

Permit



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# INDIAN PUEBLO

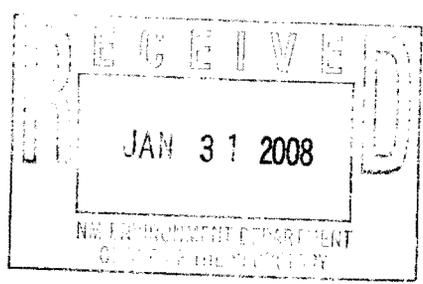
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OFFICE OF GOVERNOR

January 30, 2008

*Via facsimile, e-mail, and first-class mail:*  
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New Mexico Environment Department  
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**Re: Comments of Santa Clara Pueblo on the Los Alamos National Laboratory (LANL) August 2007 Draft Hazardous Waste Facility Permit, EPA Identification Number NM0890010515/ NM Identification Number 2390 (permit or LANL permit)**

Dear Mr. Kieling:

On behalf of Santa Clara Pueblo, I submit the following comments on the above-referenced draft LANL permit now under consideration by the Hazardous Waste Bureau of the New Mexico Environment Department (NMED) in accordance with the New Mexico Hazardous Waste Act (HWA) and the State's delegated authority to regulate pursuant to the federal Resource Conservation and Recovery Act (RCRA). The Pueblo appreciates the opportunity to comment and appreciates Secretary Curry's understanding in granting an extension of time in which to do so.

Through our government-to-government relationship with the State of New Mexico, Santa Clara Pueblo has enjoyed a productive relationship with NMED on other important environmental issues, including, most recently, our cooperative efforts to monitor groundwater and remediate a Superfund site on the National Priority List. While Santa Clara works directly with the Department of Energy (DOE) on a number of our concerns about LANL on a government-to-government basis, our comments here are focused on improving our government-to-government relationship with NMED regarding LANL issues, since NMED is the regulator of DOE and Los Alamos National Security, LLC (LANS) through this permit.



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While we recognize and appreciate efforts of NMED to address issues in the draft permit of cultural sensitivity with Santa Clara Pueblo, such as the requirement to post warning signs in Tewa and the requirement for DOE and LANS to consult with Santa Clara Pueblo on a community relations plan (*see* draft LANL permit at 16 and 27), much more needs to be done in order for NMED to fulfill the commitments of the State of New Mexico set forth in Executive Order No. 2005-004, *Statewide Adoption of Pilot Tribal Consultation Plans* (February 1, 2005), the *Statement of Policy and Process* executed by Governor Richardson and the Governors of the nineteen Pueblos (January 17, 2003), and Executive Order 2005-056, *Environmental Justice Executive Order* (Nov. 18, 2005).

As was noted recently in the environmental justice section of DOE's December 2007 Complex Transformation draft supplemental programmatic environmental impact statement summary, 57% of the population surrounding LANL are minority populations. Of course, as recognized in Governor Richardson's executive order on environmental justice, the cumulative impact of multiple sources of exposure to environmental hazards in minority communities can compromise environmental health and quality of life in those communities. We thus emphasize that Santa Clara Pueblo's comments should be addressed through the lenses of both environmental justice and our unique perspective as a sovereign nation.

As you review these comments, please bear in mind that, prior to the Manhattan Project, the Pajarito Plateau was pristine. The people of Santa Clara Pueblo are deeply connected to this area. The modern-day boundaries of Kha' Po Oweengeh, or Santa Clara Pueblo, include some 57,000 acres of land. This acreage figure includes some of our traditional lands that we have fought to regain, but does not include all of our aboriginal territory. The Pajarito Plateau contains many areas of importance to our people and any improper clean-up of this profoundly holy place for us affects the cultural survival of Santa Clara Pueblo. That is why we care so deeply about ensuring hazardous and mixed waste at LANL is properly addressed and why it is so important to us that our perspective be included in this sometimes seemingly sterile regulatory process.

### **Connections with the Consent Order**

There appears to be inconsistent use of terminology between the March 1, 2005 Compliance Order on Consent between the NMED and DOE/LANS (Consent Order) and the draft LANL permit which makes it difficult to understand what is really being proposed through the draft permit.

For instance, the Consent Order indicates that corrective action for "operating units" at LANL will be covered in the LANL permit instead of in the Consent Order. However, the draft permit

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appears to refer to “permitted units” only, not operating units. (*Compare* Consent Order at 29 to draft LANL permit at 85). Are those the same thing?

Another example can be found in the definition of “Area of Concern.” The definition in the Consent Order differs from the definition of the very same term in the draft LANL permit. Why is this? Isn’t NMED the regulator in both instances? Aren’t these two processes, the LANL permit and the Consent Order, supposed to work in tandem as part of implementing the HWA and RCRA?

These are simply two examples to illustrate the point: this kind of inconsistency of cross-references (as well as the continual need to cross reference) does not foster public understanding of the differing clean-up processes under NMED’s purview and how they do or do not connect. Connecting these dots for the public in a clear, consistent, and readily understandable way in the draft LANL permit (without having to continually cross-reference) is actually also an environmental justice issue. *See, e.g.*, Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994) at § 5-5 (c) (referenced on the NMED website at <http://www.nmenv.state.nm.us/Justice>).

Indeed, to the extent our comments here reflect what NMED believes to be a misunderstanding by Santa Clara Pueblo of the draft permit, that only underscores the need to do more to make this process transparent and clear. Santa Clara Pueblo appreciates the fact sheet prepared by NMED and the access to relevant background materials from the NMED website and the Pueblo recognizes the challenge to communicate clearly and consistently given how voluminous the administrative record appears to be. Nonetheless, more can be done throughout the permit in the actual substantive provisions of the document to explain where it does or does not and how it does and does not connect to the Consent Order.

### **Concerns about Groundwater and Surface Water Compliance Monitoring**

The draft LANL permit states that “[t]he Permittees shall coordinate such [groundwater] monitoring with the monitoring conducted under the Interim Facility Wide Groundwater Monitoring Plan and any Department-approved watershed-specific Long-term Groundwater Monitoring Plans under the [Consent] Order.” Draft LANL permit at 86-87. The draft permit also states that corrective action under the permit must meet the standards of 40 CFR §§ 264.100 and 264.101. *Id.* at 85. However, it is unclear that the groundwater monitoring scheme from the interim plan and long-term plan referenced above actually meet the substantive standards of 40 CFR § 264.100. 40 CFR § 264.100(d) requires that DOE and LANS “must establish and implement a ground-water monitoring program to demonstrate the effectiveness of the corrective

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action program.” The draft permit is not clear how this standard will be met. We need some additional explanation and assurances from NMED. This is a real concern to Santa Clara Pueblo given the history DOE has regarding groundwater monitoring at LANL.

For instance, it is our understanding that, in late November 2007, the Northern New Mexico Citizens Advisory Board (NNMCAB), in which the Pueblo participates, requested that the Environmental Protection Agency (EPA) independently evaluate two key LANL reports that NMED has approved to ensure that the groundwater monitoring program is actually properly characterizing groundwater quality. *See* Letter from J.D. Campbell, Ph.D., P.E., Chair, NNMCAB, to Richard Mayer, Ex-Officio Member NNMCAB, Hazardous Waste Management Division, U.S. EPA Region VI (Nov. 20, 2007), attached hereto as Exhibit A.

One of the reports that the NNMCAB is requesting EPA to review is LANL’s *Well Screen Analysis Report, Revision 2, LA-UR-07-2852* (May 2007) in which your own agency, in approving the document, indicated had potentially significant problems:

NMED notes that the conclusions obtained in the Report were derived mainly from analysis of extent data in the literatures, possibly under conditions different from the Los Alamos National Laboratory’s site (the site). The absence of critical site-specific data, such as adsorption properties, reaction kinetics and microbial activities, implies that there would be uncertainties and limitations in using the methodology developed in the Report to assess the quality of groundwater samples collected from monitoring wells installed at this site. NMED is especially concerned about the uncertainty with respect to monitoring certain potential contaminants of concern, such as the highly adsorptive radionuclides. NMED therefore suggests that the Permittees [DOE/LANS] consider conducting proper laboratory and field studies to address the uncertainty regarding whether or not the monitoring wells installed as the monitoring network are capable of providing reliable data to monitor potential releases of the highly adsorptive radionuclides from operation of the Laboratory to groundwater.

*See* Letter from James P. Bearzi, Chief, Hazardous Waste Bureau, NMED to David Gregory, Federal Project Director, LASO/DOE and David McInroy, Remediation Services Deputy Project Director, LANL (May 25, 2007), attached hereto as Exhibit B.

Given the nature of concerns raised by NMED and cited above, why was the report approved? Why wasn’t there more teeth in ensuring that DOE/LANS conduct proper studies first rather than merely “suggesting” that the permittees “consider” such actions? NMED’s approval process demonstrated by this approval letter hardly inspires confidence in the process.

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The other report that the NNM CAB is requesting EPA to review is LANL's *Groundwater Background Investigation Report, Revision 3, LA-UR-07-2853* (May 2007). Is that the same as the "Interim Facility Wide Groundwater Monitoring Plan" cited in the draft LANL permit as the means to meet RCRA standards? Regardless, based upon NMED's lack of ringing endorsement of the well screen report, EPA's upcoming analysis needs to be taken into account for crafting proper monitoring, as do existing reports of EPA, the DOE Inspector General, and the National Academy of Sciences all of which have explained that the existing LANL wells that are used for monitoring the regional aquifer as part of the Consent Order were constructed in a way that masks contamination and may compromise the reliability of groundwater contamination data. *See, e.g., U.S. Department of Energy Office of Inspector General, Inspection Report: Characterization Wells at Los Alamos National Laboratory (DOE/IG-0703)* (Sept. 2005). It appears from these independent analyses that there may actually be errors that need correcting in the current (Consent Order) groundwater monitoring process and thus it would be irresponsible to import any such errors into this permit as well.

Correcting any such errors now to ensure that the best possible monitoring is occurring is incredibly important considering that RCRA requires that DOE and LANS:

institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, *regardless of the time at which waste was placed in such unit.*

40 CFR § 264.101 (emphasis added).

Given the enormous quantity of still-unaddressed legacy waste that was buried in unlined pits and sometimes (in the less enlightened earlier days of LANL) dumped directly into various canyons and watersheds that dissect the facility, proper groundwater monitoring is the only way to ensure that corrective action is actually protecting human health and the environment.

As for surface water monitoring, there appears to be a requirement that DOE/LANS comply with federal and state surface water quality standards and conduct surface water sampling at predetermined locations when corrective action is being assessed. *See* draft LANL permit at 90 and 114. We want to better understand the nature and extent of monitoring and reporting for surface waters. Again, it is difficult to put all the puzzle pieces together to get a true understanding of how this will work with other mechanisms such as the NPDES process and the Consent Order to also ensure compliance with the HWA/RCRA through this LANL permit.

Please understand that proper monitoring of ground and surface water are not idle concerns for Santa Clara Pueblo. Proper monitoring is key to truly correcting the problem and is key to

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ensuring environmental justice. Santa Clara people will always live at the Pueblo. It is our homeland for forever. We cannot just pick up and leave if the area becomes too contaminated. Our future generations will need to rely on the regional aquifer for water for their homes. Our traditional practices are dependent upon animals and plants which rely on surface flows and springs and seeps. Although surface flows in the canyons by LANL empty into the Rio Grande below Santa Clara, surface water contamination does impact Santa Clara because of the Pueblo's cultural practices. Wildlife that consume those surface flows are used by Pueblo members as part of our own traditions. The whole animal is utilized far more than the general population may realize. Similarly, Santa Clara people collect and utilize many more wild plants and herbs in the Pajarito Plateau for medicinal and other cultural purposes than the general population would necessarily consume. We also consume water from surface sources and springs for our traditional practices that have to come directly from those sources, without filtration. And, of course, we have a tradition of attending feasts at our neighboring downstream pueblos and consuming traditional foods grown by them. Therefore, any improper clean-up of their surface supplies impacts us as well.

### **Concerns about Air Quality Monitoring**

The draft LANL permit indicates that DOE and LANS will be allowed to open burn up to 60,000 pounds per year of liquid and solid hazardous waste at TA-16. *See* draft LANL permit at Attachment I. Santa Clara Pueblo is concerned about open burning of hazardous materials as a waste management method and needs to better understand what other alternatives have been considered by NMED and rejected and why.

Santa Clara Pueblo appreciates NMED requiring soil monitoring associated with the open burning but why is NMED not explicitly requiring monitoring of the air and water as part of the open burning process? *See id.* at 65. The draft LANL permit indicates that open burning should occur in accordance with, among other things, 40 CFR § 264, Subpart X. That section of RCRA requires that a so-called "miscellaneous unit" regulated under that subpart "must be located, designed, constructed, operated, maintained, and closed in a manner that will ensure protection of human health and the environment" and specifically mentions including monitoring requirements as a way to achieve this. *See* 40 CFR § 264.601. Moreover, the environmental standards addressed in that subpart include numerous references to how "protection of human health and the environment" includes preventing releases affecting surface water quality, groundwater quality, and air quality and the ability to require monitoring, testing, and inspections, among other methods, as a way to achieve this.

The need for more monitoring, not less, is emphasized in a recent report of the Government Accountability Project entitled *Citizen Environmental Monitoring, Los Alamos, New Mexico*

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(June 2007), < <http://www.whistleblower.org/doc/2007/FinalLANLReport.pdf> > (GAP Report). The GAP Report contains an analysis of indoor dust samples and “environmental samples” such as sediments and ash, at a variety of sampling sites around LANL. The findings in the GAP Report revealed indoor dust samples at greater total radioactivity than shown in surrounding soils or various controls and baseline references. Both Picuris Pueblo and San Ildefonso Pueblo locations were included in the GAP Report, and residential dusts from both those Pueblos were among the most elevated radiation levels. *See* GAP Report at 2. At a minimum, the GAP Report indicates the need to increase monitoring of contaminants through airborne particulates. NMED should require more air quality monitoring and reporting in this LANL permit.

The draft permit also does not appear to include a discussion regarding how open detonation issues will be addressed. It is our understanding that these open detonation sites continue in limbo in so-called “interim status” (*see* draft LANL permit at Table O-5) where it is unclear to us whether there is any air, surface water, groundwater or soil monitoring and sampling required to determine levels of contamination. This is an extremely important issue to Santa Clara Pueblo, not only because of air, water, and soil quality concerns but also due to problems in the past caused by conducting explosives testing during ceremonies at the Pueblo. The permit needs to include proper enforceable requirements to address this specific cultural sensitivity issue.

Santa Clara Pueblo cares deeply about ensuring proper monitoring of soils, air emissions, and water associated with open burning and open detonation because Santa Clara Pueblo is downwind of LANL. Monitoring at the Pueblo reveals that the prevailing winds come from the southwest and that there is an indication of contaminant transport from LANL to the Pueblo via particulate. Of course, the quality of the air we breathe is related to health impacts (as we discuss in more detail further in these comments). In addition, emissions settle on soils and, as evidenced by the soil erosion after the Cerro Grande fire, infect surface water runoff, all of which cause impacts to our traditional practices (a few of which were mentioned in the section above regarding ground and surface water monitoring). Emissions settling on soils also impact us through our crafts. The clays and sands of the region are used by our world-famous artists. The pigments that are applied to the pottery made by Santa Clarans come from the soils too and often applied using brushes made of natural materials. It is difficult for us to describe all the ways contaminated air emissions impact Santa Clara Pueblo, in part because we are private about our traditions and in part because the impacts go to every aspect of our way of life.

### **Concerns about the Contingency Plan**

The draft LANL permit contains a requirement that DOE and LANS maintain a Contingency Plan and that the Permittees ensure that the Plan at all times accurately includes, among other things, “a description of all arrangements agreed upon by local police and fire departments, hospitals,

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federal, state and local emergency response teams, and tribal governments to coordinate emergency services.” *See* draft LANL permit at 35. The draft permit also states that “[d]istribution of the Contingency Plan shall be controlled by a system that ensures that all parties or agencies referenced in the Plan, receive current copies of the Plan within five days of the effective date of this Permit and within five days of receipt of any Department approval of a modification of the Plan.” *Id.* at 36. This language appears to show that NMED anticipated that Santa Clara Pueblo would be involved in a meaningful way in coordinating emergency services through implementation of a Contingency Plan. However, upon closer review of the rest of the discussion in the draft permit of the Plan and the actual proposed Contingency Plan in Attachment D, it appears this is not the case. This needs to be corrected.

Although it appears that notification of “appropriate . . . tribal . . . agencies with designated response roles” is included in required emergency procedures for the Contingency Plan (*see, e.g.*, draft LANL permit at 37), it does not appear from the proposed Contingency Plan that Santa Clara Pueblo or any of its tribal agencies have a “designated response role.” It appears that draft LANL permit only requires notification of Santa Clara Pueblo if evacuation is needed for the local areas or the Pueblos surrounding LANL or if operations are resuming after an emergency has already occurred. *See id.* at 38 and 39.

The permit needs to include language that requires emergency services to be coordinated with the Pueblo and that the Governor of the Pueblo be notified when an imminent or actual emergency occurs involving hazardous or mixed waste so that the leadership at the Pueblo has early notice in case the situation escalates. Waiting until a decision is made at LANL to evacuate the Los Alamos community is not wise. It is not inconceivable that emergency equipment from the Pueblo would be needed to address the emergency or the Pueblo would need time to prepare for the arrival of an onslaught of evacuees or would just need to be able to get police in place in time to help control the increased traffic. This is no small matter given that State Road 30 passes directly through the middle of Santa Clara Pueblo, separating two major Pueblo housing areas. It is well documented that much of the current vehicular traffic utilizing State Road 30 is generated by LANL employees living in the Espanola Valley and commuting to and from LANL.

### **Concerns about Allowing Hazardous Waste from Off-Site Sources**

The draft LANL permit indicates that DOE and LANS are allowed to “accept, store, treat or otherwise manage” hazardous waste from off-site facilities, including from various locations in Illinois, South Carolina, Tennessee, Utah, Texas, Florida, Colorado, Arizona, and Ohio. *See* draft LANL permit at 19 and Attachment Q. It is one thing for LANL to have to manage the waste it generates as part of its own operations; it is quite another thing to add additional waste from other facilities to LANL. Santa Clara Pueblo strongly opposes allowing LANL to receive shipments of

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hazardous waste from outside of LANL to be stored at LANL. DOE and LANS and NMED have not yet gotten a handle on true clean-up of the waste already generated and stored at LANL. Therefore, it is completely inappropriate to accept waste from off-site sources.

### **NMED Needs to Include Government-to-Government Consultation with Santa Clara Pueblo in the Permit on NMED Discretionary Actions**

There are numerous places in the draft LANL permit where, although standards to be met are set forth, further action of NMED is necessary for approval of an action or for allowing a potential amendment or waiver of a given standard. These are instances where NMED as the regulator should be conducting government-to-government consultation with Santa Clara Pueblo prior to taking further action as the regulator. Such a requirement needs to be explicit in the permit. Such consultation is necessary as a matter of environmental justice and as a matter of respect for a co-equal sovereign.

Executive Order No. 2005-056 requires all New Mexico state agencies involved in decisions that affect environmental quality and public health, including NMED, to provide "meaningful opportunities for involvement to all people regardless of race, color, ethnicity, religion, income, or education level."

In the context of environmental justice, according to the EPA:

[m]eaningful involvement means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.

See EPA Environmental Justice Program website,  
<<http://www.epa.gov/compliance/about/offices/ej.html>.>

Also, as noted in the final report on environmental justice sponsored by NMED:

[c]ommunicating with [environmental justice] community members and providing feedback on what has been accomplished should be grounded *by ensuring the full and fair participation by all potentially affected communities in the decision-making process*, and avoiding, minimizing, or mitigating disproportionately high

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and adverse human health and environmental effects, including social and economic effects, on minorities and low-income communities.

ATRI/UNM, *A Report on Environmental Justice in New Mexico* (Nov. 2004), <<http://www.nmenv.state.nm.us/Justice/Reports/NMEDFinalReport-Dec07-04.pdf>> (NMED EJ Report) at 6 (emphasis added).

In fact, one of the recommendations on the NMED EJ Report is that discretionary authority under existing statutes and regulations should be used to trigger more protective measures if a permit under consideration will affect a highly impacted community, such as Santa Clara Pueblo. See NMED EJ Report at 23.

Such consultation is also in keeping with the January 17, 2003 *Statement of Policy and Process* executed by Governor Richardson and the Governors of the 19 Pueblos and reaffirmed in Executive Order No. 2005-004. In the *Statement of Policy and Process*, the State and the Pueblos “recognize the importance of full and open communication and cooperation on issues of shared interest or concern.” The document also explicitly states that “[t]he Governor and Pueblo governing bodies shall direct and cause all cabinet secretaries, departments, agencies, units, and subdivisions of their respective governments under their supervision and control to respect the principle of government-to-government relations in all interactions between State and Pueblo governments.”

Government-to-government consultation with Tribes goes beyond some checklist of activities so that NMED can say it had Tribal input. NMED must find ways to work with Santa Clara Pueblo to ensure that information from LANL personnel and NMED personnel is being shared in a way so that issues and problems are identified in a timely and consistent manner. Only in that way, through access to information in a timeframe that allows for dialogue, can Santa Clara Pueblo give feedback and be a true partner with NMED in ensuring that contamination is being fully addressed and in a manner that is culturally relevant.

The following is a list of examples in the draft LANL permit of where such government-to-government consultation between NMED and Santa Clara Pueblo is appropriate. This is not intended to be an exhaustive list but is simply intended to highlight some of the more obvious issues.

*Waiver from the One-Year Storage Requirement:*

The draft LANL permit requires DOE and LANS to not store hazardous waste beyond one year from the date that the wastes were first placed into storage at a permitted unit, but there appears to be a rather large exception to that requirement. That requirement can be waived if the permittees

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are able to demonstrate to NMED “that such storage is solely for the purpose of accumulating such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment, or disposal.” See draft LANL permit at 20.

Prior to making a determination that DOE and LANS have made the proper demonstration to warrant this exception, NMED should consult with Santa Clara Pueblo. While the language of the exception could be viewed by some as narrow, Santa Clara Pueblo is concerned about any exceptions that allow for “cap and cover” methods to linger and needs to understand why an exception is even being considered by NMED before any such decisions are made. If anything, the Pueblo believes that the permit language should be stronger, alerting the permittees that NMED will conduct impromptu inspections to make sure storage standards from RCRA set forth in the permit are actually being followed.

*Exception to Prohibition on Dilution:*

In the draft LANL permit, NMED prohibits DOE and LANS from diluting waste as a substitute for required treatment but then states that “[a]ggregating or mixing wastes as part of a legitimate treatment process is not impermissible dilution for purposes of this Permit.” Draft LANL permit at 20.

How do we know when this is occurring as part of a “legitimate treatment process?” Consultation appears appropriate here too before NMED makes such a determination. Please understand that we need to understand these matters not because we seek to add layers to a bureaucracy; we raise these issues because protecting the Pajarito Plateau is key to the Pueblo’s cultural survival.

*Approval of Updated or Alternate Ecological Screening Methods or Additional Ecological Risk Analyses:*

The draft LANL permit states that screening for ecological risks shall be conducted using LANL ecological screening levels but with approval of NMED as those screening levels are updated and that, in the absence of a LANL ecological screening level, DOE and LANS can use an EPA standard if it is approved by NMED. See draft LANL permit at 90. Santa Clara Pueblo needs to understand these processes and why various methodologies that NMED reviews are appropriate for assessing ecological risks posed by various chemicals and have an opportunity to give input regarding the methodology prior to such approvals being given by NMED.

This seems particularly appropriate since another section of the draft LANL permit indicates that, based upon the results of a screening-level assessment, DOE and LANS must demonstrate whether additional ecological risk analyses, including a site-specific assessment, are warranted. See draft LANL permit at 129. This implies that NMED has a role in reviewing this

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demonstration and determining whether the site-specific analysis is warranted. Again, what may seem to the regulating community to be purely clinical analyses of “ecological receptors of potential concern” or “habitat and exposure pathway” evaluations, *see id.* at 130, are actually part of the spiritual lifeline of our people. That is why it is appropriate to ensure that Santa Clara Pueblo is included in this process.

*Approval of Human Risk Assessments:*

The draft LANL permit indicates that any human health risk reports required “for determination of clean closure, risk-based closure, and/or in support of corrective action” shall be conducted in accordance with, amongst other things, NMED guidance and methodology. *See* draft LANL permit at 126. The draft permit states that such assessments shall address exposure mechanisms for each exposure pathway, “including ingestion, inhalation, dermal, and inhalation of volatile organic compounds volatilized from soil and/or groundwater.” *Id.* at 127. As explained elsewhere in these comments, traditional practices of Santa Clara Pueblo members result in more exposure of Pueblo members to contaminants than the general public.

As a matter of environmental justice, and in recognition of the cultural concerns of a sovereign Tribal government, it is important that NMED consult with the Pueblo on how any such health risk assessments, including the identification of exposure pathways, are formulated. NMED as the regulator can incorporate these concerns into the guidance and methodology required of the permittees for such studies. This is obviously a sensitive issue since Tribal governments, including Santa Clara Pueblo, are concerned about any data being released without approval by the governing body of the Tribe but, as noted in the recommendations in the NMED EJ Report, there may be ways to work with the Pueblo to support community-based participatory health research and incorporate cumulative risks into these health risk assessments that promotes environmental justice. *See, e.g.,* NMED EJ Report at 20-21.

*Variances from Mandated Clean-up Levels:*

There is a blanket provision in the draft LANL permit that states that, other than water quality standards addressed in a previous section, “[f]or all other cleanup levels, the Permittees may seek approval of a variance from a cleanup level by submitting to the [NMED] a written request for a determination that attainment of the cleanup level is impracticable” and that, if NMED approves the impracticability demonstration, NMED will notify the permittees. *See* draft LANL permit at 91. This is another area where it appears government-to-government consultation is needed since practicalities need to be viewed with environmental justice in mind.

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*Interim Approvals Prior to Corrective Measures Remedy:*

Section 11.8 of the draft LANL permits outlines myriad interim processes and reports that DOE and LANS must follow and submit to NMED as part of the corrective actions procedures to protect human health or the environment for sites where releases of hazardous waste or hazardous constituents have occurred. It appears from that section, however, that it is not until the very end of the process, essentially until after NMED has reviewed many interim reports leading up to a corrective measures evaluation report and after NMED has already approved the corrective measures evaluation report and already selected a preferred remedy, that NMED allows the public to have any review or comment. (We also note that, to our great dismay, in coming up with a remedy through this process, NMED actually is requiring the permittees to give preference to the remedy that is less costly. *See* draft LANL permit at 99. It seems absurd to mandate this if the permittees are willing to incur more costs to better fix the problem. NMED should be mandating the safest and most effective remedy.) To add insult to injury, the comment period on what by then is likely an incredibly voluminous administrative record is only 45 days. *See* draft LANL permit at 92 -100.

Given the incredible importance of corrective actions, the process outlined in the draft permit seems completely inappropriate as it neither respects the government-to-government relationship with the Pueblo or the spirit of environmental justice that NMED has championed in other processes occurring in New Mexico. *See, e.g.*, NMED EJ Report at 159 (“Tribes recommend that the State of New Mexico, including the NMED, engage Tribes . . . in the preliminary stages of planning.”).

**Next Steps to Correct the Draft Permit**

While we have pointed out specific places where requiring future government-to-government consultation should be incorporated into the final LANL permit, there appears to be a variety of processes that could be employed to ensure that all of the concerns raised by Santa Clara Pueblo are fully addressed in the LANL permit before the permit is actually finalized. The most formal of those processes is a public hearing. To preserve Santa Clara Pueblo’s right to participate in such a hearing, we request such a hearing in accordance with 20.4.1.901.A.5 of the New Mexico Administrative Code to address our opposition to the permit as currently drafted and as further discussed herein. However, a hearing puts us more squarely on a litigation track and we believe there are other methods short of litigation that should be pursued first.

The 2003 *Statement of Policy and Process* outlines a process for government-to-government consultation between State agencies and Pueblos. This seems to dovetail nicely with Governor Richardson’s desire to promote alternative dispute resolution as evidenced in Executive Order No.

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2005-056, *Establishing the ADR Advisory Council* (Sept. 12, 2005). Since some of the concerns raised by Santa Clara Pueblo will, no doubt, be echoed or elaborated upon in the comments submitted by others, it may also make sense to employ the process outlined in 20.4.1.901.A.4 of the New Mexico Administrative Code prior to any public hearing. The section states that:

[i]f the Secretary issues a Draft Permit, and a timely written notice of opposition to the Draft Permit and a request for a public hearing is received, the Department, acting in conjunction with the applicant, will respond to the request in an attempt to resolve the issues giving rise to the opposition. If such issues are resolved to the satisfaction of the opponent, the opponent may withdraw the request for a public hearing.

It appears appropriate to try to resolve concerns through this process along with others who have raised concerns about the draft permit, to promote the efficient use of resources, recognizing that, at times along the way, certain specific issues may need to be addressed outside of a larger group setting through direct government-to-government discussions. It may also be helpful to use a knowledgeable, but neutral, mediator to assist in this pre-hearing process.

## **Conclusion**

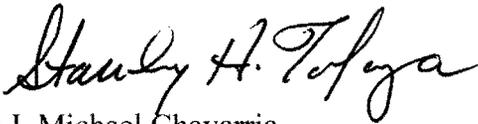
Through these comments, Santa Clara Pueblo has tried to explain where this permit should be strengthened to help better address cumulative impacts and impacts to cultural and traditional uses of the area. As we have stressed through the inclusion of various references to medicinal plants, hunting practices, or use of waters for ceremonial purposes, this area surrounding LANL has cultural resources that are uniquely tied to our identity and survival of our way of our life. Scientists speak of cleaning up various hazardous wastes to an industrial standard or even to a residential standard. It is important for NMED as the regulator to understand the Pueblo's perspective. Much of the lands for LANL were appropriated from the Pueblos. The lands need to be restored to the same condition they were in before the Manhattan Project. To do anything less is disrespectful of the earth. We realize that this permit, so long in the making after too many years of administrative extensions, is only the first step, but it is important to Santa Clara Pueblo that it be the best first step it can be.

We know that NMED has been very supportive in general of promoting environmental justice and has made great strides forward in various specific arenas, such as the solid waste permitting process, to incorporate environmental justice into permitting processes. Moreover, Santa Clara Pueblo has worked cooperatively with NMED on other important environmental projects on a government-to-government basis. Thus, it is our hope that these comments will provide an avenue for continued dialogue to improve upon the draft LANL permit before it is finalized.

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Ensuring the highest levels of cleanup through this permit will benefit not only Santa Clara Pueblo but all future generations of New Mexicans.

Sincerely,



*For* J. Michael Chavarria  
Governor

cc: Hon. Ron Curry, Secretary, NMED  
Hon. Alvin Warren, Secretary, NM Indian Affairs Department  
Milton Bluehouse, Environmental Justice & Tribal Liaison, NMED  
James Bearsi, Director, Hazardous Waste Bureau, NMED  
Joseph M. Chavarria  
Jessica R. Aberly