

## Overview of Revisions to the 2016 Compliance Order on Consent

Several substantial revisions were made to the 2016 Compliance Order on Consent (Consent Order). This document summarizes substantial revisions that the Department of Energy (DOE) and the New Mexico Environment Department (NMED) negotiated. The revisions are addressed in the order in which they appear in the Consent Order.

### Section 8: Campaigns, Five-Year Schedules, and Annual Planning Process

**2016 Consent Order:** Cleanup activity is organized into Campaigns. Each year, DOE and NMED negotiate binding Milestones for the upcoming fiscal year and nonbinding Targets for the following two fiscal years. Missing a Milestone subjects DOE to stipulated penalties.

**Revised 2016 Consent Order:** Campaigns are divided into Class A and Class B Campaigns. The revisions establish a process for setting Campaign completion dates for each Campaign. The revisions also clarify the process for prioritizing Campaigns.

- Class A Campaigns are Campaigns in which there is sufficient clarity on the cleanup that a five-year schedule can be developed. DOE and NMED will establish: (1) Milestones for the upcoming fiscal year and following fiscal year; and (2) a Campaign completion date (which could be beyond the five-year schedule). DOE is subject to stipulated penalties for missed Milestones and Campaign completion dates.
- Class B Campaigns are too uncertain to establish a Campaign completion date at this time (e.g., NMED has not selected the remedy). For these Campaigns, DOE and NMED will establish Milestones only for the upcoming fiscal year, as well as nonbinding Targets for the following two fiscal years. DOE is subject to stipulated penalties for missed Milestones. Approval of CMI Plan for a Class B Campaign will reclassify the Campaign from Class B to A.

### Section 11: Deferred Sites

**2016 Consent Order:** RCRA corrective action may be “deferred” at particular LANL sites.

**Revised 2016 Consent Order:** Specifies the four circumstances when a site may be deferred: (1) the site is located within testing hazard zones of active firing sites at LANL; (2) the site is associated with active LANL operations; (3) property is inaccessible due to land access issues (such as land is owned by a third party); and (4) another reason not addressed in the other three circumstances, which is subject to NMED approval. For sites deferred for active firing sites or facility operations, DOE must provide notice to NMED, confer with neighboring Pueblos and local governments, and notify the public. DOE will also provide an annual report on the status of all deferred sites.

### Section 23: Preparation/Review/Comment on Documents

**2016 Consent Order:** Deadlines were not pre-set. DOE and NMED were to agree on review times consistent with target deadlines set forth in Appendix D.

**Revised 2016 Consent Order:** Changes and clarifications were made regarding document review times, many of which were to conform with applicable provisions of pertinent NMED regulations. The changes clarify the timeframes by when documents are to be reviewed.

## **Section 25: Dispute Resolution**

**2016 Consent Order:** Disputes are resolved via a “tiered” process by various officials at NMED and DOE; eventually ending up with discussions between NMED’s Deputy Secretary and DOE’s Field Office Manager. If a dispute is unable to be resolved at this level, then NMED and DOE can pursue mediation or litigation.

**Revised 2016 Consent Order:** Disputes are classified as either “technical” or “non-technical.” Technical disputes are limited to scientific or engineering disagreements. For technical disputes, NMED and DOE will first attempt to resolve the dispute by first-tier officials at NMED and DOE. However, if those negotiations are unsuccessful, the dispute will be referred to a technical expert selected by mutual agreement of NMED and DOE. The expert’s decision is final and binding on NMED and DOE. For non-technical disputes, the process also begins with officials at NMED and DOE attempting to resolve the dispute, which, if not successful, results in NMED and DOE proceeding to non-binding mediation. If non-binding mediation is unsuccessful, then the dispute would be referred to an agreed-upon third-party adjudicator to issue a decision. Either NMED or DOE may pursue judicial review of that decision.

## **Section 34: Public Participation, Pueblo and Local Government Conferrals, Independent Audits, and 10 Year Reviews**

**2016 Consent Order:** This Section did not exist. It was added in the Revised 2016 Consent Order.

**Revised 2016 Consent Order:** This Section has four provisions. First, it specifies opportunities for public participation in the Consent Order, addresses regular public meetings, and requires DOE to maintain an email address for public submissions. Second, it clarifies that public meetings addressed in the first section are distinct from Pueblo or local government conferrals required under other provisions of the Consent Order or law. Third, it provides for independent audits regarding NMED and DOE performance under the Revised 2016 Consent Order (see Appendix G). Fourth, it requires NMED and DOE to review the Consent Order every 10 years to determine its efficacy and consider whether modifications are warranted.

## **Section 36: Stipulated Penalties**

**2016 Consent Order:** Stipulated penalties are addressed in Section 35 of the 2016 Consent Order. It has been renumbered to Section 36 in the Revised 2016 Consent Order. Missed Milestones are subject to stipulated penalties. Milestones that are extended by NMED are not subject to stipulated penalties. Stipulated penalties are not to be paid out of EM-LA cleanup appropriations if another source is available. NMED may approve Supplemental Environmental Projects (SEPs) in lieu of stipulated penalties. NMED may pursue judicial or other relief instead of assessing stipulated penalties.

**Revised 2016 Consent Order:** Stipulated penalties include missed Campaign completion dates and missed Milestones. When NMED extends a Milestone, it does not automatically cease to be a Milestone; DOE and NMED agree on whether: (1) a substitute Milestone is established in lieu of the extended one; or (2) the extended Milestone remains subject to stipulated penalties based on the extended date.

## **Appendix D: NMED Document Approval List and Review Timeframes**

Appendix D specifies the types of documents subject to NMED approval and includes document review times for these documents, such as corrective measures implementation plans and certificates of completion. Appendix D of the Revised 2016 Consent Order includes cross-references to the respective Sections of the Consent Order where those documents are discussed. It also contains a more comprehensive list of documents than what was contained in the 2016 Consent Order.

### **Appendix G: Independent Audits**

As mentioned in Section 34, Appendix G is a new appendix to the Revised 2016 Consent Order. It details the procedures applicable to independent audits. It requires DOE and NMED to commence a pilot audit within one year after execution of the Revised 2016 Consent Order. The audit is to be conducted by an independent third-party, and Appendix G sets out the procedures (including holding public meetings) the auditor must follow. The cost of the audit is to be shared equally among DOE and NMED. Future audits, if DOE and NMED agree to conduct them, will occur no more than once every four years, and there must be a one-year gap between the conclusion an independent audit and the 10-year review process established in Section 34.