**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW MEXICO**

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| **NUCLEAR WATCH NEW MEXICO**,<br><br>Plaintiff,<br><br>vs.<br><br>**UNITED STATES DEPARTMENT OF ENERGY, and LOS ALAMOS NATIONAL SECURITY, LLC**,<br><br>Defendants,<br><br>and<br><br>**NEW MEXICO ENVIRONMENT DEPARTMENT,**<br><br>Intervenor. | Case No. 1:16-cv-00433-JCH-SCY |

**DEFENDANT LOS ALAMOS NATIONAL SECURITY, LLC'S**
**REPLY MEMORANDUM IN SUPPORT OF ITS MOTIONS TO DISMISS**
**PLAINTIFF'S SECOND AMENDED COMPLAINT**
**OR ALTERNATIVELY FOR COURT ABSTENTION**

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## I. INTRODUCTION

Plaintiff Nuclear Watch ("Plaintiff") filed 62 pages of opposition briefing, but did not provide any credible legal arguments establishing this Court's subject matter jurisdiction or demonstrate any cognizable legal claims. Since it is evident, after three failed efforts, that Plaintiff cannot assert proper claims, the Court should dismiss the Second Amended Complaint ("Complaint" or "Compl.") without leave to amend.

Plaintiff attempts unconvincingly to portray its Complaint as an effort to tackle serious and unaddressed hazardous waste issues at Los Alamos National Laboratory ("Laboratory"). It also denigrates the 2016 Order on Consent ("2016 Order") by the New Mexico Environmental Department ("NMED") as merely an effort to undermine its citizen suit and instead characterizes it as "polluter veto power and regulatory capture." However, these assertions defy the true facts:

- Plaintiff's Complaint focuses on time extensions and deadlines for Laboratory tasks in a superseded consent order that NMED has replaced based on its extensive Laboratory remediation experience. Plaintiff's claims have no real world significance today and are both moot and request unwarranted interference with NMED's regulatory jurisdiction.
- NMED was developing the 2016 Order long before Plaintiff served its notice letters, and NMED issued its draft order for public comment before Plaintiff filed its lawsuit. Plaintiff's lawsuit was completely irrelevant to this process and, in fact, appears hurriedly filed to beat NMED's issuance of the 2016 Order.
- Plaintiff's briefing assertions that the 2016 Order was not negotiated on an arms-length basis and represents "regulatory capture" are notably absent from its Complaint and should be disregarded because they lack any factual or legal basis.
- NMED has regulated the cleanup of solid and hazardous legacy waste at the Laboratory through the Laboratory's hazardous waste permit and two sequential, detailed and stringent consent orders for an extensive period of time. In contrast, Plaintiff's lawsuit is an after-the-fact attempt to express its disagreement with NMED's remediation approaches and schedule.

In sum, as Los Alamos National Security, LLC ("LANS") will demonstrate below, Plaintiff's opposition briefs do not alter the inescapable conclusion that the Complaint should be dismissed in its entirety.[1]

[1] Since Plaintiff failed to respond to the Rule12(b)(6) arguments in LANS's Opening Brief (at 23-25), LANS does not further address those issues in this Reply Brief.

## II. THE COURT DOES NOT HAVE ORIGINAL SUBJECT MATTER JURISDICTION OF FIVE CLAIMS IN THE COMPLAINT.

### A. The Second Claim Is Barred Because Plaintiff Did Not Wait Sixty Days After Notice Before Filing The Claim.

LANS demonstrated that Plaintiff's Second Claim is barred because Plaintiff failed to wait 60 days after serving notice before filing the original complaint. LANS Opening Brief, Dkt. No. 49 ("LANS Br.") at 18-20. In response, Plaintiff concedes that some of its claims address non-hazardous waste violations (which require a 60-day waiting period), but contends that it was not required to provide *any* pre-lawsuit RCRA notice because it alleges "hybrid" hazardous/non-hazardous waste violations. Pls. Opp'n to LANS' Mot., Dkt. No. 57 ("LANS Opp.") at 10-11.[2] However, Plaintiff has made two fundamental errors.

First, all RCRA citizen suit claims, including those based in whole or in part on Subchapter III hazardous waste requirements, must be preceded by a written RCRA notice. 42 U.S.C. § 6972(b)(1)(A)(iii) (action respecting a violation of subchapter III "may be brought immediately *after such notification* . . .") (emphasis added); *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2d Cir. 1991), *rev'd in part,* 505 U.S. 557 (1992) (delay, as distinguished from notice, requirement becomes inapplicable). Second, Plaintiff's RCRA claims allege only violations of 2005 Order filing and reporting deadlines – not specific Subchapter III violations.[3] It therefore lacks a specific Subchapter III violation to form a "hybrid" with. Plaintiff's failure to delay for 60 days dooms this claim. *Hallstrom v. Tillamook Cty*., 493 U.S. 20 (1989).

### B. The Court Lacks Subject Matter Jurisdiction Of The Third And Fifth State Law Extension Claims On Many Legal Grounds.

The Court lacks subject matter jurisdiction of the Third and Fifth Claims, which allege that NMED improperly granted time extensions for some 2005 Order activities. LANS Br. at

[2] Plaintiff's Responses in Opposition to the U.S. Department of Energy ("DOE") and NMED motions (Dkt. Nos. 56, 55) are referred to respectively as "DOE Opp." and "NMED Opp."
[3] Subchapter III of RCRA and the regulations promulgated thereunder govern the processes used to manage hazardous waste.

18-23. Plaintiff repeatedly states that these claims are State law claims, but now appears to argue (for the first time) that these claims can be viewed as RCRA claims. If so, the Court lacks any RCRA jurisdiction over them. First, since Plaintiff did not file these claims until September 21 – after the June 24, 2016 issuance of the 2016 Order superseding the 2005 Order – they were not "ongoing violations" at the time they were filed and are barred by the *Gwaltney* doctrine. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56-64 (1987). Second, Plaintiff failed to serve an advance RCRA citizen suit notice of these claims.

### C. The Court Has No Subject Matter Jurisdiction Of The Fourth And Sixth Claims Attacking The 2016 Order.

Plaintiff's Fourth and Sixth Claims – attempting to invalidate the 2016 Order for failure to hold a public hearing under the New Mexico Hazardous Waste Act ("HWA") before its issuance – are based on a New Mexico law brought by a New Mexico plaintiff (Nuclear Watch) against a New Mexico defendant (NMED) for which the HWA prescribes a New Mexico forum (the New Mexico Court of Appeal). These claims do not invoke the Court's jurisdiction. LANS Br. at 20-23. In response, Plaintiff makes a half-hearted argument that the 2016 Order is "pursuant to RCRA" and "Congress specifically provided the federal district courts with RCRA jurisdiction." DOE Opp. at 4. Of course, Plaintiff elsewhere asserts that its 2016 Order claims are based only on an HWA violation. Nonetheless, a plaintiff can only invoke RCRA jurisdiction by utilizing the citizen suit notice procedures and alleging a violation of RCRA, neither of which Plaintiff has done or can do here.[4]

### D. Plaintiff Cannot Establish Supplemental Jurisdiction Over The State Law Extension Claims Or The 2016 Order Claims.

Plaintiff's Third through Sixth Claims are State law claims for which supplemental jurisdiction does not exist. LANS Br. at 21, 23. Plaintiff asserts that supplemental jurisdiction

[4] Plaintiff is wrong that it can maintain a federal or State declaratory relief claim on this topic: federal declaratory relief is not an independent basis for jurisdiction or cause of action, and federal courts do not entertain State declaratory relief claims. LANS Br. at 21-23.

exists because its 2016 Order claims might affect LANS's mootness defense. Plaintiff's theory is invalid for two reasons.[5] First, supplemental jurisdiction requires a *factual* relationship, not the kind of relationship Plaintiff asserts. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351 (2006) (State claim may be part of same case as federal claim "*because they* 'derive from a common nucleus of operative fact' as the federal claim") (emphasis added); *Price v. Wolford*, 608 F.3d 698, 702–03 (10th Cir. 2010) (Section 1367 requires "common nucleus of *operative fact*'") (emphasis added).

Second, it is improper to consider the relationship between Plaintiff's State law Claims and the Defendants' defenses—what matters is the relationship between Plaintiff's federal Claims and Plaintiff's State law Claims. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (where plaintiff asserts a federal question claim, supplemental jurisdiction may exist based on "the relationship between that claim and the state claim . . ."); *accord, Pierre v. Planet Auto., Inc.*, No. 13-CV-675 (MKB) (JO), 2016 WL 3470007, at *7 (E.D.N.Y. June 21, 2016).[6] Indeed, LANS's mootness defense cannot retroactively create jurisdiction over Plaintiff's State law Claims because jurisdiction "'depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570 (2004).[7]

Plaintiff asserts that LANS cannot both challenge supplemental jurisdiction and also use the 2016 Order in its mootness defense. DOE Opp. at 8. However, Plaintiff knew when filing the case that the 2016 Order was imminent and would moot any 2005 Order claims. Even

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[5] It also has no bearing on its Third or Fifth Claims and they should be dismissed.

[6] *Cf. Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836, 847–48 (4th Cir. 1974) (no supplemental jurisdiction even though federal claim occurred because of consideration of state claims).

[7] There is no supplemental jurisdiction over Plaintiff's State law Claims so it is not necessary to consider Section 1367(c). In any event, whether NMED was required to have public hearings is a complex question of state law ((c)(1)); the Court should abstain from adjudicating Plaintiff's RCRA Claims and thus dismiss the state law Claims ((c)(3)); and applying state law to invalidate a State agency Order that effectuates the State's remediation policy offends comity ((c)(4)). *See, e.g., Eves v. LePage*, No. 16-1492, 2016 WL 6872654, at *9 (1st Cir. Nov. 22, 2016) (declining jurisdiction in part because to do so "might promote 'comity'").

Plaintiff concedes its effect is "wiping out all the deadlines." *See* DOE Opp. at 7. Instead, Plaintiff assumed this risk by ignoring State court remedies and filing this action.[8]

## III. ALL CLAIMS BASED ON THE 2015 ORDER ARE NOW MOOT.

In its Opening Brief, LANS demonstrated that NMED's issuance of the 2016 Order, which expressly superseded the 2005 Order, moots all claims based on the 2005 Order.[9] Plaintiff argues that the 2016 Order cannot moot its claims because (1) it is not "qualified" because it supposedly is not an "arms-length agreement," is not the product of "diligent prosecution," or "represents a polluter veto power and regulatory capture," and (2) even if valid, it would not moot Plaintiff's claims. Both arguments are unavailing.

### A. The 2016 Order Is Indisputably "Qualified" To Moot This Case.

Plaintiff's diligent prosecution argument is based on a misreading of RCRA case law. RCRA contains an explicit *statutory* bar on citizen suits when EPA or a State has commenced and is "diligently prosecuting" a civil or criminal court action to require compliance with the underlying RCRA requirements. 42 U.S.C. § 6972(b)(1)(B). When this bar is invoked, a federal court sometimes must determine whether the parallel government court action is being diligently prosecuted. *See, e.g., Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, LLC*, No. CIV.A. 3:08-0088, 2008 WL 5377799, at *4-6 (S.D.W.Va. Dec. 18, 2008) ("*Ohio Valley*"). However, no motion to dismiss here asserts this RCRA statutory bar. Rather, the case requires dismissal on *mootness principles* and there is no mootness requirement of "diligent prosecution."

The main case Plaintiff cites to support this contention – *Env't Tex. Citizen Lobby, Inc. v.*

[8] Plaintiff's Third through Sixth Claims also fail to state a claim on which relief can be granted. Plaintiff failed to explain how the law required a public hearing or to cite any authority that this Court should defer to Plaintiff's alleged legal conclusions.

[9] LANS cited multiple cases in the citizen suit context that fully support mootness in this context. *See, e.g., WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1190 (10th Cir. 2012); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111-12 (10th Cir. 2010); *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 530 (5th Cir. 2008); *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 354-55 (8th Cir. 1998).

*ExxonMobil Corp.*, 824 F.3d 507 (5th Cir. 2016) – is inapplicable. In *Exxon*, Clean Air Act citizen plaintiffs argued that the trial court did not properly evaluate in the civil penalty phase the "good faith" factor regarding four projects that Exxon performed by agreement with a Texas enforcement agency. Although the court stated it is possible that the agreement was an example of "regulatory capture," it said it was entirely possible that Exxon's contrary position was correct and it left alone the trial court's contrary resolution in Exxon's favor.[10]

Plaintiff attempts to deflect the impact of the controlling *Rio Grande* case, involving a citizen suit under the Endangered Species Act ("ESA") in which the U.S. Fish and Wildlife Service ("FWS") issued two biological opinions for a project's impacts on the silvery minnow. While the case was pending, FWS issued a 2003 biological opinion that superseded the previous ones. On appeal, the court held that "FWS's issuance of the 2003 B.O. mooted the Environmental Groups' prayer for both injunctive and declaratory relief" and noted that issuance of an injunction "would have no effect on the real world because those biological opinions have been superseded." *Id.* at 1111-12. Plaintiff argues the case is distinguishable because Congress later enacted a funding rider endorsing the B.O., but this development is immaterial because the Court's mootness finding was based on the *agency's* B.O. issuance.

**B. Plaintiff Has Failed To Make Any Credible Argument That, If The 2016 Order Is Valid, It Does Not Moot Injunctive Relief.**

Plaintiff asserts that its injunctive relief is not mooted by issuance of the 2016 Order, "whether or not that document is eventually determined to have been executed in accordance with New Mexico law." DOE Opp. at 17. Plaintiff argues that one federal case – *Borough of*

[10] Plaintiff's related argument that the 2016 Order is not an arms-length agreement entitled to Court recognition reflects a misunderstanding of agency consent orders, which are important agency enforcement tools. Although they are "agreements," they settle an enforcement action. Plaintiff wrongly equates the "agreement" context with the lack of an arms-length agreement. Notably, Plaintiff did not and could not plead any facts or any claim in its Complaint seeking to invalidate the 2016 Order on this basis. Rather, its only challenge to the Order is the lack of a public hearing. Compl. ¶¶ 135, 136, 141.

*Upper Saddle River, N.J. v. Rockland Cty. Sewer Dist. #1*, 16 F. Supp. 3d 294 (S.D.N.Y. 2014) ("*Saddle River*") – supports its position. In *Saddle River*, citizens brought a Clean Water Act suit to address municipal sanitary sewage overflows. An agency consent order regarding such spills was issued prior to the lawsuit filing. The court allowed the citizen suit to proceed, but only to the extent that the citizen claims addressed *different* alleged violations than those addressed in the consent order. The instant case is crucially different because Plaintiff is addressing the exact same underlying conditions as NMED does in the 2005 and 2016 Orders through its attempt to enforce the 2005 Order itself. Thus, under *Saddle River*, Plaintiff's claims are moot here.

Plaintiff also asserts that "a case is not moot if the court can offer some relief, no matter how small." DOE Opp. at 17-18. However, this argument does not help Plaintiff because the 2005 Order deadlines it seeks to enforce no longer exist. It cites a case involving both State agency and citizen suits filed to address an alleged RCRA endangerment and, after the State action concluded with a consent judgment, the court held that the citizen suit was not mooted because the court could order remedies beyond those in the consent order. *Interfaith Cmty. Org., Inc. v. PPG Indus., Inc.*, 702 F. Supp. 2d 295 (D. N.J. 2010) ("*Interfaith*").

However, Plaintiff's reliance on *Interfaith* is misplaced. Plaintiff here did not file any claims alleging a violation of any requirement outside those contained in the 2005 Order. Rather, since its claims are predicated solely on the 2005 Order, Plaintiff cannot make a credible claim that it has filed a suit addressing a different condition or seeking any remedies different than those sought by the agency in the superseded 2005 Order. The *Interfaith* court also recognized that *Ohio Valley* properly found mootness in a situation almost identical to that here, where "plaintiffs sought a different schedule for injunctive relief than was provided in the defendant's consent decree." *Id.* at 302 n.8.[11]

[11] Indeed, in *Ohio Valley*, the court found that the citizen suit was moot even though the plaintiffs argued that they sought different relief because "the Consent Decree imposes too long a schedule for compliance and too lenient civil penalties." 2008 WL 5377799, at *4.

**C. Plaintiff Cannot Avoid A Mootness Finding By Claiming That It Fits Within The "Voluntary Cessation" Exception To The Mootness Doctrine.**

Plaintiff incorrectly argues that this case is governed by the "voluntary cessation of the alleged illegal behavior" exception. However, this is not a "voluntary cessation" case. The Tenth Circuit recognizes that a true voluntary cessation situation is based on "a defendant's voluntary cessation of an alleged illegal practice which the defendant is free to resume at any time" or where a defendant tries to "evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *Rio Grande*, 601 F.3d at 1115. That is not the case here. Many courts hold that, when alleged violations become moot through issuance of an enforcement order, it is not a voluntary cessation situation covered by the strict proof standard in *Laidlaw*. Instead, a court asks if there is a realistic prospect that the asserted violations will continue despite the consent order. *See, e.g., City of Dallas*, 529 F.3d at 528*; Comfort Lake*, 138 F.3d at 355-56; *Atl. States Legal Found., Inc. v. Eastman Kodak Co*., 933 F.2d 124, 128 (2d Cir. 1991).

LANS cannot possibly violate the 2005 Order in the future because it has been superseded. LANS meets both the "reasonable prospect" and the "heavy burden" *Laidlaw* standards: there is no possibility that LANS will violate the 2016 Order deadlines because LANS is not a party to it and because the new campaign approach contains a completely different remediation approach without the same type of prescriptive deadlines.

**D. Plaintiff's Claim For Civil Penalties Cannot Survive The 2016 Order.**

In environmental citizen suits, claims for civil penalties are not always moot when a defendant ceases the challenged conduct because civil penalties may sometimes deter future violations and thus provide plaintiff some redress. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 186 (2000). But this reasoning does not apply here. If the Court recognizes the validity of the superseding 2016 Order on its face (as it must), then Plaintiff's civil penalty claim here is moot because the 2005 Order deadlines no longer exist, and

thus civil penalties cannot possibly deter their violation nor provide any redress to Plaintiff.

Plaintiff asserts that it can still pursue civil penalties prior to the date of the 2016 Order, citing *Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993) and *Saddle River*. The former held that "a defendant's ability to show, after suit is filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot" because the CWA mandates that violators "shall" be subject to a civil penalty and finding mootness would weaken the CWA's deterrent effect. 993 F.2d at 1021. However, *Pan Am* and *Saddle River* do not apply here. LANS did not comply with the 2005 Order or request deadline extensions only after Plaintiff filed suit to defeat the suit. DOE and NMED were steadily working towards the 2016 Order and released a draft for public comment before Plaintiff filed suit.

Plaintiff fails to rebut the critical point established by *City of Dallas*, *Comfort Lake*, *Benham* and *Black Warrior Riverkeeper, Inc. v. Cherokee Mining*: civil penalty claims are moot when a state agency issues a remedial order after a citizen suit is filed, because otherwise defendants would be disincentivized to enter into such orders and courts would be forced to interfere with agency penalty determinations. LANS Br. at 9-11. Plaintiff claims only that *Benham* and *Black Warrior* involved "diligent prosecution" and penalties. DOE Opp. at 22. To the contrary, *Benham* did not address "diligent prosecution" or mention any state agency court action. *Cf.* LANS Opp. at 12-13 (diligent prosecution requires court action). While the agency mandated a small civil penalty there, the court did not hold that an administrative order issued after a citizen suit must include a civil penalty to moot this relief. *Accord, Black Warrior* (no court action; refusing "to second-guess ADEM's evaluation of the proper penalty").

## IV. PLAINTIFF CANNOT DEMONSTRATE ARTICLE III STANDING.

Plaintiff has not met its burden of "demonstrat[ing] standing for each claim [it] seeks to press." *DaimlerChrysler*, 547 U.S. at 352–53. This is so because Plaintiff did not allege that one

of its members refrained from using an area affected by *each* of the thirteen deadlines at issue and that this Court's imposition of those deadlines would beneficially affect that member's health or assuage his or her concerns. Instead it alleges only a member used "a" canyon. And it never alleges how submitting reports per the 2005 Order would affect anyone's health. At best, Plaintiff alleges injury as to an unspecified deadline, but not all of them. Plaintiff also fails to address its nexus and redressability "standing" deficiencies.

## V. THIS COURT SHOULD ABSTAIN FROM HEARING PLAINTIFF'S CLAIMS.

### A. The Existing RCRA Statutory Bars Do Not Foreclose Abstention.

Plaintiff is not correct that primary jurisdiction and *Burford* abstention do not apply in RCRA citizen suits. *See* LANS Opp. at 11-14. The Tenth Circuit has not addressed this issue, but other Circuits have rejected Plaintiff's proposition. *See Raritan Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 690-95 (3d Cir. 2011) (citing *PMC, Inc. v. Sherwin–Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998)); *accord, Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 31 (1st Cir. 2011)). Numerous courts, including three district courts within the Tenth Circuit, have applied primary jurisdiction and/or *Burford* abstention to a RCRA citizen suit. *See* LANS Br. at 12-16 (citing *Friends of Santa Fe*; *Davies*; *McCormick*; *Coal. for Health Concern)*; *see also Space Age Fuels, Inc. v. Standard Oil Co. of Cal.*, No. CIV. 95-1637-JE, 1996 WL 160741, at *3 (D. Or. Feb. 29, 1996).[12]

### B. Application Of The Primary Jurisdiction Doctrine Is Appropriate Here.

LANS showed that primary jurisdiction is appropriate using the four factors usually cited in the Tenth Circuit district court citizen suit cases. LANS Br. at 12-14. Plaintiff argues that the

[12] Cases like *Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, 954 F. Supp. 2d 448, 460 (E.D. La. 2013) are not controlling here and read too much into the diligent prosecution bar. The better approach is to find that the diligent prosecution bar should only make courts "cautious." *Davies*, 963 F. Supp. at 997; *Baykeeper*, 660 F.3d at 695; *Chico*, 633 F.3d at 31-32, 37. Even the *Apalachicola Riverkeeper* case (at n.24) notes various courts have found only that the doctrine "ordinarily" does not apply.

factors set forth in *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1239 (10th Cir. 2007) control. *See* LANS Opp. at 14-16.[13] Those factors compel the same conclusion. First, the factual issues here are not within the Court's "conventional expertise." Determining what deadlines are "reasonable" pursuant to Plaintiff's prayer would require extensive expert evidence and complex technical decisions. The Court would have to determine, on a canyon-by-canyon and Technical Area-by-Technical Area basis, whether to invalidate the completely new remediation approach and schedule for each portion of this complex facility that NMED developed based on its extensive remediation experience and technical expertise.

Second, this case definitely presents matters of administrative discretion. *See* 2005 Order (Dkt. No. 51-1, Dolan Decl., Ex. A) at § III.J.2 (NMED discretion to extend deadlines), § III.J.1 (discretion to modify 2005 Order), and § III.U (discretion to impose or not impose civil penalties and take enforcement actions). NMED exercised this discretion to prioritize the removal and disposal of high risk transuranic waste (2012 Framework Agreement) and to institute a new risk-based "campaign" approach (2016 Order), which calls for NMED to establish in its discretion 10-20 enforceable milestones per year. *See* 2016 Order (Dkt. No. 51-5, Dolan Decl., Ex. E) at § VIII. Third, Plaintiff's contentions that "there is nothing for the state regulatory agency to consider in this matter" and that "the agency's position is already known" are thus baseless. LANS Opp. at 16-17. In fact, the complicated legacy waste cleanup governed by the 2016 Order inevitably requires constant and detailed agency discretion.

### C. Plaintiff Has Not Raised Any Valid Arguments Against The Court's Application Of *Burford* Abstention Principles.

Plaintiff implicitly concedes that it could have (but failed to) timely seek State court

[13] *TON Services* did not hold that those factors are exclusive in the Tenth Circuit or state that the factors identified by LANS are not proper. To the contrary, *TON Services* recognized that "[t]here is . . . no 'fixed formula . . . for applying the doctrine'" and "[c]ourts should consider case-by-case whether 'the reasons for the existence of the doctrine are present and whether the purposes it serves [i.e., uniformity and resort to administrative expertise] will be aided by its application in the particular litigation.'" 493 F.3d at 1239.

review of NMED's 2016 Order and its 2005 Order extensions. Such review is more than sufficient for *Burford* purposes here because Plaintiff states that the "central question" raised by its Complaint is "the validity and effect" of the 2016 Order. DOE Opp. at 9. LANS also demonstrated that this federal litigation would disrupt New Mexico's efforts to establish a coherent policy for the Laboratory which is to move to the risk-based campaign approach of the 2016 Order and away from the 2005 Order's inefficient approach and schedule. Plaintiff only offers *non-sequitur* responses. First, it argues its claims are almost exclusively federal, and the State law issues it presents are not difficult. LANS Opp. at 18-21. But this factor speaks only to whether State court review is available. *See Interfaith,* 702 F. Supp. 2d at 309; *Baykeeper*, 660 F.3d at 693. Whether difficult questions of state law are presented relates to the alternative *Burford* prong which is not the basis of this motion. *See, e.g.*, *Baykeeper*, 660 F.3d at 693 (disjunctive test). Plaintiff argues that there is no need to develop State law interpreting RCRA, but it does not dispute that New Mexico has expressed a policy of moving beyond the 2005 Order approach and schedule. While Plaintiff argues the HWA was not "intended to create any kind of special forum to adjudicate the disputes in this matter," there can be no doubt that State law entrusts to NMED decisions as to the proper remediation approach and schedule.[14]

Dated: December 15, 2016

FARELLA BRAUN + MARTEL LLP

By: */s/ Paul P. Spaulding, III*
Paul P. Spaulding, III

Attorneys for Defendant LOS ALAMOS NATIONAL SECURITY, LLC

[14] Plaintiff's "supporting" case *Interfaith* helps LANS because the court distinguished cases because they "require the court to question, challenge, or otherwise contradict the [state agency's] enforcement proceedings." 702 F. Supp. 2d at 310. Plaintiff seeks to "challenge" and "contradict" NMED's enforcement decision to adopt the campaign approach of the 2016 Order.

**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2016 a true and correct copy of the foregoing was served via the Court's electronic system upon the following counsel of record:

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