

TA 16



Office of the Laboratory Counsel
Environmental Safety & Health Practice Group
P.O. Box 1663, Mail Stop A187
Los Alamos, New Mexico 87545
(505) 667-3766/FAX: (505) 665-4424

National Nuclear Security Administration
Los Alamos Site Office
528 35th Street, Mail Stop A316
Los Alamos, New Mexico 87544
(505) 667-7203/FAX (505) 665-4504

Date: July 14, 2006
Refer To: 06-009

Mr. John Keiling, Program Manager
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, New Mexico 87505-6303



Subject: Public Comment and Request for Public Hearing on the Proposed Class 3 Permit Modification to the Hazardous Waste Facility Permit for U.S. Department of Energy, Los Alamos National Laboratory.

Dear Mr. Keiling:

On May 15, 2006, the New Mexico Environment Department (NMED) issued a Public Notice proposing to approve a Class 3 permit modification for remedy selection at SWMU 16-021(c). NMED announced a 60-day comment period, and issued a Fact Sheet setting out the basis for the proposed permit modification.

The purpose of this letter is to submit comments on the proposed permit modification on behalf of the U.S. Department of Energy (DOE) and Los Alamos National Security, LLC (LANS) regarding the proposed changes to Module VIII of the Los Alamos National Laboratory Hazardous Waste Facility Permit (NM-0890010515-1) for remedy selection at SWMU 16-021(c). The comments are provided as Attachment 1 to this letter. In addition, DOE and LANS request a public hearing on the proposed Class 3 permit modification pursuant to 20.4.1.901 NMAC and the Fact Sheet issued by NMED on May 15, 2006. DOE and LANS support the technical aspects of the proposed remedy, but believe the Compliance Order on Consent (Consent Order) process and not the permit modification process is applicable to the remedy selection for SWMU 16-021(c). DOE and LANS do not represent any other parties in this matter, and wish to present testimony on the proposed permit changes at the hearing.



DOE and LANS are appreciative of the opportunity to present comments on the proposed permit modification. We welcome the opportunity to meet with you in the near future to resolve the outstanding issues. Please do not hesitate to call either of us if we can be of service.

Sincerely,



Ellen T. Louderbough
Staff Attorney

Sincerely,



Lisa Cummings
Attorney for DOE/NNSA

ETL/les

w/enclosure

Cy: Gene Turner, ES, LASO, A316
Victoria George, ENV-DO, J978
Tony Grieggs, ENV-RCRA, K490
Jack Ellvinger, ENV-RCRA, K490
Gian Bacigalupa, ENV-RCRA, K490
Dave McInroy, CAP, M992
Charles J. English, ENV-RCRA, M992
LC Records, A187
LC/ESH File

Attachment 1

Comments on the HWB's Proposed Remedy Selection for Solid Waste Management Unit 16-021(c) Draft Permit Modification

Support for Proposed Remedy: Los Alamos National Laboratory (LANL) supports the remedies proposed by the "Intent to Public Notice Remedy Selection for the SWMU 16-021(c)" and believes that these remedies will be protective of human health and the environment. The additional remedies proposed by NMED (e.g. removal of the TA-16-260 trough and further ecological characterization and potential soil removal) represent a reasonable addition to the recommended remedies.

The Consent Order Applies: LANL has a significant concern with the Hazardous Waste Bureau's (HWB) proposed permit action for the remedy selection. LANL followed the specific requirements in the Compliance Order on Consent (Consent Order) Section VII.D.7 for remedy selection. HWB proposes instead to incorporate six specific corrective action requirements for SWMU 16-021(c) into Module VIII of the Los Alamos National Laboratory Hazardous Waste Facility Permit No. NM0890010515 (Permit). LANL is committed to expeditious and timely corrective action and has demonstrated this commitment through compliance with the extensively negotiated Consent Order. The HWB's Fact Sheet, however, requires LANL to comply with both the Permit and the Consent Order, which is contrary to our agreement and the specific language of the Consent Order. LANL objects to NMED's failure to follow Consent Order requirements for remedy selection in this case. Section III.W.1 of the Consent Order states that NMED has determined that "*all corrective action ...shall be conducted solely under this Consent Order and not under the current or any future Hazardous Waste Facility Permit ...*" (emphasis added), and any exceptions were specifically noted. Section III.W.4 states "*[t]he renewed Permit, and any future modifications, renewals, or reissuance of the Permit, will not include any corrective action requirements, nor any other requirement that is duplicative of the Consent Order.*" The Consent Order provides the legally required framework for completion of corrective action.

Permit Modification Authority: HWB's Fact Sheet states that the proposed permit action is authorized under 20.1.4.900 NMAC, incorporating 40 CFR §270.42, which allows a facility to request a permit modification. Fact Sheet at 15. LANL did not request a permit modification for remedy selection, and the proposed modification is not subject to §270.42. This is a regulator-initiated permit modification and is subject to the limits of 40 CFR §270.41; NMED's proposed modification falls outside the narrow limits of the applicable regulatory section, and NMED lacks the authority to make the proposed modifications to LANL's permit.

Remedy Selection Process: In drafting the Consent Order, the parties negotiated all aspects of corrective action, including an extensive remedy selection process that contains detailed requirements, processes, and time-lines to select and approve the final remedy for numerous sites. These processes include the submittal of the Corrective Measure Implementation Plan (CMI) (Section VII.E), Remedy Completion Reports (Section VII.E.6), and progress reports (Section VII.E.5). Section VII.D.7 requires that, at the end of these processes, NMED must select a final remedy by issuing a Statement of Basis and following the public participation requirements of 40 CFR § 270.41. The Consent Order does not require LANL [or NMED] to modify the permit to incorporate the requirements and documents associated with the remedy selection process. The proposed modification for SWMU 16-021(c), however, directly conflicts with and undermines the Consent Order, and will hamper timely and effective clean-up efforts.

Duplicative and Conflicting Requirements: The requirement that LANL comply with both the Consent Order and the Permit subjects LANL to conflicting and duplicative requirements. For example, under Sections VII.E.2 and VI.F.2 of the Consent Order, LANL must submit a CMI Plan within 90 days of final remedy selection, or at a later time specified by NMED. Section XII of the Consent Order requires submittal of the CMI Plan within 90 days of final remedy selection. The proposed permit modification, however, provides 180 days for submittal of the plan, in conflict with the Consent Order. The “CMI Report” required by the permit modification duplicates the Consent Order requirement to submit a “Remedy Completion Report,” contains substantially identical elements, and is submitted for the same purpose and at the same time (e.g., after remedy completion). The Consent Order addresses progress reports at Section VII.E.5 and contains provisions identical to NMED’s proposed permit condition for progress reports at C.5. There are numerous provisions in the Consent Order that pertain to long-term monitoring. The only provision of the Consent Order that allows long-term monitoring to be incorporated into the permit is not applicable here, so the proposed permit conditions for periodic monitoring should not be part of the permit. Section III.W.1 provides that the Consent Order is the sole enforceable mechanism for corrective action with four exceptions, including “the implementation of the controls, including long-term monitoring, for any SWMU on the Permit’s Corrective Action Complete With Controls list.” HWB has no legal authority to subject LANL (or any other facility) to duplicative potentially conflicting requirements for corrective action under the New Mexico Hazardous Waste Act and its regulations.