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State of New Mexico
ENVIRONMENT DEPARTMENT
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58548



MARK E. WEIDLER
SECRETARY

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

June 8, 1998

Mr. G. Thomas Todd, Area Manager
U.S. Department of Energy
Los Alamos Area Office
Los Alamos, NM 87544

Dr. John Browne, Director
Los Alamos
P.O. Box 1663
MSK 490
Los Alamos, NM 87545

RE: Compliance Order - NM0890010515 - Corrective Action Violation
Technical Area 21 - Solid Waste Management Unit 029/DP Tank Farm

Dear Mr. Todd and Dr. Browne:

The New Mexico Environment Department (NMED) issues the enclosed Compliance Order to the U.S. Department of Energy (DOE) and the Regents of the University of California (Regents), pursuant to the New Mexico Hazardous Waste Act, NMSA 1978 §74-4-10 (Repl. Pamph. 1993). The Compliance Order is issued because Los Alamos National Laboratory (LANL) has failed to comply with the New Mexico Hazardous Waste Management Regulations (20 NMAC 4.1). The violations are specifically set out in the Compliance Order and the Compliance Order sets out a schedule of compliance required of LANL. LANL may be subject to civil penalties of up to \$25,000 for each day of noncompliance with the Compliance Order, as set forth in §74-4-10.

Any inquiries concerning this Compliance Order should be directed to Mr. John M. Tymkowych, RCRA Enforcement/Inspection Program Manager, Hazardous and Radioactive Materials Bureau, New Mexico Environment Department, at (505) 827-1508.

Sincerely,

Ed Kelley, Ph.D., Director
Water and Waste Management Division

cc: Benito Garcia, Bureau Chief, HRMB
John Tymkowych, RCRA Enforcement/Inspection Manager, HRMB
Robert S. Dinwiddie, REMP Manager, HRMB
Richard Mertz, Office of General Counsel
File: Blue/Red LANL TA-21 1997
Track: LANL, 12/97, DOE/LANL, HRMB/BT, KE, File
File: HSWA LANL 1/1106/21/21-029

Received by ER-R
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STATE OF NEW MEXICO
ENVIRONMENT DEPARTMENT

IN THE MATTER OF
THE UNITED STATES DEPARTMENT OF ENERGY
AND THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
LOS ALAMOS, NEW MEXICO
NM0890010515

COMPLIANCE ORDER
HRM-98-01 (CO)

RESPONDENTS.

ADMINISTRATIVE COMPLIANCE ORDER

The Secretary of Environment, acting through his designee, the Director of the Water and Waste Management Division of the New Mexico Environment Department ("NMED" or "Complainant") issues this Compliance Order to the United States Department of Energy and the Regents of the University of California, (collectively "Respondents") pursuant to the New Mexico Hazardous Waste Act ("HWA"), § 74-4-10, N.M.S.A. 1978 (Repl. Pamp. 1993).

FINDINGS OF FACT

1. Complainant is the administrative head of the New Mexico Environment Department, an agency within the executive branch of the government of the State of New Mexico. Complainant is charged with administration and enforcement of the New Mexico Hazardous Waste Act, §§ 74-4-1 et seq., N.M.S.A. 1978 (Repl. Pamp. 1993).
2. Respondents are the United States Department of Energy ("DOE") and the Regents of the University of California ("UC"), who notified the Environmental Protection Agency ("EPA"), of their hazardous waste generation activities on November 19, 1980.
3. DOE is an agency of the federal government and the owner and co-operator of Los Alamos National Laboratory ("LANL").
4. UC is a public educational institution of the State of California and the management and operating contractor for LANL pursuant to a contract with DOE, and is a co-operator of LANL.
5. LANL is principally located in Los Alamos County, New Mexico, approximately sixty (60) miles northeast of Albuquerque and twenty-five (25) miles northwest of Santa Fe. The LANL site encompasses approximately forty-three (43) square miles.
6. LANL was chosen as the site for the wartime development

of the atomic bomb. The facility was established as a military reservation, and operations began in 1943. Since 1943, the primary mission of LANL has been nuclear weapons research and development. In addition, the facility does work in magnetic and internal fusion, nuclear fission, nuclear safeguards and security, laser isotope separation, and medical isotope development.

7. In association with the activities identified above, LANL generates, treats, and stores hazardous waste and mixed hazardous and radioactive wastes. LANL has also applied for and received permits for the storage and management of hazardous wastes and mixed hazardous and radioactive wastes.

8. On or about November 8, 1989 the predecessor to the New Mexico Environment Department, the Environmental Improvement Division of the New Mexico Department of Health and Environment, issued to DOE and UC a permit for the operation of a hazardous waste facility, Permit No. NM0890010515.

9. On March 8, 1990, DOE and UC were issued Hazardous and Solid Waste Amendments of 1984 ("HSWA") Module VIII, which was incorporated into the hazardous waste facility permit no. NM0890010515, effective May 23, 1990.

10. On or about April 19, 1994, DOE and UC were issued a modified HSWA Module VIII, effective on or about May 19, 1994.

11. HSWA Module VIII for LANL was again modified on December 8, 1997. (Subsequent references to "HSWA Module VIII," are to the module as modified).

12. HSWA Module VIII imposes corrective action requirements.

13. Among other things, HSWA Module VIII requires Respondents to perform a RCRA Facility Investigation ("RFI") to address known or suspected releases from specified solid waste management units ("SWMUs") to affected media.

14. The specified SWMUs for which HSWA Module VIII requires an RFI include SWMU 21-029.

15. SWMU 21-029 is located in Technical Area 21 at LANL, near the Western end of DP Mesa on a moderate slope descending from DP Road toward DP Canyon. The site is bounded by the Knights of Columbus Hall on the west, a Los Alamos County fire station on the east, DP Road on the south and DP Canyon on the north.

16. SWMU 21-029 is the former location of 15 underground storage tanks and two filling stations, which were removed in 1988.

17. HSWA Module VIII requires the RFI for SWMU 21-029 to determine the nature and extent of releases of hazardous waste or hazardous constituents from the SWMU. In order to allow this determination, HSWA Module VIII requires, among other things, collection of data sufficient to define the extent, origin, direction, and rate of movement of contaminant plumes, including the horizontal and vertical extent of any soil and groundwater contamination.

18. HSWA Module VIII requires the RFI for SWMU 21-029 to describe potential contaminant migration pathways, including pathways that may allow migration of contaminants off-site.

19. HSWA Module VIII requires the RFI for SWMU 21-029 to describe actual or potential receptors, including environmental systems that are susceptible to contaminant exposure from the facility, including habitats for threatened, endangered and sensitive wildlife species, and to evaluate risks to those receptors.

20. Respondents have failed to address all necessary action to determine and verify the nature and extent of releases of hazardous waste or hazardous constituents from solid waste management unit SWMU 21-029 as required by HSWA Module VIII, in that, among other things:

a. Respondents have improperly chosen to apply UST criteria by, among other things, testing for BTEX and Total Petroleum Hydrocarbons, rather than testing for individual hazardous constituents as required;

b. Respondents have failed to conduct further characterization to define the vertical and horizontal extent of contamination in the area of the former West Fill Station, even though, among other things, TPH levels in samples from Borehole 21-30003 exceeded 670 ppm and no boring was made beyond that boring to determine the horizontal extent of contamination; samples from Boreholes 21-3002 and 21-3005 showed that BTEX and benzene are present at the bottom of those boreholes, approximately 35 feet below the surface of the ground, but samples were not taken from greater depths;

c. Sample Nos. 0121-96-0038, 0121-96-0044, 0121-96-0042, and 0121-96-0027 taken from the area of the former East Fill Station exceeded 100 ppm. TPH.

21. Respondents have failed to fully evaluate potential contaminant migration pathways at and from SWMU 21-029, including off-site contaminant transport from the SWMU as required by HSWA Module VIII, in that, among other things, petroleum contamination has been observed in DP Canyon, tuff underneath the site is known to be highly fractured, but Respondents nevertheless have not

evaluated contaminant fate and transport mechanisms potentially occurring from the Site into DP Canyon.

22. Respondents have failed to describe actual or potential receptors, including environmental systems that are susceptible to contaminant exposure from the facility, including habitats for threatened, endangered and sensitive wildlife species, and failed to evaluate risks to those receptors, in that, among other things, the RFI Report asserts that "[t]he area provides limited habitat for biota, does not contain sensitive habitats, and threatened or endangered species are not present there," when, in fact, TA-21 and the immediate area provide a nesting habitat for the Mexican Spotted Owl and a foraging habitat for the American Peregrine Falcon, and based on the erroneous assumption that ecological receptors are absent, Respondents have arbitrarily determined that there is no ecological risk.

CONCLUSIONS OF LAW

23. Respondents are each a "person" as defined at § 74-4-3.K. of HWA and § 101 of the New Mexico Hazardous Waste Management Regulations (20 NMAC 4.1.101), effective March 1, 1997, which incorporates, with a few exceptions, federal regulation 40 CFR § 260.10.

24. Respondents manage "hazardous waste" as defined at § 74-4-3.I. of HWA, and 20 NMAC 4.1.101, which incorporates, with few exceptions, federal regulation 40 CFR § 260.10.

25. Respondent DOE is an "owner" and "operator" of an "existing hazardous waste management facility" as defined at 20 NMAC 4.1.101 which incorporates with a few exceptions, federal regulation 40 CFR § 260.10.

26. Respondent UC is an "operator" of an "existing hazardous waste management facility" as defined at 20 NMAC 4.1.101 which incorporates with a few exceptions, federal regulation 40 CFR § 260.10.

27. Respondents engage in the "disposal", "storage", and or "treatment" of hazardous waste as defined at §74-4-3.C. N., and Q., respectively, of the HWA, and 20 NMAC 4.1.100, which incorporates, with a few exceptions, federal regulation 40 CFR § 260.10.

28. 20 NMAC 4.1.500, which incorporates federal regulation 40 CFR §264, makes the regulations in Part 264 (Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities), applicable to the Respondents and Respondents have violated regulations in Part 264 as specified

below.

29. Respondents have failed to address all necessary action to determine and verify the nature and extent of releases of hazardous waste or hazardous constituents from SWMU 21-029, in violation of 20 NMAC 4.1.500, which incorporates in pertinent part federal regulation 40 CFR Part 264, Subpart F and in violation of Respondents' Facility Permit Module VIII.

30. Respondents have failed to fully evaluate potential contaminant migration pathways at and from SWMU 21-029, in violation of 20 NMAC 4.1.500, which incorporates in pertinent part federal regulation 40 CFR Part 264, Subpart F and in violation of Respondents' Facility Permit Module VIII.

31. Respondents have failed to describe actual or potential receptors and to evaluate risks to those receptors as described in Paragraph 22, above, in violation of 20 NMAC 4.1.500, which incorporates in pertinent part federal regulation 40 CFR Part 264, Subpart F and in violation of Respondent's Facility Permit Module VIII.

CIVIL PENALTY

32. Section 74-4-10 of the HWA authorizes the assessment of a civil penalty of up to ten thousand dollars (\$10,000) per day for each violation of the HWA or the regulations promulgated thereunder. Complainant hereby assesses a civil penalty of sixty-seven thousand, three hundred and ninety dollars (\$67,390.00) against Respondents. The penalty is based on the seriousness of the violations and the lack of good faith efforts on the part of Respondents to comply with the applicable requirements, and any economic benefit resulting from noncompliance accruing to Respondents and such other matters as justice may require. The penalty amount is calculated pursuant to the NMED's Civil Penalty Policy. The penalty for each violation is:

<u>VIOLATION</u>	<u>AMOUNT</u>
¶ 18 Failure to address all necessary action to determine and verify the nature and extent of on-site and off-site releases of hazardous waste or hazardous constituents from SWMU 21-029.	\$20,010.00
¶ 19 Failure to identify contaminant migration pathways from SWMU 21-029.	\$20,010.00
¶ 20 Failure to describe actual or potential receptors and to evaluate risks to those	

receptors

\$27,370.00

Payment shall be made to the State of New Mexico Hazardous Waste Emergency Fund by certified check, bank draft, or other guaranteed negotiable instrument, and mailed to or hand delivered to Linda Romero, Office of General Counsel, New Mexico Environment Department, P.O. Box 26110, Santa Fe, New Mexico 87502.

SCHEDULE OF COMPLIANCE

33. Based on the foregoing Findings and Conclusions, Respondents are ordered to comply with the following Schedule of Compliance:

1. Within ninety (90) calendar days of receipt of this Order, submit an acceptable RCRA Facility Investigation Work Plan for SWMU 21-029 to adequately address all requirements as delineated in Module VIII of the Respondents' Facility Permit.

NOTICE

34. If Respondents fail to timely comply with the Schedule of Compliance, the Secretary may assess additional civil penalties of not more than twenty-five thousand dollars (\$25,000) for each day of continued noncompliance pursuant to § 74-4-10.C. of the HWA.

NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

35. Respondents have a right to request a hearing pursuant to §74-4-10.H. of the HWA and 20 NMAC 1.5.200 of NMED's Adjudicatory Procedures by filing a written request for Hearing with the Hearing Clerk within thirty (30) calendar days after receipt of this Order. The Request for Hearing shall include an Answer. The Answer shall:

1. clearly and directly admit or deny each of the factual assertions contained in the Compliance Order/Determination; but where the Respondent/Complainant has no knowledge of a particular factual assertion and so states, the assertion may be denied on that basis. Any allegation of the Compliance Order/Determination not specifically denied shall be deemed admitted;

2. indicate any affirmative defenses upon which the Respondent/Complainant intends to rely. Any affirmative defense not asserted in the Request for Hearing, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived;

3. be signed under oath or affirmation that the information contained therein is to the best of the signer's knowledge believed to be true and correct; and

4. have a copy of the Compliance Order/Determination attached.

A hearing upon the issues raised by the Order and Answer shall be held upon timely request of the Respondents. NMED's Adjudicatory Procedures shall govern all hearing and pre-hearing procedures. Respondents may contact the Hearing Clerk for a copy of these regulations.

The Hearing Clerk's name and address is:

Debra Gallegos, Hearing Clerk
P.O. Box 26110
1190 St. Francis Drive
Harold Runnels Building, N4084
Santa Fe, New Mexico 87502
(505) 827-2842

FINALITY OF ORDER

36. This Order shall become final unless Respondents file a written Request for Hearing, including an Answer, within thirty (30) calendar days of receipt of this Order. Failure by the Respondents to file an Answer constitutes an admission of all facts alleged in the Order and a waiver of Respondent's right to a hearing under §74-4-10 of the HWA.

SETTLEMENT CONFERENCE

37. Whether or not Respondents file a Request for Hearing, Respondents may confer with Complainant concerning settlement. A request for a settlement conference does not extend the thirty (30) day period during which the Request for Hearing must be submitted. The settlement conference may be pursued as an alternative to, or simultaneously with, the hearing proceedings. Respondents may appear at the settlement conference or be represented by counsel.

38. Any settlement reached by the parties shall be approved by a Stipulated Final Order of the Secretary of NMED pursuant to the conditions set forth in 20 NMAC 1.5.601. The issuance of such an Order shall serve to resolve all issues raised in the Order, shall be final and binding on all parties to the Order, and shall not be appealable.

39. To explore the possibility of settlement in this matter, contact Mr. John M. Tymkowych of the Environment Department, P.O. Box 26110, 1220 St. Francis Drive, Santa Fe, NM 87501, telephone number (505) 827-1508.

TERMINATION

40. Compliance with the requirements of this Order does not relieve Respondents of their obligation to comply with all applicable laws and regulations. This Order shall terminate when Respondents certify that all requirements of the Order have been completed and NMED has approved such certification, or when the Secretary approves a Stipulated Final Order.

MARK E. WEIDLER, SECRETARY

6/18/98
DATE

By: 
ED KELLEY, Director
Water and Waste Management Division

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Administrative Compliance Order was mailed postage prepaid as follows on this 8th day of June, 1998 to the following by Certified Mail, Return Receipt Requested:

Mr. G. Thomas Todd, Area Manager
U.S. Department of Energy
Los Alamos Area Office
528 35th Street, MS A316
Los Alamos, NM 87544

Dr. John C. Browne, Director
Los Alamos National Laboratory
P.O. Box 1663, MS A100
Los Alamos, NM 87545

Nicholas F. Persampieri
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NMED/OGC