IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NUCLEAR WATCH NEW MEXICO,
Plaintiff,
v.

UNITED STATES DEPARTMENT OF ENERGY,
and

LOS ALAMOS NATIONAL SECURITY, LLC,
Defendants
and

NEW MEXICO ENVIRONMENT DEPARTMENT,
Intervenor

No. 1:16-cv-00433-JCH-SCY

SECOND AMENDED COMPLAINT

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiff Nuclear Watch New Mexico files this Second Amended Complaint, alleging as follows:

NATURE OF THE ACTION

1. This is a civil action pursuant to the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, against the United States Department of Energy ("DOE"), and Los Alamos National Security, LLC ("LANS"), under contract to the DOE as the co-operator with DOE of the Los Alamos National Laboratory ("LANL" or "the Laboratory"), Los Alamos County, New Mexico. The action also seeks a declaratory finding, pursuant to 28 U.S.C. § 2201 and the New Mexico Declaratory Judgment Act, §§ 44-6-1 to 44-6-15 NMSA 1978, that the Intervenor New Mexico Environment Department ("NMED") failed to follow public participation procedures required by the New Mexico Hazardous Waste Act ("HWA"), N.M. Stat. Ann. §§ 74-4-1 to 74-4-17, in entering into an administrative "Compliance Order on Consent" which became effective on June 24, 2016.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1346, 1367, and 2201, and 42 U.S.C. § 6972(a).

3. Venue is proper in the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1391(b), because the DOE and LANS conduct business in this district, the alleged violations occurred in this district, and the claims in this civil action arose in this district.

PARTIES

4. The Plaintiff in this action, 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. Nuclear Watch New Mexico is a "person" within the meaning of sections 1004(15) and 7002(a) of RCRA, 42 U.S.C. §§ 6903(15), 6972(a). 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. The executive director of Nuclear Watch New Mexico, Jay Coghlan, 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 and Santa Fe National Forest. Mr. Coghlan often rock climbed in a canyon just downstream of the Laboratory site until he learned that there were a variety of pollutants from LANL's legacy waste in the intermittent streambed. He no longer climbs there, as he believes that these pollutants are dangerous to his health. However, he would like to do so again. If this Court were to grant the

relief requested herein, LANL will conduct the remediation of legacy waste more quickly and on a more definite schedule, and Mr. Coghlan would in time be able to do so again without worry about the potential effects upon his health.

5. Defendant DOE is a department, agency, or instrumentality of the United States. DOE owns and operates LANL in Los Alamos County, New Mexico. DOE is a "person" within the meaning of sections 1004(15) and 7002(a) of RCRA, 42 U.S.C. §§ 6903(15), 6972(a).

6. Defendant LANS is a limited liability company organized under the laws of the State of Delaware. LANS operates LANL under a contract with the National Nuclear Security Administration ("NNSA"), the semi-autonomous nuclear weapons agency within the DOE. LANS is a "person" within the meaning of sections 1004(15) and 7002(a) of RCRA, 42 U.S.C. §§ 6903(15), 6972(a).

7. Intervenor NMED is a department within the executive branch of the State of New Mexico, N.M. Stat. Ann. § 9-7A-6(B)(3) (1991). NMED has responsibility to implement and enforce the HWA. On June 23, 2016, NMED moved to intervene in this case (Doc. #25). The Court granted the motion on June 23, 2016 (Doc. #26).

8. 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).

STATUTORY AND REGULATORY BACKGROUND

9. Congress passed RCRA in 1976 to provide nationwide protection against the dangers of improper hazardous waste disposal. RCRA is a comprehensive statutory scheme providing for the cradle-to-grave regulation of solid and hazardous wastes. Subtitle C of RCRA, 42 U.S.C. §§ 3001 to 3013 (subchapter III), addresses the regulation of hazardous waste.

10. RCRA section 1002(5) defines "hazardous waste," with certain exceptions, as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) may pose a serious risk to human health or the environment if not properly managed." 42 U.S.C. § 6903(5).

11. RCRA requires the United States Environmental Protection Agency ("EPA") to promulgate regulations for the management of hazardous wastes, including standards governing facilities that treat, store, or dispose of hazardous waste, "as may be necessary to protect human health and the environment." 42 U.S.C. § 6924.

12. RCRA, in section 3004(u) and (v), also provides that the standards must include corrective action, or cleanup, requirements for releases into the environment of hazardous waste or hazardous waste constituents. 42 U.S.C. § 6924(u), (v).

13. RCRA section 3005(a) provides that a hazardous waste treatment, storage, or disposal facility must have a permit, issued by EPA or an authorized state, in order to operate. 42 U.S.C. § 6925(a).

14. EPA has promulgated regulations setting standards for facilities that treat, store, or dispose of hazardous waste, 40 C.F.R pts. 264, 265 (2016); requiring corrective action for releases into the environment of hazardous waste and hazardous constituents, 40 C.F.R §§ 264.100, 264.101 (2016); and providing for permits for facilities that treat, store, or dispose of hazardous waste, 40 C.F.R pt. 270.

15. RCRA provides that EPA can authorize a state to administer and enforce its hazardous waste program "in lieu of the Federal program." 42 U.S.C. § 6926(b). An authorized

state can "issue and enforce permits for the storage, treatment, or disposal of hazardous waste." *Id.* To be authorized, a state program must be "equivalent to the Federal program," provide for "adequate enforcement," and meet other minimum criteria. *Id.*

16. The New Mexico Legislature enacted the New Mexico Hazardous Waste Act ("HWA") in 1978. N.M. Stat. Ann. §§ 74-4-1 to 74-4-14. The statute generally provides for state regulation of the generation, transportation, storage, treatment, and disposal of hazardous waste. N.M. Stat. Ann. §§ 74-4-4, 74-4-4.2, 74-4-4.3, 74-4-9, 74-4-10, 74-4-10.1.

17. The HWA is the state analogue of RCRA. The HWA was modeled on RCRA, it contains many provisions that are similar to those in RCRA, and it became effective pursuant to RCRA.

18. The HWA defines "hazardous waste," with certain exceptions, as "any solid waste or combination of solid wastes that because of their quantity, concentration[,] or physical, chemical[,] or infectious characteristics may: (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of[,] or otherwise managed." N.M. Stat. Ann. § 74-4-3(K) (2010).

19. The HWA requires the New Mexico Environmental Improvement Board to adopt rules for the management of hazardous waste, including performance standards applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste, as may be necessary to protect public health and the environment. N.M. Stat. Ann. §§ 74-4-4(A)(5) (2010). Such rules must be "equivalent to and no more stringent than federal regulations adopted by [EPA] pursuant to [RCRA], as amended." *Id.* § 74-4-4(A).

20. The HWA also provides that the standards must include requirements for the taking of corrective action for all releases of hazardous waste or hazardous constituents from a solid waste management unit at a treatment, storage, or disposal facility. N.M. Stat. Ann. § 74-4-4(A)(5)(h) (2010).

21. The HWA also provides that the rules must require each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste to have a permit issued by NMED. N.M. Stat. Ann. § 74-4-4(A)(6) (2010).

22. The Environmental Improvement Board has adopted regulations incorporating by reference the federal standards for facilities that treat, store, or dispose of hazardous waste, N.M. Admin. Code §§ 20.1.4.500, 20.1.4.600 (2016); the federal requirements for corrective action for releases into the environment of hazardous waste and hazardous constituents, N.M. Admin. Code § 20.1.4.500 (2016); and the federal requirements for permits for facilities that treat, store or dispose of hazardous waste, N.M. Admin. Code § 20.1.4.900 (2016).

23. The State of New Mexico received EPA authorization to implement its hazardous waste program under the HWA in lieu of the federal program on January 25, 1985. 50 Fed. Reg. 1515 (Jan. 11, 1985); *see also* 55 Fed. Reg. 28397 (July 11, 1990); 60 Fed. Reg. 53708 (Oct. 17. 1995); 61 Fed. Reg. 2450 (Jan. 26, 1996).

24. RCRA requirements, including state requirements that have become effective pursuant to RCRA, can be enforced by citizen suit. RCRA section 7002(a)(1)(A) provides that any person may commence a civil action on his or her own behalf against any person (including the United States, and 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 that has become effective

pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A). The court in such action may enforce the permit, standard, regulation, condition, requirement, prohibition, or order that has been violated, and may impose an appropriate civil penalty. 42 U.S.C. § 6972(a).

25. RCRA section 3008(g) provides that any person who violates any requirement of RCRA is liable for a civil penalty not to exceed $25,000 for each day of violation. 42 U.S.C. § 6928(g). Pursuant to the Debt Collection Improvement Act of 1996, Public Law 104-134, each Federal agency is required to issue regulations adjusting for inflation the maximum civil monetary penalties that can be imposed under the statutes that agency implements. Accordingly, EPA adjusted the maximum civil penalty of $25,000 under section 3008(g) of RCRA upward to $37,500 for each day of the violation, for all violations occurring after January 12, 2009. 40 C.F.R. § 19.4 (2016).

26. RCRA section 6001(a) provides that each department, agency, and instrumentality of the United States "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements." These requirements include administrative orders, injunctive relief, and fines and penalties. 42 U.S.C. § 6961(a).

GENERAL ALLEGATIONS

A. *The Laboratory*

27. Los Alamos National Laboratory began operations in 1943 when the United States Army Manhattan Engineer District was established for the development and assembly of an atomic bomb. Current and historic operations have included nuclear weapons design and testing; production of plutonium pits (the fissile cores of nuclear weapons); high explosives

research, development, fabrication, and testing; chemical and material science research; electrical research and development; laser design and development; and photographic processing.

28. LANL currently comprises approximately 37 square miles (23,680 acres) and is located on the Pajarito Plateau in Los Alamos County in north central New Mexico, approximately 60 miles north-northeast of Albuquerque and 25 miles northwest of Santa Fe. The Laboratory is surrounded by the Pueblo of San Ildefonso, Los Alamos County, Bandelier National Monument, Santa Fe National Forest, and Santa Fe County.

29. The Pajarito Plateau is dissected by nineteen major surface drainages or canyons and their tributaries. The canyons run roughly west to east or southeast. From north to south, the most prominent canyons are Pueblo Canyon, Los Alamos Canyon, Sandia Canyon, Mortandad Canyon, Pajarito Canyon, Cañon de Valle and Water Canyon, Ancho Canyon, and Chaquehui Canyon. These canyons drain into the Rio Grande, which flows along part of the eastern border of the Laboratory.

30. According to hydrogeologic investigations there are four discrete hydrogeologic zones beneath the Pajarito Plateau on which LANL is located: (1) canyon alluvial systems; (2) intermediate perched water in the volcanic rocks (Tschicoma Formation and the Tshirege Member of the Bandelier Tuff); (3) canyon-specific intermediate perched water within the Otowi Member of the Bandelier Tuff, Cerros del Rio basalt and sedimentary units of the Puye Formation; and (4) the regional aquifer.

31. Water supply wells at the Laboratory, in Los Alamos County, and on San Ildefonso Pueblo property, withdraw water from the regional aquifer beneath the Pajarito Plateau for drinking and other domestic purposes.

32. LANL has been divided into approximately 54 Technical Areas or "TAs." Currently, 49 TAs exist (several former TAs have ceased operations or have been combined with other TAs.) The existing TAs include TA-16, located on the southwestern side of the Laboratory; TA-21, located on DP Mesa on the northern side of the Laboratory; TA-49, located on the southwestern boundary of LANL on Frijoles Mesa; TA-50, located in the center of LANL between Mortandad Canyon and Two Mile Canyon; and TA-54, located at the eastern end of Mesita del Buey on the eastern side of LANL.

33. For the purpose of managing and administering waste disposal at the Laboratory, LANL's operators have categorized certain areas within the TAs as "Material Disposal Areas" or "MDAs." These include, for example, MDAs A, B, T, U, and V in TA-21; MDA C in TA-50; MDAs G, H, and L in TA-54.

34. As a result of LANL operations from approximately 1943 to the present, DOE and LANS (and their predecessors) have generated, treated, stored, disposed of, and otherwise handled hazardous waste" within the meaning of section 1004(5) of RCRA, 42 U.S.C. § 6903(5), at the Laboratory.

35. DOE and LANS have engaged in the "disposal" of hazardous wastes within the meaning of section 1004(3) of RCRA, 42 U.S.C. § 6903(3), at LANL. DOE and LANS have disposed of such wastes in septic systems, pits, surface impoundments, trenches, shafts, landfills, and waste piles at the Laboratory. DOE and LANS have also discharged such wastes in industrial wastewater and other waste from outfalls into many of the canyon systems at LANL.

36. DOE and LANS have also engaged in the "storage" and "treatment" of hazardous waste within the meaning of section 1004(33) and (34) of RCRA, 42 U.S.C. § 6903(33), (34), at LANL.

37. Within the meaning of section 3004(u) and (v) of RCRA, 42 U.S.C. § 6924(u), (v), waste management activities at LANL have resulted in the "release" into the environment of hazardous wastes at the Laboratory.

38. Hazardous wastes within the meaning of section 1004(5) of RCRA, 42 U.S.C. § 6903(5), that have been released into, and detected in, soils and sediments at LANL include, explosives, such as RDX, HMX, and trinitrotoluene (TNT); volatile organic compounds and semi-volatile organic compounds; metals such as arsenic, barium, beryllium, cadmium, hexavalent chromium, copper, lead, mercury, molybdenum, silver, and zinc; and polychlorinated biphenyls (PCBs).

39. Hazardous wastes within the meaning of section 1004(5) of RCRA, 42 U.S.C. § 6903(5), that have been released into, and detected in, groundwater beneath the Laboratory include explosives, such as RDX; volatile organic compounds such as trichloroethylene, dichloroethylene, and dichloroethane; metals such as molybdenum, manganese, beryllium, lead, cadmium, hexavalent chromium, and mercury; and perchlorate. Hazardous wastes and hazardous constituents have been detected beneath LANL in all four groundwater zones.

40. NMED determined that corrective action at LANL was necessary to protect human health and the environment. Compliance Order on Consent § II (March 1, 2005) (discussed below).

B. *The March 1, 2005 Consent Order*

41. On March 1, 2005, following a period of litigation in federal and State court and lengthy settlement negotiations, the NMED, DOE, and The Regents of the University of California (predecessor to LANS as operator of Los Alamos National Laboratory) entered into a Compliance Order on Consent ("2005 Consent Order"). The stated purposes of the 2005

Consent Order were to fully determine the nature and extent of environmental contamination at LANL, to identify and evaluate alternatives for the cleanup of environmental contamination, and to implement cleanup. 2005 Consent Order § III.A.

42. The 2005 Consent Order has been modified twice, on June 18, 2008, and on October 29, 2012, to revise the deadlines and make other revisions.

43. The 2005 Consent Order expressly states that it fulfills the requirements for corrective action for releases of hazardous waste or hazardous waste constituents under, among other provisions, sections 3004(u) and (v) of RCRA, 42 U.S.C. § 6924(u), (v); the HWA, N.M. Stat. Ann. § 74-4-4(A)(5)(h), (i); and the regulations at 40 C.F.R. §§ 264.100, 264.101 (incorporated by 20.4.1.500 N.M. Admin. Code). 2005 Consent Order § III.A.

44. The 2005 Consent Order set forth a mandatory schedule for completing more than 80 specific corrective action tasks for the investigation and cleanup of environmental contamination at LANL. 2005 Consent Order § XII. The final corrective action compliance date, for submission to NMED of a remedy completion report for MDA G, was December 6, 2015. *Id.* § XII, Tables XII-2, XII-3 (Oct. 29, 2012).

45. The 2005 Consent Order allows DOE and LANS to seek an extension of time in which to perform a requirement of the 2005 Consent Order by making a written request to NMED and showing good cause. NMED then has ten business days to either grant or deny the extension in writing. If NMED does not respond to the request within 10 days, the request is automatically granted. 2005 Consent Order § III.J.2. Many of the deadlines in the 2005 Consent Order schedules have been extended pursuant to this provision, and, in fact, DOE and LANS have requested extensions for all of the most recent deadlines applicable to the violations claimed below. In each such case, for all of the violations claimed herein -- excepting that of the

Remedy Completion Report for MDA G at TA-54, for which the deadline expired without the DOE and LANS making a request for an extension – NMED denied the request, leaving no factual doubt as to the existence of any of these violations.

46. The 2005 Consent Order adopts and incorporates regulatory requirements for public participation in corrective action, although these regulations are otherwise applicable to corrective action conducted under a hazardous waste permit. Thus, the 2005 Consent Order provides that it "incorporates all rights, procedures and other protections afforded . . . the public pursuant to the regulations at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42) [(permit regulations)] 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 [NMED]." 2005 Consent Order § III.W.5. Further, the 2005 Consent Order specifies that these public participation requirements apply to modifications of the order. It states that "[a]s provided in Section III.W.5, modifications of this Consent Order are subject to the same procedural rights that would apply to those modifications if made under the Facility's Hazardous Waste Permit pursuant to the regulations at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42) and 20.4.1.901 NMAC." 2005 Consent Order § III.J.1.

47. In the 2005 Consent Order, the State of New Mexico expressly states that each requirement of the Consent Order is an enforceable "requirement" of RCRA within the meaning of the citizen suit provision at section 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A). The State also states in the Consent Order that citizens may sue to enforce the requirements of the Consent Order pursuant to the citizen suit provision at section 7002(a) of RCRA, 42 U.S.C. § 6972(a), if

DOE and the University of California (predecessor to LANS) violate those requirements. 2005 Consent Order § III.U.

C. *The June 24, 2016 Consent Order*

48. On March 30, 2016, NMED posted on its website a proposed draft consent order that would "supersede" the 2005 Consent Order. NMED published a notice stating that it would accept public comment on the draft consent order for a period of 45 days, until May 16, 2016. NMED extended the public comment period until May 31, 2016.

49. Approximately 40 members of the public, including Nuclear Watch New Mexico, submitted written comments to NMED on the draft consent order. Nuclear Watch New Mexico submitted comments on May 16 and May 31, 2016 asserting, among other things, that NMED must hold a public hearing on the draft consent order, including the opportunity for the public to present testimony and cross-examine witnesses, as required by the HWA and the 2005 Consent Order. NMED posted a "response to comments" on its website, but did not substantively address the public comments.

50. NMED did not hold a public hearing on the draft consent order before it executed the 2016 Consent Order.

51. DOE and NMED executed a final consent order (DOE on June 22, 2016; NMED on June 24, 2016), entitled "Compliance Order on Consent" ("2016 Consent Order"). According to the 2016 Consent Order, "[t]his Consent Order supersedes the 2005 Compliance Order on Consent (2005 Consent Order) and settles any outstanding alleged violations under the 2005 Consent Order." 2016 Consent Order, § II.A.

52. The 2016 Consent Order does not contain a schedule for completion of corrective action tasks. Nor does it contain a final deadline for completion of all corrective action. Rather,

it provides that each year NMED and DOE will meet to negotiate the schedule for the next federal fiscal year. 2016 Consent Order § VIII.B, C.

FIRST CLAIM FOR RELIEF:
VIOLATION OF INTERIM COMPLIANCE DATES

53. Nuclear Watch New Mexico realleges Paragraphs 1 through 47 as if fully set forth below.

54. First violation: Under the 2005 Consent Order, DOE and LANS were scheduled to submit to NMED the Remedy Completion Report for MDA A at TA-21 (SWMU 21-014) on March 11, 2011. 2005 Consent Order § XII, Tables XII-2, XII-3. This report was recast as a "Phase II Investigation/Remediation Report," and the March 11, 2011 deadline was extended three times at the request of DOE and LANS. By letter dated November 13, 2009, NMED extended the deadline until May 31, 2012; by letter dated February 9, 2011, NMED extended the deadline until December 20, 2013; and by letter dated January 2, 2014, NMED extended the deadline until June 30, 2014. By letter dated June 18, 2014, NMED denied a fourth extension request. As of this date, DOE and LANS have not submitted to NMED a Remedy Completion Report (or Phase II Investigation/Remediation Report) for MDA A.

55. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the June 30, 2014 deadline that they failed to submit to NMED a Remedy Completion Report for MDA A.

56. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the remedy and to submit to NMED a Remedy Completion Report for MDA A.

57. Second violation: Under the 2005 Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 2005 Consent Order § XII, Tables XII-2 n. 2, XII-3 n. 2. According to NMED's letter approving the Investigation Work Plan for the Cañon de Valle Aggregate Area, dated February 9, 2007, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Cañon de Valle Aggregate Area at TA-15 on June 15, 2012. This deadline was extended twice at the request of DOE and LANS. By letter dated July 28, 2011, in response to a claim of *force majeure*, NMED extended the deadline until July 2, 2012; and by letter dated December 14, 2011, NMED extended the deadline until July 2, 2014. By letter dated July 10, 2014, NMED denied a third extension request. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Cañon de Valle Aggregate Area at TA-15.

58. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the July 2, 2014 deadline that they failed to submit to NMED an Investigation Report for the Cañon de Valle Aggregate Area at TA-15.

59. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the investigation and to submit to NMED an Investigation Report for the Cañon de Valle Aggregate Area at TA-15.

60. Third violation: Under the 2005 Consent Order, DOE and LANS were required to submit to NMED work plans for the installation of regional groundwater monitoring wells. 2005 Consent Order § IV. According to NMED's letter approving the Drilling Work Plan for Regional Aquifer Wells MW-14 (R-64) and MW-10 (R-65), dated March 18, 2011, DOE and LANS were scheduled to complete the installation of monitoring Well R-65 into the regional

aquifer by September 30, 2011. This deadline was extended several times at the request of DOE and LANS. By letter dated July 28, 2011, in response to a claim of *force majeure*, NMED extended the deadline for completing monitoring Well R-65 until October 30, 2011. By letter dated September 12, 2011, NMED reversed the deadlines for completing Wells R-65 and R-66, thus extending the deadline for completion of monitoring Well R-65 until December 6, 2011. On information and belief, NMED sent a letter that extended the deadline for completing monitoring Well R-65 until January 15, 2012. By letter dated November 18, 2011, the Department extended the deadline for completing monitoring Well R-65 until January 15, 2014. By letter dated January 8, 2014, NMED extended the deadline for completing monitoring Well R-65 until June 30, 2014. On June 25, 2014, NMED denied a subsequent request to extend the deadline for completing monitoring Well R-65. As of this date, DOE and LANS have not completed the installation of regional monitoring Well R-65.

61. Under the 2005 Consent Order, DOE and LANS were required to submit to NMED a Well Completion Summary Fact Sheet describing the installation of monitoring Well R-65 within 30 days after completion of the installation or, given the last extension, on July 30, 2014. 2005 Consent Order § XII, Table XII-4. As of this date, DOE and LANS have not submitted to NMED a Well Completion Summary Fact Sheet for monitoring Well R-65.

62. Under the 2005 Consent Order, DOE and LANS were required to submit to NMED a Well Completion Report describing in greater detail the installation of monitoring Well R-65 within 150 days after completion of the installation or, given the last extension, on November 30, 2014. 2005 Consent Order § XII, Table XII-4. As of this date, DOE and LANS have not submitted to NMED a Well Completion Report for monitoring Well R-65.

63. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the July 30, 2014 deadline that they failed to submit to NMED a Well Completion Summary Fact Sheet for monitoring Well R-65, and for each day after the November 30, 2014 deadline that they failed to submit to NMED a Well Completion Report for monitoring Well R-65.

64. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the installation of monitoring Well R-65 into the regional aquifer, to submit to NMED a Well Completion Summary Fact Sheet for Well R-65 within 30 days after completion of the installation, and to submit to NMED a Well Completion Report for monitoring Well R-65 within 150 days after completion of the installation.

65. Fourth violation: Under the 2005 Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 2005 Consent Order § XII, Tables XII-2 n. 2, XII-3 n. 2. According to NMED's letter approving the Investigation Work Plan for the Lower Pajarito Canyon Aggregate Area, dated December 8, 2010, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Lower Pajarito Canyon Aggregate Area on July 31, 2012. This deadline was extended once at the request of DOE and LANS. By letter dated November 23, 2011, NMED extended the deadline until July 31, 2014. By letter dated July 22, 2014, NMED denied a second request to extend this deadline. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Lower Pajarito Canyon Aggregate Area.

66. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the July 31, 2014 deadline that they failed to submit to NMED an Investigation Report for the Lower Pajarito Canyon Aggregate Area.

67. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the investigation and to submit to NMED an Investigation Report for the Lower Pajarito Canyon Aggregate Area.

68. Fifth violation: Under the 2005 Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 2005 Consent Order § XII, Tables XII-2 n. 2, XII-3 n. 2. According to the approved Investigation Work Plan for the Twomile Canyon Aggregate Area, dated January 31, 2010, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Twomile Canyon Aggregate Area on August 15, 2012. This deadline was extended twice at the request of DOE and LANS. By letter dated July 28, 2011, in response to a claim of *force majeure*, NMED extended the deadline until August 30, 2012; and by letter dated November 23, 2011, NMED extended the deadline until August 30, 2014. By letter dated July 22, 2014, NMED denied a third request to extend this deadline. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Twomile Canyon Aggregate Area.

69. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the August 30, 2014 deadline that they failed to submit to NMED an Investigation Report for the Twomile Canyon Aggregate Area.

70. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the investigation and to submit to NMED an Investigation Report for the Twomile Canyon Aggregate Area.

71. Sixth violation: Under the 2005 Consent Order, DOE and LANS were scheduled to submit to NMED the Investigation Work Plan for the Lower Water/Indio Canyon Aggregate Area on September 30, 2012. 2005 Consent Order § XII, Tables XII-2, XII-3. This deadline was extended once at the request of DOE and LANS. By letter dated December 5, 2011, NMED extended the deadline until September 30, 2014. By letter dated September 23, 2014, NMED denied a second request to extend the deadline. As of this date, DOE and LANS have not submitted to NMED an Investigation Work Plan for the Lower Water/Indio Canyon Aggregate Area.

72. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the September 30, 2014 deadline that they failed to submit to NMED an Investigation Work Plan for the Lower Water/Indio Canyon Aggregate Area.

73. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to submit to NMED an Investigation Work Plan for the Lower Water/Indio Canyon Aggregate Area and to implement the work plan.

74. Seventh violation: Under the 2005 Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 2005 Consent Order § XII, Tables XII-2 n. 2, XII-3 n. 2. According to NMED's letter approving the Investigation Work Plan for the Cañon de Valle Aggregate Area, dated February 9, 2007, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Cañon de Valle

Aggregate Area at TA-16 on December 15, 2012. This deadline was extended once at the request of DOE and LANS. By letter dated June 11, 2012, NMED extended the deadline until December 15, 2014. By letter dated December 19, 2014, NMED denied a second request to extend the deadline. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Cañon de Valle Aggregate Area at TA-16.

75. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the December 15, 2014 deadline that they failed to submit to NMED an Investigation Report for the Cañon de Valle Aggregate Area at TA-16.

76. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the investigation and to submit to NMED an Investigation Report for the Cañon de Valle Aggregate Area at TA-16.

77. Eighth violation: Under the 2005 Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 2005 Consent Order § XII, Tables XII-2 n. 2, XII-3 n. 2. According to NMED's letter directing DOE and LANS to modify the Upper Water Canyon Investigation Work Plan (Revision 1), dated February 18, 2011, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Upper Water Canyon Aggregate Area on December 31, 2012. This deadline was extended once at the request of DOE and LANS. By letter dated June 15, 2012, NMED extended the deadline until December 31, 2014. By letter dated December 29, 2014, NMED denied a second request to extend the deadline. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Upper Water Canyon Aggregate Area.

78. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the December 31, 2014 deadline that they failed to submit to NMED an Investigation Report for the Upper Water Canyon Aggregate Area.

79. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the investigation and to submit to NMED an Investigation Report for the Upper Water Canyon Aggregate Area.

80. Ninth violation: Under the 2005 Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 2005 Consent Order § XII, Tables XII-2 n. 2, XII-3 n. 2. According to NMED's letter approving the Investigation Work Plan for the Starmer/Upper Pajarito Canyon Aggregate Area, dated March 29, 2011, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Starmer/Upper Pajarito Canyon Aggregate Area on December 31, 2012. This deadline was extended once at the request of DOE and LANS. By letter dated June 22, 2012, NMED extended the deadline until December 31, 2014. By letter dated December 29, 2014, NMED denied a second request to extend the deadline. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Starmer/Upper Pajarito Canyon Aggregate Area.

81. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the December 31, 2014 deadline that they failed to submit to NMED an Investigation Report for the Starmer/Upper Pajarito Canyon Aggregate Area.

82. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the investigation and to submit to NMED an Investigation Report for the Starmer/Upper Pajarito Canyon Aggregate Area.

83. Tenth violation: Under the 2005 Consent Order, DOE and LANS were required to submit to NMED work plans for the installation of intermediate groundwater monitoring wells. 2005 Consent Order § IV. According to NMED's letter approving the Drilling Work Plan for Perched-Intermediate Well R-26i, dated August 8, 2012, DOE and LANS were scheduled to complete the installation of monitoring Well R-26i into the intermediate perched aquifer by October 31, 2013. This deadline was extended twice at the request of DOE and LANS. By letter dated January 2, 2014, NMED extended the deadline for completion of monitoring Well R-26i until May 31, 2014. Because NMED did not respond to a second extension request within ten business days, effective on May 30, 2014, the deadline for completion of monitoring Well R-26i was automatically extended until December 31, 2014. By letter dated December 31, 2014, NMED denied a third request for extension of the deadline for completion of monitoring Well R-26i. As of this date, DOE and LANS have not completed the installation of intermediate monitoring Well R-26i.

84. Under the 2005 Consent Order, DOE and LANS were required to submit to NMED a Well Completion Summary Fact Sheet describing the installation of monitoring Well R-26i within 30 days after completion of the installation or, given the last extension, on January 30, 2015. 2005 Consent Order § XII, Table XII-4. As of this date, DOE and LANS have not submitted to NMED a Well Completion Summary Fact Sheet for monitoring Well R-26i.

85. Under the 2005 Consent Order, DOE and LANS were required to submit to NMED a Well Completion Report describing in greater detail the installation of monitoring Well

R-26i within 150 days after completion of the installation or, given the last extension, on May 30, 2015. 2005 Consent Order § XII, Table XII-4. As of this date, DOE and LANS have not submitted to NMED a Well Completion Report for monitoring Well R-26i.

86. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the January 30, 2015 deadline that they failed to submit to NMED a Well Completion Summary Fact Sheet for monitoring Well R-26i, and for each day after the May 30, 2015 deadline that they failed to submit to NMED a Well Completion Report for monitoring Well R-26i.

87. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the installation of monitoring Well R-26i into the regional aquifer, to submit to NMED a Well Completion Summary Fact Sheet for Well R-26i within 30 days after completion of the installation, and to submit to NMED a Well Completion Report for monitoring Well R-26i within 150 days after completion of the installation.

88. Eleventh violation: Under the 2005 Consent Order, DOE and LANS were scheduled to submit to NMED the Remedy Completion Report for MDA AB, Areas 1, 3, 4, 11, and 12 at TA-49 (SWMUs 49-001(a-g) and 49-003, and AOC C-49-008(d)) on January 31, 2015. By letter dated February 3, 2015, NMED denied a request for an extension of this deadline. As of this date, DOE and LANS have not submitted to NMED a Remedy Completion Report for MDA AB, Areas 1, 3, 4, 11, and 12.

89. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day

after the January 31, 2015 deadline that they failed to submit to NMED a Remedy Completion Report for MDA AB, Areas 1, 3, 4, 11, and 12.

90. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the remedy and to submit to NMED a Remedy Completion Report for MDA AB, Areas 1, 3, 4, 11, and 12.

91. Twelfth violation: Under the 2005 Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 2005 Consent Order § XII, Tables XII-2 n. 2, XII-3 n. 2. According to the approved Revised Investigation Work Plan for the Chaquehui Canyon Aggregate Area, dated November 1, 2010, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Chaquehui Canyon Aggregate Area on March 31, 2013. This deadline was extended once at the request of DOE and LANS. By letter dated June 26, 2012, NMED extended the deadline until March 31, 2015. By letter dated March 3, 2015, NMED denied a second request for an extension of this deadline. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Chaquehui Canyon Aggregate Area.

92. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the March 31, 2015 deadline that they failed to submit to NMED an Investigation Report for the Chaquehui Canyon Aggregate Area.

93. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the investigation and to submit to NMED an Investigation Report for the Chaquehui Canyon Aggregate Area.

94. By letter dated May 5, 2016, the plaintiff, Nuclear Watch New Mexico, gave notice of the violations alleged above to the Administrator of EPA (personal service), the Regional Administrator of EPA Region VI (certified mail service), the Attorney General of the United States (personal service), the United States Attorney for the District of New Mexico (certified mail service), the New Mexico Attorney General (certified mail service), the United States Secretary of Energy (for DOE) (personal service), LANS (certified mail service), and the Secretary of NMED (certified mail service) pursuant to section 7002(b)(1)(A) of RCRA, 42 U.S.C. § 6972(b)(1)(A). As of May 12, 2016, all addressees received the letter.

SECOND CLAIM FOR RELIEF:
VIOLATION OF FINAL COMPLIANCE DATE

95. Nuclear Watch New Mexico realleges Paragraphs 1 through 47 as if fully set forth below.

96. Under the 2005 Consent Order, DOE and LANS were scheduled to submit to NMED the Remedy Completion Report for MDA G at TA-54 on December 6, 2015. This deadline is the final compliance date for all corrective action at LANL under the 2005 Consent Order. As of this date, DOE and LANS have not submitted to NMED a Remedy Completion Report for MDA G.

97. Pursuant to sections 3008(g) and 7002(a) of RCRA, 42 U.S.C. §§ 6928(g), 6972(a), DOE and LANS are jointly liable for a civil penalty not to exceed $37,500 for each day after the December 6, 2015 deadline that they failed to submit to NMED a Remedy Completion Report for MDA G at TA-54.

98. Pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), DOE and LANS are jointly liable for an injunction ordering them to complete the remedy and to submit to NMED a Remedy Completion Report for MDA G at TA-54.

99. By letter dated January 20, 2016, the plaintiff, Nuclear Watch New Mexico, gave notice of the violation alleged above to the Administrator of EPA, the Regional Administrator of EPA Region VI, the Attorney General of the United States, the United States Attorney for the District of New Mexico, the New Mexico Attorney General, the United States Secretary of Energy (for DOE), LANS, and the Secretary of NMED by certified mail pursuant to section 7002(b)(1)(A) of RCRA, 42 U.S.C. § 6972(b)(1)(A). As of February 17, 2016, all addressees received the letter.

THIRD CLAIM FOR RELIEF:
VIOLATIONS OF PUBLIC HEARING REQUIREMENTS
BY EXTENSIONS AND DEFERRALS OF DEADLINES

100. Nuclear Watch New Mexico realleges Paragraphs 1 through 47 as if fully set forth below and further alleges as follows:

101. The 2005 Consent Order adopts and incorporates from permit regulations the requirements for public participation in corrective action, including public participation in modifications to corrective action requirements. *See* 2005 Consent Order at §§ III.W.5, III.J.1. (adopting N.M. Admin. Code § 20.4.1.901 and N.M. Admin. Code § 20.4.1.900 that incorporates 40 C.F.R. § 270.42).

102. The federal regulations at 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b, which are incorporated into New Mexico regulations by N.M. Admin. Code § 20.4.1.900, establish that an "extension of final compliance date" is a "Class 3" permit modification. The federal regulations at 40 C.F.R. § 270.42(c), incorporated by N.M. Admin. Code § 20.4.1.900, further provide that a permittee seeking an "extension of final compliance date" must request a "Class 3" permit modification.

103. The New Mexico Hazardous Waste Regulations provide that a "Class 3" modification under the regulations is considered to be a "major modification" under the HWA. *See* N.M. Admin. Code § 20.4.1.901.B(6).

104. The HWA provides that prior to the issuance of a "major modification" to a permit, NMED 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." N.M. Stat. Ann. § 74-4-4.2(H).

105. The 2005 Consent Order established a final compliance date of December 6, 2015 for completion of all corrective action. 2005 Consent Order § XII, Tables XII-2, XII-3 (Oct. 29, 2012).

106. DOE and LANS requested, and on December 9, 2014 NMED approved, an extension of time "for the Installation and Instrumentation of Six Boreholes at MDA T," a corrective action required pursuant to the 2005 Consent Order, for the purpose of shallow subsurface investigation. The December 9, 2014 extension of time moved the relevant deadline for the required corrective action from December 31, 2104 to July 31, 2016, a date later than the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

107. The December 9, 2014 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major

modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

108. DOE and LANS requested, and on January 2, 2015 NMED approved, an extension of time to "Deploy Tracers at Consolidated Unit 16-021(c)-99," a corrective action required pursuant to the 2005 Consent Order, for the purpose of intermediate and regional aquifer groundwater investigation. The January 2, 2015 extension of time moved the relevant deadline for the required corrective action from December 31, 2014 to December 31, 2015, a date later than the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

109. The January 2, 2015 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and, therefore, a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

110. DOE and LANS requested, and on May 8, 2015 NMED approved, deferral of submittal of the Phase II Investigation Report for Upper Sandia Canyon Aggregate Area," a corrective action required pursuant to the 2005 Consent Order, for the purpose of shallow subsurface investigation. The May 8, 2015 approval indefinitely deferred the required corrective action from April 30, 2015 to an unspecified date, a date that is now necessarily later than the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

111. The May 8, 2015 deferral that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order), a change of a final compliance date from a date certain to no date at all, is an extension of the final compliance date and therefore a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

112. DOE and LANS requested, and on June 23, 2015 NMED approved, an extension of time to "Install the Angled Boring for Sandia Wetland Borehole 1," a corrective action required pursuant to the 2005 Consent Order, for the purpose of shallow and intermediate subsurface investigation. The June 23, 2015 extension of time moved the relevant deadline for the required corrective action from October 31, 2104 to October 31, 2016, a date later than the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

113. The June 23, 2015 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

114. DOE and LANS requested, and on August 20, 2015, NMED approved, a deferral of submittal of the Remedy Completion Report for Water Canyon/Cañon de Valle Aggregate Areas," a corrective action required pursuant to the 2005 Consent Order, for the purpose of

shallow subsurface investigation. The August 20, 2015 approval indefinitely deferred the required corrective action from August 31, 2015 to an unspecified date, a date that is now necessarily later than the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

115. The August 20, 2015 deferral that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order, a change of a final compliance date from a date certain to no date at all, is a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

116. DOE and LANS requested, and on August 20, 2015 NMED approved, a deferral of submittal of the Threemile Canyon Aggregate Area Phase 2 Investigation Report," a corrective action required pursuant to the 2005 Consent Order, for the purpose of shallow subsurface investigation. The August 20, 2015 approval indefinitely deferred the required corrective action from August 31, 2013 to an unspecified date, a date that is now necessarily later than the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

117. The August 20, 2015 deferral that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order, a change of a final compliance date from a date certain to no date at all, is an extension of the final compliance date and therefore a "Class 3" modification within the meaning

of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

118. DOE and LANS requested, and on October 2, 2015 NMED approved, an extension of time to "Deploy Tracers at Consolidated Unit 16-021(c)-99," a corrective action required pursuant to the 2005 Consent Order, for the purpose of intermediate and regional aquifer groundwater investigation. The October 2, 2015 extension of time moved the relevant deadline for the required corrective action from August 31, 2012 to December 18, 2015, a date later than the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

119. The October 2, 2015 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification" within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

120. DOE and LANS requested, and on December 30, 2015 NMED approved, an extension of time to "Defer Submittal of the Revised DP Site Aggregate Area Building 21-257 Footprint Letter Work Plan," a corrective action required pursuant to the 2005 Consent Order, for the purpose of shallow subsurface investigation. On December 30, 2015, a date already beyond the final compliance date, extension of time moved the relevant deadline for the required corrective action from December 30, 2015 to February 28, 2018, a date even further beyond the

December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

121. The December 30, 2015 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification, within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

122. DOE and LANS requested, and on February 10, 2016 NMED approved, an extension of time to "Submit [1] the Response to Revision 2 to the Disapproval for the 2013 Excavation of the Los Alamos Canyon Low-Head Weir, Revision 1 and [2] the SWMU Assessment Report," corrective actions required pursuant to the 2005 Consent Order, for the purpose of shallow subsurface investigation. On February 10, 2016, a date beyond the final compliance date, an extension of time moved the relevant deadline for the required corrective action from June 30, 2016, a date also beyond the final compliance date, to August 5, 2016, a date even further beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

123. The February 10, 2016 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major

modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

124. DOE and LANS requested, and on February 10, 2016 NMED approved, an extension of time to "Submit [1] the Response to Revision 2 to the disapproval for the 2013 Excavation of the Los Alamos Canyon Low-Head Weir, Revision 1 and [2] the SWMU Assessment Report," corrective actions required pursuant to the 2005 Consent Order, for the purpose of shallow subsurface investigation. On February 10, 2016, a date beyond the final compliance date, an extension of time moved the relevant deadline for the required corrective action from February 29, 2016, a date also beyond the final compliance date, to August 5, 2016, a date even further beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

125. The February 10, 2016 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

126. DOE and LANS requested, and on March 10, 2016 NMED approved, an extension of time to "Submit the 2015 Monitoring Report and 2016 Monitoring Plan for Los Alamos/Pueblo Watershed Sediment Transport Mitigation Project...," a corrective action required pursuant to the 2005 Consent Order, for the purpose of surface water and sediment transport investigation. On March 10, 2016, a date beyond the final compliance date, an

extension of time moved the relevant deadline for the required corrective action from March 31, 2106, a date also beyond the final compliance date, to April 30, 2016, a date even further beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

127. The March 10, 2016 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

128. DOE and LANS requested, and on May 3, 2016 NMED approved, an extension of time to "Conduct Pumping Tests at CrEX-1 and CrEX-3," a corrective action required pursuant to the 2005 Consent Order, for the purpose of intermediate and regional aquifer groundwater investigation. On May 3, 2016, a date beyond the final compliance date, an extension of time moved the relevant deadline for the required corrective action from May 1, 2016, a date also beyond the final compliance date, to June 1, 2016, a date even further beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

129. The May 3, 2016 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major

modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

130. DOE and LANS requested, and on May 3, 2016 NMED approved, an extension of time to "Complete Regional Aquifer Well R-61," a corrective action required pursuant to the 2005 Consent Order, for the purpose of regional groundwater investigation. On May 3, 2016, a date beyond the final compliance date, an extension of time moved the relevant deadline for the required corrective action from June 30, 2016, a date also beyond the final compliance date, to March 30, 2018, a date even further beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order. However, DOE and LANS did not request a "Class 3" modification, and no public hearing was held.

131. The May 3, 2016 extension that would authorize remedial clean-up work being done beyond the December 6, 2015 final compliance date for all corrective action in the 2005 Consent Order is an extension of the final compliance date and therefore a "Class 3" modification within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the 2005 Consent Order.

132. Pursuant to the 2005 Consent Order, and the provisions of the regulations and the HWA incorporated therein, before approving each of the extensions and deferrals described in paragraphs 106 through 131 above, DOE and LANS were required to request a "Class 3" modification, and NMED was therefore required to hold a public hearing, with an opportunity for the public to submit data, views, and arguments and to examine witnesses.

133. For each of the extensions and deferrals described in paragraphs 106 through 131 above, DOE, LANS, and NMED are liable for an injunction restraining them from

implementing, or continuing to implement, the extensions and deferrals until a public hearing has been held, with an opportunity for the public to submit data, views, and arguments and to examine witnesses.

FOURTH CLAIM FOR RELIEF:
VIOLATION OF PUBLIC HEARING REQUIREMENTS
BY EXECUTION OF THE 2016 CONSENT ORDER

134. Nuclear Watch New Mexico realleges Paragraphs 1 through 52 and 101 through 105 as if fully set forth below.

135. The 2016 Consent Order purports to supersede the final compliance date of December 6, 2015, but the 2016 Consent Order has no final compliance date. The 2016 Consent Order provides that the schedule will be negotiated at a later time. 2016 Consent Order § VIII.B, C. A change of a final compliance date from a date certain to no date at all is an extension of the final compliance date, and therefore a "Class 3" modification, within the meaning of 40 C.F.R. § 270.42, Appendix I, ¶ A.5.b. It is a "major modification" pursuant to NMAC § 20.4.1.901.B(6), and it thus required a public hearing before approval pursuant to the HWA.

136. Pursuant to the HWA and the terms of the 2005 Consent Order, before executing the 2016 Consent Order, DOE was required to request a "Class 3" modification, and NMED was required to hold a public hearing, with an opportunity for the public to submit data, views, and arguments and to examine witnesses. However, DOE did not request a "Class 3" modification, and no public hearing was held.

137. DOE and NMED are liable for an injunction restraining them from implementing, or continuing to implement, the 2016 Consent Order until a public hearing has been held, with an opportunity for the public to submit data, views, and arguments and to examine witnesses.

FIFTH CLAIM FOR RELIEF:
DECLARATORY JUDGMENT THAT
THE EXTENSIONS AND DEFERRALS ARE INVALID

138. Nuclear Watch New Mexico realleges Paragraphs 1 through 47 and 96 through 133 as if fully set forth below and further alleges as follows:

139. Pursuant to 28 U.S.C. §§ 2201 1367(a), and to the New Mexico Declaratory Judgment Act, §§ 44-6-1 to 44-6-15 NMSA 1978, Nuclear Watch New Mexico is entitled to a declaratory judgment that because the extensions and deferrals described above were approved without the required public hearing, those extensions and deferrals are contrary to the terms of the 2005 Consent Order, and that the extensions and deferrals are therefore invalid; and the violations are continuing.

SIXTH CLAIM FOR RELIEF:
DECLARATORY JUDGMENT THAT THE 2016 CONSENT ORDER IS INVALID

140. Nuclear Watch New Mexico realleges Paragraphs 1 through 52, 101 through 105, and 135 through 137 as if fully set forth below.

141. Pursuant to 28 U.S.C. §§ 2201 1367(a) and to the New Mexico Declaratory Judgment Act, §§ 44-6-1 to 44-6-15 NMSA 1978, Nuclear Watch New Mexico is entitled to a declaratory judgment that because the 2016 Consent Order was executed without the required public hearing, that order is contrary to the terms of the 2005 Consent Order, and that the 2016 Consent Order is therefore invalid and that the 2005 Consent Order is still valid and in effect.

SEVENTH CLAIM FOR RELIEF:
COSTS OF LITIGATION

142. Nuclear Watch New Mexico realleges Paragraphs 1 through 133 as if fully set forth below.

143. Nuclear Watch New Mexico has incurred litigation costs, including reasonable attorney and expert witness fees, in the amount of at least $1,000.00, and is continuing to incur litigation costs.

144. DOE and LANS are jointly liable for costs of litigation that Nuclear Watch New Mexico has incurred, including reasonable attorney and expert witness fees, under section 7002(e) of RCRA, 42 U.S.C. § 6972(e).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Nuclear Watch New Mexico, respectfully requests that this Court enter a judgment against the Defendants, the United States Department of Energy and Los Alamos National Security, LLC, and Intervenor New Mexico Environment Department as follows:

1. Enjoining the Defendants to take action to come into compliance with the March 1, 2005 Consent Order, as amended on October 29, 2012 according to a reasonable but aggressive schedule ordered by this Court;

2. Imposing on Defendants a civil penalty not to exceed $37,500 per day for each violation of the 2005 Consent Order;

3. Enjoining Defendants DOE and LANS and Defendant-Intervenor NMED from implementing, or continuing to implement, any of the extensions and deferrals described in Paragraphs 106 through 136 above until NMED first conducts a public hearing on the extension or deferral that meets the requirements of the 2005 Consent Order;

4. Enjoining Defendant DOE and Defendant-Intervenor NMED from implementing, or continuing to implement, any of the provisions of the 2016 Consent Order until NMED first conducts a public hearing that meets the requirements of the 2005 Consent Order;

5. Rendering a declaratory judgment that the extensions and deferrals of deadlines for corrective actions required pursuant to the 2005 Consent Order, described in Paragraphs 106 through 136 above, are invalid due to the failure to comply with the public hearing requirements of the 2005 Consent Order, and that those deadlines continue in full force and effect against Defendants DOE and LANS;

6. Rendering a declaratory judgment that the 2016 Consent Order, executed by Defendant DOE and Defendant-Intervenor NMED, is invalid due to the failure to comply with the public hearing requirements of the 2005 Consent Order, and that the 2005 Consent Order continues in full force and effect against Defendants DOE and LANS;

7. Awarding Nuclear Watch New Mexico its costs of litigation, including reasonable attorney fees and expert witness fees, in this action; and

8. Granting such other relief as this Court may deem just and proper.

Respectfully submitted:

NUCLEAR WATCH NEW MEXICO

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