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Subject:	Citizen Action LANL Draft Permit Comments
Attachments:	CA Comments LANL Draft RCRA Pt B Permit.doc

Please see attached RCRA Draft Permit comments for Citizen Action.

Sincerely,

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September 4, 2009
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In the Matter of Los Alamos National Laboratory's (LANL)
Draft Part B Resource and Conservation (RCRA) Permit

Citizen Action New Mexico (CA) Request for Extension of Time for Submission of Public Comments; Request for a Public Hearing; Request for Reopened Negotiations for Draft Permit Modifications as Reissued; Request for Denial of Draft Permit; and Comments
(Notice of Opposition)

Citizen Action Comments

1. Citizen Action requested on September 3, 2009 that a **time extension for public comment** be granted for review of the Draft Permit as reissued. These comments incorporate those substantive and procedural comments by reference thereto.

2. Generally, and as explained in more detail below, **the LANL draft permit should be denied** because it does not comply with all local, state and federal requirements. (42 U.S.C. Section 6961). Under these circumstances, the LANL Draft Permit should be denied by the New Mexico Environment Department (NMED).

3. **Public Participation**

The permit should contain language that recognizes the public participation right to notice, comment and review of any well monitoring network at LANL that falls within the modifications that are listed in 40 CFR 270.42 Appendix I. NMED and DOE have a history of exclusion of the public from involvement in the work plan development for the monitoring network at LANL.

The permit does not provide the public any comprehensive or comprehensible look at what will be the well monitoring network for LANL as a facility.

One of the most fundamental elements for state programs is the broad information gathering powers and duties of the State. Not only are States required to have the right to gather information from regulated entities, but States have the duty to the public to

actually obtain relevant information and to make that information available to the public. RCRA section 6926(f) is quite clear:

> "No state program may be authorized by the Administrator under this section unless:
>
> "(1) such program provides for the public availability of information obtained by the State regarding facilities and sites for the treatment, storage, and disposal of hazardous waste; and
> "(2) such information is available to the public in substantially the same manner and to the same degree as would be the case if the Administrator was carrying out the provisions of this subchapter in such state."

NMED defeats the requirements of RCRA for an informed public participation. The Hazardous Waste Bureau (HWB) has an ongoing 10 year history of placing into a secret section of the HWB Library technical documents that may contradict NMED permitting positions and technical information from other sources, even when piad for by the taxpayer.

The permit process for LANL should be halted until NMED places all such secret technical documents for LANL into the Administrative Record and informs the public that the documents are available for review with the opportunity for a reopened comment period on the draft permit.

Currently missing from the administrative record are secret technical documents held in the NMED HWB Library that are relevant to the LANL draft permit. One such document is a January 9, 2002 TechLaw Inc. report relevant to Material Disposal Area (MDA) G, TA-54 that discusses numerous other documents related to groundwater flow and radionuclide transport in the vadose zone beneath Area G. The report is critical of the technical deficiency for a LANL computer code used to model contaminant flow and transport through the complex geology associated with LANL. The code was apparently used by LANL but not subjected to a rigorous, independent review by the NMED.

Numerous and unknown other TechLaw, Inc. reports exist for LANL that have similarly been kept secret and are not referenced or presented to the public for review within the administrative record.

Where the HWB has granted itself this far-reaching "super-privilege" to withhold information developed that may hide technical facts and that benefits the regulated entity by the withholding, that information can no longer, as a practical matter, be obtained by the public and is no longer available to the public. Thus, information about the historic and current condition of the environment and the compliance status of LANL regulated entities is not "available to the public in substantially the...same degree as would be the case if the Administrator was carrying out the provisions of this subchapter...." The NMED has thereby set itself in opposition to the public and any notion of fair play and substantive or procedural due process.

3. **Relation of Permit to Consent Order.**

20.1.4.7 (9) "Draft Permit" means a document prepared by the Division indicating the Division's proposed decision to issue, deny, or modify a permit;

The Fact Sheet beginning at p.21 incorrectly attempts to equate the term "operating unit" to the term used in the permit of "permitted unit." This is incorrect and the definition of Operating Unit differs substantially from that of Permitted Unit. As discussed below, Citizen Action disagrees moreover that the LANL Draft Permit definition for permitted unit is correct for purposes of the Resource Conservation and Recovery Act (RCRA). The March 1, 2005 LANL Consent Order defines Operating unit as follows:

> "Operable Unit" or "OU" means any individual SWMU or AOC or a group of SWMUs or AOCs based on geographic location (i.e., technical area or test area) or grouped by similar construction, transport pathways, exposure routes, receptors, potential risk, and potential locations for Contaminants to accumulate."

Under Post-closure Section 9 of the Draft Permit, the regulated units G, H and L are listed as one of three types of "permitted units." However, the MDAs G, H and L have not met the RCRA criteria for being permitted units.

The LANL Draft Permit attempts to provide a different definition not compatible with RCRA and incompatible with the LANL Consent Order definition.
Under the Draft Permit Definitions (p.18):

> **"Permitted Unit** means a hazardous waste management unit: 1) that is not an interim status unit; and 2) that is authorized by this Permit and listed in Attachment J (*Hazardous Waste Management Units*), Table J-1 (*Active Portion of the Facility*), or Table J-2 (*Permitted Units Undergoing Post-Closure Care*)."

Under the LANL 2005 Consent Order definitions, "Permit" means the RCRA Permit issued to the Respondents for the Facility to operate a hazardous waste treatment and storage facility, EPA ID No. NM0890010515, as it may be modified or amended. Under RCRA, a permit application consists of two parts, part A (see 40 CFR §270.13) and part B (*see*, 40 CFR §270.14 and applicable sections in §§270.15 through 270.29). In order to be on the RCRA Part B application, a unit must be on the RCRA Part A.

The requirements of 40 CFR 270.1 (b) for MDAs G, H and L to be permitted units have not been met. MDAs G, H and L are not on the Part A for the LANL permit. The LANL Draft Permit definition would allow LANL to bootstrap units such as MDAs G, H and L onto the permit by merely listing them in Table J although the units are absent from the RCRA Part A application.

Table J-1 p.2-3 list TA 54 "G" as an *active* landfill (code D80) and as a "regulated unit," but states "Unit not permitted to receive hazardous waste." This indicates that MDA G is still carrying on operations without having submitted a post closure application and that the unit is operating illegally without a permit and has the disposal of hazardous waste at the unit.
Table J-1 p.5 lists MDAs H and L as regulated units under the D80 code for active landfills and states "Unit not permitted to receive hazardous waste."
Table J-2 p.8 lists permitted units undergoing post closure care and there are no units listed in post closure care.

Table J-3, Closed Portion of the Facility not in Post-Closure Care identifies that TA-16 surface impoundment disposal received waste after July 26, 1982, but there is no information to indicate groundwater monitoring requirements are being met for post closure. The location of TA-16 must be, but is not identified. Surface impoundments at TA-16 are not identified in the table.

The closure performance standards for regulated units in 9.1.1 are not set forward in 9.2 closure performance standards in a clear fashion. Regulated units are confused with "permitted units" for post closure and clean closure sections. A regulated unit may have operated but may not have been permitted as is the case for MDAs G, H and L.

The Draft Permit further confuses the matter by referring to out door permitted units co-located with regulated units. It is not clear from the language whether the regulated unit itself, apart from the outdoor permitted units, can receive clean closure. There is no discussion of the possibility of leaving wastes in place in MDAs G, H and L or removing the wastes. Is NMED planning to leave the wastes in place at MDAs G, H and L?

MDAs G, H and L lost interim status. MDAs G, H and L, which are to undergo closure under the Draft Permit never became permitted units and interim status terminated. Interim status terminated because the Part B application submitted on May 1, 1985 had no request for disposal at Area G, H or L. Also, interim status terminated on November 8, 1985 for land disposal units, unless the owner/operator submitted a Part B permit application and certified compliance with groundwater monitoring before November 8, 1984.

The Fact Sheet recognizes that "No later than 15 days after termination of interim status, the owner or operator must submit a closure plan to the Department." LANL failed to timely submit a closure plan for the units. LANL also failed to submit applications for the post closure care permit for the units. EPA and/or NMED failed to enforce the closure and post closure permit requirements.

The distinction between an unpermitted regulated unit leaving wastes in place and a permitted unit is also important for applicability of groundwater monitoring requirements. 40 CFR 270.1 (c) requires in pertinent part that:

> "Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners and operators of surface impoundments, landfills, land treatment units, and waste pile units that received waste after July 26, 1982, or that certified closure (according to §265.115 of this chapter) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under §270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section." (Emphasis supplied).

The post-closure permit applications for MDAs G, H and L and the imposition of groundwater monitoring requirements are for more than a decade long overdue. The inclusion of MDAs G, H and L in the current permit is improper because the three units lost interim status and did not again become listed on a Part A application at any time and cannot now be part of a Part B application. The current permit cannot include or regulate MDAs G, H and L.

The fact that a MDA may be a "regulated unit" can not grant permitted status to such unit. Being a regulated unit imposes groundwater monitoring requirements but does not allow continued operation of the regulated unit without a permit and after loss of interim status. In fact, the continued operation of MDAs G, H and L to receive hazardous waste after the loss of interim status in May and November of 1985 constituted the illegal operation of a hazardous TSDF. LANL should have had to shutdown the operations and be subject to fines, criminal penalties and imprisonment. The fact that NMED did not impose sanctions and fines for over 14 years of unpermitted and illegal waste operations at MDAs G, H and L indicates inability to conduct the RCRA state authorized program.

As regulated units, MDAs G, H and L are required to undergo post-closure care including groundwater monitoring. However, the Fact Sheet waffles on the requirement for Subpart F monitoring by stating (p.25): "Under the Permit, *if* post closure care is required for MDAs G, H and L, it is *likely* to include groundwater monitoring in more than one watershed." (Emphasis supplied).

NMED has no legal authority to use the Consent Order as an enforceable document. The LANL Draft Permit attempts to circumvent the regulatory requirement of a post closure care permit and ground water monitoring requirements by bringing in the use of the Consent Order as an "enforceable document" and the intention to use 40 CFR 264.90(f) instead of 40 CFR 264.91-.100. This is basically a devious stratagem of NMED to allow whatever installation of monitoring wells it deems fit at LANL without respect to requirements contained in 40 CFR 264.91-.100.

Other than the recital contained in the Draft Permit and the Fact Sheet, there is no agreement between the Department and the Permittees that the Consent Order was an enforceable document for purposes of 40 CFR § 270.1(c)(7). Nor does the Consent Order contain any such agreement.

The LANL Draft Permit assumes under Section 11.1 that "The Consent Order is an enforceable document pursuant to 40 CFR §§ 264.90(f), 264.110(c), and as defined in 40 CFR § 270.1(c)(7)." There is however nothing for these sections recited within the Consent Order that would confirm the LANL Draft Permit assertion.

The Consent Order does not meet the requirements of 270.1(c)(7) to become an "enforceable document" as contemplated by that section. The Consent Order uses the phrase "enforcement document" in only two sections, III.U and III.W.6. Neither section indicates that the CO was set for public notice for adoption to be an enforceable document within the meaning of, or for the purposes of 40 CFR 270.1(c)(7), i.e., as a document that can be used *in lieu of providing a post-closure permit*:

> "40 CFR 270.1(c) (7) *Enforceable documents for post-closure care.* At the discretion of the Regional Administrator, an owner or operator may obtain, in lieu of a post-closure permit, an enforceable document imposing the requirements of 40 CFR 265.121. "Enforceable document" means an order, a plan, or other document issued by EPA or by an authorized State under an authority that meets the requirements of 40 CFR 271.16(e) including, but not limited to, a corrective action order issued by EPA under section 3008(h), a CERCLA remedial action, or a closure or post-closure plan."

40 CFR 270.1 is not referenced anywhere in the Consent Order so as to put a reasonable person on notice that the Consent Order was to be used in lieu of obtaining post closure care permits at LANL. No statement is made in the Consent Order that the requirements contained in 40 CFR 271.16(e) are being met. Neither did DOE/LANL as owner or operator submit a request so that the Consent Order would become an "enforceable document." The Consent Order did not meet the public participation requirements to become an enforceable document even though there was a public hearing for the Consent Order to become the vehicle for corrective action.

Consent Order section III.W.1 provides an exception for the use of the Consent Order for (2) the closure and post-closure care requirements of 20.4.1.500 NMAC (incorporating 40 C.F.R. Part 264, Subpart G), as they apply to "operating units" at the Facility. The LANL Draft Permit now would equate permitted units with operating units. However, for reasons described above, MDAs G, H and L are not RCRA permitted units. The Consent Order Consent Order at III.W.A asserts that it fulfills the requirements for:

> "3) groundwater monitoring, groundwater characterization and groundwater corrective action requirements for regulated units under Subpart F and for miscellaneous units under Subpart X of 40 C.F.R. Part 264 and 20.4.1.500 NMAC (incorporating 40 C.F.R. Part 264)." (Emphasis supplied).

The Consent Order at III.W.6 states that the Consent Order is to be the only enforceable instrument for corrective action. The public was not noticed that the Consent Order was to serve the purpose of being an enforceable document within the meaning of 40 CFR 270.1(c)(7). Moreover, the Secretary of the NMED did not make the determinations

required under 40 CFR 270.1(c)(7) as to what the "alternative methods" to 40 CFR Subpart F would be nor did the Secretary make the determination that the alternative methods would be equally protective of public health and the environment as provided for in 40 CFR 264.111. Nor does the Consent Order reference 40 CFR 264.111.

The Fact Sheet at P.S. 9.4.8 - **Amendment of the Closure Plan**. This section in pertinent part recognizes that amendments are needed for using alternative requirements:

> "Amendment is also required in the instances listed in 40 CFR § 264.112(c), *e.g.*, changes in operations or design affecting the closure plan, a change in the expected year of closure, unexpected events arising during closure and requiring modification, or a request to apply alternative requirements under 40 CFR §§ 264.90(f), 264.110(c), or 264.140(d). The amended closure plan is subject to public comment." (Emphasis supplied).

PS 11.1 – **Corrective Action Requirements under the Consent Order:** This section recites incorrectly that:

> "the Department and the Permittees have agreed to a Compliance Order on Consent (Consent Order) dated March 1, 2005, which is an enforceable document pursuant to section 20.4.1.500 NMAC (incorporating 40 CFR § 264.90(f)), and section 20.4.1.900 NMAC (incorporating 40 CFR § 270.1(c)(7)).), and section 20.4.1.900 NMAC (incorporating 40 CFR § 270.1(c)(7))."

Although the Draft Permit states (9.3) "The Consent Order is an enforceable document that sets forth alternative closure requirements in accordance with 40 CFR § 264.110(c)," the Draft Permit statement overlooks an important proviso within 264.110 (c) that alternative requirements must be set forward as defined in 40 CFR 270.1(c)(7). Once again, however, there is no reference to 40 CFR 264.110(c) in the Consent Order.

Alternatively, if the Consent Order were found to be an enforceable document under 40 CFR 270.1 (c)(7), **it must apply the terms of 40 CFR 265.121** that requires compliance with 40 CFR 264.91-100 for unpermitted regulated units that are closing with wastes in place. (*See,* 63 FR 56719 -- "3 Note that §§ 264.90(f) and 265.90(f) of this rule amend the requirements of Subpart F to allow the Regional Administrator to replace Subpart F requirements at regulated units with requirements developed through a corrective action process, in some cases (*see* section III.B. of this preamble)." (*Also See,* 63 FR 56715 III.B. – "*Post closure care under alternatives to permits.* ...Facilities that close with waste in place, without obtaining a permit, and then use non-permit mechanisms in lieu of a permit to address post-closure responsibilities, will have to meet three important requirements that apply to facilities that receive permits: (1) the more extensive groundwater monitoring required under Part 264, as they apply to regulated units; (2) certain requirements for information about the facility found in Part 270 that enable the overseeing agency to implement the Part 264 monitoring requirements; and (3) facility-wide corrective action for SWMUs as required under § 264.101. These requirements are set out in new §265.121, which applies to interim status" (Emphasis supplied)).

Thus, because the MDAs G, H and L did not obtain permits and are closing with waste in place, the availability of imposing what may be lesser alternative groundwater monitoring requirements under 40 CFR 264.90 (f) for regulated units co-located with other SWMUs are not available to the State RCRA authority (NMED).

The MDAs G, H and L are regulated units that never received a permit during operations and are leaving wastes in place. The fact that the regulated units are co-located with other SWMUs is irrelevant to the applicability of the requirements of 40 CFR 264.91-.100 which are imposed through 40 CFR 265.121 and 40 CFR 270.1(c)(7). NMED does not have the opportunity to use alternative requirements that are whatever it wishes to pull from a hat.

Although the Draft Permit claims that it is not modifying the Consent Order, the Draft Permit is actually attempting to modify the purpose and scope of the Consent Order *by using the Consent Order in lieu of a post closure permit.* Section III.A of the LANL Consent Order provides that:

> "The purposes of this Consent Order are: 1) to fully determine the nature and extent of releases of Contaminants at or from the Facility; 2) to identify and evaluate, where needed, alternatives for corrective measures, including interim measures, to clean up Contaminants in the environment, and to prevent or mitigate the migration of Contaminants at or from the Facility; and 3) to implement such corrective measures."

According to the Draft Permit at 11.1, the Consent Order is an enforceable document pursuant to 40 CFR §§ 264.90(f), 264.110(c), and as defined in 40 CFR § 270.1(c)(7). Perhaps the Consent Order could be "incorporated by reference" as an enforceable document after appropriate notice and opportunity for public comment and after a public hearing, if one is requested.

Nothing in the Consent Order itself or the notices for public hearing on the Consent Order, prior to its adoption, informed the public that the intent of the Consent Order was/is to meet the enforceable document requirements of 40 CFR 270.1 (c)(7) for alternative remedies in lieu of submitting a post closure permit for regulated units. Public notice and opportunity for comment should be available before the Consent Order is used as an enforceable document in lieu of a post-closure permit. The public participation requirement of RCRA is violated by retroactively declaring the Consent Order to be an enforceable document.

The Draft Permit needs to add specific language in 9.2 that unpermitted regulated units (such as MDAs G, H and L) closing with waste in place must apply the monitoring requirements of 40 CFR 264. 91-.100. This would be consistent with the language of the Draft Permit at **11.3.1 Groundwater Monitoring:**

> "11.3.1 The Permittees shall conduct groundwater monitoring for all regulated units, as defined in 40 CFR § 264.90(a)(2), at the Facility subject to the groundwater monitoring requirements of 40 CFR Part 264, Subpart F and subject to corrective action under Section 11.2 of this Permit."

40 CFR § 264.90(a)(2) imposes the groundwater monitoring requirements of 40 CFR § 264.91-.100 and that should be clearly stated instead of the regulatory loophole that is being put on the table.

Consistency between the LANL Draft Permit and other documents must be maintained. A conflict with the Draft Permit section 9.3 giving alternative closure requirements is created by a prior existing NMED approved Work Plan. The groundwater monitoring MDAs for G, H and L as regulated units must be accomplished under 40 CFR 264.90-99 at the sites of MDAs G, H and L. NMED recognized the monitoring requirements of 264.90-99 in the now NMED approved Technical Area 54 Well Evaluation and Network Recommendations, Revision 1Work Plan of October 2007 that states

> "The following requirements from 40 CFR 264.90-.99, Subpart F apply to permitted units or regulated units that received waste after July 26, 1982. The regulations apply throughout the active life of the units and the closure and post-closure period if the units are not "clean-closed" under RCRA."

The requirements of the approved work plan take precedence over the permit that cannot incorporate MDAs G, H and L into the permit as permitted units. Section 1.9.18 Approval of Submittals indicates that "such documents, as approved, shall control over any contrary or conflicting requirements of this Permit."

If clean closure were applied to MDAs G, H and L, then there would be the possibility of the application of alternative groundwater monitoring requirements by the State administrator. For example, regulated unit MDA P has been excavated. MDA B at TA-21 is currently being excavated. But there are no plans under the Consent Order or the Permit to excavate MDAs G, H and L.

NMED maintains it is using enforceable documents in lieu of post closure permits for MDA G, H and L. The problem is that the requirements for groundwater monitoring under 40 CFR 264.91-100 have not been and are not being met. The draft permit states vaguely that because MDAs G, H and L are regulated units they must satisfy Subpart F groundwater monitoring requirements. The groundwater monitoring requirements of 40 CFR 264.91-100 must be set forth as the specific subpart F requirements that are applicable.

However, the Subpart F 40 CFR 264.91-100 required monitoring wells are not in place for MDAs G, H and L for either upgradient background wells or for down gradient monitoring wells at the point of compliance (40 CFR 264.95) or anywhere remotely near the point of compliance (POC) for the units. RCRA has the 40 CFR 264.97 (Subpart F) requirement that for regulated units the groundwater monitoring system must consist of a sufficient number of wells, installed at appropriate locations and depths to yield ground-water samples from the uppermost aquifer monitoring wells be installed.

Section 74-6-5(E)(3) of the New Mexico Water Quality Act (WQA), which the LANL Draft Permit has not considered, and for which the Draft Permit must recognize to comply with 42 USC Section 6961 as a state requirement, provides that the determination

of the discharges' effect on ground water shall be measured at *any* place of withdrawal of water for present or reasonable foreseeable future use. (Emphasis supplied). Under this standard in the WQA, ground water monitoring could be required beneath the waste areas and not just at the point of compliance as the boundary of a unit. Section 74-6-5(E)(3) does not establish any specific "points of compliance" for compliance with water quality standards. Nothing in the WQA or the Water Quality Commission Regulations provides for a "point of compliance," hydraulically up-gradient of which ground water need not be protected. (*See*, NMSA 1978, Sections 74-6-1 to 74-6-17; 20.6.2 NMAC).

MDAs G, H and L have no sufficient number of wells across the areas that they represent and no wells at the point of compliance so that neither RCRA nor the WQA requirements are met. The reason for this would seem to be NMED's incorrect belief that it can use any well monitoring network scheme of its choosing under the alternatives requirements of an enforceable document as per 40 CFR 264.90(f).

- As shown by the MDA L CME Report (January 2008, Figure 4.2-1) MDA H has no POC downgradient monitoring well. R-37 is one-quarter mile away and thus too distant to qualify for POC.
- No upgradient well exists at MDA H. Figure 4.2-1 shows there is no upgradient well for MDA L. Well R-38 is one-quarter mile from MDA L and cannot meet the POC requirement. R-38 has shown contamination of the groundwater for RCRA listed constituents benzene, toluene, bis(2-ethylhexyl)phthalate and nickel. Therefore, compliance monitoring and corrective action is indicated for MDA L.
- MDA G has no background well. Monitoring well R-41 may not meet the POC requirement and the R-22 and R-39 monitoring wells do not meet POC requirements, especially given the large suite of RCRA contaminants from incorrectly installed well R-22. Compliance monitoring and corrective action are indicated for MDA G.

The Draft Permit is inadequate because it does not provide the locations for monitoring wells at MDAs G, H and L for post closure care. The public is entitled to know through a process of notice and opportunity for comment what will be the monitoring network.

There is no provision for compliance with the TA-54 Evaluation and Network Recommendations, Revision 1, p. 6 for sampling to be accomplished for "the quality of groundwater passing beneath the regulated unit[s] to allow for detection of contamination in the uppermost aquifer."

NMED Duties

The NMED duties of enforcement for public participation, the verification of data being submitted to NMED by DOE/Sandia and investigation for violations also are set forward by the requirements for compliance evaluation programs (40 CFR 271.15) and the criteria for withdrawing approval of state programs (40 CFR 271.22).

CA questions why the NMED did not enforce sanctions against LANL for continuing hazardous waste disposal operations at MDAs G, H and L that to some degree continue today within TA-54, in the absence of: mandatory RCRA permits, post closure care

permits and failure to apply 40 CFR 264.90-.100 well monitoring requirements at regulated units. The failure to impose sanctions at LANL for such ongoing violations of RCRA and not earlier requiring a RCRA permit for such operations is an indication that the NMED is not capable of enforcement of RCRA to protect public health and the environment. Under 40 C.F.R. § 271.22, the Administrator is to withdraw state authorization to implement programs under Subtitle C of RCRA, where that program no longer meets the requirements imposed by federal law.

NMED has not met the requirements for compliance evaluation programs.

271.15 (b)(2)

(i) Determine compliance or noncompliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information;

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

Further duties are set for NMED by the Criteria for withdrawing approval of State programs.

271.22 (a)(2)

When the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) When the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

4. **Miscellaneous comments.**

Characterization of wastes at MDAs G, H and L is not adequately set forth. For MDA G, for example, Table 2-1.1and 2.1-2 list multiple entries of disposal of "unknown chemical

waste" after the period of July 26, 1982 running up to 1997. This illegal dumping at MDA G is required by 40 CFR 264.98 to "conduct a ground-water monitoring program for each chemical parameter and hazardous constituent specified in the permit pursuant to paragraph (a) of this section in accordance with § 264.97(g)." The permit cannot specify what the hazardous constituents are until the wastes have been characterized at least by an accurate and reliable ground water monitoring network.

The National Academy of Sciences identified watershed monitoring as an inadequate practice to detect release of contaminants from material disposal areas (legacy waste disposal sites) located atop the mesas.

The LANL Consent Order does not contain full provisions for a RCRA Subpart F well monitoring network. The CO cannot meet what is necessary for groundwater monitoring that is required to be in the LANL Draft Permit to meet 40 CFR 264.111 and 264.112.

Permittees filed the Part A application in November 19, 1980. The application that included units G, H and L was withdrawn on April 2, 1985. Since regulated units G, H and L did not have permits for operating, closure and post-closure plans were required to be in place when they their lost interim status by withdrawal of the Part A RCRA application. On April 10, 1985, NMED requested closure plans for any disposal areas for hazardous waste. Closure plan was requested for Unit G on October 2, 1985. The alternative requirements rule of 270.1 was not adopted until October 22, 1998 (63 FR 56710) and Units G, H and L were required to meet Subpart F monitoring for Closure and Post Closure as of the date that interim status was lost.

MDA P is a regulated unit that does not conduct groundwater monitoring as required under RCRA.

The LANL Draft Permit in Section 6.20.3.1 does not have requirements for state licensed drillers or the requirement to obtain well permits from the State Engineers Office.

MDA P received waste after July 26, 1982 but has not been recognized as a "regulated unit," but during its closure process in 2002, the groundwater monitoring requirements of 40 CFR 264 Subpart F were not imposed. Thus, there was no appropriate RCRA closure as claimed in the Draft Permit. Was MDA P part of the Part A application so as to properly be included in this Part B Draft Permit? TA16 MDA P in Table J-3, Closed Portion of the Facility not in Post-Closure Care is listed as code D80 for landfill but there is no indication that MDA P underwent post closure groundwater monitoring requirements in 2002.

Table K-1, p.18, contradicts Table J-3 by listing MDA P as a SWMU currently undergoing RCRA closure. Table J-3 listed MDA P as being in the Closed Portion of the Facility not in Post-Closure Care.

Other surface impoundment disposal areas such as at TA-35-85 codes SO4 and D83 provide no further information about location or history of operations and waste

characterization. No indication is given as to whether groundwater monitoring requirements are being met for post closure. Nor is the public reader referred elsewhere to information for the sites in Table J-3.

MDA Y at TA 39 is listed only with a process code of D80 for landfill and all other columns are blank.

The Draft Permit is unclear as to how the MDAs G, H and L will be remediated. The draft permit assumes clean closure of all permitted units. The LANL Draft Permit considers them permitted units that are not receiving waste. So is the intent to clean close MDAs G, H and L?

MDAs G, H and L should have been required to submit a post-closure permit many years ago to have addressed the issue of clean closure. There is no legal authority presented in the draft permit or elsewhere that the alternative requirements of an enforceable document should be retroactively applied to these units that operated illegally without permits for decades. 63 FR 56710 requires rigorous application of Subpart F well monitoring for units that did not obtain post-closure permits. They are not to be rewarded with a lesser standard than 40 CFR 264.91-.100.

A second well installed at TA54 to monitor releases from the three RCRA regulated units at TA54 was not installed until after the issuance of the LANL draft permit. RCRA constituents, Benzene, Toluene, Nickel and bis(2-ethylhexyl)phthalate are present at statistically significant levels of contamination that require compliance monitoring to be implemented under 40 CFR 264.91-.100.

The Consent Order requires resolution of Pentachlorophenol at 0.2 parts per billion. The Racer data base shows that for four sampling events for Pentachlorophenol there is a range of results between less than 10.5 to less than 22 parts billion for the detection limits. Thus the detection limit does not accomplish protection of public health and the environment and the pentachlorophenol detection may be in exceedance of the EPA drinking water standard of 1 part per billion. This is possible because was detected in R-22 at levels of 6 parts per billion and R-22 is the closest well to the east of R-38. R-38 is the closest monitoring well at over a quarter mile away from regulated MDA L. Thus, the point of compliance requirements of 40 CFR 264.95 for monitoring well installation at MDA L are not met. Sampling analytical method shall provide resolution at 20% of the drinking water standard and that is not being accomplished as per the requirement of the LANL draft permit.

Additional time is necessary for CA and the public's review for non-enforcement of the analytical requirements of the Consent Order by the NMED at LANL. The public needs to be confident that the requirement for protection of the public are being enforced by the NMED.

Another example of non-enforcement of the analytic resolution requirements in the LANL draft permit are those for benzo(a)pyrene.

The RACER NM document is required by the LANL draft permit but is an ***exceedingly*** difficult document for the public to use. The public and permitting authority needs time to consider how the RACER NM process is to be revised so that it can be utilized in a fashion that is less consuming of the public's time. At present, RACER is unwieldy, excessively time consuming and presents a labyrinthine path for the user to try and follow for results. RACER appears to have been designed to accomplish the purpose that the public cannot use it to obtain information.

RACER presents all analyses on water samples for radionuclides that are not regulated by the NMED. In the face of the NMED letter describing the great uncertainty of the monitoring wells at LANL to detect radionuclides, there is no alert for the public that the RACER presents great uncertainty for radionuclide data.

Results in the RACER are also contradicted by data in the Well Screen Analysis Report Revision 2. The public is not advised that the RACER data is inaccurate and that sample results for RCRA contaminants of concern are in question for their uncertainty for the same reasons as are the radionuclides. The NMED has the duty under the state RCRA authorization program to verify the information contained in documents submitted to it by LANL and DOE. The discrepancies in the factual statements are further grounds for denial of the LANL Draft Permit.

Citizen Action opposes the Open Burn/Open Detonation provisions of the LANL Draft Permit. No burning should be conducted under Subpart X, but only Subpart O, if at all. There is nothing to prevent the NMED from imposing the Subpart O requirements on LANL operations. The lack of public protection from open burning and open detonations is not appropriate in a state where even open burning of trash is otherwise prohibited. There are methods for bio-remediation of high explosive waste that should be utilized.

The LANL Draft Permit gives the go ahead for continuing operations that will further the continuing poisoning of the public and environment of New Mexico as a national sacrifice zone. The permit should be denied.

Thank you for your consideration.

Respectfully submitted,

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