

Permit

John Kieling

From: Joni Arends [jarends@nuclearactive.org]
Sent: Friday, October 01, 2004 4:24 PM
To: hazardous_waste_comment@nmenv.state.nm.us
Cc: jorje44@yahoo.com
Subject: CCNS & Rice Comments on draft CO



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James,

Please find attached the comments of Concerned Citizens for Nuclear Safety and our expert, George Rice, about the draft Order on Consent for Los Alamos National Laboratory. Thank you for the opportunity to comment on this historic document. Should you have any questions or comments, please contact me.

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October 1, 2004

By email to: hazardous_waste_comment@nmenv.state.nm.us

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

Re: Comments of Concerned Citizens for Nuclear Safety about the
Proposed Order on Consent for Los Alamos National Laboratory
EPA ID No. NM0890010515

Dear Mr. Bearzi:

Concerned Citizens for Nuclear Safety (CCNS) appreciates the opportunity to make the following general and specific public comments about the September 1, 2004 draft Order on Consent for Los Alamos National Laboratory (LANL) between the New Mexico Environment Department (NMED), Respondent the U.S. Department of Energy and Respondent the University of California. We acknowledge that a public process is not required, but that the NMED has taken an important step in strengthening the democratic process by providing the draft Consent Order (CO) to the public for comment. CCNS thanks you, Secretary Ron Curry and your dedicated staffs.

That being said, in Public Notice No. 04-14 for the CO, NMED states that “[a]ll significant written comments received during this comment period will become part of the Administrative Record.” Unfortunately, “significant” is not defined in the Public Notice nor is any criteria established against which to weigh the comments. CCNS acknowledges that the CO is a negotiated agreement between the parties and that NMED has voluntarily allowed the public to comment on the CO. However, we are uncertain how our comments will be used and the degree to which our comments will cause the parties to return to the negotiating table to address our concerns. CCNS believes that changes to the regulations should be made to open up this process so that public comment is required to be incorporated into the final document.

CCNS raised similar concerns in our comments about the draft May 2, 2002 administrative order (CAO) for LANL. At that time we requested that a public participation section be included in the draft CAO, which could be based on the Environmental Protection Agency (EPA) guidance referenced in the July 30, 2002 comments of the New Mexico Attorney General. We also requested that any public

participation section be made available for a 30-day comment period. We make the same request in these comments.

The final CO should specifically state how the public will have access to the documents and maps that the Respondents are required to submit under the CO, where they will be located, the process for commenting on Respondents' submittals under Section XII of the CO, and how those comments will be incorporated into NMED's decisionmaking process. CCNS honors the steps NMED has made, with fortitude and persistence, to bring the CO to fruition. We know from past experience working with the Respondents that in order to fulfill the purposes of the CO, as described in Section III.A, the public must be involved. Therefore, a mechanism for public involvement must be included in the CO. CCNS notes that a public process was provided for the Corrective Measures Study for the Mixed Waste Landfill (MWL) at Sandia National Laboratory. CCNS believes that a similar process should be incorporated into the final CO.

Article XX, Section 21 of the New Mexico Constitution states that "[t]he protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare." NMED is charged with protecting public health and safety. Further evidence is being discovered about LANL contaminants and their impacts to the environment and, thus, the health and safety of the surrounding communities. The public must be involved in the decisionmaking processes involving LANL, a facility that has buried, emitted and discharged state and federally regulated contaminants into the environment. Prior to 1943, the Pajarito Plateau was a pristine environment and should be returned to that state wherever possible. The CO is an important step in reaching that goal.

Environmental justice demands public participation mechanisms in the final CO. NMED has spent considerable effort listening to the concerns of communities impacted by industrial activities across the state and will hopefully make recommendations for increasing public participating in the regulatory activities of the state. Providing public participation mechanisms within the final CO would be an important test case for NMED. For instance, according to the 1999 final "Site-wide Environmental Impact Statement for Continued Operation of the LANL," DOE/EIS-0238, more than 53% of the people living within a 50-mile radius of LANL are minority and of the total population in that area, 15% live below the poverty line. p. 4-148. This information is based on the 1990 census. CCNS understands that these are the highest statistics of any of the DOE sites across the country. Given this information, it is imperative that NMED respect the communities surrounding LANL and provide them ample opportunity to comment on the CO, the submittals of the Respondents and the responses of NMED.

With regard to public participation, CCNS would be pleased to participate in developing a public participation plan, similar to that for the MWL. Such a plan may include creating an email list that would notify interested parties of the availability of

documents (similar to the EPA's email list for documents on its Waste Isolation Pilot Plant webpage), along with how to participate in review and comment processes.

Further, if the state legislature in 2005 agrees with NMED to change the law so that hazardous waste fees may be increased, a portion of those fees could be devoted to maintaining that portion of the NMED website for regulated hazardous waste facilities. NMED could also visually demonstrate how corrective action work was progressing at LANL by posting the Respondents' annual map submittals, as required in Sections IV.A.2. General Facility Information and V.B. Aggregate Areas, on its website. We would also suggest posting the Solid Waste Management Unit (SWMU) and Areas Of Concern (AOCs) list, noting the date added or a determination of No Further Action (NFA).

CCNS also requests that all maps, data, reports and other information posted on the website be posted in such a manner that they may be downloaded by older computer systems without crashing the systems. Further, hardcopies of this information should be provided in an expedient manner to community members without access to technology that would allow them to download it.

A public process must be provided for in the final CO in the following areas:

1. Section III.G. Stipulated Penalties, generally.
2. Section III.G.3. Stipulated Penalty Amounts, including reductions and waivers of the stipulated penalties.
3. Section III.H.2. Examples of Force Majeure.
4. Section III.Y.1.b. Land Transfer of Facility Property in Fee, a 60-day period of time for NMED to determine whether corrective action measures are required before land is transferred. If NMED does not respond in a timely manner, it "will be deemed ... that no additional corrective action measures are necessary given the transferee's intended use of the property."
5. Section III.Y.2.b. Land Transfer of Facility Property to Another Federal Facility, same as 4 above.
6. Section V. Investigation for other SWMUs and AOCs.
7. Section VII.A through E. Corrective Measures. There should be a mechanism for the public to review and comment on all documents submitted by the Respondents in this section, including the Interim Measures Work Plan, Risk Assessment, Corrective

Measures Evaluation Report, Corrective Measures Implementation Plan, and the Remedy Completion Report.

8. Section VII.F. Accelerated Cleanup Process. There should be a mechanism for the public to review and comment on all documents submitted by the Respondents in this section, including the Accelerated Corrective Measures Work Plan, Accelerated Corrective Action Work Plan and the Remedy Completion Report.

9. Section VIII.B.1. Soil Cleanup Levels. (Please see specific comments below.) CCNS strongly supports the development of a "return of the lands used by the Facility to 1942 background levels," also known as a "pre-LANL," or "sustainable homesteader" or "sacred" scenario for the use in cleanup levels, screening levels, reporting level, migration pathways, and risk assessments. Public participation in the development of such a scenario should be provided for in the final order.

10. Section VIII.E. Requests for Variance from Cleanup Goal or Cleanup Level. (Please see specific comments below.)

For the reasons stated above and others, CCNS believes that the final CO should include more opportunities for public input than those stated in Section III.W.3. Modification of Permit. There must be mechanisms for public comment at every step of the process, from site investigation to Class 3 permit modification, for every site to be investigated under the CO.

CCNS is concerned about the provision in the CO that allows the Respondents to assume that submittals are granted if NMED does not reply to those submittals in a certain amount of time. Please see Section III.J.2. Provisions Governing Extensions of Time (10 business days) and Section III.Y.1.b. Department's Determination on Land Transfers. CCNS understands that certain concessions must be made during negotiation processes. However, from the public's viewpoint, these provisions are not acceptable. The Respondents should be never assume that their submittals are acceptable without a written response from NMED that this is so.

Our specific comments are as follows:

1. Section III.A. Purpose and Scope of Consent Order. CCNS is concerned about the exemption for AOCs that the EPA has "specifically identified in a letter" for NFA. Please provide specific information in the final CO about the date of that letter and the number of AOCs involved.

Does the exemption include the 709 SWMUs/ AOCs referenced in the EPA Region VI's August 16, 2004 letter to NMED about their determination for NFA? On September 27, 2004, CCNS filed a Freedom of Information Act (FOIA) request to EPA

Region VI regarding the technical bases for the NFA determinations made prior to January 1996. CCNS requests similar information regarding the sites designated NFA in the CO.

2. Section III.A. Purpose and Scope of Consent Order. In the second paragraph, in 2), please spell out Solid Waste Act (SWA).

3. Section III.A. Purpose and Scope of Consent Order. Fifth Paragraph. Please include a definition in Section III.B. for "industrial discharges that are point sources subject to permits under Section 402 of the Clean Water Act," which are exempt from the Hazardous Waste Act (HWA) and the Resource Conservation and Recovery Act (RCRA).

4. Section III.F. Binding Effect. CCNS recommends the addition of a sentence in this section that states a requirement that the environmental records in the possession of the University of California must be turned over to DOE or the any new managing contractor. There have been cases within the DOE complex where records have been destroyed when a new contractor takes over a management contract at a facility. Due to the uncertainty associated with the LANL contract, NMED should be proactive in safeguarding the historical environmental records at LANL.

5. Section III.G.1. Submittals Subject to Stipulated Penalties. CCNS believes that there should be a mechanism for the public to participate in the meeting that is scheduled to take place prior to or on June 30 of each year to determine which of the Respondent's submittals are subject to stipulated penalties. Furthermore, there should be a mechanism for the public to provide input into the decisionmaking process, including the public's concern about DOE/LANL/UC's history of compliance with state and federal statutes and regulations.

CCNS believes that there should be no limit on the number of submittals that shall be subject to the stipulated penalties. For the protection of our environmental resources, NMED must have the ability to impose stipulated penalties on LANL.

6. Section III.G.2. Process and Notice. CCNS suggests that there be included a list of the two ways that stipulated penalties may be imposed on the Respondents by NMED.

This section should also specify the criteria for NMED to demonstrate that the submittal does not substantially comply with the specifications in the CO. CCNS can foresee times when, without specific criteria, the argument over the submittal could waste valuable cleanup time. See also Section III.G.4. Revisions to Specifications or Schedules.

7. Section III.G.3. Stipulated Penalty Amounts. There should be a mechanism for the public to participate in the NMED's decisionmaking to reduce or waive stipulated penalties. The purpose of fines and penalties is to change the way the institutional operations impact the environment, hopefully for the better. However, over the years, CCNS has witnessed NMED's reducing or waiving fines, which has not resulted in better environmental protection. In fact, it has resulted in the continuation of harm to the environment, resulting in harm to public health. Either the CO must include an outline of public participation requirements in this section or, in the alternative the parties could agree to withdraw the final two sentences of this section.
8. Section III.H.2. Examples of Force Majeure. CCNS believes that there should be a public participation mechanism for participating in the review by NMED about the claim of Respondents that a force majeure had occurred.
9. Section III.H.3. Procedure for Claiming Force Majeure. It is unclear what the next action step would be if NMED provides in writing indications that it does not agree with the Respondents that a force majeure event took place. Do the parties automatically resort to the Dispute Resolution provisions found in Section III.I? If so, it should be specified at the end of this section.
10. Section III.O. Entry and Inspection. What consequences will the Respondents face if they fail to provide sufficient notice, a minimum of 15 days, to NMED that they will be conducting sampling? The final CO should state the consequence.
11. Section III.Q. Record Severability. CCNS wholeheartedly disagrees with the agreement of the parties that Respondents are required to keep records, documents, data and other information prepared for the CO for only ten years after receiving the notice of the CO termination. The Respondents should be required to keep all of these materials until such time as it is determined that the site should be closed, such as was done at the DOE Fernald site near Cincinnati, Ohio.

At Fernald, where large volumes of waste are being left on-site, DOE is funding a museum and learning center. Stored in that center will be the cleanup records for the site, which will be available to the public. Please see "Telling the story of Fernald: Community Based Stewardship and public access to information," a report prepared by The Perspectives Group for the Fernald Citizens Advisory Board, October 2002, located at <http://www.fernaldcab.org>.

Furthermore, we reiterate our comment about the draft CAO. The NMED should require Respondents to keep electronic copies of all records, documents, data and other information, together with a properly maintained and operating electronic reader.

CCNS requests that the parties remove the “[u]ntil ten years” stipulation in the first sentence of this Section.

12. Section III.U. Enforcement. CCNS strongly supports the statement that the state supports citizens’ suits to enforce the requirements of the CO.

13. Section III.W.3.a. Class 3 Permit Modification to Remove Corrective Action Requirements. Due to the inadequacy and incompleteness of previous permit modification requests submitted by the Respondents to NMED, CCNS believes that NMED should apply qualifying language to the last sentence of this section. CCNS suggests the following: “The Department supports the concept of the Permit Modification.”

14. Section Y. Land Transfer. CCNS objects to the inclusion of this entire section. The final CO should state the statutory and regulatory bases for this section. Land transfer should not be based on the intended use. In order to protect public health and the environment, now and in the future, all land scheduled to be transferred must be cleaned up to the condition it was in before the Respondents began discharging, emitting or burying materials so that the land is now contaminated.

15. Section III.Y.1.a. Notice and Meeting. In the alternative, this section should include an opportunity for public notice and comment and participation in the meeting.

16. Section III.Y.1.b. Department’s Determination. CCNS is very concerned about the tone of this section. The section could be interpreted as supporting a rush to transfer contaminated land to new owners. CCNS objects to the statement in this section that “Respondents will endeavor to conduct any additional corrective action requirements identified by [NMED] prior to transfer.” CCNS believes that all corrective action requirements should be completed prior to any land transfers.

17. Section III.Y.1.d. Restricted Use. The final CO must cite the statutory and regulatory authority for placing restrictions on the deed for potential land transfers. During the Cerro Grande fire, there were many serious questions about where LANL contaminated sites were located. LANL employees were hacking into LANL computers from Santa Fe to print out maps showing contaminated sites and access to the Los Alamos County offices was limited. The fire taught us that deed restrictions can be highly ineffectual in emergency situations.

What assurances are available that deed restrictions are going to work? There are numerous instances around the DOE complex of ineffectual deed restrictions. For example, DOE transferred a capped landfill to Oak Ridge, Tennessee with deed restrictions. Within a few years, the City built a golf course on top of the dump and was watering the grass, thereby watering the waste and providing pathways for waste

migration, despite the fact that the deed restrictions required that the property remain undeveloped.

CCNS is opposed to the use of deed restrictions at LANL.

18. Section III.Y.1.f. EPA Institutional Controls Tracking System. CCNS strongly suggests that the time period for DOE to submit the deed transferring title to EPA for its "pilot institutional controls data base and tracking system" be reduced from 90 to 30 days. In order to keep records as current as possible, DOE should be required to submit this information to EPA as quickly as possible.

19. Section III.Y.2.a. Notice and Meeting for Transfer of Control of Facility Property to Another Federal Facility. This section should state the consequences if DOE does not notify NMED at least 120 days prior to the proposed transfer. With all the other work with which NMED is charged under the CO and upcoming Permit, CCNS believes that there should be some consequence for DOE not notifying NMED at least 120 days prior to the proposed transfer. A 120-day period allows time for the public to participate and comment about the proposal.

20. Section IV.A.5.b. Testing Hazard Zones. CCNS is concerned about the deferral of investigation and corrective action for sites within the Testing Hazard Zones and the fact that DOE's written determination is not subject to the dispute resolution provisions of the CO. DOE should not be allowed to determine whether NMED may investigate closed or inactive Testing Hazard Zones. There is recent evidence of high explosives migrating through groundwater pathways and discharging at springs that feed the Rio Grande below the Testing Hazard Zones. Please see *New Mexico's Right to Know: The Potential for Groundwater Contaminants from LANL to Reach the Rio Grande*, by George Rice, July 2004, at www.nuclearactive.org. Therefore, all Testing Hazard Zones must be remediated through the CO regardless of DOE's determination in order to ensure that these hazardous materials are not migrating offsite.

21. Section IV.B. Canyon Watershed Investigations. CCNS believes that any characterization wells that are drilled should be drilled in such a way that the well can be transferred to the groundwater monitoring program. These wells are too expensive not to be constructed in such a way that they may be used for both purposes.

CCNS supports the Respondents' preparing a historical investigation report for each canyon watershed to provide a baseline of information for the public. CCNS suggests deleting the second to last sentence in the third paragraph of this section.

For consistency and clarity, each section for the various watersheds should include the following information:

- a. The number of SWMUs and AOCs found in the watershed (e.g., Section IV.B.1.a. Background, Los Alamos/Pueblo Canyons Watershed; Section IV.B.3.a. Background, Water Canyon/Cañon de Valle Watershed; and Section IV.B.6.a. Other Canyons;);
 - b. The approval dates for various reports (e.g., Section IV.B.1.b.i. Los Alamos/Pueblo Canyons Investigation Work Plan, second paragraph; Section IV.B.b.ii. Los Alamos/Pueblo Canyons Intermediate Groundwater Well Installation, first paragraph; Section IV.B.4.b.i. Pajarito Canyon Investigation Work Plan; Section IV.B.5.b.i. Sandia Canyon Investigation Work Plan; and Section IV.B.6.b.i. Investigation Work Plans for Other Canyons, third paragraph;);
22. Section IV.B.3.b.v. Water Canyon/Cañon de Valle Investigation Report. Does this report include investigations in Potrillo and Fence Canyons and Ancho, Chaquehui and Indio Canyons?
23. Section VII.A. Erosion Control and Monitoring. Under this section, corrective measures may be required for any SWMU or AOCs where NMED determines there has been a release. Discovering the release may be the result of surface water monitoring data, a requirement found in the draft CAO, but omitted from the CO. The public was provided the opportunity to comment on the draft CAO. Now, as a result of the proposed Federal Facilities Compliance Agreement to regulate surface water monitoring requirements at LANL, there is no opportunity to comment on any changes, additions or deletions of the monitoring requirements. CCNS reiterates the need for public comment on the draft Federal Facilities Compliance Agreement between EPA Region VI and Respondents regarding surface and storm water monitoring.
24. Section VII.D.4.b.v. Cost as a factor for the Remedial Alternative Evaluation Criteria. The cost evaluation should include the capital costs and operation and maintenance costs now, in 5, 10, 15, 25 and 50 years into the future, all based on their present net value. In many instances, it is a more efficient use of taxpayer funding to clean up now rather than monitoring over a long period of time. Respondents should provide a complete analysis of the projected costs so that NMED may make an informed decision about cleaning up now or monitoring into the future and the uncertainties associated with long-term monitoring.
25. Section VIII. Cleanup and Screening Levels. CCNS supports the comments made by Bernd Franke of the Institut für Energie und Umweltforschung (Institute for Energy and Environmental Research) of Heidelberg, Germany to the May 2002 Corrective Action Order regarding this section. Franke's recommendations should be incorporated into the final CO.

The 10^{-5} cleanup target risk level for individuals is equivalent to about 0.2 millirem/year committed effective dose equivalent (CEDE) using current risk factors by

the EPA for radioactive contaminants. The final CO should add an annual dose limit of 1 millirem/year CEDE.

As part of the final CO, the Respondents should document new information about the risks from radioactive and non-radioactive pollutants. Target values should be continually revised by NMED as more information becomes available.

CCNS supports Franke's suggestion that a 10^{-6} risk from single pollutants be added to a total target risk to individuals of 10^{-5} in the final CO.

CCNS supports Franke's recommendation that a collective dose target risk for radioactive and non-radioactive pollutants should be established in the final CO.

CCNS supports Franke's recommendation that the most restrictive usage scenario (residential, agricultural or other) for all substances under review should be added. NMED should also provide cleanup values for the agricultural scenario for non-radioactive pollutants as the Pajarito Plateau was agricultural before the Atomic Energy Commission arrived in 1943.

26. Section VIII.A.1.a. Groundwater Perchlorate Screening Levels. CCNS appreciates the inclusion of this section. However, due to the uncertainty of and controversy about the level at which perchlorate is harmful, we take a precautionary approach and support Franke's recommendation that a preliminary screening criterion for perchlorate should be set to 1 part per billion.

27. Section VIII.B.1.a. Soil Polychlorinated Biphenyls Cleanup Levels. CCNS supports Franke's recommendation that the cleanup level for PCBs of 1 milligram/kilogram of soil is not strict enough and should be lowered to 0.22 milligram/kilogram of soil.

28. Section VIII.E. Requests for Variance from Cleanup Goal or Cleanup Level. CCNS strongly believes that there must be a public process associated with any variance request by Respondents from cleanup goals and levels in which a Water Quality Control Commission (WQCC) standard is not involved. There is a public process if the variance involves a WQCC standard. Therefore, it follows that there should be a public process, as part of the final CO, for a variance request by Respondents not involving a WQCC standard.

CCNS requests a definition of the term "impracticability."

29. Section XI.E.5.b. Sampling Results. The Risk Assessment report must include the current standards against which to measure the sampling results (e.g., MCLs, WQCC, Hazardous Waste Act, etc.)

Thank you for your careful consideration of CCNS's comments. Should you have any questions or comments, please contact me by phone or email at jarends@nuclearactive.org.

Sincerely,

Joni Arends
Executive Director