



May 5, 2016

BY PERSONAL SERVICE OR BY CERTIFIED MAIL, RETURN RECEIPT*:

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

Loretta Lynch, U.S. Attorney General
United States Department of Justice
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Dr. Ernest Moniz, Secretary of Energy
U.S. Department of Energy
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Re: Notice of Additional Violations 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 violations have occurred, and continue to occur, at Los Alamos National Laboratory in Los Alamos, New Mexico. The violations described in this letter are in addition to the violations described in my letter to you of January 20, 2016.

This notice is provided pursuant to section 7002(b)(1)(A) of RCRA, 42 U.S.C. § 6972(b)(1)(A). Having fulfilled the notice requirement, Nuclear Watch New Mexico may commence a legal action in federal district court against the DOE and LANS 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 violations 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, as revised October 29, 2012 (“Consent Order”) issued by the New Mexico Environment Department and consented to by DOE, the University of California (predecessor to LANS), and LANS, as well as 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 and hazardous constituents 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.

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 the 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. The Environment Department then has ten business days to either grant or deny the extension in writing. Many of the deadlines in the 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, the Environment Department has denied the request, leaving no factual doubt as to the existence of the violations.

Specifically, the deadlines that have been violated include the following:

1. Under the Consent Order, DOE and LANS were scheduled to submit to the Environment Department the Remedy Completion Report for MDA¹ A at TA²-21 (SWMU³ 21-014) on March 11, 2011. 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, the Environment Department extended the deadline until May 31, 2012; by letter dated February 9, 2011, the Department extended the deadline until December 20, 2013; and

¹ An “MDA” is a material disposal area.

² A “TA” is a technical area.

³ A “SWMU” is a solid waste management unit.

by letter dated January 2, 2014, the Department extended the deadline until June 30, 2014. By letter dated June 18, 2014, the Environment Department denied a subsequent extension request. As of the date of this letter, the Remedy Completion Report (Phase II Investigation/Remediation Report) for MDA A has not yet been submitted. It is more than 675 days late.

2. Under the Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. According to the Environment Department'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 the Environment Department 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, the Environment Department extended the deadline until July 2, 2012; and by letter dated December 14, 2011, the Department extended the deadline until July 2, 2014. By letter dated July 10, 2014, the Environment Department denied a subsequent extension request. As of the date of this letter, the Investigation Report for the Cañon de Valle Aggregate Area at TA-15 has not yet been submitted. It is more than 675 days late.

3. Under the Consent Order, DOE and LANS were required to submit to the Environment Department work plans for the installation of regional groundwater monitoring wells, including a schedule for well completion. According to the Environment Department'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 Well R-65 into the regional aquifer by September 30, 2011. They were scheduled to submit to the Environment Department a Well Completion Summary Fact Sheet describing the installation of monitoring Well R-65 on October 30, 2011 (within 30 days after completion of the installation). They were scheduled to submit to the Environment Department a more detailed Well Completion Report on February 27, 2012 (150 days after completion of the installation). These deadlines were each extended several times at the request of DOE and LANS. By letter dated July 28, 2011, in response to a claim of force majeure, the Environment Department extended by thirty days the deadline for completing Well R-65, thus extending the deadline for submitting the Fact Sheet until November 30, 2011, and the deadline for submitting the Completion Report until March 26, 2012. By letter dated September 12, 2011, the Department reversed the deadlines for Wells R-65 and R-66, thus extending the deadline for submitting the Fact Sheet for Well R-65 until January 5, 2012, and the deadline for submitting the Completion Report for Well R-65 until May 4, 2012. By a subsequent letter, the Department extended the deadline for completing Well R-65 until January 15, 2012, thus extending the deadline for submitting the Fact Sheet until February 14, 2012, and the deadline for submitting the Completion Report until June 13, 2012. By letter dated November 18, 2011, the Department extended the deadlines for Well R-65 by two years, thus extending the deadline for submitting the Fact Sheet until February 14, 2014, and the deadline for submitting the Completion Report until June 13, 2014. By letter dated January 8, 2014, the Department extended the deadline for completing Well R-65 until June 30, 2014, thus extending the deadline for submitting the Fact Sheet until July 30, 2014, and the deadline for submitting the Completion Report until November 30, 2014. On June 25, 2014, the Environment Department denied a subsequent request to extend the deadline for completing Well R-65. As of the date of this letter, DOE and LANS had not completed the installation of regional monitoring Well R-65 and, consequentially, they had not submitted to the

Environment Department either a Well Completion Summary Fact Sheet or a Well Completion Report for the well. The Fact Sheet is more than 685 days late.

4. Under the Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. According to the Environment Department'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 the Environment Department the Investigation Report for the Lower Pajarito Canyon Aggregate Area on July 31, 2012. This deadline was extended at the request of DOE and LANS. By letter dated November 23, 2011, the Environment Department extended the deadline until July 31, 2014. By letter dated July 22, 2014, the Environment Department denied a subsequent request to extend this deadline. As of the date of this letter, the Investigation Report for the Lower Pajarito Canyon Aggregate Area has not yet been submitted. It is more than 645 days late.

5. Under the Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 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 the Environment Department 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, the Environment Department extended the deadline until August 30, 2012; and by letter dated November 23, 2011, the Department extended the deadline until August 30, 2014. By letter dated July 22, 2014, the Environment Department denied a subsequent request to extend this deadline. As of the date of this letter, the Investigation Report for the Twomile Canyon Aggregate Area has not yet been submitted. It is more than 615 days late.

6. Under the Consent Order, DOE and LANS were scheduled to submit to the Environment Department the Investigation Work Plan for the Lower Water/Indio Canyon Aggregate Area on September 30, 2012. This deadline was extended at the request of DOE and LANS. By letter dated December 5, 2011, the Environment Department extended the deadline until September 30, 2014. By letter dated September 23, 2014, the Environment Department denied a subsequent request to extend the deadline. As of the date of this letter, the Investigation Work Plan for the Lower Water/Indio Canyon Aggregate Area has not yet been submitted. It is more than 585 days late.

7. Under the Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. According to the Environment Department's letter approving the Investigation Work Plan for the Twomile Canyon Aggregate Area, dated February 9, 2007, DOE and LANS were scheduled to submit to the Environment Department the Investigation Report for the Cañon de Valle Aggregate Area at TA-16 on December 15, 2012. This deadline was extended at the request of DOE and LANS. By letter dated June 11, 2012, the Environment Department extended the deadline until December 15, 2014. By letter dated December 19, 2014, the Environment Department denied a subsequent request to extend the deadline. As of the date of this letter, the Investigation Report for the Cañon de Valle Aggregate Area at TA-16 has not yet been submitted. It is more than 480 days late.

8. Under the Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. According to the Environment Department'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 the Environment Department the Investigation Report for the Upper Water Canyon Aggregate Area on December 31, 2012. This deadline was extended at the request of DOE and LANS. By letter dated June 15, 2012, the Environment Department extended the deadline until December 31, 2014. By letter dated December 29, 2014, the Environment Department denied a subsequent request to extend the deadline. As of the date of this letter, the Investigation Report for the Upper Water Canyon Aggregate Area has not yet been submitted. It is more than 520 days late.

9. Under the Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. According to the Environment Department'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 the Environment Department the Investigation Report for the Starmer/Upper Pajarito Canyon Aggregate Area on December 31, 2012. This deadline was extended at the request of DOE and LANS. By letter dated June 22, 2012, the Environment Department extended the deadline until December 31, 2014. By letter dated December 29, 2014, the Environment Department denied a subsequent request to extend the deadline. As of the date of this letter, the Investigation Report for the Starmer/Upper Pajarito Canyon Aggregate Area has not yet been submitted. It is more than 460 days late.

10. Under the Consent Order, DOE and LANS were required to submit to the Environment Department work plans for the installation of intermediate groundwater monitoring wells, including a schedule for well completion. According to the Environment Department'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 Well R-26i into the intermediate perched aquifer by October 31, 2013. They were scheduled to submit to the Environment Department a Well Completion Summary Fact Sheet describing the installation of monitoring Well R-26i on November 30, 2013 (within 30 days after completion of the installation). They were scheduled to submit to the Environment Department a more detailed Well Completion Report on March 30, 2014 (150 days after completion of the installation). These deadlines were each extended twice at the request of DOE and LANS. By letter dated January 2, 2014, the Environment Department extended the deadline for submitting the Fact Sheet until June 30, 2014, and the deadline for submitting the Completion Report until October 28, 2014. Because the Environment Department did not respond to a second extension request within ten business days,⁴ effective on May 30, 2014, the deadline for submitting the Fact Sheet was automatically extended until January 30, 2015, and the deadline for submitting the Completion Report was automatically extended until May 30, 2015. By letter dated December 31, 2014, the Environment Department denied a subsequent request for extension of the deadline for completion of Well R-26i. As of the date of this letter, DOE and LANS had not completed the installation of intermediate monitoring Well R-26i and, consequentially, they had not submitted to the Environment Department either a Well Completion Summary Fact Sheet or a Well Completion Report for the well. The Fact Sheet is more than 460 days late.

⁴ See section III.J.2 of the Consent Order.

11. Under the Consent Order, DOE and LANS were scheduled to submit to the Environment Department 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 AOC⁵ C-49-008(d)) on January 31, 2015. By letter dated February 3, 2015, the Environment Department denied a request for an extension of this deadline. As of the date of this letter, the Remedy Completion Report for MDA AB, Areas 1, 3, 4, 11, and 12, has not yet been submitted. It is more than 460 days late.

12. Under the Consent Order, the investigation work plan for each aggregate area must include a schedule for submittal of the investigation report. 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 the Environment Department the Investigation Report for the Chaquehui Canyon Aggregate Area on March 31, 2013. This deadline was extended at the request of DOE and LANS. By letter dated June 26, 2012, the Environment Department extended the deadline until March 31, 2015. By letter dated March 3, 2015, the Environment Department denied a subsequent request for an extension of this deadline. As of the date of this letter, the Investigation Report for the Chaquehui Canyon Aggregate Area has not yet been submitted. It is more than 400 days late.

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) against 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

⁵ An “AOC” is an area of concern.

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.

DOE and LANS are liable for the violations described above. DOE and LANS is each 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).

Under section 7002(a) of RCRA, DOE and LANS are liable for an injunction ordering them to cease the violations described above. Section 7002(a) authorizes the district court “to enforce the permit, standard, regulation, condition, requirement, prohibition, or order” that is alleged to be violated. 42 U.S.C. 6972(a).

Also under section 7002(a), DOE and LANS are liable for civil penalties of up to \$37,500 per violation per day for each of the violations described above. Section 7002(a) authorizes the court “to apply any appropriate civil penalties under section” 3008(a) and (g) of RCRA, 42 U.S.C. 6928(a), (g). Section 3008(g) of RCRA provides:

Any person who violates any requirement of this subchapter [RCRA Subchapter III, 42 U.S.C. §§ 6921-6939e] shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate 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 all violations occurring after January 12, 2009. *See* 40 C.F.R. § 19.4 (2016).

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

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

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Jon Block and John Stroud, Co-counsel for Nuclear Watch, New Mexico

If you have any questions regarding this notice, please call either of us at the telephone numbers listed above. We would be happy to meet with representatives of DOE, LANS, and the U.S. Department of Justice to discuss this matter, at your earliest convenience. Please let me know if you wish to schedule such a meeting.

Sincerely,



Jonathan M. Block
Staff Attorney



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