

COPY

SANTA CLARA

POST OFFICE BOX 580
(505) 753-7326
(505) 753-7330



INDIAN PUEBLO

ESPANOLA, NEW MEXICO
87532

OFFICE OF GOVERNOR

June 6, 2008

Elizabeth Withers
LANL SWEIS Document Manager
US Department of Energy/NNSA
Albuquerque Service Center
P.O. Box 5400
Albuquerque, NM 87185-5400

Re: **Santa Clara Pueblo's Comments on the Final Site-Wide Environmental Impact Statement for Continued Operations of Los Alamos National Laboratory, Los Alamos NM (DOE/EIS-0380)**

Dear Ms Withers:

In accordance with 40 C.F.R. §1503.1(b), Santa Clara Pueblo submits the following comments on the above-referenced final site-wide environmental impact statement ("SWEIS" in general, "Final SWEIS" when referencing the final document, and "Draft SWEIS" for the version issued in June 2006) for continued operations of Los Alamos National Laboratory ("LANL"). All page references to the Final SWEIS refer to Volume 1, unless otherwise noted.

As the Council on Environmental Quality ("CEQ") regulation we cited here for the National Environmental Policy Act ("NEPA") indicates, Santa Clara Pueblo may make comments on the Final SWEIS before a decision on the document is finally made. The May 16, 2008 Notice of Availability for the Final SWEIS states that no Record of Decision will be made on the Final SWEIS for at least 30 days following the Notice of Availability. *See Department of Energy, National Nuclear Security Administration, Notice of Availability of the Final Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, Los Alamos, NM, 73 Fed. Reg. 28453, 28454 (May 16, 2008).*

Thus, these comments are timely and permissible under NEPA, and should be included in the administrative record. Santa Clara Pueblo hopes they will be afforded due respect and consideration before any decisions on the Final SWEIS or about the SWEIS process are made.

Although the Final SWEIS states that the agency proposing the action discussed therein (namely, the continued operation of LANL) is the National Nuclear Safety Administration ("NNSA"),

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 2

because that agency is part of the U.S. Department of Energy ("DOE"), with which Santa Clara Pueblo maintains a formal government-to-government relationship, the comments here reference DOE, instead of its agencies, as the institution proposing, and with ultimate responsibility for, the actions through the Final SWEIS. These comments, of course, apply in full force to the NNSA as an agency of the DOE.

Given the short timeframe, it is impossible for us to extensively review and comment upon a document that is a few thousand pages long. Many issues of concern to us are already preserved in the record through comments made on the Draft SWEIS. Thus, we focus here on the following key concerns with the Final SWEIS: (1) the DOE's failure to honor our request for government-to-government consultation on the Draft SWEIS before issuance of the Final SWEIS; (2) the DOE's failure to analyze environmental justice and cumulative impacts properly in the Final SWEIS; and (3) the necessity for the DOE to postpone any decisions (even short-term SWEIS decisions) regarding increasing plutonium pit production levels above the currently authorized level of 20 pits per year until the mandates of the National Defense Authorization Act for Fiscal Year 2008 are fulfilled.

I. Failure of the DOE to honor Santa Clara Pueblo's request for government-to-government consultation on the Draft SWEIS before issuance of the Final SWEIS

In our comments on the Draft SWEIS, sent to you on September 28, 2006, Santa Clara Pueblo specifically requested government-to-government consultation before the issuance of the Final SWEIS to address some of the concerns we raised in that comment letter. That request was not even formally acknowledged by you and was not honored before the issuance of the Final SWEIS.¹ Not only does this show disregard for the spirit and intent of NEPA² and environmental justice principles,³ it shows enormous disrespect for our government-to-

¹ The Los Alamos Site Office did eventually meet with us regarding potential programmatic issues raised in our comments but had to be clear that the SWEIS concerns were separate and were being handled at DOE headquarters in D.C. DOE continued to ignore our request for consultation prior to publication of the Final SWEIS even after our Congressman, Tom Udall, echoed our concerns in a letter to Donald Winchell dated January 17, 2008. That letter is attached as an exhibit to these comments.

² See, e.g., 40 C.F.R. §1500.2(d) ("Federal agencies shall to the fullest extent possible. . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment").

³ In implementing Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994), agencies are directed to "[i]dentify] potential effects and mitigation measures in consultation with affected communities." Comprehensive Presidential Documents No. 279, *Memorandum from the President to the Heads of Departments and Agencies*, EPA-175-N-94-001 (Feb. 11, 1994) at http://www.epa.gov/fedfac/documents/executive_order_12898.htm#memo1. Santa Clara

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 3

government relationship as it has been formalized through various documents.

In the *U.S. Department of Energy American Indian & Alaska Native Tribal Government Policy*, DOE Order 1230.2 as revised on October 31, 2000 and reaffirmed by Secretary Bodman on January 20, 2006 ("DOE Indian Policy"), the DOE states that consultation includes, but is not limited to:

prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship.

DOE Indian Policy at 2 (definition of "consultation")(emphasis added).

DOE made specific commitments to Santa Clara Pueblo in 1992 which were reaffirmed in the *Restatement of Accord between the Santa Clara Pueblo, a Federally Recognized Tribe, and the United States Department of Energy* (October 31, 2006) ("2006 Accord"). Our 2006 Accord states that:

DOE will consult with the Pueblo to assure that tribal rights, responsibilities, and concerns are addressed prior to the DOE taking actions, making decisions, or implementing programs that may affect the Pueblo. Consistent with Federal laws, . . . DOE, through its Los Alamos Site Office and other DOE organizations, including DOE Headquarters as appropriate, will consult with the Pueblo about the potential impacts of proposed actions on the Pueblo and its cultural, religious, and environmental resources

2006 Accord at 3 (emphasis added).

In the Final SWEIS, the DOE goes to great lengths to describe how consultation requirements were fulfilled because adequate notice about the Draft SWEIS was given to all of the Pueblos, various invitations were issued for involvement of the Pueblos prior to the completion of the Draft SWEIS, and because various briefings on the Draft SWEIS were held at or for Santa Clara

Pueblo sought such consultation once it better understood the DOE's perspective through review of the Draft SWEIS.

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 4

Pueblo. *See* Final SWEIS at 6-29 and 6-30. As the DOE Indian Policy acknowledges, and as we tried to explain to you in our September 2006 comments on the Draft SWEIS, consultation involves the establishment of mutually agreed upon protocols to ensure participation of the appropriate Tribal leaders at the appropriate time, regardless of staff or other briefings that occur along the way. It is not uncommon for busy Tribal leaders to wait to seek consultation until there is an actual draft document to react to and consult upon. Briefings and DOE efforts to ensure access to information prior to the issuance of an actual draft do not equate to government-to-government consultation requested on a draft document. As the DOE Indian Policy cited above acknowledges, it is not up to the DOE alone to determine how consultation requirements should be met, as appears to be the case in the Final SWEIS. All prior efforts by the DOE to give notice and involve the Pueblo and brief Pueblo staff are appreciated but that does not negate the fact that Santa Clara Pueblo's formal request for government-to-government consultation regarding the Draft SWEIS after it was issued and before the completion of the Final SWEIS was disregarded by those at DOE headquarters we were told were in charge of the SWEIS process.

It may seem as if we are belaboring this point, but it is not a small matter to us. In our comments on the Draft SWEIS, we tried to provide relevant information regarding our history and the relative close proximity of LANL to Santa Clara Pueblo and that information does not appear to have been fully incorporated into the Final SWEIS. Our location is not even acknowledged on the map of LANL and nearby land ownership. *See, e.g., id.* at Figure 1-1 (location of LANL does not show Santa Clara Pueblo lands) and Figure 4-2 (land management and ownership does not include Santa Clara Pueblo). We are attaching to these comments two maps to demonstrate how our closest border is less than six miles away from LANL. The close proximity of our lands only seems to be acknowledged on the map showing the effects of the Cerro Grande fire. *See id.* at Figure 4-5.

It also concerns us that, in our comments on the Draft SWEIS, we took the time and effort to describe our land base and some of our traditional practices only to read in the Final SWEIS a description of the Pueblo of San Ildefonso's location, size, and potential land use activities with no similar discussion for Santa Clara Pueblo. *See id.* at 4-9. Equally baffling to us is the fact that text in the Final SWEIS indicates there are no prime farmlands in the vicinity of LANL. *See id.* at 4-5. Is "prime farmland" a term of art? It is not explained in the document for the public to ascertain DOE's intent. In any event, this makes no sense to us since our comments on the Draft SWEIS clearly indicate that we continue our farming traditions and the document itself acknowledges San Ildefonso's nearby land use for farming. *See id.* at 4-9.

To have information we provided during the comment period be ignored and, then, to have our request for consultation regarding ways to fix the SWEIS before the issuance of the Final SWEIS also be ignored gives us pause and we are concerned that DOE will not honor the very few commitments it actually made to the Pueblo in the Final SWEIS. The DOE indicates that

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 5

implementation of our 2006 Accord can serve as a mitigation measure for any potential adverse effects of LANL operations but does not describe its interpretation of this proposed mitigation measure, even in the response to our comments on the Draft SWEIS. *See id.* at 5-234; *see also id.* at Vol. 3, Book 2, Section 3-722. The DOE also indicates that the "Los Alamos Site Office will consider measures that better coordinate the scheduling of explosives testing in order to resolve any adverse effects of noise on traditional practices such as ceremonial dances at the Santa Clara Pueblo" but does not list this as a mitigation measure in the Final SWEIS. *See id.* at Vol. 3, Book 2, Section 3-721. The DOE generally states that it will "implement mitigation measures to reduce the potential for impacts to the environment and the public near LANL" but is clear that it is making no such commitments through the Final SWEIS. *Id.* at Vol. 3, Book 2, Section 3-722; *see also id.* at 5-233 and 5-234.

Given our experience with the DOE on this SWEIS process, and in light of the DOE's assertions in the Final SWEIS that there are no environmental justice impacts to the Santa Clara community, Santa Clara Pueblo needs to know in advance how DOE interprets its responsibilities to implement these Indian policies and procedures in the context of making and implementing decisions regarding the Final SWEIS. Some discussion of this occurred in DOE's response to our comments on the Draft SWEIS but there was not sufficient specificity in the context of SWEIS implementation. At a minimum, whenever the Records of Decisions and associated Mitigation Action Plans are contemplated for the SWEIS, the DOE should conduct government-to-government consultation with Santa Clara Pueblo on drafts of these documents so that we can react to a draft and discuss what future government-to-government consultation commitments will, in fact, be made. This consultation should occur prior to issuance of these documents and should be done in full compliance with our 2006 Accord and the DOE Indian Policy.

II. The DOE did not analyze environmental justice (which includes cumulative impacts) properly in the Final SWEIS.

In the Final SWEIS, the DOE states that there are no disproportionately high and adverse environmental impacts on minority or low income populations under any of the alternatives analyzed in the SWEIS, thus there are no environmental justice impacts. *See, e.g.,* Final SWEIS at 5-167 and S-63. As discussed herein, DOE's analysis in the Final SWEIS is flawed because the wrong standards were applied. In parts of the document, the DOE appears to rely solely on a so-called MEI analysis for its environmental justice conclusions and in other parts of the document, the DOE appears to rely on a special user pathways receptor analysis for environmental justice conclusions. In yet another part of the document, the DOE included a discussion to "address the potential for cumulative environmental justice-related impacts." *Id.* at Vol.3, Book 1, Section 2-27. All of these discussions, however, are incomplete or applied the

wrong standards.

(A) *MEI discussion as it relates to environmental justice is flawed*

In the Final SWEIS, it appears that the DOE estimates radiation doses to an assumed Maximally Exposed Individual ("MEI") of the public and then defines risk based upon the number of "excess" cancer fatalities resulting from the estimated radiation doses beyond those caused by background radiation (which includes past operations). *See, e.g.*, Final SWEIS at 5-59. Risk is assessed only through estimates of cancer fatalities rather than looking at cancer incidence or any other health effect besides actual death that can result from assumed radiation dosages.⁴ *Id.* at Vol. 2, Book 1, C-9. The DOE states that the total dosage calculated for the MEI under the Expanded Operations alternative is 8.2 millirem per year, which is not deemed to be significant by the DOE because it is below the regulatory restriction that airborne emissions for any individual member of the public not exceed 10 millirem per year. *Id.* at 3-78 and 3-79. In calculating the MEI dosage for the Expanded Operations alternative, the DOE looks to dosage from LANSCE operations and from the High Explosive Testing firing site operations at TA-36 because those two locations "account for approximately 81 percent of the total estimated dose from all sites at LANL under the Expanded Operations Alternative." *Id.* at 5-174.

In this part of the analysis, it appears the DOE is stating that there is no environmental justice concern because the Anglo (white) population would receive the largest annual collective and individual dose from this MEI analysis. *See id.* An explanation of the DOE's modeling assumptions and its basis for this conclusion are not explained in a manner that is any way readily apparent to us in this section, but a few pages earlier in the document, the DOE makes a similar assertion with more of an explanation provided. In discussing the accident scenario with the highest risk to the offsite public for any of the alternatives under consideration — namely, a wildfire that consumes the waste storage domes in TA-54 — the DOE asserts such an accident would result in far greater impacts to the Anglo (white) population than nearby minority populations, simply because there are more Anglo people nearby. *See id.* at 5-171. The DOE implies that this also justifies its conclusion of there being no environmental justice impact from the various alternatives for continued LANL operations:

Given the proximity of the more heavily populated areas of Los Alamos and White Rock to TA-54, these areas would be the most heavily impacted in the event of such an accident. Since neither of these is a minority or low-income community, this accident would not have a disproportionate high and adverse

⁴ Santa Clara Pueblo questions the DOE's continued myopic view of risk. Just because a non-fatal cancer may be amenable to medical treatment does not mean there is no impact to a small, self-contained community such as ours from increased risk of non-fatal cancers.

impact on low income or minority populations.

*Id.*⁵

This analysis strays so far afield from what CEQ instructs is proper for conducting environmental justice review as to violate those standards and incorrectly turns the entire notion of environmental justice on its head. This discussion in the Final SWEIS completely ignores the fact we, the members of the Santa Clara Pueblo community, who number only a few thousand, are a distinct society unto ourselves and comprise a separate, unique Indian nation. Thus, any health impacts (including, but not limited to, actual cancer fatalities) to our smaller number would affect our survival as a distinct people (not only literally, but culturally and socially as well) far greater than that of the larger mainstream society. This fundamental environmental justice principle, ignored by the DOE in the Final SWEIS, is part of the CEQ's guidance on environmental justice:

Agencies should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.

Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* (Dec. 10, 1997), <http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf> ("CEQ Environmental Justice Guidance")⁶ at 2.

⁵ It appears that a similar flawed analysis was used in Appendix C wherein annual collective and individual doses were calculated for various subsets of populations with the assumption being that one only need look at the population dose that is highest for those populations with the highest number of individuals living near LANL. See Final SWEIS at Vol.2, Book 1, C-29. In other words, it appears that the DOE is stating that, because there are more Anglo people living near LANL, just in terms of sheer population size, there is no environmental justice impacts to the smaller minority populations nearby. This does not meet the standards for an environmental justice analysis.

⁶ This guidance document "interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898." CEQ Environmental Justice Guidance at 21. Although the Executive Order prohibits judicial review, some courts have held that compliance with the Executive Order is reviewable when an agency has included an environmental justice analysis in its NEPA evaluation. In any event, the CEQ is clear in its regulations for NEPA that it may provide further guidance concerning NEPA and its procedures. See CEQ, *Preamble to Final CEQ NEPA Regulations*, 43 Fed. Reg. 55978 (Nov. 29, 1978); see also 40 C.F.R. §1506.7. The DOE has indicated that its policy is to comply fully with the CEQ regulations, see 10 CFR §1021.101, and courts have recognized that CEQ's interpretation of NEPA is entitled to deference.

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 8

To add insult to injury, the DOE also appears to believe that an increase in exposure for a Native American practitioner with extra exposure pathways cannot be deemed significant if that exposure dosage is less than the difference between the MEI dosage for the No Action alternative and the Expanded Operations alternative, since that difference between alternatives is below the 10 millirem per year standard. See Final SWEIS at 5-175. As discussed in more detail in the following section, this ignores the fact that the DOE's own analysis acknowledges that the Native American pathways are in addition to those of the MEI for any given alternative. DOE seems to miss the point of an environmental justice analysis. Environmental justice is not based on the relative difference in dosage impacts of various alternatives discussed in the document and whether that difference between the alternatives is significant; rather the focus is on whether any one alternative, on its own, given all the relevant exposure pathways and chemical interactions, produces human health or environmental effects on a minority population that are significant.

(B) *CEQ Environmental Justice Guidance was only selectively applied*

Despite our comments on the Draft SWEIS advising the DOE that it is improper to cherry-pick which portions of the CEQ Environmental Justice Guidance it likes best, the Final SWEIS continues to only selectively refer to portions of the CEQ Environmental Justice Guidance for evaluating environmental justice impacts. Through this process of choosing the parts of the analysis it likes from CEQ and disregarding the rest, the DOE is able to narrow the analysis to come to its conclusion that there are no environmental justice concerns with its proposal or preferred alternative. This is not a proper NEPA analysis, however, and must be corrected to comply with NEPA.

The Final SWEIS states that:

[d]isproportionately high and adverse human health effects occur when the risk or rate of exposure to an environmental hazard for a minority or low income population is significant (as defined by NEPA) and appreciably exceeds the risk or exposure rate for the general population or for another appropriate comparison group.

Final SWEIS at 4-169.

This is only one of three factors listed in the CEQ Environmental Justice Guidance that agencies are to consider when determining whether human health effects are disproportionately high and adverse for a Native American community. The other two factors, listed in the CEQ Environmental Justice Guidance but ignored in the Final SWEIS, are whether the health risk exceeds generally accepted norms and whether health effects occur in an Indian tribe due to cumulative or multiple adverse exposures from environmental hazards. CEQ Environmental

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 9

Justice Guidance at 26.

Our discussion here focuses on the human health aspects of environmental justice though we note that the DOE makes a similar mistake in the Final SWEIS in applying less than the full analysis advised in the CEQ Environmental Justice Guidance for determining disproportionately high and adverse environmental effects.⁷

It appears that the DOE bases its conclusion that there are no disproportionately high and adverse human health effects by using the MEI discussion noted in section II.A. above to show the exposure rate is somehow less for minority and low-income populations. As described above, however, the analysis is faulty. Then, the DOE appears to indicate that its consideration of special user pathways reveals no disproportionate impact to minority populations, including Santa Clara Pueblo. *See, e.g.*, Final SWEIS at 1-46. Yet, when the special user pathways assumptions are looked at through the lens of CEQ environmental justice factors that the DOE chose to ignore in the Final SWEIS, disproportionate impacts to Santa Clara Pueblo are revealed.

The Final SWEIS looks at special user pathways "to assess the potential impacts to Native American . . . residents whose traditional living habits and diets could cause larger exposures to environmental contaminants than those experienced by the hypothetical offsite resident." *Id.* at Vol.2, Book 1, C-32. Santa Clara Pueblo maintains that the special user pathways assumed for it did not include the full gamut of potential exposure routes and that more could have, and should have, been done by DOE to work with Santa Clara Pueblo on fixing special user pathways assumptions for the Final SWEIS.⁸ Nevertheless, even using the DOE's incomplete assumptions

⁷ To calculate a disproportionately high environmental impact, the Final SWEIS focuses on impacts on the natural or physical environment that are significant (as defined by NEPA) on minority or low-income communities that appreciably exceed impacts on the larger community. *See* Final SWEIS at 4-169. In the Final SWEIS, the DOE states it also looks to "ecological, cultural, human health, economic, or social impacts." *Id.* This appears to be a summary of two of three factors that the CEQ Environmental Justice Guidance instructs agencies to consider, but, notably, does not include the CEQ instruction to look at whether environmental effects result for an "Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards." CEQ Environmental Justice Guidance at 27. As discussed herein, to the extent that the Final SWEIS does attempt to look at "the potential for cumulative environmental justice-related impacts" Final SWEIS at Vol.3, Book 1, Section 2-27, the analysis is incomplete.

⁸ For instance, through our comments on the Draft SWEIS, we indicated that our traditional practices include the use of local clays for our pottery, the use of native vegetation beyond the assumed ingestion of pinon nuts and Indian tea, and ceremonial use of springs, but these items do not appear to have been included in the modeling assumptions for the special user pathways for the Final SWEIS. *See* Final SWEIS at Vol.2, Book 1, C-31. We also indicated that our consumption of game was not fully incorporated into the special users pathway analysis because, in addition to the organ consumption noted in the special user pathway analysis, we also consume bone marrow and blood. We requested government-to-government consultation to further discuss how to fix these modeling assumptions for the Final SWEIS, but that request was ignored. The DOE responded to us that the assumptions

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 10

about special pathways used by Santa Clara Pueblo members, the Final SWEIS does show significant impacts to Santa Clara Pueblo that were ignored in the analysis.

The CEQ instructs that the DOE should have considered:

[w]hether the health effects, which may be measured in risks and rates, are significant (as employed by NEPA), or above generally accepted norms. . . .

[and]

[w]hether health effects occur in a[n] . . . Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.

CEQ Environmental Justice Guidance at 26.

Notably, the CEQ instructs that adverse health effects can include illness and infirmity, not just death, which appears to be the only health risk assessed by the DOE in the Final SWEIS. *See id.*

The inclusion of these factors as applied to the special user pathways analysis reveals disproportionate impacts to Santa Clara Pueblo from the proposed Expanded Operations alternative.⁹ At the worst, it reveals that the Final SWEIS analysis is incomplete and therefore does not meet the requirements of NEPA to take a hard look at this issue.

In the Final SWEIS, the DOE estimates that the additional special user pathways exposure results in an additional estimated 4.5 millirem per year of radiation. *See* Final SWEIS at Vol.2, Book 1, C-43. This amount for the Native American special pathways user, the DOE indicates, is additive to the amount of exposure calculated for the MEI for the various alternatives. *See id.* at Vol.2, Book1, C-44. According to the Final SWEIS, the highest estimated dose for a MEI for the Expanded Operations alternative is 8.2 millirem per year. *See id.* at Vol.2, Book 1, C-24. It is unclear from the text of the Final SWEIS whether an additional 4.5 millirem per year should be

made were conservative and that we should more specifically identify additional foodstuffs or monitoring paths so they can be incorporated into future analyses. *See id.* at Vol. 3 , Book 2, Section 3-712 and 3-713. Of course, had our request for government-to-government consultation about the Draft SWEIS been honored, such foodstuffs or monitoring paths could have been discussed and incorporated in time to correct the Final SWEIS.

⁹ According to the CEQ, identification of a disproportionately high and adverse human health effect on an Indian tribe does not necessarily preclude a proposed agency action from going forward. However, "the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population." CEQ Environmental Justice Guidance at 10.

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 11

assumed to account for past LANL operations as well as global fallout and natural sources of radiation. *See id.* at Vol. 2, Book 1, C-44. Past operations are supposed to be taken into account in a cumulative effects analysis. *See* 40 C.F.R. §1508.7; *see also* Memorandum from James L. Connaughton, Chairman, Council on Environmental Quality to Heads of Federal Agencies, *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis* (June 24, 2005), http://www.nepa.gov/nepa/regs/Guidance_on_CE.pdf, at 1 and 2 (emphasizing that a cumulative impact analysis should include the “current aggregate effects of past actions” when those past actions are relevant to determining “whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive and significant relationship to those effects”). Consequently, according to the DOE’s own analysis, it appears that the annual exposure for a Santa Clara Pueblo member resulting from the Expanded Operations alternative would be 12.7 millirem per year to possibly as high as 17.2 millirem per year. These figures do not appear to take into account additional radiation ingestion exposure from river water that apparently was separately assessed. *See* Final SWEIS at Vol.2, Book 1, C-44. It appears that the majority of the exposure pathway components assessed for the special users pathway would receive radionuclide exposure via transport through the air. *See id.* at Vol.2, Book 1, Table C-23. The DOE instructs that airborne radiation exposure should be limited to 10 millirem per year for any individual member of the public. It is important to note that this was a standard DOE chose to highlight for its discussion of the MEI exposure. *See id.* at 3-78. Thus, it appears that the DOE’s own analysis of potential exposure to Santa Clara special pathway users, which DOE states are conservative estimates (although we maintain the analysis underestimates the number of relevant pathways), reveals health effects that are disproportionate under the CEQ Environmental Justice Guidance.

Potential exposure to Santa Clara Pueblo members of 12.7 millirem per year (and possibly much higher if an additional 4.5 millirem per year is to be assumed for past operations) reveals health effects from DOE’s own analyses that are above those referenced by DOE repeatedly as safe in the Final SWEIS. Thus, these health effects appear to be “above generally accepted norms.” CEQ Environmental Justice Guidance at 26. In any event, these health effects are “significant” as that term is defined in NEPA, because significance includes the “degree to which the possible effects on the human environment . . . involve unique or unknown risks” 40 C.F.R. §1508.27(b)(5). One need only look to newspaper articles from recent years to see that LANL operations often are cited as a source of possible environmental effects, such as groundwater contamination, that are unique and not yet fully understood. Thus, according to the CEQ, these significant health effects should have been considered in determining whether human health impacts at Santa Clara Pueblo are disproportionately high and adverse. *See* CEQ Environmental Justice Guidance at 26.

As for CEQ’s instruction to look at health effects from multiple or cumulative exposures as part of environmental justice, it appears that the DOE’s analysis is incomplete. As noted above, it

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 12

appears there may have been an attempt to factor in radionuclide exposure from past LANL operations but it is unclear what was actually analyzed or how that was factored into the special user pathways analysis. *See* Final SWEIS at Vol.2, Book 1, C-43. It also appears that, separate and apart from radionuclide exposure, the DOE looked in a more isolated fashion at health impacts for various individual nonradioactive contaminants. *See id.* at Vol.2, Book 1, C-45. However, there does not appear to be any linking of all of these various exposures together and no discussion of how past, present, and potential future actions combine for these various chemical, biological, physical, and radiological elements or may cumulatively affect a special pathways user. The CEQ Environmental Justice Guidance is clear that an analysis of multiple and cumulative environmental exposures should include exposure over time and in more than one location to all of these different agents from single and multiple sources. *See* CEQ Environmental Justice Guidance at 30. In other words, the assessment of risk needs to include synergist interaction between exposure to a variety of different pollutants over time. This does not appear to have been done, despite conclusory statements about environmental justice cumulative impacts to the contrary.¹⁰

III. A decision to go forward through the SWEIS process with any increase in plutonium production is premature and would violate NEPA in light of new mandates from the President and Congress

(A) Increased pit production is imbedded in the purpose and need for the proposed action in the Final SWEIS

The Final SWEIS states that the DOE “proposes to continue managing LANL and its resources in a manner that meets evolving national security missions.” Final SWEIS at 1-1. According to

¹⁰ The DOE simply states in conclusory fashion that the “previous analysis indicates no high and adverse cumulative health and environmental impacts, including economic impacts and impacts from special pathways.” Final SWEIS at 5-232. Notably, despite the fact that CEQ regulations mandate that agencies, in assessing cumulative impacts, must address “the impact on the environment which results from the incremental impact of the action when added to other *past*, present and reasonably foreseeable future actions” and that such cumulative impacts “can result from individually minor but collectively significant actions taking place over a period of time,” this look to past actions appears not to have been included in the discussion of cumulative impacts. 40 C.F.R. §1508.7 (emphasis added). In another section of the document discussing cumulative impacts, the Final SWEIS indicates that it did not look at the past impacts from past releases of chemicals and radionuclides being addressed by the Center for Disease Control (“CDC”) through its Los Alamos Historical Document Retrieval and Assessment (“LAHDRA”) project, because that “information is not available to include in the cumulative impact analysis.” Final SWEIS at 3-108. However, the CDC through the LAHDRA project has already indicated that airborne releases of plutonium from LANL following the Manhattan Project may be on an order of magnitude greater than officially reported, constituting the largest airborne release of plutonium of all of the DOE sites around the country. *See* LAHDRA project public meeting notes (July 18, 2007), http://www.lahdra.org/meetings/mtg_15/mtg_15.htm.

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 13

the DOE, those national security responsibilities include supporting the “core missions as directed by the Congress and the President” which include ensuring “a safe and reliable stockpile.” *Id.* at 1-11; *see also id.* at Vol. 3, Book 1, Section 2-2 (“LANL’s national security responsibilities define the purpose and need for [the] action . . . described in . . . the SWEIS: to support [the] core mission as directed by the Congress and the President, which includes ensuring a safe and reliable stockpile”). The DOE states that increased plutonium pit production of up to 80 pits per year, in order to ensure 50 certifiable pits per year, is necessary “to meet the immediate requirements of the Stockpile Stewardship Program,” *id.* at 1-17, and that decisions through the SWEIS process about increasing plutonium pit production for these immediate needs are largely independent of the Complex Transformation process. *Id.* at 1-40.

It is clear from the Final SWEIS that this near-term increase in plutonium production has become part of the “purpose and need” for the proposed action in the SWEIS. *See, e.g., id.* at 1-17 (“While recent studies suggest that the lifetime of the plutonium pit in the majority of nuclear weapons may be longer than originally thought, NNSA still needs to increase pit production.”), and 1-39 (“the production rate of 80 pits per year analyzed in this SWEIS provides a bounding scenario and would . . . give . . . flexibility to meet current security needs”). Even though the Final SWEIS states that “[a]ny decision to increase pit production beyond 20 pits per year would be made after NNSA issues the Final Complex Transformation SPEIS,” *id.* at 1-17, the Final SWEIS is pretty clear that the DOE believes 80 pits to be needed in the next five years, regardless of what happens in Complex Transformation. *See id.* (DOE “has not made a decision on the configuration of the future complex, including decisions regarding whether to increase its pit production capabilities *above 80 pits per year* at LANL or another site”)(emphasis added); *see also id.* at Vol. 3, Book 1, Section 3-513 (DOE response to comments on the Draft SWEIS includes April 2006 Congressional Testimony from NNSA Administrator Thomas P. D’Agostino indicating that, even before the Draft SWEIS was issued, the DOE had planned on upgrading LANL by 2012 to a production rate of 30-50 “war reserve pits per year”¹¹ until the new Complex Transformation Consolidated Plutonium Center was built).

However, this assumed need for immediate increase in plutonium pits is no longer accurate in

¹¹ According to the U.S. Government Accountability Office (“GAO”), “[w]ar reserve pits must meet stringent specifications, while other types of pits, such as pits destructively tested for production quality control, may not meet the same standards.” The GAO indicates that LANL produced 11 pits in 2007, 8 of which were war reserve pits. Interestingly, the GAO also notes that a NNSA February 2007 memorandum established a total production requirement of only 31 pits. Why, then, does the DOE continue to insist that 50-to-80 pits are necessary? GAO, *Nuclear Weapons: NNSA Needs to Establish a Cost and Schedule Baseline for Manufacturing a Critical Nuclear Weapon Component*, GAO-08-593 (May 23, 2008), <http://www.gao.gov/docsearch/abstract.php?rptno=GAO-08-593> (“GAO Report”).

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 14

light of new mandates from the President and Congress, nor is it reasonable based upon review of the Record of Decision for the 1999 SWEIS in light of new information that has become available since the issuance of the Draft SWEIS in 2006.

(B) *The new 2008 law mandates a fresh look at underlying issues included in the purpose and need for the SWEIS*

The most recent pronouncement of the President and the Congress regarding national security sets forth a new set of requirements to be followed and makes clear that certain tasks need to be completed first by the Congress and the Department of Defense before any decisions are made by the DOE regarding the size and shape of the nuclear weapons complex, including the appropriate level of plutonium pit production capacity.

At the end of January 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181. In this new law, there is a requirement that a new Congressional Commission on the Strategic Posture of the United States be established. This Commission is tasked with reviewing the current nuclear weapons policies of the United States and then issuing a report by December 1, 2008 recommending the appropriate sizes and composition of the nuclear weapons stockpile and the size of the nuclear weapons complex. *See id.* at § 1062. This new law also requires that a "Revised Nuclear Posture Review" be completed by the Secretary of Defense in 2009 in order to address the necessary sizes and composition of the nuclear weapons stockpile and complex "for the next 5 to 10 years," including "any plans to modernize or modify the complex." *Id.* at § 1070.

The Final SWEIS is looking at actions "for initiation at LANL over about the next 5 years." Final SWEIS at 1-2. Those actions, however, may very well be affected by fulfillment of the mandates of this new 2008 law over the course of the next year or so. Moreover, the assumptions underlying the purpose and need for the actions assessed in the SWEIS — the assumed need for increase in plutonium pit production to meet near-term stockpile requirements — may very likely change as a result of the mandate for the issuance of a Revised Nuclear Posture Review addressing stockpile size for the next five to ten years (in other words, a similar timeframe for actions contemplated in this SWEIS). To assume that the current set of alternatives in the Final SWEIS regarding plutonium production will be in line with the national security requirements that, according to the Congress and the President, must be set forth in a 2009 Revised Nuclear Posture Review is simply not reasonable. The very terms of this new law make clear that it is inappropriate to issue any Record of Decision regarding an increase over currently sanctioned plutonium pit production levels until the mandates of the law are met. Locking in a Record of Decision for the preferred alternative of increasing pit production to as high as 80 pits per year would contravene the expressed intent of the President and Congress.

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 15

(C) *In light of the new law and the specific facts, making decisions based on the analysis in the Final SWEIS would violate NEPA*

In addition to thwarting Congressional intent for this new 2008 law, going forward at this time with the preferred alternative of increasing pit production to as high as 80 pits per year would violate NEPA. Basing the evaluation of alternatives for this SWEIS on outdated assumptions regarding the purpose and need for increased plutonium production is contrary to NEPA. Descriptions of purpose and need in an environmental impact statement describe to the public why an agency action is necessary and serve as the basis for identifying the reasonable alternatives available to the agency. See 40 C.F.R. §1502.13. The identification and evaluation of alternative ways of meeting the purpose and need of the proposed action is the "heart of the environmental impact statement." *Id.* at §1502.14. Consequently, if the underlying expressed need for near-term increases in pit production is outdated, flawed, or contrary to law, the evaluation of alternatives also will be skewed, rendering faulty the entire NEPA analysis. That is what happened here with respect to the short shrift given to keeping plutonium pit production capacity to 20 pits per year, that which is described in the No Action alternative.

Factually, there does not appear to be any need to rush to a decision to increase short-term pit production at LANL prior to fulfillment of the mandates of this new 2008 law. In January 2007, a group of independent scientists studying the lifetime of existing plutonium pits for the DOE revealed that there is no evidence of concern about the reliability of these legacy plutonium pits for the next century. See JASON Program Office, *Pit Lifetime*, JSR06-335 (Jan. 11, 2007), <http://www.fas.org/irp/agency/dod/jason/pit.pdf>, at 1. The Record of Decision for the 1999 SWEIS indicated that the production of 20 pits per year, deemed adequate capacity for near-term pit production requirements, would be achieved in 2007. See DOE, *Record of Decision: Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory in the State of New Mexico*, 64 Fed. Reg. 50797, 50803 (Sept. 20, 1999). In fact, LANL has not even reached that level of pit production in 2007. In 2007, LANL produced 11 pits. See GAO Report (*supra* at footnote 11). Thus, there is still considerable flexibility for LANL within the plutonium pit production bounds of the No Action Alternative while the mandates of the new 2008 law are fulfilled.

Indeed, it seems irresponsible to make any decisions about increasing pit production at LANL until recent seismic studies are more fully reviewed. The Final SWEIS indicates that the recent 2007 study revealed that "[t]he estimated probabilistic hazard [for LANL] has increased significantly, up to 83 percent, compared to the 1995 probabilistic seismic hazard analysis." Final SWEIS at 4-26. The Final SWEIS also states that these 2007 updates on seismic hazards "will require review and revision of the seismic hazard and the design basis earthquake for use in designing and establishing operating limits for LANL facilities." *Id.* at 4-27. Thus, it seems premature to make decisions about whether LANL should increase its production operations,

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 16

even in the short term, until these various reviews and revisions are completed.

It is also irresponsible to increase pit production at LANL when legacy waste has not yet been cleaned up and when the disposal path for future waste generation is not known. The Final SWEIS actually tries to turn this issue on its head by essentially stating that WIPP disposal capacity is fine for the new transuranic waste contemplated under this SWEIS but the real problem is finding a disposal path for all the old transuranic waste buried before 1970 at LANL and other DOE sites. See Final SWEIS at 3-82, 5-152, and Vol. 3, Book 2, Section 3-717 and 3-718 (indicating transuranic waste amounts in the Expanded Operations alternative could exceed WIPP capacity but that is mainly "attributable to remediation actions"). That is a completely backwards way to view responsible environmental decision-making.

In applying NEPA, courts will defer to agency expertise but agency discretion is not unlimited. The agency still must exercise its discretion in a manner which is reasonable in light of the facts of the situation and the important goals of informed decision-making and protection of the environment found in NEPA.

It appears from our review of the facts that:

- (1) existing plutonium pits have credible lifetimes of 100 years;
 - (2) LANL is nowhere close to meeting the current plutonium pit production levels it set back in 1999;
 - (3) the National Defense Authorization Act for Fiscal Year 2008 mandates a fresh look within the next few years at the issue of appropriate stockpile size which affects security requirements and necessary plutonium pit production levels;
 - (4) increased seismic hazards at LANL have not yet been fully reviewed;
- and
- (5) the DOE has no known transuranic waste disposal path for both clean-up of past waste plus generation of new waste.

In light of these facts, it is not reasonable, even in the short term, to lock in any decision that increases plutonium pit production beyond the currently authorized levels from the 1999 SWEIS until the mandates of the new 2008 law are fulfilled and these lingering impact concerns are better understood.

IV. Next steps to remedy the NEPA violations in the Final SWEIS

As described above, the Final SWEIS improperly only selectively uses parts of the CEQ's guidance and regulations regarding environmental justice and cumulative impacts. This resulted in an incomplete analysis and a failure to comply fully with NEPA requirements. To remedy this, the DOE must revise the environmental justice and cumulative impact analysis by fulfilling all of the CEQ's guidance and regulations and must circulate those portions as a revised draft SWEIS and allow for additional public review in accordance with 40 C.F.R. §1502.9(a). In addition, pursuant to the 2006 Accord, the DOE also must conduct government-to-government consultation with Santa Clara Pueblo on the proposed draft revisions to fix such defects. *See* 2006 Accord at 3 (DOE *will* consult with the Pueblo to assure that tribal rights, responsibilities, and concerns *are addressed prior to the DOE taking actions, making decisions, or implementing programs that may affect the Pueblo*)(emphasis added). However, the timing of the fixing of these defects needs to be coordinated with the resolution of issues related to completion of the relevant mandates in the National Defense Authorization Act for Fiscal Year 2008.

In addition, as described in these comments, any decisions regarding an increase in plutonium pit production above the currently-authorized levels of up to 20 pits per year would be premature until the mandates in the National Defense Authorization Act for Fiscal Year 2008 that we highlighted are fulfilled. To go forward with plutonium pit production decisions for the next five years based upon the current analysis in the Final SWEIS would violate NEPA because the alternatives discussed are based upon outdated assumptions regarding the need for certain plutonium pit production levels. Any Record of Decision issued for the SWEIS regarding plutonium pit production should be clear that the decision to expand pit manufacturing beyond the level of 20 pits per year will be postponed until the mandates of the new 2008 law are fulfilled. Once the mandates of the new 2008 are fulfilled, then the DOE should prepare a supplement analysis, *see* 10 C.F.R. §1021.314, to determine whether a supplemental environmental impact statement regarding immediate pit production needs is warranted and should consult with Santa Clara Pueblo on that supplement analysis in accordance with the 2006 Accord.¹² It certainly appears this new law constitutes significant new circumstances that bear upon the DOE's preferred alternative for plutonium production for the next five years, thus necessitating another hard look at the issue. *See id*; *see also* 40 C.F.R. §1502.9(c)(1).

This should in no way adversely affect the ability for DOE to go forward with its mandatory waste clean-up obligations pursuant to the Consent Order with the New Mexico Environment Department. Those obligations continue to exist independent of the SWEIS process or any

¹² The DOE should consider these comments not only to be a written request for government-to-government consultation on this matter but should also consider these comments to be a written request for a copy of any Supplement Analysis associated with this SWEIS in accordance with 10 C.F.R. §1021.314(c)(3).

Ms. Withers

Santa Clara Pueblo's Comments on the LANL Final SWEIS

June 6, 2008

Page 18

decisions regarding future plutonium pit production.

We end by reiterating the DOE's duty in accordance with the DOE Indian Policy and our 2006 Accord to consult with Santa Clara Pueblo on a government-to-government basis before any additional actions are taken or decisions made regarding the Final SWEIS.

Sincerely,



J. Michael Chavarria
Governor

- Encl: (1) Letter from Tom Udall, Congressman, to Donald Winchell, LASO Manager (Jan.17, 2008)
(2) Map from LAHDRA Project showing Santa Clara Pueblo and LANL
(3) Map from Santa Clara Pueblo Office of Environmental Affairs entitled "Santa Clara Pueblo - Location to Los Alamos National Laboratory"

cc w/o encl:

Members of the Santa Clara Tribal Council
DOE Secretary Samuel Bodman
NNSA Administrator Thomas P. D'Agostino
DOE Deputy Assistant Secretary for Intergovernmental & External Affairs Steve Morello
CEQ Chairman James Connaughton
Senator Pete V. Domenici
Senator Jeff Bingaman
Representative Tom Udall
Representative Heather Wilson
Representative Steve Pearce
Governor Bill Richardson
New Mexico Environment Department Secretary Ron Curry
New Mexico Indian Affairs Department Secretary Alvin Warren
Donald Winchell, LASO Manager
Brandt Petrasek, DOE Public Participation Specialist
Don Ami, LASO Intergovernmental Affairs
Joseph M. Chavarria
Jessica Aberly