The Honorable Timothy M. Keller  
New Mexico State Auditor  
2540 Camino Edward Ortiz, Suite A  
Santa Fe, New Mexico 87507  

Re: New Mexico Environment Department Settlements with United States Department of Energy

Dear State Auditor Keller:

This letter is to inform you of serious problems with three settlement agreements that the New Mexico Environment Department has entered into in the last fifteen months with the federal Department of Energy (DOE) that purport to resolve environmental compliance issues at the Los Alamos National Laboratory (LANL) and the Waste Isolation Pilot Plant (WIPP), both in New Mexico. In each settlement, the state Environment Department forgave DOE and its contractors many millions of dollars in potential civil penalties and received almost nothing in return. The first two settlements, executed in January 2016, involve waste management violations associated with the February 2014 radioactive release of plutonium and americium from WIPP. The third settlement, executed in June 2016, involves violations of the 2005 cleanup order for LANL. The settlements are described below in some detail, with key documents attached as Exhibits 1 through 12.

We have closely followed the events leading to these settlements, and we find them very problematic. The settlements have foregone millions of dollars in civil penalties owed to the State of New Mexico at a time when the State has been suffering serious budgetary shortfalls. We respectfully request that the State Auditor conduct an investigation of these settlements.

I. SETTLEMENT OF WASTE MANAGEMENT VIOLATIONS.

A. BACKGROUND.

On February 14, 2014, a waste container emplaced in Panel 7, Room 7 at WIPP ruptured, releasing radioactive waste. Some plutonium and americium dust from the breached container escaped through an exhaust vent into the atmosphere.¹ Twenty-one

¹ U.S. Dep’t of Energy, Accident Investigation Report Phase 2: Radiological Release Event at the Waste Isolation Pilot Plant February 14, 2014 (Apr. 2015), pp. 15-18. In the words of DOE, an “exothermic reaction resulted in pressurization of the drum, failure of the drum locking ring, and displacement of the drum lid”; and this “energetic release propelled [transuranic] waste from the drum up” and into the ventilation system. Id. at ES-5.
workers were exposed to alpha radiation.\(^2\) DOE's investigation traced the breached drum to LANL. Waste managers at LANL had improperly added organic absorbent to a drum containing radioactive nitrate salts. Nitrate salts can react violently when they contact certain organic compounds. LANL managers then sent the drum to WIPP for disposal.\(^3\) Further investigations revealed systematic waste management and treatment violations at both LANL and WIPP.

In response, on December 6, 2014, the New Mexico Environment Department (NMED) issued an Administrative Order Requiring Compliance and Assessing a Civil Penalty ("LANL Compliance Order") (Exhibit 1) to DOE and its LANL contractor, Los Alamos National Security, LLC ("LANS").\(^4\) The LANL Compliance Order alleged a variety of violations of the New Mexico Hazardous Waste Act,\(^5\) and the New Mexico Hazardous Waste Management Regulations.\(^6\) The alleged violations included treatment of hazardous waste without a permit, failure to notify the Environment Department of planned changes to permitted portions of the facility, failure to properly characterize hazardous waste, improper mixing of incompatible wastes and other materials in a container, and failure to notify the Environment Department of acts or omissions that may endanger human health or the environment.\(^7\) The LANL Compliance Order assessed a civil penalty of $36,604,649.00 for the alleged violations.\(^8\) The Environment Department prepared written penalty calculations\(^9\) (Exhibit 2) to support the assessed penalty under the Department's applicable Hazardous Waste Act Civil Penalty Policy\(^10\) (Exhibit 3, "Penalty Policy"). In accordance with the Hazardous Waste Act,\(^11\) the LANL Compliance Order stated that the order would become final unless, within 30 days of

\(^2\) Id. at Appendix G, ES-1.
\(^3\) Id. at 19-23.
\(^4\) N.M. Env't Dep't, Envtl. Health Division, Hazardous Waste Bureau v. U.S. Dep't of Energy & Los Alamos Nat'l Security, LLC, No. HWB-14-20 (CO), Administrative Order Requiring Compliance and Assessing a Civil Penalty (Dec. 6, 2014) (hereinafter "LANL Compliance Order").
\(^5\) NMSA 1978, §§ 74-4-1 to 74-4-14 (2008).
\(^6\) 20.4.1 NMAC.
\(^7\) LANL Compliance Order, supra note 4, §§ I.B., II.
\(^8\) Id. § IV, ¶ 138.
\(^9\) The penalty calculations consist of two sets of documents: a "penalty narrative" for each violation and a numeric "penalty calculation worksheet" for each violation. N.M. Env't Dep't, Los Alamos National Laboratory – 2014 ACO – Penalty Narrative – Violation #1 through Violation #18 (2014); N.M. Env't Dep't, LANL ACO 120614 Penalty Calculations Worksheets (Dec. 6, 2014) (hereinafter "LANL Penalty Calculation").
\(^10\) N.M. Env't Dep't, Hazardous Waste Act Civil Penalty Policy (Mar. 2007) (hereinafter "Penalty Policy").
\(^11\) NMSA 1978, § 74-4-10(H).
On January 5, 2015, DOE and LANS timely filed an Answer and Request for Hearing (Exhibit 4). They denied each of the alleged violations and requested a public hearing. Consequently, the LANL Compliance Order did not become final. The Environment Department initially scheduled a hearing on the matter but, ultimately, a public hearing was not required because the Environment Department entered into the settlement agreement with DOE and LANS.

Also on December 6, 2014, the Environment Department issued a second Administrative Order Requiring Compliance and Assessing a Civil Penalty ("WIPP Compliance Order") (Exhibit 5) to DOE and its WIPP contractor, Nuclear Waste Partnership, LLC ("NWP"). The WIPP Compliance Order likewise alleged multiple violations of the Hazardous Waste Act and the Hazardous Waste Management Regulations. The alleged violations included failure to operate the WIPP facility to minimize the potential for the release of hazardous or radioactive constituents, failure to notify the Environment Department of acts or omissions that may endanger human health or the environment, failure to immediately implement the facility contingency plan, accepting and managing prohibited waste, accepting incompatible wastes, and failure to adequately characterize hazardous waste. The WIPP Compliance Order assessed a civil penalty of $17,746,250.00 for the alleged violations. Again, the Environment Department prepared written penalty calculations (Exhibit 6) to support the assessed penalty under the Penalty Policy. The WIPP Compliance Order stated that the order would become final unless, within 30 days of receipt, DOE and NWP (the respondents) file an answer to the order and a request for a public hearing.

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13 N.M. Env't Dep't., Envtl. Health Division, Hazardous Waste Bureau v. U.S. Dep't of Energy & Nuclear Waste Partnership, LLC, No. HWB-14-21 (CO), Administrative Order Requiring Compliance and Assessing a Civil Penalty (Dec. 6, 2014) (hereinafter "WIPP Compliance Order").

14 Id. §§ I.B, II.

15 Id. § IV, ¶ 124.

16 The penalty calculations consist of two sets of documents: a "penalty narrative" for each violation and a numeric "penalty calculation worksheet" for each violation. N.M. Env't Dep't., Waste Isolation Pilot Plant - 2014 ACO - Penalty Narrative - Violation #1 through Violation #18 (2014); N.M. Env't Dep't., WIPP ACO 120614 Penalty Calculations Worksheets (Dec. 6, 2014) (hereinafter "WIPP Penalty Calculation").
On January 5, 2015, DOE and NWP timely filed an Answer and Request for Hearing (Exhibit 7). They denied each of the alleged violations and requested a public hearing. The WIPP Compliance Order, like the LANL Compliance Order, did not become final. Again, a public hearing was not required because the parties entered into the settlement agreement.

On December 6, 2014, the Environment Department announced in a press release (Exhibit 8) the assessment of more than $54 million in civil penalties, the largest penalty it had ever assessed against the federal government. However, in the end, no penalty for these alleged violations was ever paid.

**B. SETTLEMENT FOR LANL WASTE MANAGEMENT VIOLATIONS**

On January 22, 2016, the Environment Department issued a Settlement Agreement and Stipulated Final Order ("LANL Settlement Agreement") (Exhibit 9), signed by DOE and LANS, to resolve completely the claims for penalties for the violations alleged in the December 2014 LANL Compliance Order.

Under the LANL Settlement Agreement, DOE “commits” to expend funds to improve deteriorating roads and water infrastructure at LANL. These improvements are referred to as “supplemental environmental projects” or “SEPs.” Specifically, DOE first agrees to “fund up to $12 million to improve DOE-owned transportation routes at LANL.” Potential projects include “widening portions of East Jemez Road and constructing egress [and] merge lanes at the intersection of East Jemez Road and NM Route 4.” Second, DOE agrees to expend $7.5 million to design and install engineering structures in canyons in and around LANL to slow storm water flow and decrease sediment load. Third, DOE agrees to expend $10 million to replace aging water lines
and install metering equipment on LANL potable water systems. In addition, DOE agrees to expend $2.5 million to fund increased sampling and monitoring activities for storm water runoff in and around LANL.

DOE also agrees under the settlement to fund, as another supplemental environmental project, “independent, external triennial reviews of environmental regulatory compliance and operations at LANL.” The stated purpose of these triennial reviews is to “ensure that any regulatory deficiencies are identified.” Both DOE and the Environment Department are to agree upon the third party to perform the reviews. DOE and LANS agree to address any regulatory violations identified in the reviews. Significantly, the Environment Department agrees “to refrain from taking any enforcement action against” DOE and its contractors as long as they “correct any deficiencies” identified in the review within 60 days of finalizing the triennial review report, or for such additional time as the Environment Department may approve.

The LANL Settlement Agreement states that it completely resolves the claims for penalties for the violations alleged in the December 2014 LANL Compliance Order, as well as any future claims arising from the February 14, 2014 incident at WIPP. The Environment Department releases DOE and LANS from all claims that it raised or could have raised against DOE or LANS “regarding the facts alleged” in the LANL Compliance Order. The Environment Department does not collect any penalties under the LANL Settlement Agreement.

Finally, in a provision unrelated to the violations alleged in the LANL Compliance Order, the Environment Department agreed to enter into negotiations with LANL to modify the 2005 Consent Order governing cleanup at LANL, and further to “consider forgoing penalties accrued under the 2005 Consent Order upon successful completion of those discussions.” Ultimately, the Environment Department forgave millions of

24 Id. § II.B, ¶ 41.
25 Id. § II.B, ¶ 40.
26 Id. § II.B, ¶ 38.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id. § II, ¶ 33.
32 Id. § III.B, ¶ 50.
33 Id. § II, ¶ 43.
dollars in potential penalties owed by DOE and its contractor for failure to comply with the 2005 Consent Order. 34

C. SETTLEMENT FOR WIPP WASTE MANAGEMENT VIOLATIONS

On January 22, 2016, the Environment Department issued a second Settlement Agreement and Stipulated Final Order ("WIPP Settlement Agreement") (Exhibit 10), signed by DOE and NWP, to resolve completely the claims for penalties for the violations alleged in the December 2014 WIPP Compliance Order. 35

Under the WIPP Settlement Agreement, DOE agrees to "pay to the State of New Mexico $34 million to fund necessary repairs to roads used for DOE shipments of transuranic waste to WIPP, with monies first used to repave or repair the 13 mile WIPP North Access Road. 36 This payment is again referred to as a supplemental environmental project. DOE also agrees to obligate $1 million to fund "enhanced" training for local responders, including funding for training and exercises with local mine rescue teams." 37 DOE agrees to expend $4 million to fund construction of and equipment for an offsite emergency operations center near WIPP to be operated by DOE. Construction was to have been completed by the end of federal fiscal year 2016 (i.e., by September 30, 2016). 38 These expenditures are again called supplemental environmental projects. 39

As in the LANL settlement, DOE also agrees under the WIPP Settlement Agreement to fund "independent, external triennial reviews of environmental regulatory compliance and operations at WIPP." 40 Again, the purpose of the triennial reviews is to "ensure that any regulatory deficiencies are identified." 41 Both DOE and the Environment Department are to agree upon the third party to perform the reviews. 42 DOE and NWP agree to address any regulatory violations identified in the reviews. 43 Again, the Environment Department agrees "to refrain from taking any enforcement

34 See infra, § II.
36 Id. § II.B, ¶ 33.
37 Id. § II.B, ¶ 35.
38 Id. § II.B, ¶ 36.
39 Id. § II.B, ¶ 32.
40 Id. § II.B, ¶ 34.
41 Id.
42 Id.
43 Id.
action against" DOE and its contractors as long as they "correct any deficiencies" identified in the review within 60 days of finalizing the triennial review report, or for such additional time as the Environment Department may approve. Once again, the triennial reviews are referred to as a supplemental environmental project.

The WIPP Settlement Agreement, similar to the LANL agreement, states that it completely resolves the claims for penalties for the violations alleged in the December 2014 WIPP Compliance Order, as well as any future claims arising from the February 14, 2014 incident. The Environment Department releases DOE and NWP from all claims that it raised or could have raised against DOE or NWP "regarding the facts alleged" in the WIPP Compliance Order. Once again, the Environment Department does not collect any actual penalties under the WIPP Settlement Agreement.

D. WASTE MANAGEMENT SETTLEMENTS AND PUBLIC POLICY

The two 2016 settlement agreements for waste management violations at LANL and WIPP are bad public policy. The settlement agreements are bad fiscal policy in that the Environment Department has forgiven potentially millions of dollars in civil penalties owed to the State of New Mexico that should have been paid into State coffers, while the State of New Mexico received little in return, as explained below. Furthermore, both the settlement agreements contravene, in several respects, the Environment Department’s own Hazardous Waste Act Civil Penalty Policy ("Penalty Policy"), last revised in March 2007, which establishes policy for supplemental environmental projects. And the settlement agreements undermine a primary policy goal of law enforcement — to deter future violations — setting a bad precedent for enforcement policy under New Mexico environmental laws.

1. Fiscal Policy

The New Mexico Hazardous Waste Act imposes civil penalties on any person who violates its requirements. It states that whenever the Environment Department Secretary determines, on the basis of any information, that "any person" has violated any requirement of the Hazardous Waste Act, the hazardous waste management regulations, or a permit issued under the Act, the Department may issue a compliance order requiring compliance, assessing a civil penalty, or both. Alternatively, the Environment

44 Id.
45 Id. § II.B, ¶ 32.
46 Id. § II, ¶ 29.
47 Id. § III.B, ¶ 45.
48 NMSA 1978, § 74-4-10(A) (2001).
Department may commence a civil action in district court for appropriate relief. The Hazardous Waste Act further states that "any person" who violates any provision of the Act or the hazardous waste management regulations may be assessed a civil penalty not to exceed "$10,000 for each day during any portion of which a violation occurs." The Environment Department is authorized to assess such a civil penalty, not to exceed "$10,000 per day of noncompliance for each violation," in a compliance order. The statute, moreover, defines the word "person" to include a federal agency.

In assessing a civil penalty, the Environment Department must "take into account the seriousness of the violation and any good-faith efforts to comply with the applicable requirements." In addition, under its Penalty Policy, the Environment Department takes into consideration the degree of negligence or willfulness of the violator, any history of noncompliance, and whether the violator "self-reported" the violations.

The Environment Department considered these factors according to its Penalty Policy and assessed a civil penalty for the LANL violations of $36,604,649.00. It assessed a civil penalty for the WIPP violations of $17,746,250.00. The total penalty that the Environment Department assessed under the Penalty Policy against DOE and its contractors was thus $54,350,899.00. Yet, these penalty assessments notwithstanding, under the LANL and WIPP Settlement Agreements, DOE and its contractors were not required to pay – and did not pay – any penalty at all for the violations.

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49 Id.
51 NMSA 1978, § 74-4-10(B) (2001).
52 NMSA 1978, § 74-4-3(M) (2010). Further, the federal government does not have sovereign immunity from legal action under the Hazardous Waste Act. The Legislature enacted the Hazardous Waste Act to implement in New Mexico the requirements of the federal hazardous waste law, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k. Section 6001(a) of RCRA contains a clear and unambiguous waiver of federal sovereign immunity from state hazardous waste laws such as the Hazardous Waste Act. RCRA provides that each department of the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural," for the "control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as" any other person. It applies to "all civil and administrative penalties and fines." RCRA states unequivocally that "[t]he United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement." 42 U.S.C. § 6961(a).
53 Id.
54 Penalty Policy, supra note 10, at 9-11.
55 LANL Penalty Calculations, supra note 9; LANL Compliance Order, supra note 4, § IV, ¶ 138.
56 WIPP Penalty Calculations, supra note 16; WIPP Compliance Order, supra note 13, § IV, ¶ 124.
The Environment Department invariably seeks to negotiate a settlement of its claims or potential claims for civil penalties, as it should. To do so is sound enforcement policy. Moreover, the Environment Department is afforded considerable discretion in negotiating a penalty. Thus, as part of the settlement negotiations the Department invariably offers to compromise the assessed penalty. The Department typically adjusts the assessed penalty, in accordance with its Penalty Policy, taking into consideration additional, often mitigating, information supplied by the respondents. Negotiations generally lead to a reduced penalty for purposes of settlement. But to our knowledge, a settlement agreement in which the Environment Department compromises the assessed penalty to zero, even in exchange for valuable supplemental environmental projects, is unprecedented—and the value of these DOE projects is dubious, as discussed below.

A large reduction in the assessed penalty might perhaps be justified when the penalty claims are weak or legally flawed or the alleged violations not easy to prove. But that is not the case here. The Environment Department had incontrovertible evidence supporting the violations alleged. DOE did not seriously contest the claims, and DOE had no plausible defense. Moreover, the violations resulted in a serious potential for harm to public health and the environment, including the actual exposure of 21 workers to alpha radiation. For these reasons, the penalty reduction cannot be justified; the Environment Department has abused its enforcement discretion in entering into the LANL and WIPP Settlement Agreements.

If DOE and its contractors had paid civil penalties for these violations, the penalties would have been deposited in the Hazardous Waste Emergency Fund, as required by the Hazardous Waste Act. This fund can be used to address emergency spills or leaks of chemicals or hazardous substances, or to fund the State cost share of Superfund cleanups. Funds for these purposes otherwise must be appropriated from general revenues. Thus, penalties paid into the Hazardous Waste Emergency Fund allow State revenues to be spent for other purposes. Alternatively, the Legislature can also reappropriate money in the Hazardous Waste Emergency Fund for other purposes, as it has done in the past.

57 See LANL Penalty Calculation, supra note 9; WIPP Penalty Calculation, supra note 16. Both penalty calculations characterize the potential for harm to public health and the environment from the alleged violations as "major."
59 Under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), section 104(c)(3), when the federal government implements a response action to clean up an abandoned hazardous waste site using money from the Superfund, the state must pay a portion of the costs. See 42 U.S.C. § 9604(c)(3).
60 NMSA 1978, § 74-4-8 (1989); see also NMSA 1978, § 74-4-3(J) (2010).
Thus, in the LANL and WIPP Settlement Agreements, the Environment Department compromised the $54 million in penalties that it originally assessed by 100 percent, down to zero. These penalties should have been paid to the State of New Mexico. Moreover, the penalty figure represents a significant portion of the State budget deficit that was projected for fiscal year 2017.

2. Environment Department Penalty Policy

To provide guidance in applying the penalty provisions of the Hazardous Waste Act, the Environment Department has developed a Hazardous Waste Act Civil Penalty Policy, revised most recently in March 2007. Among the stated purposes of the Penalty Policy are to ensure the fair and consistent determination of civil penalties, and to ensure imposition of civil penalties proportional to the gravity of the violation. The Penalty Policy is guidance and not legally binding, but the Environment Department routinely and consistently follows the Penalty Policy in assessing civil penalties and in settling its claims for civil penalties.

However, the LANL and WIPP Settlement Agreements are contrary to the Penalty Policy in several important respects, particularly its provisions on supplemental environmental projects. A supplemental environmental project is “an environmentally beneficial project which a violator voluntarily agrees to undertake in settlement of an enforcement action but which is not legally required by law.” The LANL and WIPP Settlement Agreements contravene the Environment Department’s Penalty Policy, and the underlying policy of the United States Environmental Protection Agency (EPA), because the settlements do not require payment of any penalty, because most of the required projects lack a nexus to the alleged violations, because most of the projects lack specificity, and because DOE is already committed and in some cases legally obligated to conduct many of the projects.

a. No Penalty Payment

First, the LANL and WIPP Settlement Agreements are contrary to the Environment Department’s Penalty Policy because the agreements do not require payment of any penalty at all. For this reason, the settlements are also contrary to the EPA policy on supplemental environmental projects (“EPA SEP Policy”), which the Environment Department’s Penalty Policy references and generally follows. Both policies require payment of a substantial minimum penalty, even if the assessed penalty is reduced in exchange for one or more supplemental environmental projects.

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61 Penalty Policy, supra note 10, at 2.
62 Id. at 14.
The Penalty Policy states that the Environment Department generally will approve a supplemental environmental project only if "the monetary penalty reduction does not exceed 50 percent of the final civil penalty regardless of the actual cost of the SEP." Yet in the LANL and WIPP Settlement Agreements, the monetary penalty reduction is 100 percent, from $36.6 million to zero for LANL and from $17.7 million to zero for WIPP. To meet this provision of the Penalty Policy, the final penalty for the LANL violations would need to have been at least $18.3 million, and the final penalty for the WIPP violations would need to have been at least $8.85 million. The EPA SEP Policy likewise provides that "[s]ettlements that include a SEP must always also include a penalty," although the EPA policy uses a different equation to determine the minimum penalty.

While the Penalty Policy also states that the Environment Department "may, in its sole discretion, agree to accept any portion of the civil penalty in performance of a SEP," such an extraordinary and unprecedented exercise of the Department's enforcement discretion would need a thorough and compelling justification. The Environment Department reduced the assessed multi-million dollar civil penalty to zero, despite clear and incontrovertible violations causing a serious potential for harm to the public health and the environment. And it did so without providing any public justification or explanation for this unprecedented exercise of its discretion.

b. Lack of Nexus

The second reason that the LANL and WIPP Settlement Agreements are at odds with the Penalty Policy is the lack of nexus between the alleged violations and many of the supplemental environmental projects to be implemented under the agreements. The Penalty Policy states that there must be an adequate nexus connecting the project to the alleged violations, as determined in the sole discretion of the Department's Hazardous Waste Bureau. Although the Penalty Policy does not provide much guidance on what is an "adequate nexus," it does state that the project should be consistent with the EPA SEP Policy, and the EPA SEP Policy elaborates further on the nexus requirement. The EPA SEP Policy states that "[a]ll projects must have sufficient nexus." The policy

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64 Penalty Policy, supra note 10, at 14.
65 SEP Policy 2015 Update, supra note 63, at 22.
66 Id.
67 Id. note 10, at 14-15.
68 Id. at 15.
69 Id.
70 SEP Policy 2015 Update, supra note 63, at 7.
defines nexus as "the relationship between the violation and the proposed project." The nexus requirement "ensures the proper exercise of . . . prosecutorial discretion" by excluding projects that are unrelated to the alleged violations that form the basis of the claim for penalties and thus go beyond the agency's statutory authority. The EPA SEP Policy explains this point further, citing the U.S. Comptroller General:

The EPA's prosecutorial discretion to settle enforcement actions does not extend to the inclusion of SEPs that do not have a nexus to the violations being resolved. According to the Comptroller General of the United States, enforcement settlements may contain "terms and undertakings that go beyond the remedies specifically" identified in the statute being enforced. However, the Agency's "settlement authority should be limited to statutorily authorized prosecutorial objectives: correction or termination of a condition or practice, punishment, and deterrence."

To meet the nexus requirement under the EPA SEP Policy, a project "must advance at least one of the objectives of the environmental statute that [is] the basis of the enforcement action." It "must relate to the underlying violations at issue in the enforcement action." And it must be demonstrably "designed to reduce: a) the likelihood that similar violations will occur in the future; b) the adverse impact to public health [or] the environment to which the violation at issue contributes; or c) the overall risk to public health [or] the environment potentially affected by the violation at issue."

With the possible exception of the environmental compliance audit, none of the "supplemental environmental projects" in the LANL Settlement Agreement meets the nexus requirement, even as broadly interpreted. The LANL Compliance Order assessed civil penalties for alleged violations of hazardous waste characterization and management requirements and associated reporting requirements. The LANL Settlement Agreement resolved these penalty claims in exchange for projects for the improvement of roads, management of storm water, replacement of water lines, installation of water meters, and performance of an environmental compliance audit. Except for the compliance audit, none of these projects is designed to reduce the likelihood of similar violations in the future, to reduce the adverse effect on public health or the environment of the alleged violation, or to reduce the overall risk to public health or the environment potentially affected by the alleged violations.

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71 Id.
72 Id.
73 Id. at 7, n.8 (citation omitted) (emphasis added).
74 Id. at 8.
Similarly, most of the projects in the WIPP Settlement Agreement also lack the required nexus. The WIPP Compliance Order assessed civil penalties for alleged violations of hazardous waste characterization and management requirements, reporting requirements, and operation requirements for a hazardous waste treatment, storage, and disposal facility. The WIPP Settlement Agreement resolved the penalty claims in exchange for projects for improvement of roads, training of emergency personnel, construction of an off-site operation center, and performance of an environmental compliance audit. The large majority of the funds that DOE agrees to spend goes to the road improvement projects - $34 million versus $4 million for construction of the operations center and $1 million for personnel training (the WIPP Settlement Agreement does not quantify the funds to be spent on the compliance audit). While the smaller projects appear to meet the nexus requirement, the road improvement project does not. The road improvement project does nothing to reduce the likelihood of similar future violations, or to reduce the adverse effect on or overall risk to public health or the environment resulting from the alleged violations. Moreover, while the Environment Department has some regulatory authority over road maintenance within the WIPP facility, it has no authority at all over road maintenance outside the facility.

c. Lack of Specificity

A third reason that the LANL and WIPP Settlement Agreements are contrary to the Penalty Policy and the EPA SEP Policy, which is closely related to the lack of nexus, is that the supplemental environmental projects lack specificity. The EPA SEP Policy instructs that “SEPs may not be agreements to spend a certain amount on a project that will be defined later.” For enforcement officials “to properly evaluate a SEP’s characteristics (the ‘what, where, when’ of the SEP), and establish the connection to the underlying violation being resolved, the type and scope of each project must be specifically described and defined.” Further, “[w]ithout a well-defined project with clear environmental or public health benefit, the [enforcement agency] cannot demonstrate nexus.”

Yet the LANL and WIPP Settlement Agreements are precisely what the EPA SEP Policy says they must not be: “agreements to spend a certain amount on a project that will be defined later.” The settlements describe the “supplemental environmental projects” in the most vague and superficial terms.

The LANL Settlement Agreement provides that DOE will “fund up to $12 million to improve DOE-owned transportation routes at LANL.” A “potential project” may include “widening portions of East Jemez Road and constructing egress [and] merge lanes at the intersection of East Jemez Road and NM Route 4.” By its terms, the

75 Id.

76 LANL Settlement Agreement, supra note 19, § II.B. ¶ 37.
agreement thus allows the funds to be spent on unspecified improvements to other unspecified roads. Likewise, the WIPP Settlement Agreement requires DOE to pay to the State "$34 million to fund necessary repairs to roads used for DOE shipments of transuranic waste to WIPP, with monies first used to repave or repair the WIPP North Access Road."77 Again, if the funds are not exhausted on the WIPP North Access Road, they can be spent on other unspecified repairs to other unspecified roads.

The LANL Settlement Agreement provides that DOE will expend $7.5 million “to design and install engineering structures in canyons in and around LANL to slow storm water flow and decrease sediment load.”78 But DOE and LANS have been implementing measures to control erosion and sediment for years under the LANL storm water permits (discussed below). The agreement does not specify what sort of additional work needs to be done. The LANL Settlement Agreement also requires DOE to expend $2.5 million to fund increased sampling and monitoring activities for storm water runoff in and around LANL.79 Again, DOE and LANS have been sampling and monitoring storm water at LANL for years under the storm water permits. The agreement does not specify what the parties mean by “increased” sampling and monitoring.

The WIPP Settlement Agreement requires DOE to obligate $1 million to fund “enhanced” training for local responders, including funding for training and exercises with local mine rescue teams.80 But DOE and its contractors already conduct extensive training including local responders (discussed below). The Environment Department does not explain what “enhanced” training is needed, and the settlement agreement does not specify what “enhanced” training is required by its terms. The WIPP Settlement Agreement also requires DOE to expend $4 million to fund construction of and equipment for an offsite emergency operations center near WIPP to be operated by DOE.81 But DOE completed construction of an emergency operations center in Carlsbad in October 2015, before the settlement was executed. The settlement agreement does not specify what additional construction or equipment – if any – is needed or required.

Finally, both the LANL and WIPP Settlement Agreements require DOE to conduct environmental compliance audits at the two facilities.82 But the settlement agreements do not specify the amount of money to be spent on the audits. Without at

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77 WIPP Settlement Agreement, supra note 35, § II.B, ¶ 33.
78 LANL Settlement Agreement, supra note 19, § II.B, ¶ 39.
79 LANL Settlement Agreement, supra note 19, § II.B, ¶ 40.
80 WIPP Settlement Agreement, supra note 35, § II.B, ¶ 35.
81 Id., § II.B, ¶ 36.
82 LANL Settlement Agreement, supra note 19, § II.B, ¶ 38; WIPP Settlement Agreement, supra note 35, § II.B, ¶ 34.
least an approximate dollar figure, it is impossible to place a value on the audits in terms of reducing the penalty. Thus, no such reduction should apply.  

**d. Pre-existing Obligation or Commitment**

A fourth reason that the LANL and WIPP Settlement Agreements contravene the Penalty Policy and the EPA SEP Policy is that DOE was already committed or in some instances legally obligated to perform much of the work identified as supplemental environmental projects. Consequently, this work should not qualify as supplemental environmental projects.

Under the Penalty Policy, a supplemental environmental project is, by definition, a project that “is not legally required by law.” Under the EPA SEP Policy, likewise, a supplemental environmental project is one that the violator “is not otherwise legally required to perform.” In other words, “the project or activity is not required by any federal, state, or local law or regulation or achievable under applicable environmental and other federal laws.” Further, according to EPA, a supplemental environmental project “cannot include actions which the [viator], or any other third party, is likely to be required to perform” under any other “legal action” or potential legal action, in any “settlement or order,” or through any other type of “local, state, or federal requirement[sl].” The EPA SEP Policy also states that because its primary purpose “is to obtain environmental [or] public health benefits that would not have occurred ‘but for’ the settlement, projects which the defendant has previously committed to perform or has begun implementing before the settlement is final are not eligible as SEPs.” In addition, the EPA SEP Policy instructs that “[p]rojects or actions that are not required, but that reflect standard industry practices, are generally not acceptable as SEPs.”

These limitations on supplemental environmental projects are entirely sensible and appropriate. A violator should not get credit against an assessed penalty for work that it was already legally required or obligated to do, that it was already planning to do, or that it ought to do as a matter of standard industry practice. For a violator to be credited with...

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83 See SEP Policy 2015 Update, supra note 63, at 15 (“Credit is only given for the costs associated with conducting the audit.”).
84 Penalty Policy, supra note 10, at 14.
85 SEP Policy 2015 Update, supra note 63, at 6.
86 Id.
87 Id. at 6-7.
88 Id. at 6, n.4 (emphasis added).
89 Id. at 7.
a penalty reduction, the violator must undertake an environmental project that would otherwise not be undertaken.

As described above, in the LANL and WIPP settlements, DOE has agreed to repair and upgrade deteriorating roads at LANL and WIPP, to improve water infrastructure at LANL, to construct an emergency operations office and train local emergency responders at WIPP, and to conduct triennial reviews of environmental compliance at both facilities. But, as explained in detail below, DOE has responsibility to implement most of these projects even in the absence of the settlements.

Roads. Under the LANL Settlement Agreement, DOE agrees to “fund up to $12 million to improve DOE-owned transportation routes at LANL,” which may include “widening portions of East Jemez Road and constructing egress [and] merge lanes at the intersection of East Jemez Road and NM Route 4.” By its terms the agreement addresses only “DOE-owned” roads. According to DOE documents, East Jemez Road lies within LANL and is under DOE control. DOE is legally responsible for the upkeep, maintenance, and safety of roads on its own lands; it should not receive a credit against the assessed penalty for making needed improvements to its own roads.

Moreover, DOE planning documents reveal that DOE had committed to widen East Jemez Road long before the LANL Settlement Agreement was executed and, indeed, before the LANL Compliance Order was issued. For example, in the LANL ten-year site plan for fiscal year 2014, published in June 2013, DOE stated that in the 2024 to 2038 timeframe, “widening East Jemez Road (truck route) for safety purposes is planned.” Similarly, in the twenty-five year site plan for LANL, published in July 2012, DOE stated that the 2024 to 2037 planning horizon “includes major work on all primary roadways, the most notable being the widening of the truck route.” Thus, DOE was “previously committed to perform” the widening of East Jemez Road, and the project thus should not have been eligible as a supplemental environmental project. Furthermore, proper maintenance of roads on DOE’s own lands would constitute “standard industry practice,” another reason it should not have been eligible as a supplemental environmental project.

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90 LANL Settlement Agreement, supra note 19, § II.B, ¶ 37.
94 SEP Policy 2015 Update, supra note 63, at 6, n.4.
Under the WIPP Settlement Agreement, DOE agrees to pay to the State "$34 million to fund necessary repairs to roads used for DOE shipments of transuranic waste to WIPP, with monies first used to repave or repair the WIPP North Access Road. The North Access Road is a two-lane road that connects the WIPP facility with U.S. Highway 62/180, 13 miles to the north. An approximately two-mile stretch of the road is within the WIPP Land Withdrawal Area under DOE jurisdiction and management, while the remainder is on property owned by the Bureau of Land Management ("BLM"). BLM granted to DOE a perpetual right-of-way reservation (NM 55676) for the North Access Road on August 24, 1983. The road is restricted for use by DOE, BLM, and their contractors and licensees. According to DOE documents – which predate the WIPP Settlement Agreement – DOE assumes responsibility for maintaining the WIPP North Access Road. Moreover, DOE maintenance of the WIPP North Access Road would also constitute “standard industry practice.” For these reasons, repair and maintenance of the WIPP North Access Road should not qualify as a supplemental environmental project.

Although the WIPP Settlement Agreement does not specify what other roads might be subject to improvement, the only other WIPP access road is the South Access Road, which connects the facility with New Mexico State Highway 128, approximately 3.75 miles to the south. DOE had planned the reconstruction of the South Access Road for several years, and DOE received funding for the project under the 2009 American Recovery and Reinvestment Act. In January 2011, DOE completed the project, resurfacing and widening the road to encompass eight-foot shoulders on each side.

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95 WIPP Settlement Agreement, supra note 35, § II.B, ¶ 33.
98 Id. at 62.
99 Id.
Given the lack of specificity in the WIPP Settlement Agreement, DOE could also fund improvement of other roads—such as State or county roads—that are used to transport waste shipments to WIPP. Depending on the circumstances, such projects might be ones that DOE has no prior obligation or commitment to implement, although they would most likely not have the necessary nexus to the violations alleged in the compliance orders.

Thus, DOE is responsible for maintenance of East Jemez Road at LANL, and it began planning improvements to the road long before the LANL Settlement Agreement. DOE is also responsible for the maintenance of the WIPP North Access Road. These road improvements should not qualify as supplemental environmental projects to offset civil penalties assessed against DOE and its contractors for violations at LANL and WIPP. Reconstruction of the WIPP South Access Road was completed in 2011, and it does not appear that further improvements are necessary. Other road improvement projects that might otherwise be eligible would probably lack the requisite nexus to the alleged violations (discussed above).

**Water infrastructure.** Under the LANL Settlement Agreement, DOE agrees to expend $7.5 million to design and install engineering structures in canyons in and around LANL to slow storm water flow and decrease sediment load. But DOE is legally required to implement sediment controls under its storm water permits, independent of the settlement. Under section 402 of the federal Clean Water Act, DOE and LANS, as co-operators of LANL, are required to obtain permits under the National Pollutant Discharge Elimination System (NPDES) for discharges of pollutants into waters of the United States. Under section 402(p) of the Clean Water Act, NPDES permits must cover discharges of storm water from industrial activities. Accordingly, EPA, which administers the NPDES permit program in New Mexico, has issued both a general NPDES storm water permit applicable to LANL and an individual NPDES storm water permit specifically written for LANL. The individual permit covers specific sites at LANL that are contaminated with hazardous waste or hazardous constituents.

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103 LANL Settlement Agreement, supra note 19, § II.B, ¶ 39.
105 The canyons at LANL are tributaries to the Rio Grande and are waters of the United States.
108 U.S. Envtl. Prot. Agency, Region 6, Authorization to Discharge under the National Pollutant Discharge Elimination System (NPDES Permit No. 0030759) (Sept. 30, 2010) (hereinafter “Individual NPDES Storm Water Permit for LANL”). Although this permit was, on its face, to expire on March 31, 2014, DOE and LANS have submitted to EPA a permit renewal application
Both permits require DOE and LANS to address erosion and sedimentation. The general NPDES storm water permit mandates:

**Erosion and Sediment Controls.** You must minimize erosion by stabilizing exposed soils at your facility in order to minimize pollutant discharges and placing flow velocity dissipation devices at discharge locations to minimize channel and streambank erosion and scour in the immediate vicinity of discharge points. You must also use structural and non-structural control measures to minimize the discharge of sediment.  

The individual NPDES storm water permit for LANL similarly prescribes:

The Permittees must minimize discharges of pollutants caused by onsite erosion and sedimentation. The Permittees must implement structural and non-structural, vegetative, and/or stabilization control measures as necessary to achieve this requirement.

Under these permits DOE and LANS are already taking measures to control erosion and sediment. The 2015 annual report on implementation of the individual NPDES storm water permit lists hundreds of erosion control and sediment control measures that were installed at LANL in 2015. Because of the vagueness of the LANL Settlement Agreement, it is not possible to determine what erosion and sediment control measures DOE and LANS must implement beyond those already required in the permits.

In the LANL Settlement Agreement, DOE also agrees to expend $2.5 million to fund increased sampling and monitoring activities for storm water runoff in and around LANL. This requirement is especially vague – what the parties meant by “increased monitoring” is not specified in the agreement and cannot be determined from publicly available documents. But, again, both LANL storm water permits currently require detailed monitoring of storm water runoff. The general NPDES storm water permit requires DOE and LANS to “collect and analyze stormwater samples and document...”

dated March 2014. Assuming the application was timely submitted, the expiration date of the current permit is automatically extended until EPA issues a new permit. See 40 CFR § 122.6.

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100 See Individual NPDES Storm Water Permit for LANL, supra note 108. In the jargon of hazardous waste laws, these sites are called “solid waste management units” and “areas of concern.”

101 Multi-Sector General NPDES Storm Water Permit, supra note 107, at 17.

102 Individual NPDES Storm Water Permit for LANL, supra note 108, at 1.


104 LANL Settlement Agreement, supra note 19, § II.B, ¶ 40.
monitoring activities consistent with the procedures described in" the permit, and it describes those procedures in some detail. The individual NPDES storm water permit likewise requires DOE and LANS to “monitor storm water discharges from Sites at specified sampling points.” The permit specifies the procedures for selecting sampling locations and for collecting samples. The permit lists more than 400 specific locations where storm water samples must be collected and specifies the sampling parameters for each location.

The Environment Department does not explain how or why “increased monitoring” of storm water might be necessary. Nor does it explain why any monitoring gaps cannot be filled under the authority of the extant storm water permits.

Finally, under the water infrastructure provisions of the LANL Settlement Agreement, DOE agrees to expend $10 million to replace aging water lines and install metering equipment on LANL potable water systems. This requirement is so vague that it is impossible to conclude whether or not it conforms to either the Penalty Policy or the EPA SEP Policy. Given that DOE and its contractor are neither the owners nor the operators of the public water system – DOE transferred the system to the Los Alamos County Public Utilities Commission in 2000 – DOE and its contractors do not appear to have any legal responsibility over the water system.

Thus, the storm water control and monitoring projects that DOE agrees to implement as "supplemental environmental projects" under the LANL Settlement Agreement either are already required or could be required under the NPDES storm water permits for LANL. They should not qualify as supplemental environmental projects to offset civil penalties assessed against DOE. The remaining water infrastructure project, replacing water lines and water meters in the public water system, does not appear to be disqualified for this reason, but it appears to lack the requisite nexus to the alleged violations (discussed above).

**Emergency operations.** Under the WIPP Settlement Agreement, DOE agrees to obligate $1 million to fund “enhanced” training for local responders, including funding

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114 Multi-Sector General NPDES Storm Water Permit, *supra* note 107, at 39.
115 *Id.* at 39-46, 115-18.
116 *Id.* at 39-46, 115-18.
117 *Id.* at 5-7.
118 *Id.* Appendix A.
119 *Id.* Appendix B.
120 LANL Settlement Agreement, *supra* note 19, §§ II.B, ¶ 41.
for training and exercises with local mine rescue teams. But DOE is legally required to provide such training.

The Waste Isolation Pilot Plant Land Withdrawal Act requires DOE to “provide technical assistance and funds for the purpose of training public safety officials, and other emergency responders” in any state through which transuranic waste is transported to WIPP. The training must cover procedures for responding to an emergency incident involving the transuranic waste, including (1) training of government officials and public safety officers in procedures for the command and control of the response; (2) training of emergency response personnel in procedures for the initial response; and (3) training of radiological protection and emergency medical personnel in procedures for responding to the incident. DOE must review this training program periodically. If DOE, in consultation with the State, determines that it is necessary and appropriate, the training must continue for as long as waste continues to be shipped to WIPP. Accordingly, for years the DOE Carlsbad Field Office has provided training to first responders, including fire, medical, law enforcement, and rescue personnel, and to incident commanders. If additional or “enhanced” training is necessary, DOE is obligated by law to provide it. Therefore, such training should not qualify as a supplemental environmental project.

DOE also agrees under the WIPP Settlement Agreement to expend $4 million to fund construction of and equipment for an offsite emergency operations center near WIPP to be operated by DOE. Again, DOE appears to be obligated to provide such facility and equipment. Moreover, DOE began implementing this project long before the WIPP Settlement Agreement was executed.

The WIPP Land Withdrawal Act requires DOE to assist states in acquiring equipment for response to incidents involving transuranic waste transported to or from WIPP. Moreover, DOE began planning for the construction of an offsite emergency operations center years ago. In October 2015 – three months before execution of the

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122 WIPP Settlement Agreement, supra note 35, § II.B, ¶ 35.
124 Id. § 16(c)(1)(D), 106 Stat. at 4793.
125 Id. § 16(c)(1)(C), 106 Stat. at 4792-93.
126 Id. § 16(c)(1)(B), 106 Stat. at 4792.
128 WIPP Settlement Agreement, supra note 35, § II.B, ¶ 36.
WIPP Settlement Agreement – DOE announced that construction was completed on the 4,000 square foot state of the art emergency operations office in Carlsbad.\footnote{U.S. Dep’t of Energy, Carlsbad Field Office, Press Release, WIPP Completes State of the Art Emergency Operations Center (Oct. 15, 2015).}

DOE therefore was legally obligated to provide training to local responders and, most probably, to provide funds for construction of the offsite emergency operations center. Moreover, DOE had begun construction of the emergency operations center long before the WIPP Settlement Agreement was executed. These projects should not qualify as supplemental environmental projects.

**Triennial compliance review.** Under both the LANL Settlement Agreement and the WIPP Settlement Agreement, DOE agrees to conduct, every three years, an environmental compliance review, or audit, for each facility.\footnote{LANL Settlement Agreement, supra note 19, § II.B, ¶ 38; WIPP Settlement Agreement, supra note 35, § II.B, ¶ 34.} Conducting regular environmental compliance audits is standard industry practice. According to EPA, “most large companies routinely conduct compliance audits.”\footnote{SEP Policy 2015 Update, supra note 63, at 15.} Thus, “mitigating penalties for such audits would reward violators for performing an activity that most companies already do.”\footnote{Id.} The EPA SEP Policy therefore cautions that “compliance audits are acceptable as SEPs only when the defendant is a small business, small community, or a state or local government entity.”\footnote{Id.} The national nuclear weapons complex run by DOE encompasses a dozen or so large facilities in as many states, all of which are subject to environmental regulation, and operates under a multi-billion dollar budget; it is much more akin to a large corporation than to a small business or state or local government. DOE should be routinely and regularly conducting environmental compliance audits at its facilities irrespective of a settlement agreement. The Environment Department therefore should not have approved environmental compliance audits for LANL and WIPP as supplemental environmental projects.

3. **General Law Enforcement Policy**

The LANL and WIPP Settlement Agreements are also at odds with general environmental law enforcement policy. The primary purpose of assessing civil penalties for violation of environmental laws, and commencing enforcement actions to collect...
those penalties, is to deter future violations. The Environment Department’s Penalty Policy states that a “primary purpose of enforcement is to deter noncompliance.” It further states that deterrence of noncompliance is achieved by, among other things, “the likelihood and appropriateness of sanctions[,] including civil penalties.”

Allowing DOE and its contractors to avoid payment of any civil penalty, despite serious environmental violations, in exchange for ill-defined “supplemental environmental projects,” most of which DOE was already legally obligated or otherwise committed to implement, is unlikely to deter DOE or its contractors from future violations.

For all these reasons, the Environment Department abused its enforcement discretion by entering into settlement agreements forgiving millions of dollars in civil penalties - indeed, imposing no penalties - for serious hazardous waste violations, while receiving virtually nothing in return. These empty settlements are without precedent in the State of New Mexico and, we believe, in the nation.

II. SETTLEMENT OF CLEANUP VIOLATIONS

A. BACKGROUND

The third settlement agreement, which involves cleanup of environmental contamination at LANL, has a much longer history. LANL has operated nuclear weapons research and fabrication, among myriad other research and testing activities, continuously since the early 1940’s. Its operations have left behind a legacy of soils, surface water, and groundwater contaminated with a mix of toxic and radioactive substances. Prior to 2005, DOE and its contractors made woefully little progress in cleanup of the Laboratory. Investigation and cleanup efforts were piecemeal, uncoordinated, sporadic, protracted, underfunded, and ineffective. Consequently, beginning in about 2001, the Environment Department began a concerted effort to force DOE to fund and implement investigation and cleanup of LANL sufficiently and comprehensively, with DOE and its contractors facing stiff penalties if they did not do so.

On May 2, 2002, the Environment Department made a determination that conditions at the Laboratory posed an imminent and substantial endangerment to health and the environment under the Hazardous Waste Act. The Environment Department, also on that date, issued a unilateral cleanup order in draft form for public comment. On

136 Penalty Policy, supra note 10, at 2.
137 NMSA 1978, § 74-4-13.
November 26, 2002, the Environment Department issued the final unilateral order to DOE and its contractor, the University of California. DOE and the University responded by promptly suing the Environment Department in State and federal court. The parties then entered into what became protracted settlement negotiations; after nearly two years — under the consecutive administrations of Governor Johnson and Governor Richardson — the parties reached and approved a settlement agreement. This agreement — including deadlines and schedules — was made available for public comment. On March 5, 2005, the Environment Department, DOE, and the University executed a Compliance Order on Consent, requiring DOE and its contractor to conduct a comprehensive investigation and cleanup of environmental contamination at LANL (“2005 Consent Order”) (Exhibit 11). Of particular importance, the 2005 Consent Order placed DOE and its contractor on a detailed compliance schedule, with dozens of deadlines, culminating in complete and final cleanup of contamination at LANL. Failure to meet key deadlines in the compliance schedule, without a showing of good cause, subjected DOE and its contractor to stipulated penalties.

With the 2005 Consent Order in place, DOE and its contractor began investigation and cleanup in earnest. The 2005 Consent Order, with its enforceable deadlines, was very successful in prompting DOE to request and Congress to appropriate adequate cleanup funds. From 2005 through about 2010, DOE and its contractors, under close Environment Department oversight, accomplished a significant amount of work towards cleanup of LANL. Most of the investigation work was completed. A large plume of hexavalent chromium was discovered in groundwater migrating into Mortandad Canyon. Remedies were completed at dozens of individual sites. The 2005 Consent Order was revised twice to make minor adjustments to the schedule and other requirements, on June 18, 2008 and on October 29, 2012. But the enforceable schedule and comprehensive cleanup requirements remained intact.

In 2011 and 2012, however, as the new gubernatorial administration “realigned” its priorities, cleanup at LANL became a lower priority. DOE diverted funds from compliance with the 2005 Consent Order, and cleanup progress slowed markedly. Little has been accomplished in the last five years. DOE and its contractor requested, and the Environment Department granted, more than 150 extensions of time to meet 2005 Consent Order deadlines, often without any showing of good cause. Despite repeated

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138 *In re U.S. Dep’t of Energy and Univ. of Calif.: Los Alamos National Laboratory, Los Alamos County, New Mexico, Compliance Order on Consent (Mar. 1, 2005) (hereinafter “2005 Consent Order”).

139 *Id.* § XII.

140 *Id.* § III.G.

141 The correspondence requesting and granting the extensions of time are available in Environment Department files. [https://www.env.nm.gov/HWB/documents/LANL_Consent_Order_Extensions_5-3-2016](https://www.env.nm.gov/HWB/documents/LANL_Consent_Order_Extensions_5-3-2016)
extensions - in some cases as many as three or four extensions for the same deadline - DOE and its contractor missed many of the deadlines in the 2005 Consent Order. DOE and its contractor thus committed multiple violations of the 2005 Consent Order, including among other things, failure to complete investigations at individual sites, failure to install groundwater monitoring wells, failure to submit groundwater monitoring reports, failure to evaluate remedial alternatives for individual sites, and failure to complete final remedies. DOE now estimates that cleanup of legacy waste at LANL will not be completed until 2035 to 2040.\(^\text{142}\)

The cleanup deadlines were enforceable. Under the terms of the 2005 Consent Order, many of these deadlines were subject to stipulated penalties if they were not met.\(^\text{143}\) Alternatively, the 2005 Consent Order allowed the Environment Department to seek civil penalties for missed deadlines in an enforcement action.\(^\text{144}\) DOE and LANS were potentially liable for tens of millions of dollars in civil penalties for these violations.\(^\text{145}\)

The deadlines were also enforceable in a citizen suit.\(^\text{146}\) Last year, Nuclear Watch New Mexico, an environmental watchdog group, filed a lawsuit in federal court against DOE and LANS seeking injunctive relief and civil penalties for these violations of the 2005 Consent Order.\(^\text{147}\) DOE and LANS, and the Environment Department intervening on behalf of DOE and LANS, filed multiple motions to dismiss the lawsuit. The motions are pending before the court.

B. CONSENT ORDER FOR LANL CLEANUP VIOLATIONS

On June 26, 2016, DOE and the Environment Department executed a new Compliance Order on Consent ("2016 Consent Order")\(^\text{148}\) (Exhibit 12) for the cleanup of LANL. The 2016 Consent Order states that it "settles any outstanding alleged violations


\(^{143}\) 2005 Consent Order, *supra* note 138, § III.G.

\(^{144}\) *Id.*, § III.G.7.

\(^{145}\) *Id.*, § III.G.7.  

\(^{146}\) See NMSSA 1978, § 74-4-10(A) (2001) (authorizing the Environment Department to assess up to $10,000 for each day of violation).

\(^{147}\) 2005 Consent Order, *supra* note 138, § III.U; see also RCRA § 7002(a), 42 U.S.C. § 6972(a) (authorizing citizen suits).


\(^{148}\) State of N.M. Env’t Dep’t, *Compliance Order on Consent: U.S. Dep’t of Energy, Los Alamos National Laboratory* (June 2016) (hereinafter "2016 Consent Order").
under the 2005 Consent Order. Yet DOE and LANS do not pay any penalties to settle these violations. Nor do they agree even to conduct any supplemental environmental projects.

Further, the 2016 Consent Order states that it “supersedes the 2005 Compliance Order on Consent.” Thus, the 2005 Consent Order, and the cleanup schedule it imposed, has ostensibly been nullified. In its place, the 2016 Consent Order adopts what is described as a “campaign approach” to cleanup. Under this approach, cleanup activities “will be organized into campaigns, generally based upon a risk-based approach to grouping, prioritizing, and accomplishing” cleanup activities at LANL. Significantly, the 2016 Consent Order does not specify any deadlines for cleanup. Rather, each year DOE and the Environment Department are to negotiate a schedule of 10 to 20 “milestone” deadlines for the next federal fiscal year. These milestones will be enforceable and subject to stipulated penalties. Additional “target” deadlines are also to be negotiated for the second following fiscal year, but these targets are not enforceable. The milestones for any fiscal year are to be determined in large part by congressionally appropriated funding. Moreover, DOE and LANL can avoid cleanup to applicable standards by convincing the Environment Department that it is too impracticable or costly to do so.

C. LANL CLEANUP SETTLEMENT AND PUBLIC POLICY

Like the LANL and WIPP Settlement Agreements, the 2016 Consent Order is bad public policy. Under the 2016 Consent Order, the Environment Department again forgave potentially tens of millions of dollars in civil penalties owed to the State of New Mexico by DOE and its contractor for violating multiple deadlines in the 2005 Consent Order. And, remarkably, the Environment Department got nothing in return for

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149 Id.
150 Id. § II.A.
151 The Nuclear Watch lawsuit alleges that the 2016 Consent Order is void in that it changed the schedules in the 2005 Consent Order without following required procedures for public participation. Second Amended Complaint, Nuclear Watch N.M. v. U.S. Dep’t of Energy, No. 1:16-cv-00433-JCH-SCY (D.N.M. filed Sept. 21, 2016) (Doc. No. 42). If this lawsuit prevails, the 2005 Consent Order would remain in effect.
152 2016 Consent Order, supra note 148, § VIII.A.
153 Id. § VIII.B and C.
154 Id. § VIII.C.
155 Id. § IX.L, M, N.
156 The Nuclear Watch lawsuit claims nearly $300 million in penalties for these violations. Nuclear Watch New Mexico, Press Release, Nuclear Watch NM Files Lawsuit Over Lack of Cleanup at the Los Alamos Lab; NM Environment Dept. Forgoes Nearly $300 Million in Penalties (May 17, 2016).
Letter to The Honorable Timothy M. Keller, New Mexico State Auditor  
RE: New Mexico Environment Department Settlements  
April 20, 2017, Page 27

foregoing collection of these penalties, not even supplemental environmental projects. Forgiving these penalties is bad fiscal policy, especially given the State’s current budgetary shortfalls, and it is bad law enforcement policy, for the reasons described in the previous section.157 Penalties for these violations should have been assessed and collected in accordance with the 2005 Consent Order and the Environment Department’s Penalty Policy.

Other than settling the Environment Department’s claims against DOE and LANS for civil penalties with nothing in return, there is another serious flaw in the 2016 Consent Order. In another concession to DOE, the Environment Department agreed to eliminate all the deadlines for completing cleanup under the now “superseded” 158 2005 Consent Order. The 2016 Consent Order replaced the deadlines with an indefinite, opaque, and protracted negotiating process. The 2016 Consent Order thus diminishes government accountability and transparency in implementation of the cleanup at LANL.

As explained above, the 2005 Consent Order established dozens of enforceable deadlines for the completion of cleanup tasks required by the Order. This schedule had been subject to public notice and comment. Until 2011 or 2012, when the Environment Department began summarily granting deadline extensions, these provisions of the 2005 Consent Order had been very effective in compelling DOE and its contractors to move forward with investigation and cleanup. But the 2016 Consent Order reverses this successful approach, abandoning the provisions and the schedule of the 2005 Consent Order, and replacing them with a so-called “campaign approach.”159 Under the 2016 Consent Order, it is up to DOE, not the Environment Department, to select the timing and scope of each “campaign.”160 The 2016 Consent Order itself contains no schedule, no final cleanup deadline, and no interim deadlines. A limited schedule is to be negotiated only later. Enforceable deadlines for cleanup tasks will apply no more than one year into the future. The yearly deadlines will be based on DOE’s chosen “campaign.” And the yearly deadlines will be driven by DOE funding, rather than the schedule driving the funding – the approach of the 2005 Consent Order. Moreover, the yearly deadlines will be negotiated with the Environment Department at a distinct disadvantage. By forgiving its claims for civil penalties at the outset, the Environment Department has given away all its bargaining power and its leverage has been lost. Furthermore, negotiation of the

But it should be noted that the Nuclear Watch action was brought under federal law, which provides for much higher maximum penalties ($37,500 per day of violation) than is allowed under State law ($10,000 per day of violation).

157 See supra, Section I.D.1 and 3.

158 2016 Consent Order, supra note 148, § II.A (The 2016 Consent Order “supersedes the 2005 Compliance Order on Consent,” including its cleanup schedule.).

159 Id. § VIII.

160 Id. § VIII.A.3.
deadlines will take place behind closed doors, with no public participation, and no opportunity for the public to comment on the schedule. The 2016 Consent Order will make it much more difficult for the Environment Department to hold DOE accountable for its cleanup responsibilities at LANL, and more difficult for the public to follow and to participate in the cleanup process.

We therefore urge you to investigate these three settlement agreements between the Environment Department and the Department of Energy. We believe that the Environment Department has inappropriately forgiven claims for millions of dollars in civil penalties – for serious violations of environmental requirements – which DOE and its contractors should have paid to the State of New Mexico. We believe the Environment Department has abused its enforcement discretion by executing these agreements, to the detriment of the State of New Mexico.

We would be happy to arrange a meeting to brief you or your staff on these settlements. To schedule a meeting, or if you have any questions, please call Jonathan Block, Staff Attorney, New Mexico Environmental Law Center at 505-989-9022 or jblock@nmele.org.

Thank you for your consideration of our request.

Sincerely,

Douglas Meiklejohn  
Executive Director  
New Mexico Environmental Law Center

Jay Coghián  
Executive Director  
Nuclear Watch New Mexico

Enclosures: Exhibits 1-12
List of Exhibits

Exhibit 1

Exhibit 2
“LANL Penalty Calculation”, NMED written penalty calculations for Los Alamos National Security, LLC. The penalty calculation consists of two sets of documents: a “penalty narrative” for each violation and a numeric “penalty calculation worksheet” for each violation.
http://www.sric.org/nuclear/docs/LANL_ACO_120614_Penalty_Narratives.pdf
http://www.sric.org/nuclear/docs/LANL_ACO_120614_Penalty_Calculations.pdf

Exhibit 3

Exhibit 4

Exhibit 5

Exhibit 6
“WIPP Penalty Calculation”, NMED written penalty calculations for WIPP. The penalty calculation consists of two sets of documents: a “penalty narrative” for each violation and a numeric “penalty calculation worksheet” for each violation.
http://www.sric.org/nuclear/docs/WIPP_ACO_120614_Penalty_Narratives.pdf
http://www.sric.org/nuclear/docs/WIPP_ACO_120614_Penalty_Calculations.pdf

Exhibit 7
Letter to The Honorable Timothy M. Keller, New Mexico State Auditor
RE: New Mexico Environment Department Settlements
April 20, 2017, Page 30

Exhibit 8
NMED Press Release Announcing Assessment Of More Than $54 Million In Civil Penalties
“New Mexico Environment Department Issues Compliance Orders to U.S. Department of Energy to Protect Safety and Success of Waste Isolation Pilot Plant”, December 6, 2014,

Exhibit 9
“LANL Settlement Agreement”, LANL Settlement Agreement and Stipulated Final Order HWB-14-20 (CO), January 22, 2016,

Exhibit 10
“WIPP Settlement Agreement”, WIPP Settlement Agreement and Stipulated Final Order HWB-14-21 (CO), January 22, 2016,

Exhibit 11
“2005 Consent Order”, LANL 2005 Compliance Order on Consent, March 5, 2005,

Exhibit 12
“2016 Consent Order”, LANL 2005 Compliance Order on Consent, June 26, 2016,