

Permit



LOS ALAMOS COUNTY

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October 1, 2004



Mr. James Bearzi, Bureau Chief
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, New Mexico 87505-6303

RE: Incorporated County of Los Alamos, New Mexico comments to the Los Alamos National Laboratory Draft Order on Consent Between the New Mexico Environment Department, the United States Department of Energy and the University of California

Dear Mr. Bearzi:

The Los Alamos National Laboratory Draft Order on Consent Between the New Mexico Environment Department, the United States Department of Energy and the University of California ("Draft Order") impacts the Incorporated County of Los Alamos, New Mexico ("County") directly.

The County appreciates that hard work of NMED, the U.S. Department of Energy ("DOE"), and University of California ("UC") (collectively the "Parties") to complete the Draft Order for public comment. We especially appreciate that a section is included in the Draft Order that addresses the "land transfer parcels" to assist in facilitating the expeditious cleanup and transfer of the land that will assist the County with economic development. As the local governmental entity likely to be most impacted by the Draft Order, we have general comments to the Draft Order, which are set forth below.

i. Los Alamos County appreciates and supports the inclusion of a section that addresses "land transfer" issues and this section is an important part of the Draft Order. (Section III.Y)

A. The Draft Order sets forth important time frames for ensuring the timely conveyance of land transfer parcels. The Parties should more clearly define the process in the Draft Order (Section III.Y).

The Draft Order outlines provisions for the transfer of property in fee of DOE property to another party. DOE must notify NMED at least 120 days prior to the date of transfer. DOE, NMED and transferee must meet within 30 days after DOE's notice of



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transfer. Within 60 days of the initial meeting NMED will determine if the protective measures laid out in the land transfer agreement are protective of human health and the environment and sufficient for the intended use of the property.

The Draft Order provisions that outline the required NMED steps, based on an NMED determination whether corrective measures implemented by DOE and UC with regard to the property are or are not protective of human health and the environment in light of the transferees intended use of the property, will be an important part of the land transfer process. The current NMED and DOE disagreements are centered on a DOE determination that the property is suitable for conveyance and NMED disagreeing and currently there is no process to resolve the dispute. The Draft Order should be amended to include a process for resolving disputes between NMED and DOE if NMED disagrees with the DOE determination. The County proposes the following process: if NMED does not agree with the DOE determination, DOE should either be required to respond to NMED's determination within 60 days with a work plan to address the issue, submit the dispute to the dispute resolution process or provide a written notice to NMED specifying why it does not agree with the NMED determination; NMED should then either approve the work plan or submit the dispute to the dispute resolution process.

Another issue that the Draft Order needs to address is the process for NMED approving or disapproving a DOE submitted work plan for environmental remediation testing or cleanup activities on land transfer property. The County recommends that DOE submit the work plan for environmental remediation testing or cleanup activities and NMED be required to respond to the work plan with an approval or disapproval within 60 days. If NMED does not agree with the work plan, the issue should be submitted to the dispute resolution process.

The County expects that a clear process will ensure that the land is remediated to the level that is required for the protective reuse of the land and that the land will be conveyed in a more timely manner than the current process.

Additionally, the Draft Order should be amended to clarify that the Parties are required to meet with the transferee (the County for land transfer properties) and permit the transferee to participate in the Parties' discussions and the dispute resolution process where the transferee has executed an agreement with the DOE to acquire the land by long-term lease or in fee.

Further, the County believes that the ability of DOE to work with a transferee through CERCLA § 120(h)(3)(A)(ii)(I), consistent with the terms of CERCLA § 120(h)(3)(C), also known as a covenant deferral request can be an important tool, as the Draft Order recognizes. The covenant deferral request option will provide the Parties and any potential transferee with the ability to acquire property sooner and ensure that the real property is remediated to a level agreed to by the Parties.

- B. Land use restrictions should be discussed and negotiated with the Party acquiring the land. The proposed land use restrictions in the Draft Order may make sense in some instances and not others and the Draft Order should permit the Parties and the entity acquiring the land to negotiate an alternative restriction (Section III.Y).**

The Draft Order provides that DOE and NMED reserve the right to place land use restrictions on the property and the transferee must agree to those restrictions. The Draft Order provides, "[t]he language of the deed restriction governing future land use necessarily will differ for each deed, depending upon the facts and circumstances of the property being transferred." The flexibility is needed to ensure that the entity acquiring the real property has an opportunity to engage the Parties to develop restrictive language that makes sense and permits protection of human health and the environment and reuse of property.

The Draft Order should be changed so that the amount of time that DOE is required to provide NMED and the transferee with the opportunity to review and comment upon the language and the proposed deed restriction limiting future land use to sixty (60) days (from 30 days in the Draft Order) to ensure that the DOE, NMED and the transferee have the opportunity to negotiate the language. In addition, NMED should continue to be required to provide comments on such proposed language no later than fifteen (15) days after receipt of DOE's proposed language, as currently set forth in the Draft Order.

Finally, the Draft Order requires that the Parties agree that the contract of sale between the United States and a transferee will state that the parties to the contract agree that the deed restriction to be set forth in the deed, as a requirement within the meaning of CERCLA § 310(a)(1). The Draft Order should be clarified that it does not require DOE to amend existing sales contracts between the United States and a transferee.

II. The County supports risk based cleanup as set forth in the Draft Order (Section III.Y).

The County supports the Parties' agreement to establish specific cleanup levels for sites based upon the anticipated land use. This agreement should assist in a more expeditious cleanup of sites.

The Parties should ensure that the land use controls identified in the Draft Order are sufficient, and at the same time not too restrictive, to ensure protection of human health and the environment. The Parties should be required to engage any likely transferee and the local government that will have regulatory control over the property in the discussion when determining appropriate land use controls. The County is supportive of various land use controls, but only to the extent that they make sense and do not impose an unnecessary burden on the transferee. For example, where property is remediated to a level that should not require restrictions, the property should not be encumbered by any restrictions just because the property was owned by DOE and/or impacted by contaminants at one time. Similarly, if a property is only cleaned up to a level that would permit an industrial use, the land use restriction should reflect the restraint clearly and such notice of the restraint should be provided to the transferee and the County (where the County is the land use regulator) to ensure that the County can take action to ensure the property remains protective (such as the County not issuing a future permit that permits a less restrictive use of the property). For an effective land use control system to be developed, the Parties will need to engage the County in the

discussions prior to finalizing the land use controls on property that will be conveyed out of federal ownership.

III. The Dispute Resolution Process needs to be more defined (Section III.I).

The current problem with UC, DOE and NMED negotiations is that negotiations continually stall and take too long to resolve disputes. The process does not work and needs to be fixed. The multi-year process for DOE, UC and NMED to reach the current stage of the Draft Order is a good example of a failed communication/negotiation process. The short time periods set forth in the dispute resolution process should assist in facilitating a more timely process but it does not currently provide timely resolution. The Draft Order should be amended to develop a process that provides finality in the dispute resolution process.

The Draft Order primarily deals with protection of human health and the environment. The issues that will likely be submitted for dispute resolution are in two categories 1) technical issues and 2) policy/political issues. The County suggestion for creating a more definitive dispute resolution process for the technical issues, to ensure that the decision makers are using the same assumptions and information to make decisions, is as follows: (a) the Parties will create a impartial third party group of three technical experts when a dispute arises (after the Parties attempt to resolve the issues through the process in the Draft Order). NMED would select one technical expert, UC and DOE would select a second technical expert and the third technical expert would be selected by the two appointed technical experts. This group of three technical experts would be given ten days to reach a resolution on the issue. The Parties could be bound by the results or the results could be treated as advisory. The decision makers could then better understand and know the technical issues from a third party perspective to make a decision.

IV. The notifications under the Draft Order should require notification of the land owner and any government with jurisdiction over the impacted land (Section III.L)

The Notice provision in the Draft Order requires that notice be sent to DOE, NMED and UC when a plan, report, or other document required by the Draft Order is submitted by one of the Parties. The Draft Order should also require the submission of notices to a party that owns, leases or holds a right to acquire the property that is (a) subject to or (b) impacted by the information set forth in plan, report or other document. Further, the notice should be provided to each municipality or other unit of local government or Pueblo government, as applicable, in which real property, that is (i) subject to or (ii) impacted by the information set forth in plan, report or other document, is located. For example, the Draft Order should require the Parties to provide documents and notice to the County on environmental health and safety issues that affect the County in the same manner and time frame that DOE notifies NMED, and the County should be provided with any notices related to land transfer parcels (remediation, environmental remediation work plans, proposed land use controls, NMED correspondence to DOE related to such parcels and other relevant issues), protection to human health or the environment in the County, and any proposed land use controls on property located in the County.

Further, the Draft Order should require DOE and UC to ensure that information that is submitted to NMED regarding protection of human health and the environment in the County be publicly available in a timely manner. Similarly, the Draft Order should require NMED to ensure that information that is submitted to DOE and UC regarding protection of human health and the environment in the County be publicly available in a timely manner.

Finally, NMED, UC and DOE should actively engage the County in discussions between the Parties on issues that impact the County including the protection of human health and the environment and possible impacts on the local economy.

V. Permit Modifications should be addressed expeditiously (Section III.W).

The County supports NMED's commitment to process permit modifications expeditiously. The Draft Order provides that if NMED fails to issue for public comment a draft Permit Modification request within six months after the date a Permit Modification request is submitted the Draft Order would be automatically vacated.

Further, required actions by DOE and NMED related to No Further Action ("NFA") letters that exist need to be clarified. The County proposes that if U.S. Environmental Protection Agency agreed with a DOE NFA determination and NMED has not responded to such determination, that such NFA determination should be final. In addition, where DOE submits a NFA to NMED, NMED should be required to respond to such submittal within 90 days with an approval or disapproval with the reasons for such disapproval in writing.

VI. Closure Milestone Schedule.

The County is interested in the transfer of site MDA B in the near future. Therefore the County seeks consideration for the modification of the 2011 final date for this site. If practical we request this date be moved to 2007.

VII. The Parties should brief the County on the Draft Order and other issues that impact the health of citizens that live and work in the County and environment of the County. NMED should extend the comment period and hold a public hearing in Los Alamos County.

The County has been informed that the Draft Order is necessary because of the threat to human health and the environment in the County. NMED and DOE have actively engaged in negotiations over this Draft Order for the past two (2) years. Several times, the County has requested specific information related to the negotiations. During that time NMED and DOE have repeatedly informed the County that neither party can disclose specific provisions of the Draft Order that impact the County. Now that the Draft Order has been released, NMED and DOE expect the County, without either party briefing the County directly, to comment on the Draft Order. Further, the only public meeting held (with only 8 days notice) on the Draft Order was not held in the County, the local jurisdiction likely to be most impacted by the Draft Order. Communications with the County is an import aspect of ensuring success in the implementation of the Draft Order.

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Once again, we appreciate the work of NMED, UC, and DOE to reach an agreement on the Draft Order. Further, the County looks forward to continuing to work closely with all of the Parties on these important issues.

Sincerely,



Donna Dreska

Los Alamos County Administrator

TM:ss

Cc: Los Alamos County Council
Pam Bacon, County Attorney
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