



# Attorney General of New Mexico

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22 January 2002

James Bearzi, Bureau Chief  
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New Mexico Environment Department  
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Dear James:

This letter contains comments by the New Mexico Attorney General's Office (AGO) on the content of Public Notice No. 01-10 concerning the Los Alamos National Laboratory (LANL) Installation Work Plan (IWP) Schedule 2001-2005, dated December 21, 2001, and issued by the New Mexico Environment Department (NMED).

To begin, we acknowledge NMED for bringing a note of urgency to the corrective action process. The dates and requirements included in the proposed LANL Work Schedule do call for action in the near term with relation to the major areas of contamination. We point out also that the AGO has previously submitted comments to NMED on the proposed IWP addendum; these comments were dated April 25, 2001, and September 27, 2001. To date, we have received no response to those comments, and we request that a response to those comments and to the present comments be made when the schedule is issued in final form.

The AGO has a concern about the public process used to adopt this proposal. We expressed concern previously over the sufficiency of public involvement in the process of

remediation at Technical Area 54 in a letter dated July 12, 2001. As for the present process, the AGO submits that the proposed schedule constitutes a permit modification and that the public processes for permit modifications apply here and must be followed.

The HSWA Module in the current permit states at several points that the ongoing reports and schedules submitted and approved under the permit constitute part of the permit:

“All plans and schedules required by the conditions of this Corrective Action Schedule of Compliance are, upon approval of the Administrative Authority, incorporated into this Schedule of Compliance by reference and become an enforceable part of this permit. Any noncompliance with such approved plans and schedules shall be termed noncompliance with this Permit. Extensions of the due dates for submittals may be granted by the Administrative Authority in accordance with the permit modification process under 40 CFR 270.42.”

(Permit Module VIII, at 12)(See also id. 30, 32).

Further, it is specifically stated that any direction for corrective measures shall be adopted pursuant to the permit modification process:

“If the Administrative Authority finds that corrective measures are warranted after the approval of the RFI report, the Administrative Authority will propose a permit modification and follow appropriate procedures including a public notice period and a public hearing, if warranted.”

(id.). Other provisions state that changes such as a no-further-action determination and the adoption of a different task, such as interim corrective measures, should be processed as major modifications, if appropriate, annually. (id. 13.). Modification to the Corrective Action Schedule of Compliance contained in Module VIII is subject to public processes as well. (id. 35).

The proposed “LANL Work Schedule” contains numerous schedule modifications and extensions and directions for development of corrective measures. It seems clear that

the permit modification procedures of 40 CFR § 270.41 or § 270.42 apply here. The preamble to § 270.42 states that, pending further rulemaking, "individual permits will specify where permits will be modified for corrective action, and modifications will generally take place under the procedures of § 270.41." 53 Fed. Reg. 37912, 37931 (Sept. 28, 1988). Section 270.41 authorizes permit modifications, inter alia, where good cause exists for modification in compliance schedules. § 270.41(a)(4). The rule states, further, that when a permit is modified, "only the conditions subject to modification are reopened," and "a draft permit must be prepared and other procedures in part 124 (or procedures of an authorized state program) followed." (id.) Under the state program, if the Secretary decides to modify a permit under § 270.41, a draft permit shall be prepared incorporating the proposed changes, only those conditions to be modified shall be reopened, and public notice is to be given of the issuance of a draft permit and the opportunity to request a hearing. See 20 NMAC 4.1.901. When the Secretary acts upon the proposal, he or she is required to respond to the comments submitted by the public. (id.). These are the procedures that apply to the adoption of the proposed LANL Work Schedule.

The substance of the proposal also raises questions. The proposed LANL Work Schedule is almost unintelligible, except to one who has assiduously and continuously studied corrective action at Los Alamos. References to "21-011(k)", "260 Outfall", and "R-13" lack meaning without an explanation of the origins of the contamination and the progress of remediation. Even more troublesome is the use of cryptic terms such as "Investigation Work Plan" and the listing of "key components" such as "delineate nature

rate, and extent of subsurface contamination . . .” The stated requirements are so cursory that the public cannot tell what is being demanded.

The rules require more than this. NMED is required to prepare a Fact Sheet containing “the principal facts and the significant factual legal, methodological and policy questions considered in preparing the Draft Permit”, 20 NMAC 4.1.901.D(1), and “[a] brief summary of the basis for the Draft Permit conditions including references to applicable statutory or regulatory provisions.” Id. 4.1.901.D(2)(c). In the present case, such materials would explain the role to be played by each of the scheduled submittals and actions in the corrective action process.

For example, the proposed Work Schedule would require, as to MDA G, an Investigation Work Plan with the following “key components”:

“Delineation of nature, rate, and extent of subsurface contamination not complete. Install borings at each pit and disposal shaft row. Install additional vadose zone and groundwater monitoring wells. Install alluvial wells in Pajarito Canyon and Cañada del Buey. Install vadose zone and groundwater monitoring wells.”

The proposal would clearly require certain data to be gathered. However, it is not clear how the data would advance the corrective action process. Additional data from wells may be valuable information—or may prove useless, depending upon how it is to be used in the overall remediation process. There is significant doubt about the reliability of available methods to project flow and transport in a fractured vadose zone. See National Research Council, *Conceptual Models of Flow and Transport in the Fractured Vadose Zone* (2001). Likewise, there are large uncertainties in any quantification of the long-term risk of disposal of large, but uncertain, quantities of waste in imperfectly understood rock bodies. In this situation, to ask the public to comment upon a program of further drilling and data-gathering, without stating NMED’s overall plan to use the data to

eliminate risk, falls short of section 901.D. What decisions will be informed by the data from these wells? Thus, what is still missing is NMED's articulation of the methodology it has chosen to govern decision-making as to final corrective action. The public should be allowed to comment on the specifics of NMED's planning, based on an explanation of the design of the overall plan.

This office requests a response to the comments contained in this letter and our previous letters. We look forward to a continued dialogue on these questions of environmental importance to the State.

Very truly yours,



LINDSAY A. LOVEJOY, JR.  
Assistant Attorney General

LALJr:laljr