

Permit

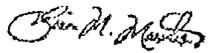
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**IN THE NEW MEXICO COURT OF APPEALS**

IN THE MATTER OF THE APPLICATION  
OF THE UNITED STATES DEPARTMENT OF  
ENERGY AND LOS ALAMOS NATIONAL  
SECURITY, LLC FOR A HAZARDOUS  
WASTE FACILITY PERMIT FOR LOS ALAMOS  
NATIONAL LABORATORY AND THE NOTICE  
OF INTENT TO DENY A PERMIT FOR OPEN  
BURN UNITS TA-16-388 AND TA-16-399 FOR  
LOS ALAMOS NATIONAL LABORATORY

Ct. App. No. \_\_\_\_\_

No. HWB 09-37(P)  
HWB 10-04(P)

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
**FILED**  
DEC 30 2010  


**NOTICE OF APPEAL**

Pursuant to Rule 12-601 NMRA and NMSA 1978, Section 74-4-14 (2000), Appellant Los Alamos National Security, LLC (“Appellant”) give this notice of appeal as of right from the Secretary of Environment for the State of New Mexico (“Secretary”) to the Court of Appeals for review of the Secretary’s Final Order to issue a Final Hazardous Waste Facility Permit entered of record by the Secretary on November 30, 2010, a copy of which is attached as Exhibit “1” hereto.<sup>1</sup> Appeal is taken by Appellant against the Secretary’s decision at this time on substantive,

<sup>1</sup>On December 21, 2010, the Secretary of the New Mexico Environment Department entered an Order Granting Applicants’ Motion for Partial Reconsideration (the “Partial Remand Order”) which granted reconsideration of that part of the November 30, 2010 Final Order denying that part of the Applicants’ application for a hazardous waste permit to operate open burn units TA-16-399 and TA-16-388 and remanded that aspect of the application to the New Mexico Environment Department for further proceedings. The Partial Remand Order declared that “[a]ll other provisions of the [November 30, 2010] Final Order remain in full force and effect.” This appeal pertains only to those aspects of the November 30, 2010 Final Order unaffected by the Partial Remand Order.

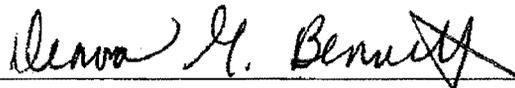


procedural and evidentiary issues relating to the Final Order and Final Hazardous Waste Permit.

A federal court action in the United States District Court District of New Mexico is currently pending in this matter. Appellant has moved to intervene in the federal court action and the United States does not oppose Appellant's motion. Thus, Appellant is filing this Notice of Appeal as a protective measure. Appellant shortly will be filing a motion to stay this appeal pending the outcome of the federal court matter.

Respectfully Submitted,

**MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.**

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was sent via U.S. Mail on December 30, 2010.

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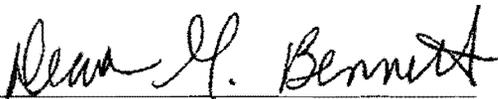
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STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTERS OF THE APPLICATION OF  
THE UNITED STATES DEPARTMENT OF ENERGY  
AND LOS ALAMOS NATIONAL SECURITY, LLC  
FOR A HAZARDOUS WASTE FACILITY PERMIT  
FOR LOS ALAMOS NATIONAL LABORATORY  
AND THE NOTICE OF INTENT TO DENY A PERMIT  
FOR OPEN BURN UNITS TA-16-388 AND TA-16-399 FOR  
LOS ALAMOS NATIONAL LABORATORY



No. HWB 09-37(P)  
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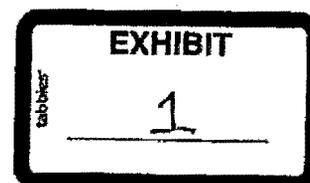
FINAL ORDER

This matter comes before the Secretary of the Environment following a hearing before the Hearing Officer over a period of fifteen days between April 6, 2010 and May 7, 2010 in Santa Fe, Pojoaque, Ohkay Owingeh, Los Alamos, and Albuquerque, New Mexico.

Applicants the United States Department of Energy and Los Alamos National Security, LLC (Applicants) seek a Hazardous Waste Facility Permit for Los Alamos National Laboratory. The New Mexico Environment Department (Department) Hazardous Waste Bureau (Bureau) supports the issuance of the permit with conditions necessary to protect the public health and welfare and the environment, and proposes to deny a permit for open burn units TA-16-388 and TA-16-399 for Los Alamos National Laboratory.

Having considered the administrative record in its entirety, including the Proposed Finding of Fact and Conclusions of Law, Closing Arguments, and all post hearing submittals submitted by Applicants, the Department and other parties to these proceedings, and the Hearing Officer's Report; and being otherwise fully advised regarding this matter;

THE SECRETARY HEREBY ADOPTS THE HEARING OFFICER'S REPORT, PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDED CONIDITIONS, EXCEPT AS NOTED BELOW.



IT IS THEREFORE ORDERED:

1. Pursuant to 20 NMAC 1.4.403, written comments were accepted and considered, but no oral argument will be accepted on the Hearing Officer's Report.
2. In place of the July 19, 2010 revised Proposed Permit, the Bureau submitted a Corrected Revised Proposed Permit dated September 10, 2010. Applicants agree that the September 10, 2010 Permit includes agreed upon changes to the Proposed Permit. Notwithstanding other references in the Hearing Officer's Report, it is the Corrected Revised Proposed Permit dated September 10, 2010 that shall, as modified below, be issued as the final Permit in this matter.
3. The Corrected Revised Proposed Permit dated September 10, 2010 includes changes to Permit Sections 1.17, 1.17.3, 2.4.9, 2.10.1, 2.10.5, 3.7.1(2), 3.7.1(4) and 3.11.3 agreed to by the Parties during the hearing. Additional findings of fact (FOF) and conclusions of law (COL) are appropriate to support the final Permit:
  - a. For changes to Permit Sections 1.17 and 1.17.3, Applicants' FOF 96-99 and COL 16-19 are adopted.
  - b. For changes to Permit Section 2.4.9, Applicants' 149-153 and COL 31-33 are adopted.
  - c. For changes to Permit Section 2.10.1, Applicants' FOF 154-160 and COL 34-36 are adopted.
  - d. For changes to Permit Section 2.10.5, Applicants' FOF 161-164 and COL 37-39 are adopted.
  - e. For changes to Permit Section 3.7.1(2), Applicants' FOF 189-196 and COL 42-44 are adopted.

- f. For changes to Permit Section 3.7.1(4), Applicants' FOF 197-201 and COL 45-47 are adopted.
  - g. For changes to Permit Section 3.11.3, Applicants' FOF 202-207 and COL 48-51 are adopted.
4. Although the Secretary adopts the Hearing Officer's recommendation that financial assurance conditions be deleted from the final permit, proposed Findings of Fact 386 through 395 are not adopted, nor is proposed Conclusion of Law 127. The Secretary's decision is based on the other grounds given by the Hearing Officer.
  5. Proposed Finding of Fact 268 is not adopted; the Applicants initially objected to Condition 2.4.9 of the Proposed Permit, but subsequently dropped their objection.
  6. Proposed Finding of Fact 418 is not adopted, as it conflicts with proposed Conclusions of Law 205 and 206.
  7. Additional findings of fact and conclusions of law supporting the closure plan limitation on disposal of low-level radioactive waste in areas undergoing closure are hereby adopted:
    - a. It is not practical to close a hazardous waste management unit properly if that unit is continuing to receive waste, even "non-hazardous" waste. Bearzi Testimony, Transcript Volume 15, page 4105.
    - b. Continued disposal of low-level radioactive waste would change the physical characteristics of the disposal area and the potential for migration of contamination. *Id.* at 4106.

- c. Continued disposal of low-level radioactive waste could reduce the effectiveness of a final cover, or interfere with the excavation of interred wastes. *Id.* at 4106.
  - d. Environmental Protection Agency regulations provide that closure of a hazardous waste management unit must begin following the final receipt of hazardous waste, or non-hazardous waste, at the unit. *See* Department Response Brief at 19-20; 40 C.F.R. Section 264.113(a)(2009), incorporated by 20.4.1.500 NMAC.
  - e. A closure plan limitation on disposal of low-level radioactive waste in areas undergoing closure is not a substantive regulation of radioactive waste; such waste is largely exempt from the Resource Conservation and Recovery Act (RCRA). This limitation is a tool for the Department to implement proper closure of hazardous waste management units at the Laboratory. Department Response Brief at p. 19.
  - f. Applicants had adequate notice and opportunity to respond to the closure plan limitation on the disposal of waste in areas undergoing closure. Department Response Brief at pp. 20-21, Transcript at page 4107.
8. The Secretary adopts the Hearing Officer's recommendation to deny the open burning permit for TA-16-388 and TA-16-399, but due to winter field conditions will grant additional time to perform closure of those units.
- a. Section 4.2 of the closure plans shall be modified to allow closure activities to commence April 1, 2011.

- b. The extension of time for closure does not authorize continued operation of those units beyond December 31, 2010.
  - c. Section 5.2.1 of the closure plans shall also be revised to allow metal to be recycled at the units, based on the testimony of Ms. Vigil-Holterman at Transcript Volume 5, page 1268.
- 9. The Secretary adopts the Hearing Officer's recommendation to establish both an electronic and physical information repository. The changes to Permit Section 1.10 proposed by the Bureau in NMED Exhibit 229 shall be incorporated into the final Permit.
- 10. The Secretary adopts the Hearing Officer's recommendation to include Section 4.6 in the final Permit, relating to the Radioactive Liquid Waste Treatment Facility. Based on the Bureau's agreement during hearing testimony, the second sentence of the Section shall include the phrase "or as otherwise authorized," to read "If the Permittees intentionally discharge through a location other than the permitted outfall or as otherwise authorized, they will fail to comply with this requirement."
- 11. The Hearing Officer's Report defined the Department of Energy, an agency of the federal government, and Los Alamos National Security, a contractor to the federal government, and they are the Applicants and Permittees. The Report did not define or address the National Nuclear Security Administration (NNSA), which is a separately organized agency.
- 12. The permit shall be further revised to include the following:
  - a. No delegation or assignment of the Applicants' responsibilities under this permit can be made to any person or entity, including a separately organized

agency, without the express permission of the Department; this prohibition does not preclude the Applicants' use of contractors for remediation.

- b. The Applicants shall not allow any person or entity which currently exists or may be created, including a separately organized agency, to interfere with the performance of their obligations or responsibilities under this permit.

13. In all other respects, the Application of the United States Department of Energy and Los Alamos National Security LLC for a Hazardous Waste Facility Permit for Los Alamos National Laboratory is granted subject to the conditions set out in the Hearing Officer's Report.



RON CURRY  
Secretary of Environment

Notice of Opportunity for Judicial Review

Pursuant to NMSA 1978, Section 74-4-14, any person who is or may be affected by any final administrative action of the Secretary may appeal to the Court of Appeals for further relief within thirty days after the action.