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## **Exhibit D**

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**to the**

Declaration of Timothy A. Dolan in Support of  
Defendant Los Alamos National Security, LLC's  
Request for Judicial Notice in Support of  
Defendant Los Alamos National Security, LLC's  
Motions to Dismiss Plaintiff's First Amended Complaint  
or Alternatively for Court Abstention



May 31, 2016

Ms. Kathryn Roberts  
New Mexico Environment Department  
Post Office Box 5469  
Santa Fe, New Mexico 87502

*Via email to [kathryn.roberts@state.nm.us](mailto:kathryn.roberts@state.nm.us)*

Dear Ms. Roberts:

As you know, Nuclear Watch New Mexico closely follows cleanup issues at the Los Alamos National Laboratory (LANL). Our mission statement includes citizen action to promote environmental protection and cleanup at nuclear facilities. We have been an active participant in hazardous waste management and cleanup issues at the Laboratory. We have advocated for increased cleanup funding for over fifteen years. We provided technical and procedural comments on two drafts of the original Consent Order, which went into effect in March 2005 (modified October 2012). We also participated in the LANL Hazardous Waste Permit negotiations and hearing during 2009 and 2010. Nuclear Watch is certain to remain strongly active in cleanup issues at the Lab.

Additionally, as private citizens we have often hiked, hunted, climbed and cross country skied in the canyons and on the cliffs around the Laboratory and in the adjacent Bandelier National Monument, Santa Fe National Forest and Valles Calderas National Preserve. As such, Nuclear Watch New Mexico clearly has strong standing in cleanup issues at LANL, and in particular any revised Consent Order governing cleanup at the Lab.

We urge the New Mexico Environment Department (NMED) to withdraw its proposed 2016 Compliance Order on Consent ("Consent Order") governing cleanup at the Los Alamos National Laboratory (LANL), released for public comment on March 30, 2016. If implemented, the revised Consent Order will almost certainly create serious barriers to achieving cleanup, especially given the Lab's known opposition to full and complete cleanup. In addition, the proposed revised Consent Order limits public participation opportunities; undermines enforceability by the Environment Department; puts the Department of Energy (DOE) in the driver's seat; and lacks a final milestone compliance date. The proposed 2016 Consent Order is potentially a giant step backwards if the goal is to achieve genuine, comprehensive cleanup at LANL.

Instead, the Environment Department should basically keep the existing Consent Order that went into effect March 1, 2005, modified as needed with new realistic milestone compliance dates. Section XII of the 2005 Consent Order established dozens of mandatory deadlines for the completion of corrective action cleanup tasks, including completion of investigations at individual sites, installation of groundwater monitoring wells, submittal of groundwater

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monitoring reports, evaluation of remedial alternatives for individual sites, and completion of final cleanup remedies. These deadlines were enforceable under section III.G of the 2005 Consent Order.

As explained in these comments, in our view the New Mexico Environment Department has preemptively surrendered enforcement power to DOE, particularly through allowing a giant loophole whereby the Energy Department and the Lab can simply plead that they don't have enough money for cleanup. This is the direct opposite of the original 2005 Consent Order, whose underlying intent was to make DOE and LANL ask Congress for additional funding for accelerated cleanup. This is particularly galling given that LANL is key to the trillion dollar rebuilding of nuclear forces as the premier nuclear weapons design lab and the nation's sole production site for plutonium pit triggers, the most critical nuclear weapons components. Funding for Department of Energy (DOE) nuclear weapons programs is nearly double historic Cold War averages, with around \$1.5 billion spent annually at LANL alone. In contrast, funding for Lab cleanup has been cut to \$189 million for FY 2017, with only approximately a sixth going to actual cleanup.<sup>1</sup>

The original 2005 Consent Order required DOE and LANL to investigate, characterize, and clean up hazardous and mixed radioactive contaminants from 70 years of nuclear weapons research and production. It also stipulated a detailed compliance schedule that the Lab was required to meet. Ironically, the last milestone, due December 6, 2015, required a report from LANL on how it successfully cleaned up Area G, its largest waste dump. However, real cleanup remains decades away, if ever. Instead, the Lab plans to "cap and cover" Area G, thereby creating a permanent nuclear waste dump in unlined pits and shafts, with an estimated 200,000 cubic yards of toxic and radioactive wastes buried above the regional groundwater aquifer, four miles uphill from the Rio Grande.

Nuclear Watch New Mexico asks that senior NMED management carefully consider all this, as Environment Department leadership will be gone in a few years, but a revised Consent Order will remain that is likely doomed to failure in compelling DOE and LANL to fully cleanup. That would be a real failure in leadership because genuine, comprehensive cleanup at LANL would be a real win-win for New Mexicans, permanently protecting the environment and our precious water resources while creating hundreds of high paying jobs (for more, see Attachment B).

Nuclear Watch urges the Environment Department to simply modify the 2005 Consent Order with updated Section XII cleanup schedules that provide realistic final milestone compliance dates. Long-range, concrete schedules are key to holding DOE and LANL accountable for cleanup and to incentivize increased funding for cleanup, contrary to the declining funding that we are now witnessing. Having said that, we are not advising that there be an end date to the Consent Order itself, as it is obvious that compliance milestones schedules will have to be periodically modified as cleanup remedies are selected and implemented, and/or new contamination discovered requiring cleanup, such as occurred with the chromium groundwater plume.

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<sup>1</sup> One-third of DOE Environmental Management funding goes to pensions, another third to safeguard improperly treated radioactive waste barrels, one of which ruptured and closed the multi-billion dollar Waste Isolation Pilot Plant, and overhead takes more than half of the remaining third. Thus only one-sixth or less of available "cleanup" funding actually goes to cleanup.

Nuclear Watch also formally requests that NMED hold a public hearing on any revised Consent Order, as required by the New Mexico Hazardous Waste Act (NMSA 1978, §§ 74-4-1 to 14) and the federal Resource Conservation and Recovery Act (RCRA) (40 CFR §270.42, Appendix I.A.5.b.) Please note that our position is that NMED is legally required to hold that public hearing in the event that there are unresolved issues between interested parties, as we believe there surely will be at this point in time. Our basis for saying that is that these requirements were explicitly incorporated into the 2005 Consent Order. We also communicated this directly to NMED Secretary Ryan Flynn long before the draft revised Consent Order was released, in a letter dated September 21, 2016, to which we never received a written reply (that letter is incorporated into these comments as Attachment A).<sup>2</sup>

If NMED goes on to approve the new Consent Order, we believe it will then be violating the legal requirements of the 2005 Consent Order by not implementing its public participation requirements. A substantially revised Consent Order is clearly a “major modification” in the legal sense, which in turn triggers required public participation requirements.

Finally, the public participation requirements that were incorporated in to the 2005 Consent Order should be incorporated into any revised Consent Order as well.

## **GENERAL COMMENTS**

### **Don't Put DOE in the Driver's Seat**

The revised Consent Order as proposed is a giveaway to the Department of Energy and LANL who created the mess to begin because it lacks enforceability and puts DOE in the driver's seat. Examples from the draft Consent Order are:

P. 27: “Milestones scheduled for the current fiscal year are enforceable and subject to Stipulated penalties under Section XXXXV (Stipulated Penalties); targets are not enforceable and not subject to stipulated penalties.”

This is absurd to have enforceable milestones for only one year, when we all know that any genuine cleanup of LANL will take decades. It is also wrong to not hold DOE's feet to the fire over the long term when the Department has a terrible record of meeting long-term cleanup goals (and everything else, for that matter). Rather than abjectly surrender to that fact, any new Consent Order should be tough with DOE and simply enforce compliance (including with the use of stipulated penalties) with a detailed long-term compliance milestones schedule. There is a reason that DOE has been on the Government Accountability Office's High Risk List for 25 consecutive years, and it is simply not to be trusted. To propose milestones that are enforceable for only one year followed by unenforceable targets smacks of being a divide and conquer strategy to avoid comprehensive cleanup.

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<sup>2</sup> Letter to NMED Secretary Ryan Flynn, Nuclear Watch New Mexico, September 21, 2016, [http://www.nukewatch.org/facts/nwd/NukeWatch-NMED-Consent\\_Order\\_9-21-15.pdf](http://www.nukewatch.org/facts/nwd/NukeWatch-NMED-Consent_Order_9-21-15.pdf)

Our recommendation is to strike this provision and replace it with a long-term compliance schedule that is robustly enforced by NMED. Those milestone dates can be adjusted or added to as needed, with the proviso that there be meaningful public participation while doing so.

P. 27: “The Parties agree that DOE’s project’s plans and tools will be used to identify proposed milestones and targets.”

This is entirely wrong and clearly puts DOE in the driver’s seat. Our recommendation is to strike this provision and replace it with a provision that DOE can propose project’s plans and tools, which NMED may or may not approve. We also want to see unenforceable “targets” eliminated (what good are they anyway?), to be replaced by long term, enforceable compliance milestone schedules.

P. 28: “DOE shall update the milestones and targets in Appendix B on an annual basis, accounting for such factors as, for example, actual work progress, changed conditions, and changes in anticipated funding levels. This is called the annual planning process.”

What does that mean? How is that a “planning process,” other than a prescription for DOE and LANL to get out of cleanup? “Actual work progress” is usually far slower than wanted, (witness the 2005 Consent Order). So does this “planning process” then condone lack of cleanup? How is it that DOE updates the milestones and target? It should instead be NMED that updates enforceable long-term milestones (again, eliminate “targets”).

Perhaps the worst flaw of all in the proposed Consent Order is to empower DOE to update milestones according to anticipated funding levels. This is a prescription for failed cleanup, when DOE’s track record already demonstrates declining cleanup funding for LANL, while funding for the Lab’s nuclear weapons programs that caused the mess to begin with continues to climb. This is also true across the nuclear weapons complex, to us a clear *quid pro quo*, that is cuts to cleanup, nonproliferation and dismantlement programs to help pay for increased nuclear weapons research and production programs.

Our recommendation is to completely delink the Consent Order from DOE cleanup budgets. Costs and budgets are DOE’s problem. Go back to the original intent of the 2005 Consent Order, which was to make DOE and LANL get the money from Congress for accelerated cleanup. Enforce it with the vigorous use of stipulated penalties, with no milestone compliance extensions granted other than for trues cases of *force majeure*. Get DOE out of updating milestones (and eliminate “targets”), which NMED should be doing anyway.<sup>3</sup>

p. 29: “...the DAMs [Designated Agency Managers] shall meet to discuss the appropriation and any necessary revision to the forecast, e.g. DOE did not receive adequate appropriations from Congress...”

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<sup>3</sup> Being mindful of NMED’s own budget and resource constraints, it would be acceptable to us to have DOE propose milestones which NMED then stringently oversees. But NMED should make sure that DOE pays for NMED’s time in that oversight.

Again, this is the Consent Order being held hostage to DOE funding. Instead, NMED should completely revamp the proposed Consent Order to eliminate any link to DOE funding. Use the Consent Order to make DOE go get additional cleanup funding.

p. 31: “DOE shall define the use of screening levels and cleanup levels at a site...”

This again indicates that DOE is in the driver’s seat. It is acceptable that DOE proposes “screening levels and cleanup levels at a site,” but it must be made explicitly clear that NMED has final decision-making authority.

p. 33: “If attainment of established cleanup objectives is demonstrated to be technically infeasible, DOE may perform risk-based alternative cleanup objectives...”

This is a giant loophole that needs to be closed. The criteria for technically infeasible must strictly defined so that DOE doesn’t get an easy out. Also estimated cost should not be a factor in determining technical feasibility (see immediately below).

P. 34: “For all other instances in which DOE seeks to vary from a cleanup objective identified above, DOE shall submit a demonstration to NMED that achievement of the cleanup objective is impracticable. In making such demonstration, DOE may consider such things as technical difficulty or physical impracticability of the project, the effectiveness of proposed solutions, the cost of the project, hazards to workers or to the public, and any other basis that may support a finding of impracticability at a particular SWMU(s) and/or AOC(s).”

The new Consent Order should be delinked from costs. In our view, DOE lowballs projects when it wants to do them (for example, the Chemistry and Metallurgy Research Replacement Project at LANL, the Uranium Processing Facility at the Y-12 Plant, the National Ignition Facility at the Livermore Lab, the failed MOX Fuel Fabrication Facility at the Savannah River Site, etc., etc.). But DOE highballs projects that it doesn’t want to do, such as cleanup of the Lab’s biggest radioactive and hazardous waste dump, Area G. In short, LANL estimated full exhumation and cleanup of Area G would cost \$29 billion, a clearly impossible cost. But our own cost comparison based on hard costs from cleaning up MDAs B and C is \$6-7 billion, which would still provide hundreds of high paying jobs for New Mexicans. (See our cost comparison at Appendix C.)

NMED’s responsibility is to make sure that New Mexicans and the environment and our precious water resources are protected, and not to accommodate DOE’s funding priorities. Cleanup costs are DOE problems that DOE caused to begin with. Claims of poverty in cleanup funding are mighty hard to swallow when nuclear weapons programs are awash in taxpayers’ cash. To repeat yet once again, promulgate a Consent Order with updated compliance milestones that are fully enforceable with the vigorous use of stipulated penalties. Make DOE and LANL go out and get the money for accelerated cleanup. Protect the homeland by cleaning it up!

More generally, the proposed Consent Order is replete with “should.” “Shoulds” must be “shalls”, otherwise DOE is in the driver’s seat and genuine, comprehensive cleanup won’t be accomplished at LANL.



### **Draft RFP Shows that DOE Already Agrees with Proposed Consent Order**

On May 26, 2016, DOE posted a Draft Request for Proposals (RFP) of the Los Alamos Legacy Cleanup Contract (LLCC) for review. The proposed 2016 Consent Order is the guts of the draft RFP. As the DOE document states that the “draft 2016 Consent Order is the contract requirement that all Offerors shall propose to and comply with...” (Pg. C-2) At the very least, it’s premature for DOE to request bidders to frame a work proposal centered on a Consent Order that is still draft. What is DOE’s rush? We think the answer lies in just how favorable the proposed Consent Order is to DOE. This evidence of how badly DOE wants it.

A quick review of the “Campaigns” sections in both the draft RFP and the proposed Consent Order show them to be nearly identical in exact language. (The DOE RFP’s *Attachment J-8 Campaign Cross Walk to PWS Sections* is incorporated into our comments as Attachment D.) DOE does not caution that this information was taken from a draft document and is still far from approval.

Or is it far from approval? DOE’s speed and use of nearly identical language makes it difficult for us to believe that there has been no closed door negotiations between NMED and DOE over the proposed Consent Order. On numerous occasions, the draft RFP refers to specific sections of the proposed Consent Order. For example the draft RFP states, “The most significant requirement[s] for monitoring groundwater are identified in the 2016 Consent Order, Section XII, *Groundwater Monitoring*.” (Pg. C-58) For the most part, the draft RFP does not use the word ‘draft’ when referring to the proposed 2016 Consent Order.

So, it feels as if the proposed 2016 Consent Order is a done deal and that public comments will have little impact. DOE is all in and ready to move on the 2016 Consent Order, precisely because it is so advantageous to it and LANL. Now they can get it on with the real business of producing new nuclear weapons for they are already calling the Second Nuclear Age before they have cleaned up from the first nuclear age, while just meeting the procedural hurdles of a gutted Consent Order. Would DOE waste a bunch of contractors’ time working on a bid for proposed Consent Order work that will substantially change after public comments? We think not.

### **The Fatal Flaw of the Proposed Consent Order Is Immediately Evident**

On May 26, 2016, DOE released a press release, “*DOE Releases Draft Request for Proposal for Los Alamos Legacy Cleanup Contract*” which stated, “The total estimated value of the contract is approximately \$1.7B over the prospective ten-year period of performance...”  
<http://energy.gov/em/articles/doe-releases-draft-request-proposal-los-alamos-legacy-cleanup-contract>

This averages to \$170 million per year, but the current proposed cleanup budget for Los Alamos is \$189M for FY 2017. So it appears that, before it is even signed, the proposed 2016 Consent Order has failed to increase the cleanup budget for the next ten years. There is no mechanism spelled out in the proposed 2016 Consent Order to increase, or to even maintain, an annual budget. The whole ‘Annual Planning Process’ laid out in the proposed 2016 Consent Order must be scrapped, as it is a fatal flaw to achieving comprehensive cleanup at Los Alamos National Laboratory. As we have repeatedly stated, this is directly opposite to the intent of the original 2005 Consent Order, which was to make DOE and LANL get more money from Congress for accelerated, comprehensive cleanup.

### **SPECIFIC COMMENTS**

#### **NMED leadership should refrain from saying that the 2005 Consent Order didn't work.**

- How could it work when that same leadership granted more than 150 time extensions for compliance milestones? Saying that the 2005 Consent Order didn't work must not be used as an excuse to grant DOE and LANL a new Consent Order that preemptively surrenders enforcement authority. That clearly won't work if the goal is to compel genuine, comprehensive cleanup at LANL.

#### **NMED Must Add Los Alamos National Security, LLC (LANS), the management contractor at LANL, as a Party**

- The proposed 2016 draft Consent Order omits naming LANS, a limited liability corporation, and management contractor at LANL, as a Party to the Order.

#### **The opportunity for a public hearing must be provided**

- Any extension of a final compliance date must be treated as a Class 3 permit modification to the 2005 Consent Order and therefore requires a 60-day public comment period.
- Any extension of a final compliance date under the 2005 Consent Order can be implemented only after the opportunity for public comment and a public hearing, including formal testimony and cross-examination of witnesses.
- The Environment Department is legally required to follow these public participation requirements that explicitly incorporated into the 2005 Consent Order.
- All issues raised in these comments are subject for a public hearing if there are unresolved issues (as we anticipate there will be).

#### **Withdraw the proposed draft 2016 Consent Order**

- The proposed draft represents a big step backwards in achieving the goal of genuine cleanup of the Laboratory.
- The Environment Department should keep the current 2005 Consent Order and revise the Section XII cleanup schedule and final compliance date.
- We request that the Environment Department withdraw the proposed draft 2016 Consent Order.

#### **The public deserves the opportunity to comment on all following drafts**

- It seems likely that a later draft – after the Lab's and public comments are incorporated into a revised draft – and after closed-door negotiations between the Environment Department and the Laboratory – could be substantially different from the current draft. Our fears are magnified by the fact that the recently released DOE RFP for the LANL cleanup contract so closely mirrors the draft revised Consent Order, which cannot be coincidental.
- We request that the public have the opportunity to review and comment on any further drafts of a revised proposed 2016 Consent Order.



**Public participation provisions in the existing 2005 Consent Order must be incorporated into the proposed draft 2016 Consent Order**

- The proposed draft 2016 Consent Order explicitly limits public participation requirements incorporated into the existing 2005 Consent Order.
- We request that all notices, milestones, targets, annual negotiations, and modifications require public review and comment, and the opportunity for a public hearing.

**The current state of cleanup must be updated and next steps scheduled**

- Work under the existing 2005 Consent Order needs to be subject to public review. In 2005 DOE agreed to complete cleanup under the Consent Order by December 6, 2015, which did not happen. In order for the public to understand where the work under the existing Consent Order stands, LANL should be required to provide a current, publicly available list of the status of all cleanup projects under the 2005 Consent Order.
- Further, we request that next steps for cleanup at every site listed in the 2005 Consent Order be documented in detail and given a scheduled completion date, or alternatively verified as already completed.
- All documents submitted under the 2005 Consent Order must be incorporated into any revised Consent Order.

**All documents must be made public as required in the 2005 Consent Order**

- The State and the Lab must make all communications, documents, submittals, approvals, notices of deficiencies and denials under any revised Consent Order readily and electronically available to the public.
- The State and the Lab must notify individuals by e-mail of all submittals, as required in the 2005 Consent Order.

**The Environment Department must respond in writing to all public comments**

- We request that the Environment Department reply individually to each and every comment submitted.
- The Lab's comments and NMED's response to comments must be made public through LANL's Electronic Public Reading Room at <http://epr.lanl.gov/oppie/service>.

**All future work must have enforceable deadlines**

- The proposed 2016 Consent Order eliminates all the deadlines for completing cleanup as required by the 2005 Consent Order. It replaces the deadlines with an open-ended and vague scheduling process, with limited enforcement opportunities.
- The proposed 2016 Consent Order proposes a "campaign" approach with enforceable cleanup deadlines limited to the work scheduled only for that year, thereby ensuring that it would be open-ended without a final compliance date.
- Campaign deadlines would be negotiated each year between NMED and DOE and LANL with no public participation, no opportunity to comment on the proposed deadlines, nor a required public hearing. That is wrong. Any revised Consent Order should contain strong public input provisions for the selection of campaign targets and deadlines.
- The revised Consent Order must ensure that all scheduled cleanup work has mandatory completion dates, which must be enforced by NMED.
- The annual schedule would be up to DOE's discretion, rather than the schedule driving the funding appropriated by Congress, which is the fundamental approach of the 2005 Consent Order.

### **New Mexico Attorney General Approval Must Be Obtained**

- The 2005 Consent Order was signed by the Attorney General of New Mexico for purposes of the Section III Covenant Not to Sue and the Reservation of Rights provisions.
- The proposed 2016 Consent Order provided the State of New Mexico with a covenant not to sue DOE on behalf of the State of New Mexico, not merely on behalf of the Environment Department. Nevertheless, there is no signature line for the New Mexico Attorney General in the proposed 2016 Consent Order. The Attorney General was an active participant, representing the People of New Mexico, in the 2005 Consent Order.
- The Environment Department must ensure that the New Mexico Attorney General is consulted, and his approval obtained, before any Consent Order is finalized.

### **Cleanup Levels Must Remain Strict**

- Section IX *Cleanup Objectives and Cleanup Levels* of the proposed 2016 Consent Order would allow DOE to “develop site specific ecological cleanup levels” to mitigate unacceptable ecological risk due to release of site-related contaminants.
- There is no mention of NMED’s role in this process. DOE would be allowed to demonstrate to NMED that any particular “cleanup objective is impracticable.”
- The criteria for DOE to determine whether a cleanup is “impracticable, include technical difficulty, the cost of the project, hazards to workers or to the public, and any other basis that may support a finding of impracticability.
- If NMED approves the impracticability request, DOE can then propose alternative cleanup methods using site-specific risk assessments. All of the decision-making could take place behind closed doors, as there are no public participation requirements in this section.
- NMED must specify what cleanup levels will be used and when and where they will be applied.

### **The Consent Order cannot be open-ended**

- The proposed 2016 consent order would indefinitely extend the final compliance date for completing corrective action at the Laboratory, without the opportunity for a public hearing with formal testimony and cross-examination of witnesses.
- Any Consent Order for LANL cleanup must have a final compliance date to which both NMED and DOE and LANS agree to and are so bound.
- NMED must provide a 60-day public review and comment period, in addition to an opportunity for a public hearing about changes to Section XII of the 2005 Consent Order and the new final compliance date as required by state and federal regulations. See 40 CFR §270.42, Appendix I.A.5.b.

### **Existing Violations Must Not Be Eliminated**

- Section II.A of the proposed 2016 Consent Order would “settle any outstanding violations of the 2005 Consent Order.” This is a get out of jail free card. Without enforceable schedules, any consent order is not enforceable. The Environment Department is abdicating its responsibility to protect human health and the environment as required by the federal RCRA and the New Mexico Hazardous Waste Act.
- NMED must not surrender its regulatory and enforcement powers.

### **New Mexico Attorney General Approval Must Be Obtained**

- The 2005 Consent Order was signed by the Attorney General of New Mexico for purposes of the Section III Covenant Not to Sue and the Reservation of Rights provisions.
- The proposed 2016 Consent Order provided the State of New Mexico with a covenant not to sue DOE on behalf of the State of New Mexico, not merely on behalf of the Environment Department. Nevertheless, there is no signature line for the New Mexico Attorney General in the proposed 2016 Consent Order. The Attorney General was an active participant, representing the People of New Mexico, in the 2005 Consent Order.
- The Environment Department must ensure that the New Mexico Attorney General is consulted, and his approval obtained, before any Consent Order is finalized.

### **The Proposed 2016 Consent Order Must Not Extend the Original Final Compliance Date Without Required Public Participation**

The proposed 2016 consent order would indefinitely extend the final compliance date for completing corrective action at the Laboratory, without the opportunity for a public hearing with formal testimony and cross-examination of witnesses. Any extension of a final compliance date under the 2005 Consent Order requires a 60-day public comment period and the opportunity for a public hearing, including formal testimony and cross-examination. The Environment Department is legally required to follow these procedural requirements.

The legal requirements that mandate a public hearing are clear. Section XII of the 2005 Consent Order establishes the compliance schedule for implementation and completion of corrective actions at specific sites at the Laboratory. This schedule is mandatory. The final report that was to be submitted under the 2005 Consent Order – therefore, the final compliance date – was the remedy completion report for the huge Area G waste dump, required to be submitted by December 6, 2015. The proposed 2016 Consent Order would indefinitely extend this final compliance date by not designating a specific final compliance date.

But this revision must be treated as a major Class 3 permit modification. Section III.W.5 of the 2005 Consent Order explicitly provides for the preservation of full procedural rights for the public as follows:

This Consent Order hereby incorporates all rights, procedures and other protections afforded the Respondents [DOE and UC, now LANS] and the public pursuant to the regulations at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42) and 20.4.1.901 NMAC, including, but not limited to, opportunities for public participation, including public notice and comment, administrative hearings, and judicial appeals concerning, for example, remedy selection decisions of the [Environment] Department.

Thus, extension of a final compliance date under the 2005 Consent Order requires a 60-day public comment period and the opportunity for a public hearing, including formal testimony and cross-examination.

### **The Proposed New Consent Order Must Not Limit Other Public Participation Procedures**

The proposed 2016 Consent Order expressly limits public participation requirements in a way that completely diverges from those provided in the 2005 Consent Order. As explained above, the 2005 Consent Order explicitly protects procedural due process rights available to the public. The proposed 2016 Consent Order explicitly removes these protections, as follows:

The Parties agree that the rights, procedures and other protections set forth at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42), 20.4.1.901 NMAC, and 20.4.1.902 NMAC, including, but not limited to, opportunities for public participation, including public notice and comment, administrative hearings, and judicial appeals, *do not apply* to modification of the Consent Order itself. *[Emphasis added]*

Thus, as proposed in the above language, the Parties (the Environment Department, Department of Energy and Los Alamos National Security, LLC) have inappropriately agreed to remove the due process rights, procedures and other protections provided to the public under the Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act. This provision must be stripped from the proposed 2016 Consent Order.

### **The Proposed New Consent Order Must Not Eliminate Enforceable Deadlines**

The proposed 2016 consent order would eliminate all the deadlines for completing cleanup under the 2005 Consent Order, and replace them with an open-ended and vague scheduling process, with limited enforcement opportunities.

The 2005 Consent Order, in Section XII, established dozens of deadlines for the completion of corrective action tasks, including completion of investigations at individual sites, installation of groundwater monitoring wells, submittal of groundwater monitoring reports, evaluation of remedial alternatives for individual sites, and completion of final remedies. These deadlines are enforceable under section III.G.

The proposed 2016 Consent Order would abandon the 2005 Consent Order provisions and replace them with a so-called “Campaign Approach” under Section VIII. Under Section VIII.A.3, it would be up to the DOE, not the regulator at the New Mexico Environment Department, to select the timing and scope of each “campaign.”

Enforceable deadlines for cleanup tasks would apply no more than one year into the future. Deadlines would be based on “Campaigns” negotiated each year with DOE with no public participation and opportunity to comment on the schedule. To add insult to injury, the annual schedule would be determined by funding at DOE’s discretion, rather than the schedule driving the funding, which was the fundamental approach of the 2005 Consent Order.

All cleanup projects must mandatory completion dates scheduled from the beginning date of any revised Consent Order, and must be fully enforceable.

### **Existing Violations Must Not Be Eliminated**

Section II.A of the proposed 2016 Consent Order would “settle any outstanding violations of the 2005 Consent Order.” This is a get out of jail free card. Without enforceable schedules from the beginning, any consent order is not truly unenforceable, and the Environment Department would be abdicating its responsibility to protect human health and the environment as required by the federal Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act. NMED must not surrender its regulatory and enforcement powers!

### **Attorney General Approval Must Be Obtained**

The 2005 Consent Order was signed by the Attorney General of New Mexico for purposes of the Covenant Not to Sue (section III.) and the Reservation of Rights (section III.). As indicated on the draft signature page, there is no indication of the NM Attorney General plans to sign the proposed 2016 Consent Order. Yet it would provide the State of New Mexico with a

covenant not to sue DOE on behalf of the State of New Mexico, not merely on behalf of the Environment Department. The Attorney General was an active participant, representing the People of New Mexico, in the 2005 Consent Order. The Environment Department has a responsibility to ensure that the NM Attorney General is consulted, and his approval obtained, before any consent order is adopted.

### **The Proposed 2016 Consent Order Must Not Omit Detailed Requirements Found in the 2005 Consent Order**

The 2005 Consent Order includes numerous detailed requirements for such things as well installation, sample collection, and preparation of work plans and reports. These ensure that the cleanup work is done properly, consistently, and according to standard industry practices. They also ensured that work plans and reports were consistent, easy for the Environment Department to review, and easy for the public to understand. The proposed 2016 Consent Order omits many such requirements, which should be corrected.

### **The Proposed 2016 Consent Order Must Not Allow Budget To Dictate Cleanup**

The proposed 2016 Consent Order allows DOE to provide cleanup priorities based on anticipated budget, which is backwards. . By the time NMED receives an estimated annual cleanup budget from DOE, the horse has left the barn. The original purpose of the 2005 Consent Order was to compel DOE and LANL to ask Congress for additional funds to accelerate cleanup. The giant loophole in the proposed 2016 Consent Order that allows DOE and LANL to say that they don't have sufficient funding and therefore can choose to exempt themselves from cleanup should be eliminated.

### **Cleanup Levels Must Remain Strict**

Section IX Cleanup Objectives and Cleanup Levels of the proposed 2016 Consent Order would allow DOE to “develop site specific ecological cleanup levels” to mitigate unacceptable ecological risk due to release of site-related contaminants. There is no mention of NMED’s role in this process. DOE would be allowed to demonstrate to NMED that any particular “cleanup objective is impracticable.” To do this, DOE may consider such things as technical difficulty, the cost of the project, hazards to workers or to the public, and any other basis that may support a finding of impracticability. If NMED approves the impracticability request, DOE can then propose alternative cleanup methods using site-specific risk assessments. All of this could take place behind closed doors, as there are no public participation requirements in this section. Please clarify what cleanup levels will be used and when and where they will be applied.

### **List of Acronyms**

- All acronyms must be listed
  - IM?
  - ACA?
  - RFI?
  - Admin – Cmplt SIR?

### **Appendix A**

#### **Solid Waste Management Unit/Area Of Concern List**

- The list is incomplete – all areas must be included.
  - Example - Include MDA G - CME Submitted to NMED
- Where are the Aggregate Areas?



- All acronyms must be listed.
  - IM?
  - ACA?
  - RFI?
  - Admin – Cmplt SIR?

## **Appendix B**

### **Milestones And Targets**

- All items of all Campaigns must have enforceable, long-term dates. If “targets” are not enforceable eliminate them and turn them into enforceable long-term compliance milestones.

## **Appendix C**

### **Future Campaigns**

- All Campaigns must have enforceable dates.

## **Appendix D**

### **Document Review/Comment And Revision Schedule**

- What happens if schedule is missed must be stated.
- What happens if more Review/Revise cycles are needed must be stated.

## **Appendix E**

### **Document Templates**

- Change “shoulds” to “shalls.”
- “Guidance” that relies on “should” is not really regulation.
- What happens if DOE should not want to do something?
- Appendix is not searchable.

## **Appendix F**

### **Sampling/Analytical/Field Method**

#### **Regulatory Guidance**

- Too many “shoulds” – use “shall.”
- “Guidance” that relies on “should” is not really regulation.
- What happens if DOE should not want to do something?
- Appendix is not searchable.

## **New Mexico deserves better**

In closing, the Environment Department’s proposed 2016 Consent Order allows the federal government to leave Northern New Mexico contaminated if DOE believes that cleanup is too difficult or costly– a sorry situation indeed for a nuclear weapons facility that receives over 2 billion taxpayer dollars a year. Instead, the New Mexico Environment Department should implement a new revised Consent Order that is aggressive and enforceable and in which the



State of New Mexico stays in the driver's seat, not LANL and DOE. That would be a real win-win for New Mexicans, helping to permanently protect the environment and our precious water resources while creating hundreds of high-paying cleanup jobs.

These comments respectfully submitted,

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