IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NUCLEAR WATCH NEW MEXICO, *Plaintiff*,	)	
v.	)	**No. 1:16-cv-00433-JCH-SCY**
UNITED STATES DEPARTMENT OF ENERGY,	)	
and	)	
LOS ALAMOS NATIONAL SECURITY, LLC, *Defendants*	)	
and	)	
NEW MEXICO ENVIRONMENT DEPARTMENT, *Intervenor*.	)	

DOE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant United States Department of Energy ("DOE") respectfully requests that this Court dismiss for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), the First Amended Complaint (July 19, 2016), ECF 30, ("Amended Complaint" or "Am. Compl."), filed by Nuclear Watch New Mexico ("Nuclear Watch") in its entirety. The Third Claim for Relief should also be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Nuclear Watch's Amended Complaint relies primarily on the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a), which authorizes civil actions in the federal district courts against any person, including a federal agency such as DOE, that is alleged to be in violation of an order that is in effect pursuant to RCRA. 42 U.S.C. § 6972(a)(1)(A).

Nuclear Watch alleges that DOE and co-defendant Los Alamos National Security, LLC ("LANS") have violated the terms of a compliance order on consent issued by the New Mexico

Environment Department ("NMED") in 2005 ("2005 Consent Order") (DOE Exhibit 1)[1] to govern the cleanup of hazardous waste ("corrective action") at the Los Alamos National Laboratory ("Facility") and requests injunctive relief and civil penalties as remedies for those purported violations. Nuclear Watch also requests a declaratory judgment holding that a superseding compliance order on consent issued by NMED on June 24, 2016 ("2016 Consent Order"), Exhibit 2, is invalid because NMED allegedly failed to comply with procedural requirements established by the New Mexico Hazardous Waste Act, N.M. Stat. Ann. § 74-4-4, and the New Mexico Hazardous Waste Regulations, N.M. Admin. Code § 20.4.1.901.

As explained below, Nuclear Watch's claims for injunctive relief and civil penalties based on the alleged violations of the 2005 Consent Order became moot when NMED issued the 2016 Consent Order, which expressly superseded the 2005 Order and resolved all violations under that Order. 2016 Consent Order, § II.A (p.5), Exh. 2. Therefore, these claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Furthermore, Nuclear Watch's claim for a declaratory judgment should be dismissed because Nuclear Watch has not established that Congress provided this Court with jurisdiction over a claim that a state agency did not comply with state law.

BACKGROUND

I. STATUTORY BACKGROUND

Congress enacted Subtitle C of RCRA, 42 U.S.C. §§ 6921-39g, to establish a comprehensive regulatory scheme to address the storage, treatment and disposal of hazardous

[1] DOE is submitting excerpts from two compliance orders on consent as exhibits to this memorandum. The complete orders are each substantially longer than the page limits for exhibits established by the Court's rules. The full orders are available on the web site of NMED's Hazardous Waste Bureau at https://www.env.nm.gov/HWB/lanlperm.html (last visited on Aug. 31, 2016). DOE will file the complete texts of the orders if the Court prefers.

wastes. Congress provided for a federal-state partnership to achieve this objective. A State may seek authorization from the United States Environmental Protection Agency ("EPA") for the State's hazardous waste management program plan. Upon authorization, the State program operates in lieu of the federal hazardous waste management program, 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. 42 U.S.C. § 6926(b) and (d).

Congress enacted the citizen suit provision to enable non-governmental parties to participate in the enforcement of RCRA. The statute, in relevant part, allows "any person," after providing notice of intent to sue, to file a civil action in federal district court:

> against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.

42 U.S.C. § 6972(a)(1)(A). For the purpose of this provision, an order issued by a state agency administering an authorized program is deemed to have become effective under RCRA. *Glazer*, 894 F. Supp. at 1040. Before an action can be filed under this provision, the plaintiff must provide 60 days advance notice of the intent to sue, unless the action addresses an alleged violation of RCRA subchapter III (Hazardous Waste Management). 42 U.S.C. § 6972(b)(1). If plaintiff prevails, the district court may issue an order to enforce the violated "permit, standard, regulation, condition, requirement, prohibition, or order," and "may impose an appropriate civil penalty." *Id*. § 6972(a).

II. ADMINISTRATIVE BACKGROUND

EPA has authorized New Mexico's hazardous waste management program, as administered by NMED, to operate in lieu of RCRA, including the corrective action program,

within the State. 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). Thus, NMED is responsible for issuing to DOE permits and corrective action requirements for the management, treatment, and disposal of hazardous waste at the Los Alamos Facility pursuant to the New Mexico Hazardous Waste Act, NMSA 1978, §§74-4-1 to -14, and the Hazardous Waste Regulations, 20.4.1 NMAC.

The 2016 Consent Order, IV.A. (pp.12-21), Exh. 2, sets out the history of the efforts by NMED, EPA, and DOE to remedy contamination at the Los Alamos Facility caused in part by releases of hazardous waste that have occurred since the facility began operation in 1943. *Id*. at IV.A.4-5 (pp. 14-15). The 2005 Consent Order was issued to effectuate this cleanup. *Id*. at IV.A.7.m (p. 21). More specifically, the 2005 Consent Order explained 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.

III.A (p. 10). Exh. 1. The 2005 Consent Order resolved a number of legal disputes between NMED and DOE and DOE's contractor. 2016 Consent Order, IV.A.7.n (p. 21). Exh.2. As a result, NMED withdrew several contested corrective action orders and the United States and its contractor withdrew lawsuits challenging various actions by NMED. *Id*.

To accomplish its purposes, the 2005 Consent Order established an enforceable schedule for the completion of more than 80 specific actions over a period of ten years. *Id*. at § XII (Compliance Schedule Tables) (pp. 240-53). Exh. 1. The 2005 Consent Order also included provisions for adjusting these deadlines for "good cause." *Id*. at III.J.2 (p. 22). The 2005 Consent Order separately addressed the adjustment of deadlines for DOE if NMED delayed

progress, for example by not taking action to approve or disapprove a submission by DOE where such approval was necessary before DOE could complete the next requirement. *Id*. at III.M.2 (pp. 25-26). The deadlines for action imposed by the 2005 Consent Order were in fact revised on several occasions, most recently on October 26, 2012. *Id*. at IV.A.7.n (p. 21). In addition, certain deadlines were extended by NMED pursuant to III.J.2 (p. 22). *See* Am. Compl. ¶ 45.

In 2011, after a wildfire threatened certain wastes stored above-ground at the facility, the Governor of New Mexico asked DOE to realign the priorities as established by the 2005 Consent Order to prioritize removing wastes in certain types of above-ground storage. 2016 Consent Order, IV.A.6.k (p. 18). Exh. 2. During the course of the discussions regarding reprioritization, DOE "acknowledged that meeting the milestones of the 2005 Consent Order was difficult, if not impossible, given past and anticipated funding shortfalls." *Id*. at IV.A.6.m (p. 18). Thereafter, NMED and DOE engaged in negotiations that led to the 2016 Consent Order. The 2016 Consent Order provides that it "supersedes the [2005 Consent Order] and settles any outstanding alleged violations under the 2005 Consent Order." *Id*. at II.A (p. 5).

The 2016 Consent Order replaced the "corrective action process" of the 2005 Order with a process called a "campaign approach."

> [C]orrective action activities required by this Consent Order will be organized into campaigns, generally based upon a risk-based approach to grouping, prioritizing, and accomplishing corrective action activities at SWMUs and AOCs.[2] A campaign may consist of one or more projects; campaigns and projects consist of one or more tasks and deliverables. Campaigns, projects, tasks, and deliverables may be subject to two types of deadlines: milestones, which are enforceable; or targets, which are not enforceable.

[2] These acronyms stand for "Solid Waste Management Units" and "Areas of Concern," which are terms defined in Section III of the 2016 Order (pp. 7-12) to refer to certain areas of the facility.

2016 Consent Order, VIII.A (p.26). Exh. 2. Each year, the parties must agree to milestones for the current fiscal year, and targets for the next two years. Appendix A of the 2016 Order lists 1,395 specific units to be addressed by NMED and DOE. Exh.2. For each unit, except those listed as "deferred," the status is listed, as well as either a date by which action has been completed or an assignment to a particular campaign. For each relevant campaign, Appendix B sets out the enforceable milestones for fiscal year 2017 and also identifies the actions that are expected to be completed in fiscal years 2018 and 2019 and the applicable target dates. Exh. 2. Finally, Appendix C identifies and describes each of the 15 campaigns that are expected to be performed at the facility, five of which are "in progress," and also estimates the amount of time necessary to complete each campaign. Exh.2.

III. LITIGATION BACKGROUND

Nuclear Watch filed its original Complaint on May 12, 2016. ECF 1. The Complaint alleged that DOE had violated 13 requirements of 2005 Consent Order by failing to meet the applicable deadlines for completing specific actions. On June 23, 2016, the Court granted a motion to intervene filed by NMED. ECF 6. Nuclear Watch filed its First Amended Complaint on July 19, 2016. ECF 30. The amendment added a new claim: a request for a declaratory judgment that the 2016 Consent Order was invalid because NMED had failed to comply with the procedural requirements under the New Mexico Hazardous Waste Act. Am. Compl. ¶¶ 100-07 (Third Claim for Relief). Specifically, Nuclear Watch alleges that NMED was required to 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." *Id.* ¶ 103 (quoting N.M. Stat. Ann. § 74-4-4.2(H)). Nuclear Watch further alleges that this requirement was incorporated into the 2005 Consent Order and so

imposed an obligation for NMED to allow for such a hearing before executing the 2016 Consent Order. Nuclear Watch, however, does not name NMED as a defendant.

STANDARD OF REVIEW

A court should not review the merits of a claim until the court has determined that it has subject matter jurisdiction to do so. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden of demonstrating that jurisdiction exists, and while factual allegations should be construed in a light favorable to the plaintiff,[3] mere conclusory allegations of jurisdiction are insufficient to support this burden. *New Mexicans For Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995); *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. *See also Thomas v. Kaven*, 765 F.3d 1183, 1190-91 (10th Cir. 2014).

[3] Consistent with this standard of review, DOE will not contest the accuracy of Nuclear Watch's allegations for the limited purpose of this one motion.

ARGUMENT

I. THE CLAIMS FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES ARE MOOT

Under Article III of the Constitution, the power of the federal courts extends only to 'actual, ongoing cases or controversies.'" *Wyoming v. U.S. Dep't of Agriculture*, 414 F.3d 1207, 1211 (10th Cir. 2005) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). The case and controversy "must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *United States v. Seminole Nation of Oklahoma*, 321 F.3d 939, 943 (10th Cir. 2002). A case is moot, and thus is not justiciable, if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Wyoming*, 414 F.3d at 1211 (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). "The crucial question is whether granting a present determination of the issues offered will have some effect in the real world." *Id*. at 1212 (quoting *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000)).

The first and second claims in the Amended Complaint, ¶¶ 53-99, ask the Court to order DOE to complete specific tasks required by the 2005 Consent Order by deadlines to be set by the Court. Nuclear Watch also asks the Court to impose civil penalties based on the alleged failure of DOE to meet the deadlines established in the 2005 Consent Order. *Id*. The claims must be analyzed separately for the purpose of evaluating mootness. *See Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1019–21 (2d Cir. 1993). These analyses show that Nuclear Watch's claims for both forms of relief are moot. Therefore, these claims must be dismissed for lack of jurisdiction. *Unified Sch. Dist. No. 259 v. Disability Rights Ctr. of Kan.*, 491 F.3d 1143, 1146–47 (10th Cir. 2007).

A. The Claim for Injunctive Relief Is Moot.

Under RCRA's citizen suit provision, 42 U.S.C. § 6972(a), this Court's jurisdiction to issue injunctive relief is limited to ongoing violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66-67 (1987).[4] The Amended Complaint alleges only that DOE has violated certain requirements of the *2005* Consent Order. In the 2016 Consent Order, II (p.5), NMED explicitly stated that the Order "supersedes" the 2005 Consent Order and "settles any outstanding alleged violations under" the 2005 Consent Order. As discussed above, *supra* at 5-6, the 2016 Consent Order abandoned the framework of the 2005 Consent Order which set fixed deadlines for all specified activities, and instead utilized the more dynamic campaign approach, where a discrete number of obligations with corresponding deadlines are established on a rolling basis. Consequently, there cannot be an "ongoing violation" of the 2005 Consent Order. Because the 2016 Consent Order moots any claim for injunctive relief for alleged violations of the 2005 Consent Order, Nuclear Watch's claim for such relief must be dismissed. *Gwaltney*, 484 U.S. at 66-67. *See also Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990).

The Tenth Circuit addressed a similar set of circumstances in *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010). Plaintiffs sought an injunction to require the Bureau of Reclamation to consult with the Fish and Wildlife Service regarding biological opinions issued in 2001 and 2002 pursuant to the Endangered Species Act, 16 U.S.C. § 1536(a)(2). The court found the claims to be moot because the Service had issued a new biological opinion in 2003, after the litigation had been filed, that superseded the 2001 and 2002

[4] *Gwaltney* addressed the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. The relevant statutory language, however, is essentially the same as the language in RCRA's citizen suit provision, 42 U.S.C. § 6972(a).

opinions. The court explained that it could no longer order the Bureau of Reclamation to consult with the Fish and Wildlife Service concerning the earlier biological opinions because those opinions no longer existed. 601 F.3d at 1111 ("the 2003 [opinion] establishes a new regulatory framework under which the propriety of Reclamation's actions must be judged."). *See also Wyoming*, 414 F.3d at 1210 (challenge to federal regulation became moot when agency promulgated a replacement rule.)

In light of this precedent, the claims seeking to enforce the now-superseded 2005 Consent Order are moot because any violations of that Order are necessarily wholly in the past. *Gwaltney*, 484 U.S. at 66-67.

B. The Claim for Civil Penalties Is Moot.

In addition to seeking an injunction to enforce provisions of the 2005 Consent Order that have been explicitly superseded, Nuclear Watch also seeks civil penalties for the alleged violations of these same provisions. These claims for relief are also moot because the alleged violations are wholly in the past and cannot recur. *See Mississippi River Revival, Inc. v. City of Minneapolis, Minn.*, 319 F.3d 1013, 1016 (8th Cir. 2003) (penalty claim must be dismissed as moot where alleged violation will not recur).

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) ("*Laidlaw*"), the Supreme Court addressed the application of the mootness doctrine to penalty claims in a CWA citizen suit. The Court held that even where a penalty claim became moot only because of defendant's voluntary action, the claim must be dismissed if it was clear that the violation could not recur. *Id*. at 190. In the present matter, Nuclear Watch's claims were not mooted by a voluntary action by DOE, but instead by NMED's decision to proceed with the 2016 Consent Order. Under these circumstances, the appropriate standard is whether the

plaintiff can show that there is "a reasonable prospect that the violations will continue" despite the agency action. *Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519, 526 n.3 (5th Cir. 2008) (citing *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998) and *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991)). This is a standard that Nuclear Watch cannot meet.

In *Rio Grande Silvery Minnow*, 601 F.3d at 1116-17, the Tenth Circuit explained that *Laidlaw* required that the defendant establish that the violation would not recur because of the concern that otherwise the defendant could temporarily halt the alleged misconduct and resume the activity after the litigation was dismissed. Here NMED has changed the applicable requirements so that the deadlines DOE allegedly violated are no longer in effect. This reality conclusively establishes that there can no longer be a recurrence or continuation of those violations. *Id*. at 1118 (there is no reasonable expectation that challenged conduct will recur where the regulatory framework on which plaintiff's claims were based has been superseded by a new framework.).

III. NUCLEAR WATCH'S CLAIM FOR A DECLARATORY JUDGMENT THAT THE 2016 CONSENT ORDER IS INVALID SHOULD BE DISMISSED FOR BOTH LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

"In any suit in which the United States is a defendant, there must be a cause of action, subject matter jurisdiction, and a waiver of sovereign immunity." *Presidential Gardens Assocs. v. United States*, 175 F.3d 132, 139 (2d Cir. 1999); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 692-93 (1949); *Stew Farm, Ltd. v. Natural Resources Conservation Service*, 767 F.3d 554, 562 (6th Cir. 2014); *Rice v. Office of Servicemembers Group Life Ins.*, 260 F.3d 1240, 1245 (10th Cir. 2001). Nuclear Watch has asked this Court for a declaratory judgment pursuant to 28 U.S.C. § 2201 holding that the 2016 Order is invalid

because NMED executed the Order without providing a public hearing, which Nuclear Watch maintains was required under state law. The Declaratory Judgment Act only provides a remedy, however, and not a basis for jurisdiction or a federal cause of action. *Fry Bros. Corp. v. Dep't of Housing and Urban Development*, 614 F.2d 732, 733 (10th Cir. 1980); *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir. 1993) (Declaratory Judgment Act does not provide independent cause of action). Still less does this provision waive *federal* sovereign immunity for a claim alleging a violation of *state* law by a *state* agency.

Nuclear Watch does rattle off a string cite of federal statutes in addition to 28 U.S.C. § 2201, that allegedly supply jurisdiction for its entire complaint. Am. Compl. ¶ 2 (citing 28 U.S.C. §§ 1331, 1346, 1367, and 42 U.S.C. § 6972(a)). None of these statutes, however, either alone or collectively, provides the requisite basis for a claim against the United States challenging the 2016 Consent Order.

First, 28 U.S.C. § 1331 is the general federal-question statute, and neither waives sovereign immunity nor creates a cause of action. *See Rice*, 260 F.3d at 1245; *325 Bleecker, Inc. v. Local Union No. 747*, 500 F. Supp. 2d 110, 119 (N.D.N.Y. 2007) (28 U.S.C. § 1331 does not create a cause of action). Moreover, the question of whether NMED complied with its obligations under state law is not a *federal* question. The fact that EPA authorized NMED to operate its state program in lieu of RCRA, 42 U.S.C. §§ 6926(b) and (d), does not transform state law into federal law. *United States Dept. of Energy v. Ohio*, 503 U.S. 607, 624–25 (1992).

Second, 28 U.S.C. § 1346 provides for district court jurisdiction over certain tax recovery and damages claims against the United States, but does not reach to a request for declaratory relief concerning a state administrative order. *See Wells Fargo v. Southeastern NM*, 877 F. Supp .2d 1115 (D.N.M. 2012) (28 U.S.C. § 1346 does not empower courts to grant injunctive or

declaratory relief). Moreover, this statute does not provide the basis for a substantive claim against the United States. NMED has failed to allege a federal statute that provides a cause of action against a federal agency based on the actions of a state agency pursuant to state law. *See In re Franklin Savings Corp.*, 385 F.3d 1279, 1286 (10th Cir. 2004).

Third, 42 U.S.C. § 6972(a), the RCRA citizen suit provision discussed above, *supra* at 3, also does not provide either a cause of action, a jurisdictional basis or a waiver of immunity to allow a claim against DOE based on the allegation that NMED failed to comply with procedural requirements imposed by state law.

Finally, 28 U.S.C. § 1367 provides for *supplemental* jurisdiction over related claims in matters in which the court already has jurisdiction; it does not, however, itself establish jurisdiction, let alone create a cause of action or waive federal sovereign immunity. *See Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 n.3 (9th Cir. 2007) (§ 1367 cannot operate as waiver of sovereign immunity). For the reasons stated above, all of Nuclear Watch's *federal* claims should be dismissed. Therefore, the Court should not exercise supplemental jurisdiction over a *state* law claim. *Carroll v. Lawton Independent School Dist. No. 8*, 805 F.3d 1222, 1230 (10th Cir. 2015). Moreover, under 28 U.S.C. § 1367(c), the federal courts should decline supplemental jurisdiction where the state law claims predominate. *See Schutza v. McDonalds Corp.*, 133 F.Supp.3d 1241, 1247-48 (S.D. Cal. 2015). Here, Nuclear Watch's claim that the 2016 Consent Order is invalid because NMED failed to comply with state law procedural requirements is a threshold issue that could be dispositive of all of Nuclear Watch's claims regarding alleged violations of the 2005 Consent Order. For this reason as well, the Court should decline to exercise supplemental jurisdiction.

New Mexico has provided the state court of appeals with jurisdiction to hear challenges to NMED's orders. NMSA 1978, Section 74-4-14; *Citizen Action New Mexico v. New Mexico Environment Dept.*, 350 P.3d 1178, 1184 (N.M. App. 2015). Nuclear Watch has not shown any basis for its suggestion that Congress has authorized this Court to provide an alternative forum for judicial review of NMED's action. Therefore, Nuclear Watch's claim seeking review of NMED's compliance with the state law procedural requirements should be dismissed.

CONCLUSION

DOE's motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), (6) should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by the Court's electronic filing system on all counsel of record on August 31, 2016.

/s/ *Eileen T. McDonough*