter to NMED Secretary Peter Maggione, lab Director John C. Browne and the Department of Energy's Office of Los Alamos Site Operations Director, Ralph E. Erikson, wrote, "In particular, the imminent and substantial endangerment finding is a matter of concern to us because we believe it may create a false impression that there is a substantial threat to human health."

On the contrary, said the officials, representing DOE and the regents of the University of California, the studies they have presented as evidence "conclude there are no significant risks associated with contamination at the facility."

For example, NMED uses a laboratory report to back an assertion that the very presence of radioactive tritium in the groundwater of Los Alamos County poses an endangerment. The laboratory's response cites the same report to gird its argument that the presence of tritium in the Otowi 1 well at the reported levels of 38 picocuries/liter "poses no significant threat to human health," because it is 500 times lower than the drinking water standard.

From the beginning, when the draft order was first presented on May 2, NMED sought to inoculate itself from arguments that placed the burden of proof on the state for a finding of imminent and substantial endangerment. Rather, the Hazardous Waste Bureau Chief James Bearzi said at the outset that the standard for making such a determination,

as defined by legal precedent, had a low threshold. Bearzi argued that state regulators had merely to establish a risk, and not even an immediate risk, in order to justify their intervention.

"NMED asserts," said Bearzi on May 2, "that groundwater contamination is enough to make that determination."

The lab's lawyers countered that at some point relying upon a trivial burden of proof becomes arbitrary and capricious.

"At its heart," they declared, "the 'determination' is no more than an assertion by NMED that it really does not have any endangerment evidence one way or the other."

While the implication of the NMED finding was that where there is smoke, there is fire, the lab countered that there is no fire.

The kernel of the laboratory's legal arguments denied that the state has legal grounds for basing any part of its findings on "the alleged presence, releases and dangers of radionuclides," which are considered matters "exclusively regulated by DOE under the Atomic Energy Act."

The laboratory's reply identified a number of factual errors in the NMED finding and order. The laboratory disputed which way canyons run, for example. NMED mistakenly wrote that they run from "east to west/southwest," while the lab insists they run from west/southwest to east. Dozens of

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petty factual errors were flagged to support the lab's argument that the state's documents were so riddled with error that they were not to be taken seriously.

Deputy County Administrator Fred Brueggeman was enlisted to testify that during his 18 years of employment with the county he was not aware of any warning having been given by the state concerning an imminent and substantial health danger. The point was relevant, according to an argument woven into the lab's response – if this matter is so urgent, why didn't the state say anything about it before its announcement on May 2.

Bearzi has said that every comment will be answered in writing and has scheduled the next two months to accomplish that. In introducing the draft package, he had

said the department's motivation was in part, because it was tired of arguing over every little thing.

Apparently, the arguments will not only continue, but flourish.

In the meantime, the lab has filed suit in federal court, in case administrative efforts fail and further defensive action is needed in the legal arena.

On the positive side, the lab announced the lighting of a proactive backfire. A letter in the appendix of the lab's reply, from Beverly Ramsey, of the lab's Risk Reduction and Environmental Stewardship Division, details LANL's own clean-up plan. Approved earlier in the week, the letter describes an accelerated program for reducing risk and addressing "legacy contamination and surface water and groundwater con-

cerns."

This newly minted Performance Management Plan could be accomplished by 2015, fifteen years earlier than current plans, wrote Ramsay.

Santa Fe environmental watchdog groups have looked on with suspicion as the two institutions lock horns over a clean-up program.

"It's a ritual clean-up paradigm," said Greg Mello of Los Alamos Study Group, who has expressed concerns that the state's efforts will not only fail, but will tie the hands of a future governor to intervene effectively.

Now that the lab has taken a turn at bat, the regulatory momentum has changed again. While NMED seeks to find a legitimate oversight mechanism for the state, the lab has shown, not surprisingly, its mastery over its own business.