



September 21, 2015

Mr. Ryan Flynn, Secretary  
New Mexico Environment Department  
Post Office Box 5469  
Santa Fe, New Mexico 87502

*Via USPS and email*

Dear Secretary Flynn:

We are writing to express our strong concern with the New Mexico Environment Department's stated plans to renegotiate the final compliance date for corrective action (i.e., cleanup) at the Los Alamos National Laboratory (LANL) under the March 1, 2005 Compliance Order on Consent without the required public participation process. As explained below, the Consent Order incorporated the full public participation requirements applicable to hazardous waste permits under the regulations. Consequently, any major modifications to the Consent Order, including any extension of the final deadline for completing corrective action, will require the opportunity for a public hearing.

As you know, Nuclear Watch New Mexico closely follows cleanup issues at LANL. We have advocated for increased cleanup funding for over fifteen years. We provided technical and procedural comments on two drafts of the Consent Order, which went into effect in March 2005 (modified October 2012). We also participated in the LANL Hazardous Waste Permit negotiations and hearing during 2009 and 2010. Nuclear Watch is certain to remain strongly active in cleanup issues at the Lab.

The Consent Order requires the U.S. Department of Energy (DOE) and Los Alamos National Security LLC (LANS) to conduct a cleanup of environmental pollution by December 2015. If that final compliance date is changed – and we acknowledge at this point that it will certainly need to change – we have always understood that a public hearing would be held. Our understanding is based on numerous statements by NMED officials over many years and, more importantly, on the express terms of the Consent Order.

The Consent Order provides:

**III.W.5 Preservation of Procedural Rights**

This Consent Order hereby incorporates all rights, procedures and other protections afforded the Respondents and the public pursuant to the regulations at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42) and 20.4.1.901 NMAC, including, but not limited to, opportunities for public participation, including public notice and

**903 W. Alameda #325, Santa Fe, NM 87501 • Voice and fax: 505.989.7342**  
***info@nukewatch.org • www.nukewatch.org • <http://www.nukewatch.org/watchblog/>***  
***<http://www.facebook.com/NukeWatch.NM>***

comment, administrative hearings, and judicial appeals concerning, for example, remedy selection decisions of the Department.

Further, the Consent Order specifically contemplated full public participation for modifications to the order:

### **III.J MODIFICATION**

#### **III.J.1 Procedures for Modifying Provisions of the Consent Order**

The Parties may modify any of the provisions of this Consent Order. Except as provided in Sections III.L (Notice to Parties) and III.M (Work Plans and Other Deliverable Documents), any such modifications must be in writing and signed by all Parties. As provided in Section III.W.5, modifications of this Consent Order are subject to the same procedural rights that would apply to those modifications if made under the Facility’s Hazardous Waste Permit pursuant to the regulations at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42) and 20.4.1.901 NMAC.

The federal regulations, 40 C.F.R. § 270.42 Appendix 1 A, which are incorporated into New Mexico regulations, 20.4.1.900 NMAC, establishes the public participation procedures for various types of permit modifications, including:

MODIFICATIONS	CLASS
5. Schedule of compliance	
a. Changes in interim compliance dates, with prior approval of the director	1
b. Extension of final compliance date	3

Thus, 40 C.F.R. § 270.42 Appendix 1 A.5.b requires a “Class 3” permit modification for an extension of a final compliance date. Under 40 C.F.R § 270.42(c), incorporated by 20.4.1.900 NMAC, a Class 3 permit modification can be made only after the opportunity for a public hearing. Moreover, the New Mexico Hazardous Waste Act specifies that prior to the issuance of a “major modification” to a permit, NMED must afford “an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.” NMSA 1978, § 74-4-4.2(H) (2006). Further, the State regulations make clear that a “major modification” is the same thing as a “Class 3” modification. 20.4.1.901.B(6) NMAC.

Because the Consent Order contains the corrective action requirements that are typically in a permit, the Consent Order expressly adopted these public participation requirements in section III.W.5. Extension of a final compliance date under the Consent Order requires the opportunity for a public hearing, contingent on the outcome of negotiations.

The compliance schedule for the Consent Order (Revised October 29, 2012) is in Section XII. The introductory paragraph to section XII reads as follows:

### **XII. COMPLIANCE SCHEDULE TABLES**

The Respondents shall follow the specified compliance schedules for all of the SWMUs, AOCs, canyons, and watershed aggregates included in this Order. Table

XII-1 is the closure milestone schedule by watershed. Tables XII-2 and XII-3 are the compliance schedules of deliverables.

The final scheduled compliance date in Section XII is December 6, 2015, which is the date that the Remedy Completion Report for MDA G is due. Changing this last compliance date triggers a Class 3 Permit Modification process and the necessary public participation requirements, including an opportunity for a public hearing. This is made more urgent by the fact that NMED has recently approved an extension request beyond December 6, 2015, with perhaps more to follow.

Ideally, a hearing would be obviated by preceding negotiations for the Class 3 modification, which is described in section 20.4.1.901.A(4) NMAC. It states that NMED, in conjunction with the applicants, must respond to requests for hearings and notices of opposition to draft permits issued under the State Hazardous Waste Act in an effort to resolve those issues that gave rise to the hearing requests. So to be clear, we are not fixated on the need for a hearing itself; rather we seek the full public participation process required by the existing Consent Order, which includes the opportunity for a hearing if negotiations are not successful.

Short-circuiting the Class 3 modification procedures would deny the public many procedural rights, such as the opportunity to testify, to present expert testimony, and to question witnesses at a public hearing. It would also deny the public the opportunity to sit down with NMED, DOE and LANS for negotiations, as a Class 3 modification would.

NMED has stated that there would be (at least) a 60-day comment period for the modified Consent Order, similar to the comment period on the draft Consent Order. However, we do not regard that as valid precedent given the final Consent Order's clear public participation requirements.

Thank you for your consideration of this important matter. We are, of course, more than willing to meet with you and your staff at your earliest convenience to discuss this issue.

Sincerely,

Jay Coghlan

Scott Kovac

CC: Mr. Jeffrey M. Kendall, General Counsel, NMED  
Ms. Kathryn Roberts, Division Director, NMED  
Mr. Hector H. Balderas Jr., New Mexico Attorney General  
Ms. Laurie F. King, EPA Region 6