

6/19/06



STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE PETITION OF )  
LOS ALAMOS COUNTY FOR SUSPENSION )  
OF GROUND WATER MONITORING )  
REQUIREMENT IN 20.9.1.800 NMAC )  
AT THE LOS ALAMOS COUNTY LANDFILL )

No. SWB 06-08(AP)

**INCORPORATED COUNTY OF LOS ALAMOS'  
RESPONSE TO MOTION TO PRESENT NEW EVIDENCE AND  
REQUEST FOR EXTENSION TO SUBMIT PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Incorporated County of Los Alamos ("County") hereby responds to the Motion to Present New Evidence and Request for Extension to Submit Proposed Findings of Fact and Conclusions of Law filed by the Solid Waste Bureau ("Bureau") of the Environmental Protection Division ("Division") of the New Mexico Environment Department ("Department") on June 19, 2006. In its motion, the Department seeks to introduce new evidence to the hearing record, making the argument that the Department's Solid Waste Bureau was not aware of evidence held by the Department's Hazardous Waste Bureau. For the reasons set forth below, the arguments made by the Department are insufficient to support the introduction of new evidence. The County respectfully requests that the Hearing Officer deny the Department's motion and proceed according to the public hearing procedures of 20.1.4 NMAC to complete the Hearing Officer's Report and advance the post-hearing procedures to a timely resolution.

The Department's motion should be denied, based on the following record that shows that the County has followed proper procedures for its Petition for Suspension of Groundwater Monitoring ("Petition") and that the County is being irreparably harmed by the Department's actions in this matter.

1. The Department has been aware of the County's request for a suspension of groundwater monitoring requirements for many years.
  - a. The County's original closure plan, submitted to the Department for review in June 1999, included a request and evidence to support a suspension of groundwater monitoring requirements.
  - b. On August 30, 2004, the County submitted a Supplemental Hydrogeology Report to the Department. This report provided additional site-specific hydrogeologic evidence to support a suspension of groundwater monitoring requirements. The Supplemental Hydrogeology Report is included in Exhibit 3 of the County's Petition.

LA 06-08-01 [Leticia Sanchez]



- c. On November 23, 2004, the County submitted a Site Investigation and Modeling Plan to the Department for review and concurrence, prior to undertaking additional hydrogeologic assessment activities. This plan indicated that the additional site investigation and modeling were intended to lead to either a groundwater monitoring plan or a groundwater monitoring suspension request, based on the outcome of the assessment.
- d. On March 9, 2005, the County submitted a report titled, Hydrologic Modeling of Leachate Transport, Los Alamos County Closure Plan. This report presented the results of transport modeling using U.S. Environmental Protection Agency models. Based on the modeling results, the report provided recommendations for a site investigation exploratory drilling program.
- e. On May 3, 2005, the Department issued a letter to the County indicating agreement with the investigation plan; noting that the modeling simulations had been verified and the proposed boring depths were adequate to encounter a potential release from the landfill.
- f. On September 22, 2005, the County submitted a Closure Plan Amendment to the Department, which included the results of the hydrogeologic investigation.

The County has provided ample information to the Department regarding the site-specific hydrogeologic conditions at the landfill and potential for contaminant transport. The Department has had ample time to review and reach conclusions on the adequacy of the information provided.

2. The County's Petition, dated February 7, 2006, included documentation of public notice meeting the requirements of 20.9.1 NMAC. The public notice was provided in English and Spanish and was provided by certified mail to all property owners within 100 feet and to all municipalities, counties, and tribal governments within a ten mile radius. The notice was posted in four publicly accessible and conspicuous places, including the facility entrance. Additionally, the notice was published in a newspaper of general circulation in the county in both the classified advertisements and a 6-inch by 11-inch advertisement on page A7 of the Sunday, March 5, 2006 edition of the newspaper.
3. The Department completed a thorough review of the County's Petition and issued a Notice of Completion Determination on March 31, 2006.
4. In accordance with the requirements of 20.1.4 NMAC Part 200.C(2) the Department issued public notice of the public hearing on the Petition.
  - a. The Department's public notice was announced by publication in a newspaper, mailing the Notice of Hearing to interested parties that had provided written notice to the Department, and mailing the Notice of Hearing to each local, state, or federal agency and Tribal government affected by the facility that is the subject of the

hearing.

- b. The public notice described the requirements for filing a Statement of Intent to Present Technical Testimony for all scientific, engineering, economic or other specialized testimony. The public notice indicated that all exhibits and technical materials must be identified in the Statement of Intent. The public notice stated the following, "To promote efficiency and fairness, and to avoid prejudice and surprise, a person's direct technical testimony shall be limited to the data, views and arguments raised in that person's filed Statement of Intent."
5. The Statement of Intent filed by the Solid Waste Bureau of the Environmental Protection Division did not include any of the exhibits the Bureau is now seeking to introduce by its motion. The Hazardous Waste Bureau of the Water and Waste Division did not file a Statement of Intent and is not a party to the hearing. The Solid Waste Bureau, on behalf of the Division, filed a Statement of Intent to Present Technical Testimony into the hearing record on April 27, 2006. The Bureau's statement recommended approval of the Petition. In the Bureau's statement, the Bureau reserved the right to modify its position, call any person to testify, and present any exhibit in response to any other statement of intent, testimony presented at the hearing, or public comment provided at the hearing. No testimony at the hearing or any part of the hearing record raises any evidence to support the Bureau's motion to introduce new evidence after the public hearing was closed.
6. A public hearing on the County's Petition was held on May 11, 2006. At the public hearing, the County offered evidence and expert testimony to meet its burden of persuasion for approval of the Petition. The Department offered evidence and testimony recommending approval of the Petition. All witnesses agreed that standards and conditions of the Regulations were satisfied, including the requirements of 20.9.1 NMAC Part 800.A(3) regarding suspension of groundwater monitoring. There was no adverse testimony, public comments or exhibits contesting the Petition or any portion of the technical data or testimony at the Public Hearing on May 11, 2006. The Hearing Officer closed the public hearing, and in accordance with 20.1.4 NMAC Part 500.B, set a 30-day deadline for the parties to file Proposed Findings and Conclusions and Closing Argument.
7. Within the 30-day deadline set by the Hearing Officer, the County filed Proposed Findings of Fact, Conclusions of Law, and Recommended Decision on June 12, 2006.

For the following reasons, the Department's motion is without merit and should be denied. The Department's motion is contrary to the procedures of 20.1.4 NMAC, which bars introduction of new evidence in the post-hearing procedures.

8. The post-hearing procedures of 20.1.4 NMAC Section 500.B call for submissions of Proposed Findings and Conclusions and Closing Argument to contain adequate references to the Hearing Record and authorities relied upon. In accordance with 20.1.4 NMAC Section 500.B, no new evidence shall be presented.

9. The post-hearing procedures of 20.1.4 NMAC Section 500.C call for the Hearing Officer to file a report containing the Hearing Officer's findings of fact, conclusions of law, recommended decision, and proposed final order.
10. On June 12, 2006, the Department filed a Motion for Extension, requesting a five (5) day extension of time for submitting Proposed Findings of Fact and Conclusions of Law. The County did not oppose this motion.
11. At the end of the 5-day extension requested by the Department, the Department did not file Proposed Findings of Fact and Conclusions of Law.
12. On June 19, 2006, the Department filed a Motion to Present New Evidence and Request for Extension to Submit Proposed Findings of Fact and Conclusions of Law. The Department's motion included numerous documents and computer files on two compact discs. A total of 256 documents and computer files were included with the motion.
13. The documents submitted by the Department should not be accepted as evidence since they were not introduced through the administrative process specified by 20.1.4 NMAC Part 300.B(1)(a), which requires that all exhibits and technical materials relied upon to be filed with a Statement of Intent to Present Technical Testimony no later than fourteen (14) days prior to the hearing. Said documents are further prohibited by reason of the Hazardous Waste Bureau's failure both to enter an appearance and to file a Statement of Intent to Present Technical Testimony, as required by Part 300(A)(2) & (B)(1)(b).
14. Among the 256 documents and computer files the Department seeks to introduce as evidence, only two (2) address the Los Alamos County Landfill. These two documents offer no new information of relevance to the decision for approval of the Petition. These two documents include:
  - a. The Compliance Order on Consent (Consent Order) between the New Mexico Environment Department and the U.S. Department of Energy, the Regents of the University of California, and Los Alamos National Laboratory, dated March 1, 2005. Introduction of the Consent Order is unnecessary, because the County has already cited this document in the Petition.
  - b. A memorandum from Maxine S. Goad, Program Manager, NMED Ground Water Section to Raymond Sisneros, Program Manager, NMED PEM Section, dated April 4, 1983, provides a recommendation from NMED regarding an evaluation of sites for disposal of hazardous waste generated by the State Highway Department. The memorandum concludes that the Los Alamos County Landfill has geologic and hydrologic characteristics that will protect groundwater quality. The memorandum does not contain any evidence that regulated hazardous waste was disposed by the State of New Mexico at the Los Alamos County Landfill.
15. The vast number of the documents and computer files the Department seeks to introduce offer no evidence relevant to the matter at hand.

- a. All of the Department's documents and computer files, with the exception of the two documents addressed above, address waste disposal or spill sites other than the Los Alamos County Landfill. The documents submitted with the Department's motion address disposal and spill sites involving hazardous, radioactive, and liquid wastes.
- b. As a municipal solid waste landfill, the Los Alamos County Landfill is subject to different regulatory standards than the hazardous, radioactive, and liquid waste disposal and spill sites addressed in the Department's documents.

The documents submitted with the Department's motion are immaterial to the decision to grant or deny the Petition. They are merely case studies of unrelated contamination issues at sites other than the Los Alamos County Landfill.

16. None of the evidence submitted with the Department's motion is new. Document dates range from 1983 to 2005. All of the documents were available to the Department during the time the Petition was under review and prior to the public hearing.
17. The documents and computer files included with the Department's motion are voluminous and in such disarray and poorly documented that the County is currently suffering irreparable harm in addressing this matter. The Department's tactics have forced the County to expend additional legal and technical resources in defense of maintaining compliance with the procedural rules of 20.1.4 NMAC.
18. The Department is the agency in charge of environmental protection and regulatory compliance in New Mexico. The Department has substantial expertise in the State's environmental regulations, including the public hearing procedures of 20.1.4 NMAC.
19. The Department has an obligation to abide by the public hearing procedures of 20.1.4 NMAC to provide for a hearing process that is fair to all parties, including the applicant and the public.

The County respectfully requests that the Department's motion to reopen the hearing record for the purpose of offering new evidence be denied. Reopening the hearing record is unduly prejudicial to the County and would deny the County fair treatment in accordance with the public hearing procedures of 20.1.4 NMAC. Reopening the hearing record would also cause irreparable financial damages to the County, by requiring the County to expend substantial legal and technical resources to defend against the improper procedural acts of the NMED that seek to introduce new material into the closed record.

The County further requests that Department's motion to extend the date to submit Proposed Findings of Fact and Conclusions of Law be denied. The County did not object to the Department's motion filed on June 12, 2006, extending the deadline by five (5) days. However, after the five day extension, the Department did not submit Proposed Findings of Fact and Conclusions of Law. Instead, the Department filed a motion to reopen the hearing record and further extend the time for post-hearing procedures. The post-hearing procedures of 20.1.4 NMAC Part 500.B provide that any party may submit Proposed Findings of Fact, Conclusions of Law, and Closing Argument within thirty (30) days. The

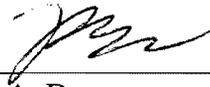
Department has waived their opportunity for this submittal and any further extension should be denied.

In accordance with 20.1.4 NMAC Part 400.A(3), the Hearing Officer shall determine each matter in controversy by a preponderance of the evidence. In this matter, the preponderance of the evidence offered by both the County and Department supports approval of the Petition.

Therefore, based on the forgoing response, the County urges the Hearing Officer to deny the Department's motion of June 19, 2006 and to recommend approval of the Petition.

Respectfully submitted,

COUNTY OF LOS ALAMOS



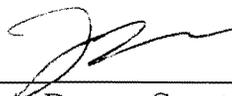
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Response to the Motion to Present New Evidence and Request for Extension to Submit Proposed Findings of Fact and Conclusions of Law was served on the following parties of record on July 5, 2006:

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