



January 20, 2016

BY CERTIFIED MAIL RETURN RECEIPT REQUESTED TO:

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, D.C. 20460

Hector H. Balderas
New Mexico Attorney General
Paul G. Bardacke Complex
408 Galisteo Street
Santa Fe, New Mexico 87501-2645

Dr. Ernest Moniz, Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

Kimberly Davis Lebak, Manager
Los Alamos Field Office, U.S. DOE
3747 West Jemez Road, MS A316
Los Alamos, New Mexico 87544

Charles F. McMillan, Director
Los Alamos National Laboratory
P.O. Box 1663, MS K499
Los Alamos, New Mexico 87545

Re: Notice of Violation Pursuant to §7002 of the Resource Conservation and Recovery Act
Los Alamos National Laboratory

Dear Administrator McCarthy, Attorney General Balderas, Secretary Moniz, Ms. Lebak, and
Mr. McMillan:

This letter is to provide you with formal notice, on behalf of Nuclear Watch New Mexico, that the United States Department of Energy ("DOE") and Los Alamos National Security LLC ("LANS") are in violation of one or more permits, standards, regulations, conditions, requirements, prohibitions, or orders that became effective pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 to 6976, as more fully described below. The violation has occurred, and continues to occur, at Los Alamos National Laboratory in Los Alamos, New Mexico.

This notice is provided pursuant to §7002(b)(1)(A) of RCRA, 42 U.S.C. §6972(b)(1)(A). Nuclear Watch New Mexico may commence a legal action in federal district court against the United States Department of Energy and Los Alamos National Security under section 7002(a)(1)(A) of RCRA, 42 U.S.C. §6972(a)(1)(A), seeking civil penalties and injunctive relief to address the violation under sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§6928(g), 6972(a).

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Specifically, DOE and LANS are in violation of the March 1, 2005 Compliance Order on Consent (“Consent Order”) issued by the New Mexico Environment Department and consented to by DOE and the University of California (predecessor to LANS), and State and Federal regulations governing corrective action for releases of hazardous waste and hazardous waste constituents into the environment. The Consent Order requires DOE and LANS to implement corrective action to investigate, characterize, and clean up hazardous waste, hazardous constituents, and other contaminants released into the environment from the Laboratory over its years of operations. As noted in section III.A of the Consent Order, corrective action for releases of hazardous waste or hazardous waste constituents is required under sections 3004(u) and (v) and 3008(h) of RCRA, 42 U.S.C. §§6924(u) and (v) and 6928(h); the New Mexico Hazardous Waste Act, NMSA 1978, §§74-4-4(A)(5)(h) and (i), 74-4-4.2(B), and 74-4-10(E); the federal hazardous waste regulations at 40 C.F.R. Part 264, subpart F; and the New Mexico hazardous waste regulations at section 20.4.1.500 NMAC, which incorporate by reference the federal regulations.

Section XII of the Consent Order (as revised October 29, 2012) establishes the compliance schedule for implementation and completion of the corrective action. This schedule is mandatory. The opening paragraph to section XII provides that “[t]he Respondents [DOE and, now, LANS] *shall* follow the specified compliance schedules” for all of the corrective action tasks included in the order (emphasis added). Within section XII, Tables XII-2 and XII-3 set forth the compliance schedules for the submission of the work plans, reports, and other deliverables that must be submitted to the Environment Department for review and approval. Many of the reports are to be submitted after a significant task under the Consent Order has been completed. Most importantly, the final report that is to be submitted under the Consent Order, which signifies completion of all corrective action, is the remedy completion report for MDA G.¹ In accordance with Tables XII-2 and XII-3, it was to be submitted by December 6, 2015.

As of the date of this letter, DOE and LANS have not submitted the remedy completion report for MDA G to the Environment Department. As of the date of this letter, DOE and LANS have not even begun to implement a remedy for MDA G.

Under section III.J.2 of the Consent Order, DOE and LANS may seek an extension of time in which to perform a requirement of this Consent Order upon a showing of good cause, and the Environment Department may grant such a request. DOE and LANS must make their request to the Environment Department in writing. As of the date of this letter, an extension of time on the December 6, 2015 compliance schedule for submission of the remedy completion report for MDA G has neither been requested nor been granted. Moreover, any request for an extension of this deadline would be subject to an opportunity for a public hearing.

The Consent Order, in section III.W.5, provides for the preservation of full procedural rights, both for DOE and LANS and for the public:

¹ “MDA” in the Laboratory’s nomenclature refers to a “Material Disposal Area.”

This Consent Order hereby incorporates all rights, procedures and other protections afforded the Respondents 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 Department.

The federal regulations at 40 C.F.R. §270.42, Appendix 1 A, which are incorporated into the New Mexico regulations at 20.4.1.900 NMAC, establish the public participation procedures for various types of permit modifications. These regulations require a “Class 3” permit modification for an extension of a final compliance date. 40 C.F.R. §270.42, Appendix 1 A.5.b. Under 40 C.F.R §270.42(c), incorporated by 20.4.1.900 NMAC, a Class 3 permit modification can be made only after the opportunity for a public meeting. Moreover, the New Mexico Hazardous Waste Act specifies that prior to the issuance of a “major modification” to a permit, the Environment Department must afford “an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.” NMSA 1978, §74-4-4.2(H) (2006). Further, the State regulations make clear that a “major modification” is the same thing as a “Class 3” modification. 20.4.1.901.B(6) NMAC.

Because the Consent Order contains the corrective action requirements that are typically in a permit, the Consent Order expressly adopted these public participation requirements in section III.W.5. Extension of a final compliance date under the Consent Order requires the opportunity for a public hearing. Thus, to extend the final December 6, 2015 deadline, DOE and LANS must submit to the Environment Department a written request for a Class 3 permit modification in accordance with 40 C.F.R §270.42(c), incorporated by 20.4.1.900 NMAC.

Consequently, DOE and LANS are liable for civil penalties and injunctive relief in an action brought by Nuclear Watch New Mexico to address the violation under section 7002(a)(1)(A) of RCRA. That section provides that “any person may commence a civil action on his own behalf”:

[A]gainst any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.

42 U.S.C. §6972(a)(1)(A). Moreover, under section III.U of the Consent Order, the State of New Mexico expressly asserts that the Consent Order is enforceable under section 7002(a)(1)(A) of RCRA.

Nuclear Watch New Mexico has the authority to bring an action under RCRA. Nuclear Watch New Mexico is a project of the Southwest Research and Information Center, a not-for-profit corporation organized under the laws of the State of New Mexico and a “person” within the meaning of sections 1004(15) and 7002(a) of RCRA, 42 U.S.C. §§6903(15), 6972(a). Nuclear Watch New Mexico also has standing to bring an action in federal court under section 7002(a)(1)(A) of RCRA. The mission statement of Nuclear Watch New Mexico includes citizen action to promote environmental protection and cleanup at nuclear facilities. Nuclear Watch New Mexico has been an active participant in hazardous waste management and cleanup issues at the Laboratory. It submitted lengthy substantive comments on the public drafts of both the Consent Order and the unilateral order that preceded it. Nuclear Watch New Mexico also participated as a party in the 2010 public hearing on the hazardous waste facility permit for the Laboratory. Moreover, the executive director of Nuclear Watch New Mexico has a personal interest in cleanup of environmental contamination at the Laboratory. He is an avid hiker and rock climber, and he often enjoys these activities in the canyons and on the cliffs around the Laboratory, in the neighboring town of White Rock and in the adjacent Bandelier National Monument.

DOE and LANS are liable for the violation described above. Each of them is considered a “person” within the meaning of sections 1004(15) and 7002(a)(1)(A) of RCRA, 42 U.S.C. §§6903(15), 6972(a)(1)(A). DOE is the “owner” and DOE and LANS is each the “operator” of the Laboratory within the meaning of the hazardous waste regulations at 40 C.F.R. §261.10 (incorporated by 20.4.1.100 NMAC). Moreover, Congress has clearly and unambiguously waived the sovereign immunity of the United States – including DOE – in section 6001(a) of RCRA, 42 U.S.C. §6961(a).

The federal district court would have jurisdiction over this action under 28 U.S.C. §§1331 (federal question) and 1346 (United States as a defendant), and 42 U.S.C. §7002(a).

The name, address, and telephone number of the plaintiff in this matter are as follows:

Nuclear Watch New Mexico
903 West Alameda Street #325
Santa Fe, New Mexico 87501
(505) 989-7342

The names, addresses, and telephone numbers of the attorneys representing the plaintiff, Nuclear Watch New Mexico, in this matter are as follows:

Jonathan M. Block, Eric D. Jantz,
Douglas Meiklejohn, Jamie Park
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1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505-4074
(505) 989-9022

Lead counsel: Jonathan M. Block

If you have any questions regarding this notice, please call me at (505) 989-9022. We would be happy to meet with representatives of DOE, LANS, and the U.S. Department of Justice to discuss this matter, at their earliest convenience. Please let me know if you wish to schedule such a meeting.

Sincerely,



Jonathan M. Block
Staff Attorney

Copies by certified mail, return receipt requested, to:

Loretta Lynch, Attorney General of the United States
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Ron Curry, Regional Administrator
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