

Repermit



STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTERS OF THE APPLICATION OF  
THE UNITED STATES DEPARTMENT OF ENERGY

HWB 09-37

(P)  
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

HWB 10-04 (P)

STATEMENT OF INTENT TO PRESENT TESTIMONY  
AT THE SUBJECT HEARING

Pursuant to 20.1.4.300A(1) NMAC, A. John Ahlquist intends to present technical testimony on the Los Alamos National Laboratory Resource Conservation and Recovery Act Draft Permit. He previously submitted comments on the permit, requested a public hearing in the matter, and requested to be included as a party to the proceedings.

He may be contacted at:

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\_\_\_\_\_(signed)\_\_\_\_\_  
A. John Ahlquist



3/19/10

**CERTIFICATE OF SERVICE**

I hereby certify that on this March 19, 2010, a copy of the  
**NOTICE OF ENTRY OF APPEARANCE FOR  
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TECHNICAL TESTIMONY**  
was sent by electronic mail to:

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**TESTIMONY OF A. JOHN AHLQUIST  
IN THE MATTER OF THE RCRA PERMIT  
FOR THE LOS ALAMOS NATIONAL LABORATORY  
[FEBRUARY 2, 2010 VERSION]**

I am not against regulation. However, regulations and permits must be wisely constructed, well written, and fairly enforced to be effective. Common sense should be applied to ensure that the ultimate goal of good waste handling and timely and effective cleanup is accomplished. It is not the charge of the regulator to micromanage a project or waste operation but to ensure that the operation or project is operated within the regulatory guidelines.

**It should be clearly demonstrated that this permit can be fairly, efficiently and effectively administered and enforced.**

To date the New Mexico Environment [NMED] has failed badly in its regulation of the Resource Conservation and Recovery Act [RCRA] at the Los Alamos National Laboratory [LANL]. It has failed so badly that serious consideration should be given to either a drastic overhaul of how NMED regulates RCRA at LANL or it should give regulatory authority back to the Environmental Protection Agency [EPA] which is the ultimate regulator for RCRA.

The proof of failure is clear because the current draft permit is over 10½ years behind schedule for renewal [due in 1999] of the 1989 permit. [See attached time line developed from the NMED web page.] So far the administrative record for this renewal is well over 1.5 million pages [500 boxes of binders with double-sided printing]. The listing of items in the record is 412 pages long and the first item is a technical article from 1938 that discusses milk anemia. It is difficult to imagine how any manager would not be alarmed by any deliverable that is 10½ years late, especially since it is only a modification of an existing document. In these 10½ years, the 1989 permit has been modified a number of times. Determining the current version from which to operate has been difficult for both NMED inspectors and LANL. In addition that confusion, it must be difficult, with a huge administrative record, for NMED and LANL to determine where they are and what is necessary and this logically leads to confusion, frustration, bad relationships and basically ineffective regulation which has cost many millions of dollars. If a permittee were 10½ years behind schedule on a major deliverable, NMED would have shut them down.

**NMED does not meet its review obligations in a timely manner.** At the signing of the consent order on cleanup [which is really an order on environmental characterization], NMED was behind on responding to approximately 300 deliverables provided by the permittees at an estimated cost of \$60M. NMED responded to this by resetting the deadlines upon signing the order. i.e, it reset the deliverable clock. NMED does not extend this ability to reset the clock to the permittees. In something so simple as a finding of no further action [NFA] for a solid waste management unit [SWMU], NMED

has trouble deciding and acting. In 2007 NMED finally made the NFA determinations for one SWMU submitted in 1995, one in 1996 and 18 in 2001. [ref. 3/26/07 press release subsequently removed from the web page]

**NMED is not consistent in its application of regulation.** The Sandia National Laboratory at Albuquerque [SNLA] is roughly the same size as LANL and has similar hazardous waste issues. In response to my earlier questions on how RCRA is applied at SNLA, NMED has been silent leading me to conclude that the SNLA permit renewal did not take over 10 years beyond the scheduled completion to accomplish.

During the negotiations following the 7/6/09 version of the permit, NMED held between 35 and 40 meetings with various parties who had requested a public hearing. I asked if I could be part of those meetings and/or see the minutes of them and was told I could not because I had not requested a public hearing. However, San Ildefonso Pueblo was invited to be part of those closed meetings and it had not requested a public hearing. I agree that the Pueblo should have been included and there was no good reason to exclude me.

On that same permit version, NMED stated it would respond to all comments in writing. It did not and said the new [1/20/10] version of the permit rendered all previous comments moot. NMED has been meeting with selected groups on the current version of the permit but I have yet to be invited. I can only conclude that NMED is doing its best to avoid facing the issues I have raised for over two years.

NMED requires that the permittees do "corrective actions" for residential septic tanks [e.g., AOC-00-0030 (p)], a concrete block manufacturing plant [AOC-00-034 (a)] and a borrow pit used for housing construction [AOC-00-0034 (b)]. Until NMED can affirm that it requires this same level of investigation/remediation at all residential septic tanks, concrete plants and borrow pits in the State, NMED should not require investigation of these units by the permittees.

NMED should also provide the amount [number, length, and number of inspectors] of RCRA inspection effort at LANL and other similar facilities to hopefully demonstrate that one facility is not called out over another.

**NMED is in denial that it has a problem.** When I pointed out to NMED management that the lateness of the renewal and the size of the administrative record were a significant problem and wished them well in finding a way to reform the process, then Deputy Secretary Jon Goldstein responded was that the Hazardous Waste Bureau [HWB], which has responsibility for managing the permit renewal, has never been in better shape.

**NMED needs to demonstrate that it can administer the permit in a fair and unbiased manner.** Secretary Ron Curry's biographical sketch on the NMED web pages says that he worked on a LANL Environmental Impact Statement [EIS]. Section 20.1.4.100.E(3) of the regulations for public hearings states that

*“The Secretary or the Hearing Officer shall not perform any function provided for in this Part regarding any matter in which the Secretary or Hearing Officer (i) has a personal bias or prejudice concerning a party, the Application or Petition involved in the proceeding; (ii) has a financial interest in the proceeding or facility that is the subject of the proceeding...”*

It would seem appropriate that the Secretary disclose the nature of his work on the LANL EIS and the financial considerations associated with this work.

In an article in the Santa Fe New Mexican on 12/12/09, NMED Water and Waste Management Division Director Marcy Leavitt finally took the Concerned Citizens for Nuclear Safety [CCNS] to task for some of the allegations they made about NMED and LANL groundwater. However, her article included the statement

*“New Mexico Environment Department has found that only through firm and fair enforcement does Los Alamos National Laboratory become motivated to address its environmental problems.”*

With my involvement and knowledge of 40 years of environmental operations at LANL and the fact that LANL and the DOE are currently spending well over \$100M per year on environmental work at LANL, I find that comment personally offensive and, if LANL were a person, the statement would be grounds for a libel lawsuit. It certainly calls into question her ability to be involved in RCRA at LANL in a fair and unbiased manner. I suspect her comments were related to technical differences between NMED and LANL. NMED should provide if there is dispute resolution process to allow for technical differences and how often that process has been invoked.

Table K-1 of the permit is prejudicially labeled “SWMUs and AOCs Requiring Corrective Action”. Deep in the text of the permit one learns that corrective measure options include a **no action alternative**. A significant fraction, if not the majority of the items in the list, would require no remediation or corrective action. Correct RCRA terminology for the title would be “RCRA Facility Investigation Units”. As labeled, the Table suggests things are worse than they actually are.

NMED allows far too much access to the permitting process for groups who are not official parties to the permit and then over reacts to them. Many of these groups refer to the 35-40 meetings as negotiations. Is it even legal in New Mexico to allow groups other than permittees and NMED to be direct parties to permit negotiations? As NMED learned [and should have known] several of the groups, through their stipulations, had no substantive agreement with the permit even after the unprecedented access they were given. For some of the more radical activist groups, it is in their DNA to not agree. They exist to criticize and not accomplish. They do not have to technically correct or weigh cost, scope and schedule and make the sometimes difficult choices of what can or cannot be done or what should be done. If they don't criticize, complain and fuss and make a public noise, the contributions that keep them alive will dry up. They must fuss

and will misuse data to suit their purpose. It is the responsibility of NMED to listen and in the few places where their point is valid, acknowledge that but otherwise represent all the taxpayers in a firm, fair, effective and efficient manner and tell the chronic complainers no.

**LANL and DOE are making a significant error by limiting their request for disposal of mixed waste sealed sources to one drum per year and NMED is making the mistake of putting this limitation into the permit.** Collecting orphan and unneeded sealed sources and ensuring their proper disposal is a vital element in our national security to prohibit these materials from being used in a radiological dispersal device. When found, these sources should be quickly secured, properly packaged and promptly disposed. It was a tremendous bureaucratic struggle to get the pipeline opened so that this could occur. However complicated [much of it unnecessarily], there is now a pathway to disposal at the Waste Isolation Pilot Plant [WIPP]. If a new type of source containing a listed waste were to be collected now or sometime in the future, then the sources would have to be stockpiled while the parties went through a negotiation process to allow more than one drum per year to be sent to WIPP. If history is prologue, such negotiations between the parties could take years. I doubt that the source recovery program can guarantee no surprises. An artificial limit is not useful and could unnecessarily limit future source recovery options and disposal. LANL should request that NMED should delete paragraph 2.2.1(4)b and NMED should do so. The radiological hazard to the public from these sources could be significant but goes to zero when the disposal is complete. I would think the activist groups would agree with me.

**NMED has substantively failed in its technical argument used as the rationale to deny open burning/open detonation [OB/OD] at facilities TA-16-388 and TA-16-399.** With this failure, NMED is not in a position to deny the applicants permitted use of these facilities.

The argument fails because:

1. NMED is inconsistent within itself in the rationale for the denial of permit application.
2. NMED itself concludes that there is no human health risk.
3. There is no perspective provided in the argument about the amount of past use of these facilities and how much new activities would add to the burden already existing in the environment.
4. There is no perspective on the size of the area that meets NMED's criteria for a low ecological risk for the deer mouse.
5. NMED believes "there may be preferable and viable alternatives to burning the HE waste" but does not indicate the basis for that belief nor provide an assessment of the viability of that belief.

## Technical discussion on OB/OD

### **NMED is inconsistent within itself in the rationale for the denial of permit application.**

In the conclusions section on the risk assessment, it states that NMED's

*"evaluation of the ecological assessment as submitted by the Applicants shows a low to moderate ecological risk to non-protected species, including the deer mouse, Montane shrew, and earthworm".*

However, five paragraphs earlier, NMED states

*"a spatial assessment was conducted for the deer mouse and Montane shrew. These two receptors were selected as they appear to be the most sensitive species. The results of the spatial analysis indicated slightly elevated hazard [1.9] for the deer mouse but acceptable hazard for the Montane shrew."*

It appears that NMED's conclusion statement should be limited to the deer mouse and its risk level should be low, not "low to moderate". This low risk should not be sufficient grounds for permit denial.

**NMED concludes that there is no human health risk.** That conclusion is correct so NMED correctly does not use this reason to deny the OB/OD permit.

**There is no perspective provided in the argument about the amount of past use of these facilities and how much new activities would add to the burden already existing in the environment.** In its conclusions, NMED fails to point out that the ecological risk evaluation is based on contamination from past operations and does not put that into perspective. The NMED orders for closure for TA-16-399 and -399 note that 675,500 lbs of material and 840 gallons of liquids have undergone treatment since 1980 at those units. Since S-Site started in 1943, one could surmise that the volumes of waste treated since the beginning of the laboratory would be double the 1980 amount or 1,351,000 lbs and 1680 gallons of liquids. Also, planned treatment is for smaller quantities of waste that will be more effectively destroyed than in the past.

**There is no perspective on the size of the area that fails to meet NMED's criteria for a low ecological risk for the deer mouse.** The sampling area upon which the ecological risk assessment is based is about 12 acres. The contaminated area with the highest concentrations is a few acres in extent. Scraping one foot off two acres [3200 cubic yards] would be a strong remedial action and would eliminate NMED's already weak rationale. It is difficult to see how an alleged trivial ecological risk to the deer mouse in a few acres of contaminated soil from 66 years of past operation can justify denial of the permit for OB/OD at those sites.

If LANL were to scoop up the more highly contaminated spots so that even the alleged trivial risk went below NMED's threshold, NMED would not have any basis upon which to deny OB/OD. NMED should suggest alternatives to meeting their criteria so that OB/OD could continue.

**NMED believes "there may be preferable and viable alternatives to burning the HE waste" but does not indicate the basis for that belief nor provide an assessment of the viability of that belief.** In reviewing applications such as this, effective regulation should not just deny but offer acceptable alternatives other than a "belief" that there are other disposal methods, so that effective, safe waste treatment can continue.

**Conclusion on OB/OD:** It appears that NMED is using the equation

$$\text{RISK} = \text{HAZARD} + \text{OUTRAGE}$$

as the basis for its determination to deny use of these facilities. The hazard, by NMED's own admission, is that there is no adverse impact on humans and that the only current ecological risk is small to the deer mouse over a limited area from decades of OB/OD at TA-16. This is not a sufficient basis upon which to deny OB/OD permits for TA-16-388 and -399.

NMED acknowledges that there was considerable public comment from the public opposing OB/OD. Many of the public members expressing concern live far from the facilities so their concern appears to somewhat be misplaced. Because there is no human health risk and the ecological risk is low [based on a weak rationale] to non-existent, it appears that NMED basing its decision on the public outrage factor. It is not clear that NMED can legally deny an applicant a permit to operate because perceived public outrage expressed by few loud people.

NMED is correct in requesting that the "Applicants should reevaluate the alternatives to open burning...and their own ability to reduce HE waste streams". Statements to this effect should be included in the permit to encourage continuing waste minimization programs and NMED should annually review progress towards these goals.

Acceptance or denial should be based on impact of the planned operations and not what occurred previously. The past provides an indicator but is should not be the sole arbiter of the future.

**General comment:** I am amazed at the strength at which some of the groups oppose this permit. They will not be satisfied! That must mean they believe the 1989 permit with all its modifications is adequate because that is the current operative permit. In its insightful comments on the 7/6/09 version of the permit by Santa Clara Pueblo stated

*"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."*

Enough work has been expended, with a few final modifications, this permit will finally be the best first step it is likely to be. To make this happen, NMED will have to tune out the noise of outrage and make a technical decision.

**Final comment:** As a former member of the characterization/remedial action community, I have an empathy and sympathy for those involved in this RCRA process and characterization and remedial actions associated with it. Most of the people in NMED, LANL and DOE, many of whom I know, are trying to do the right thing and there are always a few who have other motivations. For me, it was ultimately discouraging to spend so much time and money to accomplish so little of significance. If the process can be corrected, then something of significance can occur. I challenge all managers involved to straighten out the process so that the staff can walk tall and be proud of the significance of their accomplishments. If NMED is not up to the task of correcting the process, then the EPA should step in and take back its authority. There is a good model for action in the Rocky Flats experience. The taxpayers would thank you.

## TIMELINE FOR RCRA AT LANL

[RCRA corrective actions are not included in this timeline.]

- 11/19/80 - RCRA regulations become effective; LANL files Part A application
- 1/25/85 - NM given authority by EPA to regulate hazardous wastes under NM Hazardous Waste Act [HWA]
- 11/8/89 - NM Environmental Improvement Dept. issues LANL permit [good for 10 yr]
- 3/8/90 - EPA issues environmental investigation/corrective action module under RCRA regulations to LANL permit
- 7/25/90 - NM gets expanded EPA authorization to handle hazardous component of mixed waste
- 6/95 - LANL files Part B for Technical Area [TA]-16 [and again in 2003]
- 1/2/96 - EPA grants authorization to NM to regulate corrective actions
- 6/96 - LANL files Part B for TA-55 [and again in 2003]
- 8/96 - LANL files new Part A and Part B in preparation for 1999 permit renewal [provides further Part A information from 1999 to 2006 {the latter reflecting change in contractors} and Part B information in 1999, 2000, 2001, 2002, 2003]
- 1/99 - LANL files Part B for TA-50 [and again in 2002]
- 1/99 - LANL files Part B for TA-54 [and again in 2003]
- 6/99 - on or before this date, LANL files Part B for TA-14, TA-36 and TA-39
- 9/99 - TA-3 Part B submitted by LANL
- 11/99 - NMED extends 1989 LANL permit [did not act on previous applications and makes several subsequent updates of old permit]
- 3/1/05 - Consent Order on cleanup signed
- 8/27/07 - NMED issues updated draft permit for 60-day public comment period to end October 26, 2007
- 10/22/07 - NMED extends the public comment period to January 11, 2008

1/15/08 - NMED extends the public comment period to February 1, 2008

8/08 to 6/26/09 – NMED hold 35-40 meetings with permittees and groups that requested a public hearing on the draft permit in an attempt to resolve differences in lieu of a public hearing.

6/26/09 - A Stipulation on Permit Language is entered into with the parties to the meetings. Several groups except most of the draft permit.

6/30/09 – Applicants provided an updated version of their Part A Permit Renewal Application

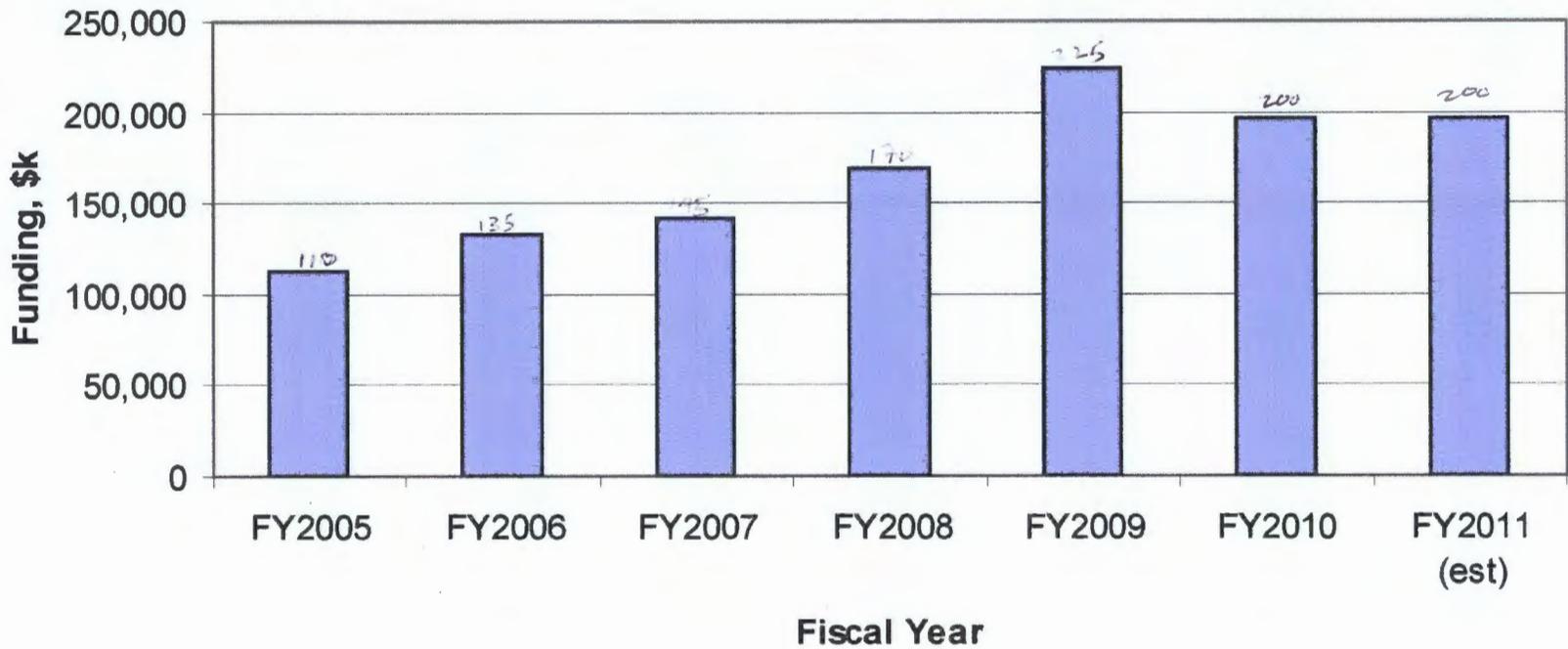
7/6/09 – NMED issues revised draft permit for public comment, withdraws the 8/27/07 version, and declares that comments and requests for public hearings on that version of the permit are now moot.

9/25/09 – NMED issues a letter saying the comment period has been extended and that there are plans for a public hearing to be held before June 30, 2010.

1/20/10 – Revised draft issued.

2/2/10 - Final revised draft issued.

### Exhibit 3. Annual Funding for Consent Order Implementation



Σ

|     |      |                   |
|-----|------|-------------------|
| 110 | 110  |                   |
| 135 | 245  |                   |
| 145 | 390  |                   |
| 170 | 560  |                   |
| 225 | 885  | - 590 = 44M       |
| 200 | 1085 | 95% <u>\$841M</u> |
| 200 | 1285 |                   |

AHLQUIST  
EXHIBIT