

## **New Mexico Should Renegotiate the LANL Cleanup Consent Order**

**Summary:** The State of New Mexico should again demonstrate the political will it successfully displayed in 2005 when it compelled the federal Department of Energy to agree to an enforceable Consent Order governing cleanup at the Los Alamos National Laboratory. At the Lab's request the Martinez Administration eviscerated that Consent Order with more than 150 milestone extensions. Further, in a process riddled with conflicts of interest, it negotiated a revised 2016 Consent Order that subordinated cleanup to the budget that DOE wants. The need to protect New Mexico's environment and precious water resources should drive the Lab's cleanup budget, not DOE's planned budget of expanded nuclear weapons research and production.<sup>1</sup> The incoming Biden Administration could offer new opportunity to renegotiate a Consent Order that is in the Land of Enchantment's best interests. The present New Mexico State Administration should pursue that opportunity.

### **Why renegotiate the 2016 Consent Order?**

- In June 2016 the New Mexico Environment Department (NMED), the Department of Energy (DOE) and Los Alamos National Security, LLC (then the Lab's contractor) signed a revised Consent Order governing cleanup at the Los Alamos National Laboratory (LANL). The new Consent Order was an unfortunate step backwards in compelling comprehensive, genuine cleanup at the Lab.
- The State of New Mexico should have kept the original, enforceable 2005 Consent Order that it fought so hard for under the Richardson Administration (including successfully defending itself against DOE lawsuits), modified as needed for cleanup schedules and a final compliance date.
- Under Gov. Martinez, the revised 2016 Consent Order was a giveaway by NMED to DOE and the Lab, surrendering the strong enforceability of the old Consent Order. As documented below, it is clearly the reverse of the 2005 Consent Order, whose underlying goal was to make DOE and LANL get more money from Congress for accelerated cleanup.
- The inevitable outcome is slow cleanup with no plans for comprehensive cleanup. DOE proposed a 46% cut to LANL cleanup funding in FY 2021. In contrast, funding for LANL's nuclear weapons research and production programs that caused the need for cleanup to begin with has doubled over the last decade. The planned expansion of those programs will result in more contamination and radioactive and hazardous wastes.
- The incoming Biden Administration could possibly offer better opportunity for renegotiating a Consent Order with DOE that is in New Mexico's best interests.

### **The 2016 Consent Order was negotiated to allow DOE's budget to drive cleanup, not what is needed to permanently protect our environment and precious water resources.**

- As late as 1996 LANL was claiming that groundwater contamination from its operations was impossible, even going so far as to request a waiver from NMED from having to monitor for contamination to begin with (which was fortunately denied).
- Since then, extensive groundwater contamination from chromium, perchlorates, high explosives and VOCs has been documented.

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<sup>1</sup> A direct outcome of this misplaced prioritization was DOE's proposal to cut Lab cleanup by 46% in FY 2021.

- As a harbinger of more to come, plutonium has been detected up to 240 feet below the surface of Area G, the Lab's largest waste dump.<sup>2</sup> LANL plans to "cap and cover" some 800,000 cubic yards of toxic and radioactive wastes at Area G, creating a permanent nuclear waste dump in unlined pits and shafts.
- Despite the threat to precious water resources, the revised 2016 Consent Order allows DOE to determine cleanup priorities based on its anticipated budget, which is the reverse of the original Consent Order.
- The 2016 Consent Order allows LANL and DOE to get out of future cleanup by simply claiming that it's too expensive or impractical to clean up. (See Consent Order quotes below.)
- Shortly after the 2016 Consent Order went into effect, DOE took advantage of it by estimating a lifetime budget that projected a top range of \$3.8 billion to clean up the Lab, while delaying completion to 2040. That works out to only around \$150 million per year, when NMED is already on record that \$250 million per year is needed. DOE is planning "cleanup" on the cheap.
- Worst of all, DOE claimed that only 5,000 cubic meters of mixed radioactive wastes need to be cleaned up, willfully ignoring the estimated 800,000 cubic yards in Area G alone.<sup>3</sup>

**The 2016 Consent Order was negotiated with blatant conflicts-of-interest. The 2016 Consent Order is certainly not in New Mexico's best interests.**

- After signing the 2016 Consent Order in June 2016, then-NMED Secretary Ryan Flynn displayed his true environmental colors by resigning to become the Executive Director of the New Mexico Oil and Gas Association. The Association's main purpose is to lobby on behalf of the oil and gas industry against environmental regulations. Prior to his position as NMED Secretary Flynn had worked for a law firm that defended LANL or LANS (LANL's managing contractor) against environment regulations and labor complaints.
- In January 2017 Kathryn Roberts, the head of NMED's Resource Protection Division and lead Consent Order negotiator, announced that she was leaving to work as a public communications specialist for Longenecker and Associates, a DOE contractor. Prior to working at NMED, Ms. Roberts worked at LANL for four years as Group Leader for Regulatory Support and Performance.
- At Longenecker Ms. Roberts joined Christine Gelles, its Senior Vice President for Operations. They knew each other well, as Ms. Gelles was the former interim manager of the new DOE Environmental Management field office at the Los Alamos Lab. A Longenecker resume' noted that Gelles "Led planning and initial regulatory interactions with New Mexico Environment Department negotiation of Los Alamos Consent Order."<sup>4</sup> Gelles also led initial development of the LANL lifecycle budget that shortchanged cleanup funding.
- During the 2016 Consent Order negotiations, Ms. Roberts was one of Gelles' main counterparts on the other side of the table as head of NMED's Resource Protection Division. Now Gelles is one of Robert's superiors at Longenecker and Associates, which is involved in both the LANL prime and cleanup contracts. As an April 29, 2018 Longenecker notice put it, "We are pleased to report that our N3B [main LANL cleanup contractor] team on the Los Alamos Legacy Cleanup Contract yesterday declared transition complete and DOE has accepted that declaration... Congratulations to Christine Gelles, Katie Roberts and the rest of the L&A [Longenecker and Associates] team who tirelessly supported transition over the last 97 days."<sup>5</sup>

<sup>2</sup> See [https://nukewatch.org/importantdocs/resources/AGCME-Plate\\_B-3\\_radionuclides\\_subsurface.pdf](https://nukewatch.org/importantdocs/resources/AGCME-Plate_B-3_radionuclides_subsurface.pdf)

<sup>3</sup> See [https://nukewatch.org/importantdocs/resources/Area\\_G\\_Pit\\_Totals\\_from\\_CME\\_rev3\\_Sept-2011.pdf](https://nukewatch.org/importantdocs/resources/Area_G_Pit_Totals_from_CME_rev3_Sept-2011.pdf)

<sup>4</sup> Quote formerly available at <http://longenecker-associates.com/leadership/> but now defunct.

<sup>5</sup> See <https://la-inc.com/news-updates/>

- All of this was very much in LANL's and DOE's interests. Section II.A of the 2016 Consent Order allowed the Lab and DOE to "settle any outstanding violations of the 2005 Consent Order." Existing violations were then waived without any penalties.
- NMED pre-emptively surrendered its regulatory and enforcement powers to LANL and DOE, when the State of New Mexico really needed the money!
- New Mexico could have collected more than \$300 million in stipulated penalties had NMED vigorously enforced the 2005 Consent Order. At the time, New Mexico was facing a budget crisis with a projected \$600 million deficit. In effect, NMED gave half of that deficit away to a polluting nuclear weapons site with a multi-billion dollar annual budget.

**The 2005 Consent Order was all about enforceable schedules.**

- The 2005 Consent Order required DOE and LANL to investigate, characterize, and clean up hazardous and mixed radioactive contaminants from 70 years of nuclear weapons research and production.
- It stipulated a detailed compliance schedule that the Lab was required to meet. Ironically, the last milestone, due in December 2015, required a report from LANL on how it successfully cleaned up Area G, its largest waste dump.

**Under Gov. Martinez, NMED extensions eviscerated the 2005 Consent Order.**

- When NMED Secretary Ryan Flynn announced a draft new Consent Order on March 30, 2016, he publicly claimed that the 2005 Consent Order was not working, hence the need for a new one to replace it.
- Nuclear Watch agrees that the 2005 Consent Order wasn't working, but that's because Flynn granted more than 150 compliance milestone extensions at the Lab's request, effectively eviscerating it. The 2005 Consent Order was working quite well until Gov. Martinez took office.

**Some specific provisions in the 2016 Consent Order<sup>6</sup> that put DOE in the driver's seat instead of New Mexico.**

- "The Parties agree that DOE's project's plans and tools will be used to identify proposed milestones and targets." P. 28.
- "DOE shall define the use of screening levels and cleanup levels at a site..." P. 32.
- "DOE shall update the milestones and targets in Appendix B on an annual basis, accounting for such factors as... changes in anticipated funding levels." P. 29.
- "... [DOE and NMED] shall meet to discuss the appropriation and any necessary revision to the forecast, e.g. DOE did not receive adequate appropriations from Congress..." P. 30.
- "If attainment of established cleanup objectives is demonstrated to be technically infeasible, DOE may perform risk-based alternative cleanup objectives..." P. 34. DOE can opt out because of "impracticability" or cost of cleanup. P. 35.
- Altogether, these put the Department of Energy in the driver's seat, not the New Mexico Environment Department, and create giant loopholes that threaten comprehensive cleanup at LANL. The 2016 Consent Order and therefore cleanup at LANL is held hostage to the DOE budget, when the Department's own track record makes clear that its priority is expanded nuclear weapons production paid for in part by cutting cleanup and nonproliferation programs.

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<sup>6</sup> The 2016 Consent Order is available at <https://www.env.nm.gov/wp-content/uploads/sites/12/2016/05/LANL-Consent-Order-June-2016.pdf>

**Future cleanup under the 2016 Consent Order does not have enforceable deadlines.**

- Under the 2016 Consent Order, all anticipated cleanup projects do not have scheduled, enforceable cleanup deadlines from the beginning to the end of the project. This will encourage a lack of accountability in LANL cleanup programs that are already slow, incomplete, and wasteful of taxpayers' dollars.
- The 2016 Consent Order eliminated all the final deadlines for completing cleanup under the 2005 Consent Order and replaced them with an open-ended and vague scheduling process, with highly limited enforcement opportunities.
- The 2005 Consent Order (Section XII) established dozens of detailed deadlines for the completion of corrective action tasks, including completion of investigations at individual sites, installation of groundwater monitoring wells, submittal of groundwater monitoring reports, evaluation of remedial alternatives for individual sites, and completion of final remedies. These deadlines were truly enforceable under Section III.G.
- The 2016 Consent Order abandons the 2005 Consent Order provisions and replaces them with a so-called "Campaign Approach" under Section VIII. Under Section VIII.A.3, it would be up to the DOE, not the regulator (i.e., NMED) to select the timing and scope of each "campaign."
- "Campaigns" have enforceable cleanup deadlines for only the work scheduled for the current year, when cleanup takes many years. These campaigns are to be negotiated each year between NMED and DOE with no public participation and opportunity to comment on the schedule. To add insult to injury, the annual schedule is determined by funding at DOE's discretion, rather than the schedule driving the funding, which was the fundamental driver of the 2005 Order.
- All cleanup projects should have mandatory completion dates scheduled from the beginning and must be fully enforceable. The 2016 Consent Order miserably fails that test.

**The opportunity for a public hearing was not provided.**

- Any extension of a final compliance date (which was December 6, 2015) under the 2005 Consent Order should have been implemented only after the opportunity for public comment and a public hearing, including formal testimony and cross-examination.
- The Environment Department was legally required to follow these public participation requirements that were explicitly incorporated into the 2005 Consent Order but did not.

**The 2016 Consent Order deleted 2005 Consent Order public participation provisions.**

- The 2016 Consent Order explicitly limits public participation requirements that were incorporated into the 2005 Consent Order.
- All notices, milestones, targets, annual negotiations, and modifications should have had public review and comment and the opportunity for a public hearing but did not.

**Comprehensive cleanup at LANL would be a win-win for northern New Mexicans, permanently protecting the environment while providing hundreds of high paying jobs.**

- When DOE wants to do something, it lowballs the cost. When DOE doesn't want to do something, it highballs the cost. LANL has estimated that comprehensive cleanup of Area G would cost \$29 billion. Using actual costs of cleaning up smaller dumps, Nuclear Watch has extrapolated that cleanup of Area G would cost \$7 to 8 billion.<sup>7</sup>
- But of that \$29 billion, DOE estimated that labor costs would be \$13 billion. Applying that 45% proportion to Nuclear Watch's estimate, that would be around \$3.5 billion in jobs, jobs, jobs that northern New Mexico sorely needs.
- Comprehensive cleanup at LANL would be a real job producer!

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<sup>7</sup> See [https://www.nukewatch.org/facts/nwd/Area\\_G\\_Comparison\\_Costs-11-14-12.pdf](https://www.nukewatch.org/facts/nwd/Area_G_Comparison_Costs-11-14-12.pdf)