

TA-73

State of New Mexico
ENVIRONMENT DEPARTMENT

Hazardous Waste Bureau

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

August 28, 2006

Edwin L. Wilmot
Manager
Los Alamos Site Office
Department of Energy
528 35th Street, Mail Stop A316
Los Alamos, NM 87544

**RE: REQUEST FOR EXTENSION FOR THE INVESTIGATION REPORT FOR
SOLID WASTE MANAGEMENT UNIT (SWMU) 73-002, LOS ALAMOS
NATIONAL LABORATORY, EPA ID #NM0890010515
HWB-LANL-05-005**

Dear Messrs. Gregory and McInroy:

The New Mexico Environment Department (NMED) is in receipt of the request for an extension of time for submitting the *Inspection Report for Solid Waste Management Unit (SWMU) 73-002*, dated August 25, 2006, submitted by the U.S. Department of Energy (DOE). While the extension request makes reference to the "Inspection Report" for the aforementioned SWMU, NMED assumes that DOE is referencing the "Investigation Report" to be submitted to NMED by September 12, 2006 under the March 1, 2005 Order on Consent (Order). In the letter, DOE requests a new submission date of January 31, 2007 for the Investigation Report.

DOE's primary justification for the extension request is that DOE entered into a new Interagency Agreement (IA) with the Army corps of Engineers (COE) while DOE was "taking steps to address technical issues related to restarting work on SWMU 73-002." According to the letter, the development of the IA is done through DOE's Albuquerque Service Center, and is "beyond [the] control of DOE's Los Alamos Site Office." DOE further states that "[u]ntil a new IA is executed, we are unable to utilize the contract with Innovative Technical Solutions, Inc. (ITSI) in order to allow work to proceed."



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The letter makes clear that the decision to enter into a new IA, and thus delay work with the COE contractor, was made by the DOE and was within the control of DOE. Section III.H of the Order defines force majeure as "... any event arising from causes beyond the reasonable control of the Respondents or their agents, contractors, or employees that delays or prevents the performance of any of the obligations of the Respondents" under the Order. Because the DOE is one of the Respondents, and DOE actually caused the delay, force majeure cannot be invoked. DOE-created barriers to meeting compliance requirements of the Order are not "good cause" for an extension of time under Section III.J.2 of the Order.

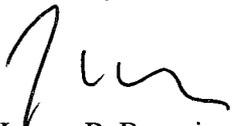
DOE was aware of the September 12, 2006 due date since NMED issued approval of the *Work Plan for Corrective Action of SWMU 73-002 and Investigation of Consolidated Unit 73-002-99* on September 30, 2005. DOE should have considered this due date when determining whether or not it was necessary to enter into a new IA with the COE.

NMED agrees that it was prudent for DOE to suspend site work upon discovery of unexploded ordnance (UXO), in particular to ensure the safety of workers. However, DOE notified NMED by e-mail on December 2, 2005 that a final plan for UXO cleanup would be submitted by December 5, 2005, with resumption of site work by December 12, 2005. This December 12 date was confirmed by DOE in an e-mail dated December 5, 2005.

For these reasons, NMED hereby denies the DOE's request for an extension. The due date for the Investigation Report for SWMU 73-002 remains September 12, 2006.

Should you have any questions, please contact Kathryn Chamberlain at (505) 428-2546.

Sincerely,



James P. Bearzi
Chief
Hazardous Waste Bureau

JPB:kc

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cc: K. Chamberlain, NMED HWB
D. Goering, NMED HWB
C. deSaillan, NMED OGC
S. Yanicak, NMED DOE OB, MS J993
L. King, EPA 6PD-N
G. Rael, DOE LASO, MS A316
A. Phelps, ENV, MS T002
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file: Reading and LANL TA-73 (SWMU73-002)