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NEW MEXICO
IT 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)**

**ANSWER TO ADMINISTRATIVE COMPLIANCE ORDER
AND REQUEST FOR HEARING**

The United States Department of Energy (DOE) and The Regents of the University of California (UC) (collectively, Respondents) submit this joint Answer to Compliance Order HRM-98-01 (Order).

1. Respondents admit the findings contained in Paragraphs 1, 2, 3, 4, 5, and 6.
2. Respondents admit the findings contained in the first sentence of Paragraph 7. Respondents admit all of the findings contained in the second sentence of Paragraph 7, except that Respondents deny that Los Alamos National Laboratory (LANL) has applied for and received permits for the storage and management of wastes that are radioactive only.
3. Respondents admit the findings contained in Paragraphs 8, 9, 10, 11, 12, 13, and 14.
4. Respondents admit the findings contained in the first sentence of Paragraph 15. With regard to the findings contained in the second sentence of Paragraph 15, Respondents affirmatively state, as was stated in Section 1.1 of the RFI Report for Potential Release Site 21-029 (January 1996) that the property of the site of PRS 21-029 is surrounded by a 6 ft. chainlink fence, and further affirmatively state that outside the boundaries of the chainlink fence are the Knights of Columbus Hall to the west, a Los Alamos County fire station to the east, DP road to the south, and DP Canyon to the north. To the extent that the findings in the second sentence of Paragraph 15 are inconsistent or contrary to the affirmative statements in the preceding sentence, they are denied.
5. Respondents admit the findings contained in Paragraph 16.
6. Respondents admit the findings contained in the first sentence of Paragraph 17. With regard to the findings contained in the second sentence of Paragraph 17, Respondents affirmatively state that Module VIII of Respondents' Hazardous Waste Facility Permit, Permit No. NM0890010515, as amended (Module VIII), requires Respondents to "collect analytical data on groundwater, soils, surface water, sediment, and subsurface gas contamination when necessary to characterize contamination from a [Solid Waste Management Unit] SWMU", including SWMU



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21-029. Respondents further affirmatively state that Module VII requires that such data be sufficient to define the extent, origin, direction and rate of movement of contaminant plumes. To the extent that the findings in the second sentence of Paragraph 17 are inconsistent with the affirmative statements contained in the preceding two sentences, they are denied.

7. Respondents admit the findings contained in Paragraph 18 and Respondents affirmatively state that the term "off-site" as used in the LANL permit means off of or outside of the boundaries of the LANL facility.

8. Respondents admit the findings contained in Paragraph 19.

9. With regard to the findings contained in Paragraph 20, exclusive of the findings contained in subparagraphs a., b., and c., Respondents deny all of these findings except that Respondents admit upon information and belief that as to the "seep" located in DP Canyon, Respondents are continuing to take all necessary actions, as this seep is identified and referred to in the LANL Response to Denial Letter, transmitted to Complainant by way of letter from Respondents to Benito Garcia dated July 17, 1997.

10. With regard to the findings contained in subparagraph 20.a., Respondents admit that they applied UST criteria by testing for BTEX and Total Petroleum Hydrocarbons, but deny that this was improper, and further deny the remaining findings contained in this subparagraph. Respondents affirmatively state upon information and belief that their efforts to address contamination at the site through application of the UST regulations was both known and approved by various NMED Bureaus, including the Hazardous and Radioactive Materials Bureau and the Underground Storage Tank Bureau. Respondents further affirmatively state that they tested for individual hazardous constituents in 1994 by taking a number of surface and subsurface samples at SWMU 21-029, and determined on the basis of the analytical results of these samples that petroleum hydrocarbons were the only contaminants of concern.

11. With regard to the findings contained in subparagraph 20.b., Respondents deny that they have failed to conduct further characterization to define the vertical and horizontal extent of contamination in the area of the former West Fill Station, and deny that the remaining findings contained in this paragraph support this finding. Respondents deny that any samples were taken from Borehole 21-30003 and further deny that any such Borehole ever existed. Respondents admit that TPH levels in samples from Borehole 21-3003 exceeded 670 ppm and that no boring was made beyond that boring to determine the horizontal extent of contamination. Respondents further admit that samples from boreholes 21-3002 and 21-3005 showed that BTEX and benzene are at the bottom of those boreholes, that such boreholes were drilled to approximately 35 feet below the surface of the ground, and that samples were not taken from greater depths. Respondents affirmatively state that for the purposes of protecting human health and the environment, adequate bounding of the presence of TPH, BTEX and benzene was achieved.

12. Respondents admit the allegations contained in subparagraph 20.c. Respondents affirmatively state that these samples were confirmatory samples taken during a voluntary corrective action in May, 1996, and were taken from locations considerably below the ground surface. Respondents further affirmatively state that the concentrations of contaminants indicated by these samples analytical results do not pose a threat to human health or the environment.

13. With regard to the findings contained in Paragraph 21, Respondents admit that further evaluation is warranted of potential contamination migration pathways associated with the "seep" in DP Canyon, as identified and referenced in the LANL Response to Denial Letter, transmitted to Complainant by way of letter from Respondents to Benito Garcia, dated July 17, 1997, admit that what appears to be petroleum contamination has been observed on the surface of waters in the ephemeral stream at the headworks of DP Canyon, admit that the tuff underneath the site has been found to be fractured, and admit that contaminant fate and transport mechanisms potentially occurring in association with the "seep" in lower reaches of DP Canyon have not been completely evaluated. Respondents deny all findings contained in Paragraph 21 to the extent that they are inconsistent with or contrary to the admissions contained in the preceding sentence. Respondents affirmatively state that sufficient evaluation occurred within the fenced boundaries of SWMU 21-029, and that upon information and belief further evaluation of the "seep" may be warranted.

14. With regard to the findings contained in Paragraph 22, Respondents deny all of these findings except that Respondents admit that the referenced RFI report states that "[t]he area provides limited habitat for biota, does not contain sensitive habitats, and threatened or endangered species are not present there." Respondents affirmatively state that the referenced RFI report also concludes that threatened and endangered species are not in the immediate area of SWMU 21-029 by stating: "The mesa top at DP Tank Farm is within the townsite. The surrounding area has heavy commercial development and urban disturbance. The affected habitat in this area is assessed in the ecological surveys of TAs 1, 32, and 21 (Bennett 1992, 01-0008; Biggs 1993, 01-0019). As these surveys show, there are no threatened or endangered species in the immediate vicinity of DP Tank Farm."

CONCLUSIONS OF LAW

15. Respondents admit the conclusions contained in Paragraphs 23, 24, 25 and 26.

16 Respondents admit the conclusions contained in Paragraph 27, except that Respondents deny that Respondents engage in the disposal of hazardous waste on-site.

17. Respondents deny the conclusions contained in Paragraph 28, except that Respondents admit that 20 NMAC 4.1.500 incorporates by reference federal regulation 40 CFR 264 (Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities) and that 20 NMAC 4.1.500 applies to the LANL facility to the extent that

the LANL facility engages in storage or treatment of hazardous wastes subject to hazardous waste permitting requirements.

18. Respondents deny all the conclusions contained in Paragraph 29, except that Respondents admit that 20 NMAC 4.1.500 incorporates in part federal regulation 40 CFR Part 264, Subpart F by reference, and admit upon information and belief that as to the "seep" located in DP Canyon, as this seep is identified and referred to in the LANL Response to Denial Letter, transmitted to Complainant by way of letter from Respondents to Benito Garcia, dated July 17, 1997, Respondents are completing all necessary actions to determine and verify the nature and extent of releases of hazardous waste or hazardous constituents associated with this seep.

19. Respondents deny all the conclusions contained in Paragraph 30, except that Respondents admit that 20 NMAC 4.1.500 incorporates in part federal regulation 40 CFR Part 264, Subpart F by reference, and admit that as to the "seep," located in DP Canyon, as this seep is identified and referred to in the LANL Response to Denial Letter, transmitted to Complainant by way of letter from Respondents to Benito Garcia, dated July 17, 1997, Respondents are continuing to further evaluate potential contaminant migration pathways.

20. Respondents deny all the conclusions contained in Paragraph 31, except that Respondents admit that 20 NMAC 4.1.500 incorporates in part federal regulation 40 CFR Part 264, Subpart F by reference.

FIRST AFFIRMATIVE DEFENSE

Respondents' Answer and each denial or affirmative statement contained therein constitute Respondents' first affirmative defense.

SECOND AFFIRMATIVE DEFENSE

Respondents state that Compliance Order 98-01 (Order) is unwarranted and premature and the subject matter of the Order is unripe for this administrative proceeding on the basis that SWMU 21-029 was subject to further ongoing review and action by the NMED UST Bureau (USTB), which in turn upon information and belief was awaiting final review and action on the site by the NMED Surface Water Bureau (SWB), all of which had not occurred at the time of the issuance of the Order. Complainant through communications from the Hazardous and Radioactive Materials Bureau (HRMB) to Respondents has admitted that the site of SWMU 21-029 (Site) is subject to closure requirements under the NMED UST Bureau.

THIRD AFFIRMATIVE DEFENSE

Respondents state that the Order is unwarranted and premature and the subject matter of the Order is unripe for this administrative proceeding because Complainant is bound by the legal

doctrine of waiver. Complainant has acknowledged through communications from the NMED HRMB, USTB and SWQB received by Respondents that final action on this site would require closure under the USTB requirements and this latter agency had not finally acted on the site. Upon information and belief the USTB was awaiting final action by SWQB and this latter agency had not finally acted on the site. Complainant required and induced Respondents to rely and wait upon final actions by these two Bureaus; therefore, Complainant waived any right to object to Respondents' ongoing characterization of the site.

FOURTH AFFIRMATIVE DEFENSE

Respondents state that the Order is unwarranted and premature and the subject matter of the Order is unripe for this administrative proceeding because Complainant is bound by the legal doctrine of estoppel. Complainant has acknowledged through communications from the NMED HRMB, USTB and SWQB received by Respondents that final action on this site would require closure under the USTB requirements and this latter agency had not finally acted on the site. Upon information and belief the USTB was awaiting final action by the SWQB and this latter agency had not finally acted on the site. By inducing Respondents to rely and wait upon final actions by these two Bureaus, which Respondents did in fact rely upon, Complainant is estopped from complaining about Respondents ongoing characterization of the site, if any.

FIFTH AFFIRMATIVE DEFENSE

With regard to the allegations contained in Paragraph 20, Subparagraphs 20.a., b., and c., and Paragraphs 21, 29 and 30, Respondents state that Complainant through HRMB and its authorizing and predecessor administrative authority, the United States Environmental Protection Agency (EPA), acknowledged and represented orally, in writing and by way of practice that given SWMUs could be addressed through the application of alternate regulatory requirements, including UST regulatory standards for corrective action and closure of a site containing underground storage tanks. Respondents relied and acted upon such acknowledgments and representations in addressing SWMU 21-029 by applying UST corrective action and closure standards. Complainant is bound by the legal doctrines of waiver and estoppel with regard to Respondents' reliance and actions.

SIXTH AFFIRMATIVE DEFENSE

With regard to Complainant's issuance of this Compliance Order, which contains a Schedule of Compliance and assesses civil penalties, Respondents state that Complainant in its letter rejecting the RFI Report for PRS 21-029 (January 1996), dated June 12, 1997, from Robert S. Dinwiddie to Theodore J. Taylor and Jorg Jansen (Letter), provided no notice that any subsequent submittals of Respondents would be responded to by or the subject matter of a Compliance Order. Respondents submitted a response to the Letter by way of letter to Benito Garcia, dated July 17, 1997 and Complainant without any notice whatsoever issued this Compliance Order. In light of Complainant's failure to provide adequate notice to

Respondents, Complainant's issuance of this Compliance Order, which contains alleged violations, mandates specified actions and assesses civil penalties, constitutes arbitrary, capricious and unlawful action and violates the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and the due process and equal protection clauses of Article II, Section 18 of the State of New Mexico Constitution.

SEVENTH AFFIRMATIVE DEFENSE

With regard to Complainant's issuance of this Compliance Order which contains a Schedule of Compliance and assesses civil penalties, Respondents state that Complainant has issued no regulations, nor provided any guidance, letter or policy notifying Respondents that upon Complainant's denial of a No Further Action Proposal, Complainant would resort to issuance of an administrative compliance order mandating specified actions and assessing civil penalties; in light of Complainant's failure to provide notice to Respondents through issuance of any such regulation, guidance, letter or policy, Complainant's alleging the violations contained in the Compliance Order, mandating specified actions, and assessing civil penalties in connection therewith constitute arbitrary, capricious and unlawful actions and violate the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and the due process and equal protection clauses of Article II, Section 18 of the State of New Mexico Constitution.

EIGHTH AFFIRMATIVE DEFENSE

With regard to the allegations contained in Paragraph 20, Subparagraphs 20. a., b., and c., and Paragraphs 21, 29 and 30, Respondents state that they are in the process of meeting the applicable UST regulatory standards for corrective action and closure of a site containing underground storage tanks.

NINTH AFFIRMATIVE DEFENSE

With regard to the allegations contained in Paragraph 20, Subparagraphs 20. a., b., and c., and Paragraphs 21, 29, and 30, Respondents state that they have been in the process of meeting the applicable SWB standards as they may apply to the "seep," located in DP Canyon, as this seep is identified and referenced in the LANL Response to Denial Letter, transmitted to Complainant by way of letter from Respondents to Benito Garcia, dated July 17, 1997.

TENTH AFFIRMATIVE DEFENSE

Respondents state that in issuing this Order, Complainant has not acted in accordance with provision I. (4) of Module VIII, inasmuch as this provision states that in the event the Administrative Authority disapproves an RFI report, it shall specify the deficiencies and Respondents shall have 30 days to respond to the stated deficiencies, and that if the modified report is not approved, the Administrative Authority may make further modifications as

required. Respondents responded to the disapproved RFI Report for SWMU 21-029 by way of letter to Benito Garcia, dated July 17, 1997, and Complainant's apparent response has been to issue this Order, thereby failing to act in accordance with the above described provision. In issuing this Order, Complainant has not acted in accordance with subsection I. (4) of Module VIII, and Respondents invoke subsection B.3. of Module VIII as a shield and affirmative defense against the issuance of this Order and the civil penalties and relief it seeks.

ELEVENTH AFFIRMATIVE DEFENSE

With regard to the civil penalties proposed by Complainant, Respondents state that as to the alleged violations enumerated in the Order which Respondents have denied in this Answer, no civil penalty may be imposed.

TWELFTH AFFIRMATIVE DEFENSE *

With regard to the civil penalties proposed by Complainant, Respondents assert the following defenses:

- a. Complainant failed to consider the good faith efforts of Respondents to comply with alleged applicable requirements, pursuant to 74-4-10.B NMSA 1978;
- b. Complainant failed to consider the seriousness of the violation, pursuant to 74-4-10.B. NMSA 1978;
- c. Complainant failed to adhere to the Hazardous Waste Penalty Policy adopted by Complainant on September 4, 1992;
- d. Complainant's imposition of penalties is arbitrary, capricious, unlawful and without substantial basis in law or in fact; and
- e. Complainant improperly imposed penalties for violations of law which did not occur.

The Compliance Order contains in Paragraph 33 a Schedule of Compliance and an ordered action requiring Respondents to submit an acceptable RCRA Facility Work Plan for SWMU 21-029 within 90 calendar days of receipt of the Order. Respondents object to this requirement on the basis of its being vague and overly broad. Notwithstanding any response on the part of Respondents to Paragraph 33, Respondents state (a) that in the event they complete the ordered action, Respondents do not admit the underlying finding or conclusion contained in any numbered Paragraphs of the Order that may be related to the ordered action, unless specifically admitted in this Answer; (b) that they reserve the right to contest and dispute any underlying finding or conclusion relating to the ordered action, unless the underlying finding or conclusion have been specifically admitted in this Answer; and (c) that Respondents deny on

both substantive and procedural grounds, Complainant's basis for requiring Respondents to complete the ordered action contained in Paragraph 33, and hereby place at issue all elements and aspects of the ordered action unless Respondents have admitted both the underlying finding and the underlying conclusion contained in the related numbered Paragraph in the Order.

FACTS PLACED AT ISSUE

Respondents state that they place at issue all facts denied in this Answer.

REQUEST FOR HEARING

Respondents hereby request a hearing pursuant to Section 74-4-10 of the New Mexico Hazardous Waste Act, NMSA 1978 and 20 NMAC 1.5.200.

WHEREFORE, Respondents request that Complainant be required to rescind the Compliance Order in its entirety, or, in the alternative, that the determination be made that Respondents did not commit the violations alleged by Complainant in the Order unless specifically admitted to by Respondents in this Answer, that the civil penalties proposed by Complainant be denied, or, in the event that a violation is determined to have occurred, which Respondents specifically deny, any proposed civil penalty for any such violation be reduced, that the Schedule of Compliance and action ordered thereunder by Complainant be denied, and that other such relief as the Hearing Officer deems just and proper be granted.

I hereby affirm my belief that the information contained herein is to the best of my knowledge true and correct.

The Regents of the University of California

Date July 9, 1998

By Joseph B. Pachelle

I hereby affirm my belief that the information contained herein is to the best of my knowledge true and correct.

United States Department of Energy

Date 9 July '98

By [Signature]