

**UPDATE ON LITIGATION AND THE EFFECTS OF NMED'S ABANDONMENT  
OF THE 2005 LANL CONSENT ORDER AND ADOPTION OF  
THE 2016 ORDER ON CONSENT**

**PREPARED FOR THE  
JOINT RADIOACTIVE AND HAZARDOUS WASTE COMMITTEE**

**by  
NUCLEAR WATCH NEW MEXICO  
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**EXECUTIVE SUMMARY**

In 2005, after extensive litigation in federal and state courts over violations of the federal and state hazardous waste laws, the New Mexico Environment Department (NMED) entered into an Order on Consent with the Department of Energy (DOE) and its LANL contractor, the University of California. The 2005 Consent Order (CO) was a comprehensive plan to remedy contamination at the Los Alamos Lab caused by releases of hazardous waste, and it established an enforceable schedule for the completion of more than 80 specific actions of investigation, remediation and monitoring over a period of ten years.

Beginning with the Martinez Administration in 2011, violations of the CO and DOE's RCRA permit soared. In May 2016, Nuclear Watch filed suit against DOE and LANS, DOE's contracted LANL facility operator, on the basis that their failures to perform the obligations of a consent order with a RCRA regulatory agency were violations of federal RCRA law.

On June 24, 2016, a new Consent Order was entered into between NMED and DOE. The 2016 CO eliminated virtually all of the obligations of the 2005 CO. NMED's current assertion that cleanup will be hastened under the 2016 Order is contradicted by the facts: Cleanup, Monitoring Wells, and Contaminated Area Investigations have, with one exception, been indefinitely delayed under the 2016 Order. As a result, these activities have been set back by at least 4 years in most cases and more than 11 years in some. Particular areas of concern - Los Alamos Canyon, Mortandad Canyon and Area G - have not been addressed.

The adoption of the 2016 CO has also resulted in a loss of state environmental regulatory power and loss of public confidence in NMED's willingness and ability to protect the public's water supplies.

An aggressive independent regulator is needed because historically, LANL has consistently underestimated the nature and extent of contamination and the environmental threats presented by it. But under the 2016 CO, NMED, the

**regulator, cannot require DOE to do anything DOE does not agree to do – that means NMED has ceded the regulatory power it had under the 2005 CO and that investigation, monitoring and cleanup schedules are now being determined by the polluter rather than upon the regulator's determination of what is necessary for the protection of public health and the environment.**

**The fact of NMED's cession of regulatory power by the execution of the 2016 Consent Order is apparent to all, so for the intended beneficiaries of the state's regulation – the public – there is a loss of confidence that NMED can or will act in the future in their best interests.**

**Action is needed by the legislative and the executive branches. Of this Committee we respectfully request the following:**

**1. That this Committee Support Revitalization of the Environment Department Generally, and Specifically of the Hazardous Waste and LANL Oversight Bureaus.**

**2. That this Committee Begin an Investigation, Including Public Hearings as Necessary, Independent of NMED and LANL, on the Contamination Threat from LANL Legacy Wastes and the Harm Caused by Abandonment of the 2005 CO Cleanup Schedule.**

**3. That this Committee Recommend to Governor Lujan Grisham that She Direct the Environment Department to Reconsider Its Lawsuit Position (that NukeWatch's Claims Are Barred by the 2016 CO) and Either a) Support NukeWatch's Right to Continue these Claims or b) Request Leave to Withdraw from the Lawsuit.**

# THE EFFECTS OF NMED'S ABANDONMENT OF THE 2005 CONSENT ORDER AND ITS ADOPTION OF THE 2016 ORDER ON CONSENT

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# UPDATE ON LITIGATION AND THE EFFECTS OF NMED'S ABANDONMENT OF THE 2005 LANL CONSENT ORDER AND ADOPTION OF THE 2016 ORDER ON CONSENT

## I. INTRODUCTION.

Congress enacted Subtitle C of the Resource Conservation and Recovery Act (RCRA)<sup>1</sup> to establish a comprehensive regulatory scheme to address the storage, treatment and disposal of hazardous wastes, and it provided for a federal-state partnership to achieve this objective. A state may seek authorization from the EPA for the state's hazardous waste management program plan, as administered by NMED, to operate in lieu of RCRA, including the corrective action program within the state,<sup>2</sup> and the state may issue and enforce permits for the storage, treatment, and disposal of hazardous waste, which have the same effect as permits issued by EPA.<sup>3</sup> The State of New Mexico received EPA authorization to implement its hazardous waste program under the Hazardous Waste Act (HWA) in lieu of the federal program on January 25, 1985.<sup>4</sup> Under that regulatory program, the NMED can also regulate hazardous waste that contains radioactive substances, so-called "mixed waste."<sup>5</sup>

In addition, Congress enacted a citizen suit provision to enable non-governmental parties to participate in the enforcement of RCRA. The statute allows a citizen or organization, after providing notice of intent to sue, to file a civil action in federal district court to enforce any provision of RCRA.<sup>6</sup>

### A. The March 1, 2005 Consent Order.

On March 1, 2005, following a period of extensive litigation in federal and state courts and lengthy settlement negotiations, NMED, DOE, and the Regents of the University of California (operator of Los Alamos National Laboratory) entered into a Compliance Order on Consent ("2005 Consent Order"). The purposes of the 2005 Consent Order were to fully determine the nature and extent of environmental contamination at LANL, to identify and evaluate alternatives for the cleanup of environmental contamination and to implement cleanup.<sup>7</sup>

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1 42 U.S.C. §§ 6921-39g.

2 50 Fed. Reg. 1515 (Jan. 11, 1985); *see also* 55 Fed. Reg. 28,397 (July 11, 1990); 60 Fed. Reg. 53,708 (Oct. 17, 1995); 61 Fed. Reg. 2450 (Jan. 26, 1996).

3 42 U.S.C. § 6926(b) and (d).

4 50 Fed. Reg. 1515 (Jan. 11, 1985); *see also* 55 Fed. Reg. 28397 (July 11, 1990); 60 Fed. Reg. 53708 (Oct. 17, 1995); 61 Fed. Reg. 2450 (Jan. 26, 1996).

*See United States v. New Mexico*, 32 F.3d 494, 497-99 (10th Cir. 1994) (State may regulate mixed waste without interfering with DOE's regulation of the radioactive component of mixed waste).

6 42 U.S.C. § 6972(a)(1)(A).

7 2005 Consent Order § III.A.

The 2005 Consent Order set forth a mandatory schedule for completing more than 80 specific corrective action tasks for the investigation and cleanup of environmental contamination at LANL.<sup>8</sup> The final corrective action compliance date under the 2005 CO, for submission to NMED of a Remedy Completion Report for Material Disposal Area G<sup>9</sup> was December 6, 2015.<sup>10</sup>

The 2005 Consent Order allowed DOE and UC (and later, Los Alamos National Security, LLC ("LANS"), as UC's successor contractor facility operator), to seek an extension of time in which to perform a requirement of the 2005 Consent Order by making a written request to NMED and showing good cause<sup>11</sup>. Most of the deadlines in the 2005 Consent Order schedules were extended pursuant to this provision.

The 2005 CO (as well as a later Consent Order executed in 2016) states:

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

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

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

DOE and LANS have engaged in the “disposal” of hazardous wastes within the meaning of section 1004(3) of RCRA, 42 U.S.C. § 6903(3), at LANL. DOE and LANS have disposed of such wastes in septic systems, pits, surface impoundments, trenches, shafts, landfills, and waste piles at the

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8 2005 Consent Order § XII.

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

10 *Id.* § XII, Tables XII-2, XII-3 (Oct. 29, 2012).

11 2005 Consent Order § III.J.2.

Laboratory. DOE and LANS have also discharged such wastes in industrial wastewater and other waste from outfalls into many of the canyon systems at LANL.

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

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

Hazardous wastes within the meaning of section 1004(5) of RCRA, 42 U.S.C. § 6903(5), that have been released into, and detected in, groundwater beneath the Laboratory include explosives, such as RDX; volatile organic compounds such as trichloroethylene, dichloroethylene, and dichloroethane; metals such as molybdenum, manganese, beryllium, lead, cadmium, hexavalent chromium, and mercury; and perchlorate. Hazardous wastes and hazardous constituents have been detected beneath LANL in all four groundwater zones.<sup>12</sup>

NMED determined that corrective action at LANL was necessary to protect human health and the environment.<sup>13</sup> That necessity has not dissipated with the repeated failures by DOE and LANS to accomplish the required cleanup.

## **B. VIOLATIONS OF THE 2005 CO AND THE LANL RCRA PERMIT.**

Beginning about 2011, with the incoming Martinez administration, violations of the 2005 CO began to rise dramatically. At the same time, other violations of DOE's RCRA permit for LANL also increased, as shown by the following table:

<u>Fiscal Year Viols Occurred</u>	<u>No. of RCRA Violations</u>	<u>Source</u> <sup>14</sup>
2011	12	RINR 2011

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<sup>12</sup> 2005 CO, pars. 29-39.

<sup>13</sup> Compliance Order on Consent § II (March 1, 2005).

<sup>14</sup> DOE and LANS were required, by the provisions of LANL's Hazardous Waste Permit, Sections 1.9.13 and 1.9.14, to report instances of noncompliance and releases ("RINRS"). *See, e.g.*, DOE's and LANS's "Fiscal Year 2011 Reporting of Instances of Noncompliance and Releases - Los Alamos National Laboratory Hazardous Waste Facility Permit." The report must be submitted by December 1 of each year. *Id.*

2012	14	RINR 2012
2013	193	RINR 2013
2014	76	RINR 2014
2015	421	RINR 2015
2016	107	RINR 2016
2017	25	RINR 2017

These data show that DOE and LANS’s self-reported RCRA violations began to sharply increase after 2012, reaching a total of 421 self-reported violations in FY 2015. Examination of those repeated violations shows that this pattern was not a mere failure to meet a few paperwork and report filing deadlines set forth in a now-irrelevant consent order, but rather a systematic and systemic failure by defendants DOE and LANS to meet crucial cleanup deadlines for sites with known, admitted and ongoing environmental discharges of contaminants classified as “hazardous wastes” under RCRA.

### **C. NUCLEAR WATCH FILES SUIT**

Nuclear Watch served DOE and LANS, its LANL facility contractor, with two written notice letters prior to filing its Complaint and Amended Complaint. Those Notices warned DOE and LANS that by their failures to comply with the terms of the 2005 CO, they were violating the federal RCRA statute which forbids a defendant bound by a Consent Order with a RCRA regulatory agency to fail to comply with the requirements of that Consent Order.<sup>15</sup> On that basis, Nuclear Watch filed its original Complaint on May 12, 2016. The Complaint alleged that DOE and LANS had violated RCRA by failing to timely comply with the 2005 CO’s requirements for investigation, cleanup, and monitoring of 13 critical contaminated areas at LANL.

After motions and a lengthy briefing period, the Court in August 2018 dismissed NukeWatch’s claims that the 2016 CO was invalid, but preserved its claims for penalties for RCRA violations relating to the failures to comply with the 2005 CO. The Court explained that civil penalties payable to the U.S. Treasury potentially still could be imposed in this litigation because such penalties may deter future violations.<sup>16</sup> At the present time, the parties are awaiting the Court’s decision on cross-motions for summary judgment.

### **D. THE 2016 CONSENT ORDER.**

DOE and NMED executed a new consent order on June 24, 2016, entitled “Compliance Order on Consent” (“2016 Consent Order”). According to the 2016 Order, “[t]his Consent Order supersedes the 2005 Compliance Order on Consent (2005 Consent Order) and settles any outstanding alleged violations under the 2005 Consent Order.”<sup>17</sup>

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<sup>15</sup> 42 U.S.C. § 6972(a)(1)(A)5.

<sup>16</sup> July 21, 2018 Memorandum Opinion and Order, at 31.

<sup>17</sup> 2016 Consent Order. § II.A.



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

The 2016 Consent Order does not contain a schedule for completion of corrective action tasks. Nor does it contain a final deadline for completion of all corrective action. Rather, it provides that each year NMED and DOE will meet to negotiate the schedule for the next federal fiscal year.<sup>18</sup>

**The 2016 CO is not a product of diligent prosecution, but rather represents a polluter’s veto power and regulatory capture.**

The 2016 CO is so ineffective an enforcement and cleanup tool as to be in conflict with the purposes of RCRA and the NM Hazardous Waste Act (HWA). An inspection of the terms of the 2016 CO reveals no enforceable obligations on the DOE or its contractors to accomplish any of the cleanup tasks cited by Nuclear Watch in its lawsuit. The 2016 Consent Order eliminates all deadlines, suspends all existing clean-up efforts previously scheduled to take place, and wipes clean a huge slate of DOE/LANS violations of RCRA and the NM HWA without exacting a dime of civil penalties or taking any meaningful steps to keep the cleanup process on course. Further, the 2016 CO will never contain any enforceable obligations of any kind on DOE unless DOE explicitly agrees to them. In other words, under the 2016 CO, the regulated entity has a veto power over the regulator. This is indeed, in the language of the U.S. Fifth Circuit, “a sterling example of regulatory capture at its worst.”<sup>19</sup>

**NMED’s Assertion That Cleanup Will Be Hastened Under the 2016 Order Is Contradicted by the Facts.**

NMED has claimed that DOE's and LANS's “patterns of delay” will be “less likely to occur in the future” and that the 2016 Order” will “hasten cleanup of legacy hazardous waste.”<sup>20</sup> However, comparison of the actual cleanup schedules in the 2005 CO with those in the 2016 Order for the contaminated areas that were the subject of the 2005 CO shows beyond doubt that actual cleanup of the subject areas has already been delayed by years and, in most cases, has been “indefinitely extended,” not “hastened.”

**II. THE EFFECTS OF NMED'S ABANDONMENT OF THE 2005 CONSENT ORDER AND ITS ADOPTION OF THE 2016 ORDER ON CONSENT.**

**A. Effects of NMED's Abandonment of the 2005 Consent Order.**

**1. Cleanup, Monitoring Wells, and Contaminated Area Investigations Have,**

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18 2016 Consent Order § V III. B, C.

19 See, *Env't Tex. Citizen Lobby, Inc. v. Exxon Mobil Corp.*, 824 F.3d 507, 526 (5th Cir. 2016).

20 NMED 11-9-18 Motion for Summary Judgment, at 5-6.

**With One Exception, Been Indefinitely Delayed under the 2016 Order.**

Comparison of the actual cleanup schedules in the 2005 CO with those in the 2016 Order shows beyond doubt that actual cleanup of the areas which were the subject of the 2005 CO has already been delayed by years and, in most cases, has been indefinitely delayed. This in distinct contrast to the characterization of NMED that cleanup has been “hastened” under the 2016 Order.

**a. Remedy Completions and Reports**

In four LANL Material Disposal Areas (MDAs A, B, C and G) scheduled for remediation in the 2005 CO, DOE and LANS were required to complete implementation of a remedy and report the results to NMED.

The following table shows the deadlines for accomplishment of remediation of these contaminated areas and reporting of the results to NMED, in both the 2005 CO and the 2016 Order:

<u>Material Disposal Area</u>	<u>Remedy Compl. Rpt. Due Date: 2005 CO<sup>21</sup></u>	<u>Remedy Compl. Rpt. Due Date: 2016 Order<sup>22</sup></u>	<u>Minimum Delay As of Nov 2018</u>
MDA A	June 30, 2014	None	4 years, 3months
MDA B	January 31, 2015	None	4 years, 8 months
MDA C	September 5, 2010	None	9 years, 1 month
MDA G	December 5, 2015	None	4 years, 10 months

In none of these contaminated areas has the implementation of a remedy and reporting of the results been “hastened” by the adoption of the 2016 Order.

**b. Groundwater Monitoring Wells**

DOE and LANS failed to install either the regional groundwater monitoring well designated R-65 or the intermediate perched-aquifer monitoring well designated R-26i. These monitoring wells are important because, as the 2005 CO and 2016 CO state, “[c]ontaminants have been detected beneath the Facility in all four groundwater zones.” Furthermore, the state of the groundwater at LANL was not just a concern in 2005; these groundwater monitoring wells, R-65 and R-26i, according to NMED, were also a priority of the Martinez Administration:

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21 Due dates shown are pursuant to last approved extension request, if any, and are confirmed by NMED.

22 As of FY2018 Appendices B and C to the 2016 Order, for either enforceable Milestone deadlines or non-enforceable Target dates.

NMED is concerned over delays that affect the progress of groundwater characterization and remediation. Governor Martinez has prioritized the protection of groundwater, and any delay in completing R-65 is counter to this objective. The Permittee is required to complete the installation of well R-65 as previously scheduled on June 30, 2014.<sup>23</sup>

and

NMED is concerned over delays that affect the progress of corrective action including characterization and remediation. The protection of groundwater in New Mexico has been prioritized, and any delay in completion of well R-26i is counter to this objective. The Permittees must complete the installation of Well R-26i no later than December 31, 2014, as previously scheduled.<sup>24</sup>

Despite the recognized need, however, DOE and LANS never did install monitoring wells R-65 and R-26i. Unfortunately, there can be no table as above comparing the due dates for installation of these “high priority” monitoring wells under the 2005 CO and the 2016 CO because the 2016 CO fails to require them at all: as of the date of the FY 2018 Appendices to the 2016 Order, they appear in no planned Campaign. NWNM finds in this situation again no factual support for NMED’s claim that cleanup will be hastened under the 2016 CO.

**c. Investigative Field Work and Reports.**

Substantial investigative field work is necessary before an informed selection of remedy can be made for a contaminated area and then implemented. The following table shows the deadlines for these fundamental investigations to be completed and reported on to NMED, in both the 2005 CO and the 2016 Order, for twenty of the Aggregate Areas scheduled for investigation and cleanup by the 2005 CO:

<u>Aggregate Area</u>	<u>Invest. Rpt. Due Date: 2005 CO</u>	<u>Invest. Rpt. Due Date: 2016 Order</u>	<u>Minimum Delay As of Oct 30, 2019</u>
Cañon de Valle at TA-15	July 2, 2014	None	5 years, 3 months
Lower Pajarito Canyon	July 31, 2014	None	5 years, 3 months
Twomile Canyon	August 30, 2014	None	5 years, 2 months
Cañon de Valle at TA-16	December 31, 2014	None	4 years, 10 months
Upper Water Canyon	December 31, 2014	None	4 years, 10 months

23 Letter, NMED to DOE and LANS, June 25, 2014.

24 Letter, NMED to DOE and LANS, December 31, 2014.

Starmer/Upper Pajarito Canyon	December 31, 2014	None	4 years, 10 months
Chaquehui Canyon	March 31, 2015	Sept 30, 2019	Submitted September 30, 2019 4 years, 6 months late
DP Site, Los Alamos Canyon	December 31, 2014	None	4 years, 11 months
Upper Los Alamos Canyon	June 30, 2014	None	5 years, 4 months
Middle Los Alamos Canyon	January 19, 2008	None	11 years, 9 months
Upper Mortendad Canyon	January 31, 2015	None	4 years, 9 months
Upper Cañada del Buey	December 28, 2014	None	4 years, 11 months
Lower Mortendad/ Cedro Canyon	June 23, 2012	None	7 years, 4 months
Water Canyon/ Cañon de Valle	January 31, 2015	None	Submitted June 23, 2016, 1 year, 4 months late
S Site	September 15, 2014	None	5 years, 1 month
Sandia Canyon	July 31, 2012	None	7 years, 3 months
Lower Sandia Canyon	June 30, 2014	None	5 years, 4 months
TA-57 Canyon	December 31, 2014	None	4 years, 10 months
Potrillo/Fence Canyon	June 30, 2014	None	5 years, 4 months
North Ancho	May 30, 2014	None	5 years, 1 month

Every Aggregate Area Investigation Report listed above is omitted from the most recent list of enforceable Milestones under the 2016 Order. Every case except the Chaquehui Canyon Investigative Report is omitted even from the 2016 Order’s list of non-enforceable Targets. That Report was submitted September 30, 2019, some 4 years and 6 months after the last extended deadline under the 2005 CO. For the Chaquehui Canyon Investigative Report, then, it is possible to estimate the delay resulting from adoption of the 2016 Order’s schedule for this work – 4 years, 6 months, as noted. For all other Aggregate Areas, the minimum delay currently is as shown above, but the ultimate delay is unknown but continuing to increase.

However, since deadlines for all the other cited Aggregate Area Investigative Reports do not exist under the 2016 CO, appearing neither in the enforceable Milestones list nor in the non-enforceable Targets list, it impossible to describe the required Reports as being anything other than “indefinitely delayed.” And certainly, in no way can one describe cleanup as having been “hastened” in any of these cases.<sup>25</sup>

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<sup>25</sup> In one other Aggregate Area, the Lower Water Canyon Aggregate Area, DOE and LANS submitted the required Investigation Work Plan on June 23, 2016, the day before the 2016 CO was approved, and the

## **DOE and LANS Requested and Obtained from NMED Over 150 Extensions of Deadlines for Compliance with the Requirements of the 2005 CO.**

In assessing the breadth and depth of the patterns of delay engaged in by DOE and LANS to avoid ultimate compliance with the requirements of the 2005 CO, the number of extensions requested and obtained for extensions of deadlines for requirements of the CO is certainly relevant. A full list is available at the NMED website.<sup>26</sup> In all, more than 150 extensions of 2005 CO deadlines were requested by DOE and LANL and approved by NMED. This extensive effort, engaged in by DOE and LANL for years, to attempt to ultimately avoid the requirements of the 2005 CO, was unfortunately very successful. NMED now relies on the 2016 CO to conclude that the cleanup requirements of the 2005 CO, which NMED attempted to enforce as late as April 15, 2015 as priorities of the Martinez Administration, are now of low priority, deserving of few resources, and, with one exception, appropriately not appearing on either an enforceable Milestone list or a non-enforceable Target date list.

NMED, in at least eleven notices of violations under the 2005 CO, admonished DOE and LANL that it granted extensions of deadlines for required work because the Permittees had committed, in the January 2012 Framework Agreement, to progress in the areas prioritized by the Martinez Administration: groundwater and surface water protection, and the accelerated removal of TRU waste from MDA G.

But DOE and LANS, instead of progressing on acceleration of TRU waste from MDA G, violated RCRA remediation, packing, and labeling requirements, resulting in an explosion of one of the TRU drums shipped by DOE and LANS to the WIPP facility on February 14, 2014, contaminating the facility, requiring its closure for nearly four years, adding at least a billion dollars in additional expense for DOE's TRU waste cleanup program and halting all shipments of TRU waste from LANL until August 2018.

And as noted above, DOE and LANS also failed to progress in protection of groundwater or surface water, failing to install monitoring wells R-65 and R-26i, and failed to perform required investigations and report the results for 19 Aggregate Areas in 6 different watersheds.

### **2. Particular Areas of Concern - Discharge of Contaminants to Groundwater and the Rio Grande.**

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Plan was approved by NMED on 3-30-17. The submission by DOE and LANS was 16 months late, so even if it was considered submitted pursuant to the 2016 Order, that Order cannot be said to have hastened the cleanup.

<sup>26</sup> [https://www.env.nm.gov/HWB/documents/LANL\\_Consent\\_Order\\_Extensions\\_5-3-2016.pdf](https://www.env.nm.gov/HWB/documents/LANL_Consent_Order_Extensions_5-3-2016.pdf) (as of 12/12/2018).

The quantity of water discharged from the Los Alamos area to the Rio Grande is about 18,000 acre-feet per year, or some 6 billion gallons per year.<sup>27</sup> Part of this discharge is captured by the Buckman Wellfield.<sup>28</sup> Effluent containing radionuclides has been discharged into Acid, DP, Los Alamos and Mortandad Canyons. Contaminants from Lab operations flow down the canyons and into the Rio Grande, as well as percolating downward to pollute the groundwater.<sup>29</sup>

#### a. Los Alamos Canyon.

Los Alamos Canyon is of particular interest because of its contamination history and its hydrologic connection to groundwater and the Rio Grande, with surface water flows from the Canyon entering the Rio Grande upstream from the Buckman Direct Diversion. Stormwater flows down Los Alamos Canyon for 1999 were 100 acre-feet. The contamination history includes radionuclide releases from DP Site, with effluent discharges directly into the Canyon:

Since the establishment of the Laboratory in 1943, LANL research facilities have discharged effluent byproducts into the canyon over lengthy time periods. Of particular concern are a number of radionuclides present in both surface water and groundwater. From 1952 until 1986, an industrial liquid waste treatment plant at TA-21 discharged effluent containing radionuclides into DP Canyon, a tributary, to Los Alamos Canyon within the watershed (LANL Environmental Protection Group, 1995). Though the original source has been eliminated, residual levels of contamination remain in both the surface water and groundwater systems.<sup>30</sup>

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27 "Estimates by Spiegel and Baldwin (1963, p. 200-201) of 25 cubic feet per second over a 26-mile reach (0.96 cubic foot per second per mile) between the streamflow gages at Otowi Bridge and near Cochiti Pueblo and by Griggs (1964, p. 95) of 500 to 600 gallons per minute per mile (1.1 to 1.3 cubic feet per second per mile) in a 21-mile reach downstream from Otowi Bridge are consistent except for a different estimated river mileage...Thus, ground-water discharge to the reach from Otowi Bridge to Cochiti Pueblo could be in the range of about 10 to 30 cubic feet per second." Frenzel, USGS 1995, at 20.

"Discharge to the river may occur as lateral flow, upward flow, or as flow from springs in White Rock Canyon. Purtymun (1966) suggested that all the springs, which collectively flow approximately 85 kg per sec, discharge water from the upper surface of the main aquifer." Keating *et al.*, *Vadose Zone Journal* Aug 2005, at 656.

28 Our initial analysis considers the Buckman wellfield alone (without pumping at the collector well). The three-dimensional capture zone of the wellfield includes areas both west and east of the Rio Grande and a portion of the Rio Grande itself. At steady state, the predicted relative proportions of water extracted at Buckman are 27% from the Rio Grande and the Pojoaque river, **34%-western basin, including the Pajarito Plateau**, and 39%-eastern basin. **Of the water originating in the west, most is recharged at high elevations, outside the LANL boundaries, but flows through the regional aquifer beneath the laboratory.** Vesselinov and Keating May 2002, at 14, *emph. added*.

29 Most of the radionuclides become bound to alluvial sediments, so their concentration in the canyons increases... [T]hese sediments are then carried out of the canyons by storm runoff (Purtymun, 1974).

30 Gray 1996, Los Alamos Watershed Evaluation, at 46.

Transport of contaminants through Los Alamos Canyon to the Rio Grande has been rapid.<sup>31</sup>

...[I]t is clear that erosional processes are transporting radiochemical contamination, mainly as suspended sediment and bedload sediment, through the Los Alamos Canyon watershed and into the Rio Grande and have been for some time.

As described above, active erosional processes have moved substantial inventories of radionuclides bound to sediments from the watershed into the stream channels of downstream land owners and into the Rio Grande.

Strontium is also being carried out of Los Alamos Canyon into the Rio Grande.<sup>32</sup>

Plutonium is also being carried out of Los Alamos Canyon, into the Rio Grande, and downstream, with speeds exceeding 1 mile per year in the Rio Grande.<sup>33</sup> However, substantial quantities remain in the soils and surface water of the canyon.<sup>34</sup>

Groundwater under Los Alamos Canyon is contaminated with radionuclides and tritium.<sup>35</sup>

Of greater concern is the detection of high <sup>90</sup>Sr activity in the alluvial groundwater within the canyon, which was measured in 1993 at 367.7 pCi/L in alluvial observation well LAO-2, located at the confluence of DP Canyon with Los Alamos Canyon, a level significantly in excess of

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31 *Id.*, at 61.

32 "Using the average K<sub>d</sub> for channel sediments, a retardation factor (R<sub>f</sub>) of 102.3 for <sup>90</sup>Sr and a predicted migration rate of 2.7 m/yr was determined (Longmire, et al., 1996a). The currently observed widespread distribution of <sup>90</sup>Sr in alluvial sediments in Los Alamos Canyon thus suggests significant transport by sediment mobilization. The high peak flows, attributable to urban runoff, shown by the lower gage stream hydrograph (Figure 14) imply that the potential for surface contaminant redistribution is greatest in the lower watershed (Wilcox, et al., unpublished draft report). *Id.*, emph. added.

33 "Purtyman, et al., (1990) reported that between 1975 and 1986, 57% of the plutonium that reached the Rio Grande was associated with suspended sediments, and that 40% was associated with bedload sediments, while 3% was in solution. Five of seven runoff events during the study resulted in transporting an estimated total of 600 ~Ci of plutonium to the Rio Grande...Graf (1995) found that most of the LANL contributions remain in storage along the river between Otowi and Pena Blanca, about 3 miles below Cochiti Reservoir. **In as much as plutonium migration has only occurred since 1943 and the Cochiti Dam began impounding the sediments in 1973, a rough approximation of maximum travel time from the Los Alamos vicinity is thus -35 miles over 30 years, or -6100 ft/yr.**" *Id.*, at 60, emph. added.

34 "In 1993, <sup>239</sup>Pu concentrations in surface water in Los Alamos Canyon (at the lower streamflow gage) were measured at levels ranging from 0.029 to 0.040 picoCuries per liter (pCi/L) while <sup>238</sup>Pu concentrations ranged from 0.004 to 0.017 pCi/L. Other radionuclides present in surface waters in the canyon include <sup>137</sup>Cs at 0.4 to 2.9 pCi/L and <sup>3</sup>H at 500 to 1,100 pCi/L (LANL Environmental Protection Group, 1995)." *Id.*, at 60.

35 Groundwater also shows elevated radionuclide concentrations, with <sup>238</sup>Pu measured at 0.0 to 0.356 pCi/L, <sup>239</sup>[u] at 0.015 to 1.584 pCi/L, <sup>137</sup>Cs at 0.1 to 3.0 pCi/L, <sup>241</sup>Am at 0.019 pCi/L, <sup>3</sup>H at 200 to 1,300 pCi/L and total uranium at 50.4 [Jlg]/L.

the DOE DCG and EPA MCL for drinking water of 8 pCi/L, but below the DOE DCG for water in uncontrolled areas of 1000 pCi/L 90Sr.<sup>36</sup>

In January of 1993, a leak of ~3 gal/hr was discovered in the cooling system delay line at the Omega West Reactor (OWR) facility at TA-2, resulting in an extended release of tritium into the shallow subsurface.<sup>37</sup> It has been estimated that over the years of its operation (which began in 1956), the reactor facility may have leaked as much as a million gallons of tritiated water into the alluvial groundwater system in Los Alamos Canyon.<sup>38</sup> Also, discharges of tritium from TA-21 into DP Canyon have likely occurred from a leaking tritiated water tank at the tritium facility.<sup>39</sup> Tritium occurs in the alluvial aquifer in the form of tritiated water and is a conservative species which migrates at the same rate as the groundwater. In Los Alamos Canyon, the alluvial groundwater flow rate is estimated to be about 900 feet per year.<sup>40</sup>

Testing has confirmed the presence of tritium in intermediate-perched water zones.<sup>41</sup> A hydrologic connection between the alluvial groundwater and the intermediate-perched water is believed to exist.<sup>42</sup>

#### **b. Mortandad Canyon.**

Mortandad Canyon is also of particular interest for its contamination history, surface water flow connection to the Rio Grande, and because it is the source of the hexavalent chromium plume in the regional aquifer.

[Water-borne] contaminants may reach the perched waters by recharge from contaminated surface waters, especially in the canyons. Leakage from perched-water zones may permit contamination of the regional aquifer. For example, tritium has been detected at depths of at least 195 ft beneath Mortandad Canyon (Stoker *et al.*, 1991). The perched saturated zones in the tuff come to the surface via springs along canyons. where the water issues from fractures.<sup>43</sup>

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36 Gray 1996, Los Alamos Watershed Evaluation, at 51.

37 LANL Environmental Protection Group, 1995, cited by Gray 1996, Los Alamos Watershed Evaluation, at 52.

38 Pat Longmire, pers. commun. to Gray, cited in Gray 1996, Los Alamos Watershed Evaluation, at 52.

39 LANL, 1981, cited in Gray 1996, Los Alamos Watershed Evaluation, at 52.

40 Gallaher, 1995, cited in Gray 1996, Los Alamos Watershed Evaluation, at 52.

41 Preliminary Drilling Results for Boreholes LADP-3 and LADP-4 at TA-21: LADP-3 found water in intermediate-depth perched groundwater zone contained 6.0 nCi/l of tritium. LADP- 4 found 2.15 pCi/g tritium in a tuff sample collected from a moist zone at a depth of 160 ft. **The origin of the tritium is not yet known but moisture transport from several industrial sites at TA-21 is a possibility.** emph. added. Earth Science Investigations for Environmental Restoration, LANL, May 1995, at 100.

42 The chemistry of the Guaje Pumice Bed groundwater is similar in major constituents to that of the alluvial groundwater. **This similarity, in addition to the presence of low-level tritium contamination, strongly suggests a hydrologic connection between the two perched groundwaters.** emph. added. Los Alamos Watershed Evaluation, Gray, *op. cit.*, at 51.

43 Stone, "Some Fundamental Hydrologic Issues Pertinent to Environmental Activities, NM Geological Society 1996, at 451.



**c. Area G.**

Plutonium has been detected up to 240 feet below the surface of Area G, the Lab's largest waste dump. At present (and there is no indication that NMED disagrees), LANL plans to "cap and cover" some 200,000 cubic meters of toxic and radioactive wastes at Area G, creating a permanent nuclear waste dump in unlined pits and shafts. Only about 5,000 cubic meters of mixed radioactive wastes would actually be cleaned up, leaving the 200,000 cubic meters as a continuing threat to ground and surface water.

**B. Loss of State Environmental Regulatory Power and Loss of Confidence in NMED's Ability to Protect the Public.**

**1. Loss of Needed State Environmental Regulatory Power.**

**a. An Aggressive Independent Regulator Is Needed Because Historically, LANL Has Consistently Underestimated the Nature and Extent of Contamination and the Environmental Threats Presented by It.**

1. Underestimation of the Threat to Groundwater.

a. the Claim: "Groundwater contamination not possible."

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 at all at Area G and other contaminated sites (which fortunately NMED denied).<sup>44</sup>

The reality, as set forth in both the 2005 CO and the 2016 CO:

Hazardous wastes within the meaning of section 1004(5) of RCRA, 42 U.S.C. § 6903(5), that have been released into, and detected in, groundwater beneath the Laboratory include explosives, such as RDX; volatile organic compounds such as trichloroethylene, dichloroethylene, and dichloroethane; metals such as molybdenum, manganese, beryllium, lead, cadmium, hexavalent chromium, and mercury; and perchlorate. Hazardous wastes and hazardous constituents have been detected beneath LANL in all four groundwater zones.<sup>45</sup>

b. The Claim: "The tuff is impermeable."

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<sup>44</sup> Letter, NMED to DOE denying DOE application for waiver from groundwater monitoring requirements, May 30, 1995.

<sup>45</sup> 2005 CO, pars. 29-39.

The main aquifer is isolated from alluvial water and perched water by about 110 to 190 m (350 to 620 ft) of dry tuff and volcanic sediments. **Thus, there is no hydrologic connection or potential for recharge to the main aquifer from alluvial or perched water.**<sup>46</sup>

and

Personnel from the Laboratory's Environmental Restoration Project have found preliminary indications of low levels of tritium in two perched groundwater zones - saturated areas that are segregated from the main aquifer by **impermeable geologic formations** - in Los Alamos Canyon.<sup>47</sup>

The hydrologic characteristics and conditions of the soil, seal material and tuff indicate no recharge to the stream-connected aquifers or main aquifer through the surface soil, buried wastes, or underlying tuff at Mesita del Buey...[U]nder present climatic conditions the estimated life of the pits will be about 27,000 years.<sup>48</sup>

The reality:

...various lines of evidence suggest that while the tuff may retard percolation, it does not prevent it. The perching of ground water in the canyon alluvium on the tuff attests to its low permeability, but modeling of such perched water in Mortandad Canyon has suggested that there is considerable leakage into the tuff (Koenig and McIn, 1992; Geddis, 1992; Stone, 1995).

Although the tuff lacks primary porosity and permeability, especially where welded, cooling and tectonic fractures are common. Such fractures often exhibit clay skins, suggesting water has moved along them.

Another line of evidence that the tuff is not a barrier to flow is the occurrence of water within the tuff itself. Water that was not introduced during drilling has been encountered in two holes in mesa settings (Gardner et al 1993). Also, springs have been observed discharging from ...the tuff in the Pajarito Canyon and Canyon de Valle areas (Dale and Yanita, this volume).<sup>49</sup>

## 2. Underestimation of the Threat to Surface Water and the Rio Grande.

The reality:

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46 LANL, Environmental Surveillance at Los Alamos During 1979, at 10, *emph. added*.

47 LANL Daily Newsbulletin, Thursday, Dec. 11, 1997.

48 LANL, Purtyman 1970, at 11.

49 Stone, *op.cit.*, at 450.

[Water-borne] contaminants may reach the perched waters by recharge from contaminated surface waters, especially in the canyons. Leakage from perched-water zones may permit contamination of the regional aquifer. For example, tritium has been detected at depths of at least 195 ft beneath Mortandad Canyon (Stoker et al., 1991). The perched saturated zones in the tuff come to the surface via springs along canyons, where the water issues from fractures.<sup>50</sup>

And

Effluent containing radionuclides has been discharged into Acid, DP, Los Alamos and Mortandad Canyons. Most of the radionuclides become bound to alluvial sediments, so their concentration in the canyons increases... [T]hese sediments are then carried out of the canyons by storm runoff. (Purtymun, 1974)<sup>51</sup>

### 3. Underestimation of the Groundwater Chromium Contamination Problem.

The Claim: "The Chromium Problem Is Well Understood and Concentrations Are Stable."

Chromium: Nature and extent of groundwater contamination generally understood. Cr concentrations at the downgradient portion of the plume are below NM GW STD and stable, especially in deeper screens where concentrations are at background levels.<sup>52</sup>

The reality:

The altered shape and potential spread of the plume was only discovered after the lab drilled a new well earlier this year, which it believed was outside the scope of contamination. But sampling taken in July revealed the well had 270 parts per billion of chromium, more than five times the state limit of 50 parts per billion. Inside the plume, the concentration is significantly higher.

Officials also will inject molasses and sodium dithionite into the plume, testing a technique they hope will show success at reducing the toxic chromium in the groundwater. Still, full remediation could take decades. Katzman declined to wager a completion date.<sup>53</sup>

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50 *Id.*, at 451.

51 *Id.*, at 452.

52 LANL Monitoring Year 2016 Interim Facility Wide Groundwater Monitoring Plan.

53 Santa Fe New Mexican, November 4, 2017, on a briefing to the RHCW by Danny Katzman, LANS Program Manager.

The source of the contamination is chromium in hexavalent form that discharged into Sandia Canyon between 1956 and 1972. The November 2017 shape of the plume was about 1 mile long, 1/2 mile wide, and it was about a 1/4 mile from a large community supply well.<sup>54</sup> The chromium has been carried down the canyon in surface water flow, it is present in the Sandia Canyon wetland sediments, it is also present in the subsurface in the vadose zone (including in perched-intermediate groundwater) and, as noted, in the regional aquifer beneath Sandia and Mortendad Canyons.<sup>55</sup>

Investigations have disclosed complex contaminant transport pathways from surface water to perched groundwater into the regional aquifer, with some 1,100 kg of chromium having been transported into the aquifer in about 40 years, about 12,000 kg presently on the way to the regional aquifer from the perched groundwater, and about 23,000 kg migrating downward to the perched groundwater.<sup>56</sup>

**b. But NMED Argues that Aggressive Enforcement of RCRA for Non-Compliance with the 2005 CO, Including Court Assessment of Penalties, Would Undermine Its Authority.**

NMED has claimed that a court's assessment of penalties against DOE and LANS would undermine its regulatory authority.<sup>57</sup> But a court will only do that if NMED has not but should have. The imposition of fines and penalties on violators should increase the regulatory authority of the Department, not decrease it. That view, based upon experience, is also shared by Robert Alvarez, former Assistant Secretary for Environmental Management at DOE, whose experience supports the position that DOE cleanup funds appropriated by Congress flow preferentially to those contaminated sites where cleanup is subject to enforceable deadlines.<sup>58</sup> Imposition of fines and penalties thus not only bolsters the authority of the regulator, it results in more cleanup dollars and quicker and more comprehensive cleanup.

NMED's shrinking from its regulatory authority is unfortunately congruent with the thinking of DOE that the best way to be in compliance with cleanup requirements imposed by environmental laws is to have little or no requirements at all.<sup>59</sup>

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54 Katzman, briefing to RHWC, Nov 3, 2017.

55 LANL Interim Measures Work Plan for the Evaluation of Chromium Mass Removal April 2013, at 1.

56 *Id.*, Fig. 10-1

57 *Ibid.*, ftnt 20 above.

58 Declaration of Robert Alvarez, NW Response to Motion for Summary Judgment, at ¶ 11.

59 DOE has argued that there is no reasonable expectation that the 2005 CO violations could recur under the 2016 Order because: 1) The previous violations all “related to deliverables”; 2) Those particular deliverables obligations no longer exist in the 2016 Order; and 3) Therefore, those particular violations are no longer possible. The same action or, in this case non-action, has been redefined from “noncomplying” to “complying,” in reliance on the simplistic proposition that “there can’t be any deadline violations if there are no deadlines.” **By this reasoning, the greatest compliance would be realized with the complete absence of any deadlines for cleanup action.**

It is also apparent that NMED has been cowed by DOE's explicit threat that any penalties levied against it would come out of cleanup funds:

By the time NMED established the 2005 Order, the sum total of commitments made to States across the DOE Complex far exceeded U.S. Congressional appropriations. **In addition, there was a determination that the only source of funds for fines and penalties assessed due to lack of Federal funding were the appropriated funds for site cleanup activities. As a result, assessing fines and penalties would result in less funding for the actual cleanup activities, which was not in the public interest.**<sup>60</sup>

That is blatant extortion of the regulator by the supposed regulatee. If NMED does not reverse this abdication of its regulatory power to DOE, it will never recover the confidence of the public.

**c. Under the 2016 CO, NMED, the Regulator, Cannot Require DOE to Do Anything DOE Does Not Agree to Do – That Means NMED Ceded the Regulatory Power It Had under the 2005 CO.**

It is shocking that a regulatory agency would enter into a Consent Order which gave veto power over the subject, scope, nature, and timing of any environmental cleanup to be accomplished, but that is the nature of the 2016 Consent Order. The 2016 Consent Order eliminates all the final deadlines for completing cleanup under the 2005 Consent Order and replaces 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

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<sup>60</sup> Declaration of Randall Erickson, 11-19-18 LANS Motion for Summary Judgment, *emph. added.*

DOE's discretion, rather than the schedule driving the funding, which was the fundamental driver of the 2005 Consent Order. That is, **the 2016 Consent Order was negotiated to allow DOE's budget to drive cleanup, not what is needed to permanently protect our water.** Some specific provisions in the 2016 Consent Order that cede control from the NMED to DOE and its own budget priorities include:

"The Parties agree that DOE's project's plans and tools will be used to identify proposed milestones and targets." <sup>61</sup>

"DOE shall define the use of screening levels and cleanup levels at a site..." <sup>62</sup>

"DOE shall update the milestones and targets in Appendix B on an annual basis, accounting for such factors as... changes in anticipated funding levels." <sup>63</sup>

"... [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..." <sup>64</sup>

"If attainment of established cleanup objectives is demonstrated to be technically infeasible, DOE may perform risk-based alternative cleanup objectives..." <sup>65</sup>

And ultimately, DOE can simply "opt out" because of "impracticability" of the cost of cleanup.<sup>66</sup>

Altogether, these terms put the Department of Energy in the driver's seat, not the New Mexico Environment Department, and they create giant loopholes that threaten comprehensive cleanup at LANL. Cleanup at LANL is being held hostage to DOE funding, when the Department's own track record makes clear that its priority is expanded nuclear weapons production nationwide, including greatly expanded plutonium pit production at LANL, paid for in part by cutting cleanup and nonproliferation programs.

**d. The Fact of NMED's Cession of Regulatory Authority by the Adoption of the 2016 Order is Apparent to All, so for the Intended Beneficiaries of the State's Regulation – the Public – There is a Loss of Confidence that NMED Can or Will Act in the Future in their Best Interests.**

Because the 2016 CO is manifestly a cession of state regulatory power to DOE, putting any cleanup on DOE's schedule and subject to its own funding priorities, NMED can offer the public no confidence that under the 2016 Consent Order DOE will be able to perform the failed cleanups of the contaminated areas that were at the heart of the 2005

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61 2016 CO, Sect. VIII.A.4.c.

62 *Id.*, Sect. IX.C.

63 *Id.*, Sect. VIII.C.3.

64 *Id.*, Sect. VIII.C.3.

65 *Id.*, Sect. IX.L.

66 *Id.*, Sect. IX.M.

CO. As noted above, the 2016 Order contains no enforceable deadlines for investigation or remediation of any of the twenty-four Aggregate Areas and Material Disposal Areas that were the subject of the 2005 CO.

And because of the inability of the 2016 CO to serve as an effective vehicle for LANL legacy waste investigation, cleanup and monitoring, it is clear that NMED cannot act in the public's best interest on this subject, and that there is no current prospect of that changing. The consequence is that NMED's present impotence will be extended indefinitely into the future, with the protection of the public's groundwater and in a perilous state of non-action.

## **SUMMARY AND CONCLUSIONS**

### **The Consequences of NMED's Abandonment of the 2005 CO Cleanup Schedule Are Real and Continue to Mount.**

Cleanup of the sites which were the subject of the 2005 CO did not suddenly occur on June 24, 2016, the date of the 2016 Order. To the contrary, all the 2016 Order did, with respect to these required investigations, remediations and monitoring, was to declare that DOE's and LANS's continuing failure to perform the required work was no longer to be deemed non-complying.

### **There Is a Loss of Confidence in NMED's Willingness and Ability to Enforce Environmental Laws at LANL.**

NMED can offer no confidence that DOE will be able to perform the failed cleanups that were at the heart of the 2005 CO because the 2016 Order contains no enforceable or even non-enforceable deadlines in those areas. Only one of the Material Disposal Areas that were the subject of the 2005 CO is scheduled for investigation or remediation in the 2016 CO. That is one out of twenty-four.

## **Action Is Needed: Three Requests of this Committee**

Nuclear Watch respectfully requests that this Committee support the public, protection of public water resources, and the NMED in the following ways:

### **1. That this Committee Support Revitalization of the Environment Department Generally and Specifically of the Hazardous Waste and DOE Oversight Bureaus.**

It is no secret that the Environment Department and the Hazardous Waste and DOE Oversight Bureaus were decimated during the Martinez Administration. Nuclear Watch strongly urges Committee support for the increased resources, personnel and leadership that will be necessary to begin the arduous task of restoring lost credibility and morale.

### **2. That this Committee Begin an Investigation, Including Public Hearings as Necessary, on the Contamination Threat from LANL Legacy Wastes and the Harm Caused by Abandonment of the 2005 CO Cleanup Schedule.**

There is a great need for a technical investigation, independent of NMED and LANL, to evaluate the consequences of abandonment of the 2005 CO and its cleanup schedule. NukeWatch believes the Legislature, and particularly this Committee, have the required independence and credibility to initiate such an investigation, hold hearings, and reach a conclusion which will inevitably redound to the benefit of our groundwater and surface water protections.

### **3. That this Committee Recommend to Governor Lujan Grisham that She Direct the Environment Department to Reconsider Its Lawsuit Position (that NukeWatch's Claims Are Barred by the 2016 CO) and Either a) Support NukeWatch's Right to Continue these Claims or b) Request Leave to Withdraw from the Lawsuit.**

NMED claims that NukeWatch's attempts to enforce RCRA on its own, through citizen action, when NMED would not, undermine its authority and should be barred. That is a position contrary to what a real regulator should be taking. NukeWatch is not asking for any appearance in the lawsuit by anyone but is requesting that the Governor recognize that the NMED position is inappropriate for the environmental regulator in her administration. The Governor should either: a) direct the NMED to reverse its position on the allowability of NukeWatch's claims for penalties to be paid to the U.S. Treasury for DOE's and LANS's RCRA violations; or b) request leave to withdraw from the lawsuit. Our request to the Committee is that it also recognize that NMED's position is inconsistent with that of a genuine independent regulator and support our request to the Governor by conveying to her its agreement on the matter.