UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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

DEFENDANT LOS ALAMOS NATIONAL SECURITY, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT OR ALTERNATIVELY FOR COURT ABSTENTION

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I. INTRODUCTION

By these motions, Defendant Los Alamos National Security, LLC ("LANS") moves to dismiss, or to have the Court abstain from adjudicating, the claims in the First Amended Complaint, ECF No. 30 ("Complaint"), filed by Nuclear Watch New Mexico ("Plaintiff") against the U.S. Department of Energy ("DOE") and LANS based on alleged violations of a consent order issued by the New Mexico Environment Department ("NMED") governing the remediation of solid and hazardous waste at Los Alamos National Laboratory ("LANL" or "Laboratory"). In particular, Plaintiff seeks to use the citizen suit provision in the Resource Conservation and Recovery Act ("RCRA") in a misdirected attempt to enforce asserted deadlines in a 2005 Compliance Order on Consent ("2005 Order") issued, actively administered and enforced by NMED.[1]

Plaintiff's original complaint was based solely on Defendants' alleged failures to comply with thirteen initial deadlines for reports or activities contained in the 2005 Order. It is notable that Plaintiff did not (and could not) independently assert any other type of RCRA citizen suit claims such as that Defendants have directly violated RCRA hazardous waste management requirements or that there is an "imminent and substantial endangerment" based on solid or

[1] In support of these motions, LANS has filed a Request for Judicial Notice, accompanied by the Declaration of Timothy A. Dolan ("Dolan Decl."), seeking judicial notice of documents specifically identified in the Complaint and/or public records that are not subject to reasonable dispute. The introduction of these judicially noticeable materials is appropriate both on Rule 12(b)(1) and 12(b)(6) motions and does not (and is not intended to) convert these motions to a motion for summary judgment. *See Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1296 (10th Cir. 2003) ("When a party challenges the allegations supporting subject-matter jurisdiction, the 'court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts.' [citation] 'In such instances, a court's reference to evidence outside the pleadings does not convert the motion [to dismiss] to a Rule 56 motion [for summary judgment].'"); *A.M. v. New Mexico Dep't of Health*, 148 F. Supp. 3d 1232, 1245 (D.N.M. 2015) (on Rule 12(b)(6) motion court may consider documents that complaint incorporates by reference or refers to and are central to the plaintiff's claim if authenticity is not disputed, and matters that are judicially noticeable). All parties confirmed they do not oppose LANS submitting more than 50 pages of exhibits. *See* D.N.M. Local R. Civ. P. § 10.5.

hazardous waste located at the Laboratory. Rather, Plaintiff predicates its RCRA claims solely on the 2005 Order and asks the Court to reinterpret and impose new deadlines for the cleanup tasks in the 2005 Order because it disagrees with NMED's current cleanup priorities, approaches and enforcement decisions.

However, on June 24, 2016, an important event occurred which moots Plaintiff's claims in their entirety: NMED issued a new Compliance Order on Consent ("2016 Order") governing remediation of solid and hazardous waste at the Laboratory that supersedes the 2005 Order and explicitly settles and fully resolves any alleged violations arising under the 2005 Order. Dolan Decl., Ex. E. The 2016 Order is based on a new set of NMED and DOE priorities, adopts a new "campaign approach" to cleaning up the Laboratory and imposes a new set of deadlines for task completion targeted to the new priorities. *See* Section II, *infra*.[2]

On July 19, 2016, Plaintiff filed the First Amended Complaint, which retains the three claims in its original complaint relating to the 2005 Order and adds a new claim seeking a declaration that NMED's issuance of the 2016 Order is "invalid" because of alleged State law procedural irregularities in its issuance. However, this claim improperly attempts to override NMED's corrective action decisions for Laboratory remediation. Further, this claim is not within this Court's subject matter jurisdiction because it constitutes a State law claim only cognizable in State court, and even if it could be a RCRA claim, Plaintiff never asserted it in a RCRA 60-day notice letter.

Perhaps most significantly, Plaintiff's First Amended Complaint reveals its true agenda for this lawsuit. Plaintiff's Complaint is no more than a preemptive and collateral attack on the

[2] In its original complaint filed on May 12, 2016, Plaintiff failed to inform the Court that NMED was working on a new consent order to supersede the 2005 Order. ECF No. 1. It is undisputed that Plaintiff has long been aware that NMED was working on a new consent order, with modified task deadlines, to replace the 2005 Order. Plaintiff concedes, in its Amended Complaint (at ¶ 48), that on March 30, 2016 (six weeks before Plaintiff filed its original complaint), "NMED posted on its website a proposed draft consent order that would 'supersede' the 2005 Consent Order" ("Draft Order").

2016 Order, which contains cleanup approaches, priorities and deadlines which it disagrees with.[3] Plaintiff apparently hopes to invalidate the 2016 Order and supplant the considered judgment of NMED – the agency with authority under State and federal law and the expertise to make these complicated technical decisions – on exactly what cleanup approach should be taken at LANL, on what schedule and in what order. That it cannot do.

NMED's issuance of the 2016 Order requires dismissal of this case on mootness grounds. NMED began working on this 2016 Order before Plaintiff gave notice of its alleged claims and Plaintiff knew issuance of the 2016 Order was imminent before it filed this case. The 2016 Order was not judicially challenged by Plaintiff or any other person in State court using available remedies and is now a binding legal order. Since the 2005 Order cleanup tasks and deadlines on which Plaintiff bases its claims are no longer operative, any alleged "case" or "controversy" regarding them has been eliminated. Plaintiff cannot allege now, if it ever could (see standing discussion below), that it has suffered any actual injury for which the Court can award relief. The sole basis for Plaintiff's injury was that thirteen deadlines in the 2005 Order had not been met. However, that Order is no longer valid and NMED has resolved any alleged violations of it. Accordingly, this case is moot and dismissal is necessary. *See* Section III, *infra*.

The twin doctrines of primary jurisdiction and Burford Abstention also compel dismissal of the Complaint. NMED has actively exercised its jurisdiction over the cleanup of this complicated federal facility for decades, including for the last eleven years under the 2005 Order, and it has the expertise and detailed scientific information necessary to determine the appropriate

[3] In written comments dated May 31, 2016, Plaintiff strenuously opposed adoption of the new order. In these comments, Plaintiff contended that NMED "has preemptively surrendered enforcement power to DOE" and that the new order "is potentially a giant step backwards" and "is likely doomed to failure" and "would be a real failure in leadership." *See* Dolan Decl., Ex. D at 1-2. Plaintiff urged NMED to retain and modify the 2005 Order with updated cleanup schedules instead of adopting the new order. *Id*. However, after Plaintiff realized that the forthcoming consent order likely would not have the priorities, remedies and milestones that it wanted, Plaintiff filed its initial complaint on May 12, 2016 to enforce the 2005 Order.

cleanup approaches, priorities and deadlines. The Court should decline to exercise jurisdiction, particularly based on the voided 2005 Order, and thereby avoid interfering with this ongoing State agency process. Moreover, since NMED has now replaced the 2005 Order with the 2016 Order, Plaintiff's Complaint would put the Court in the untenable position (for which these doctrines are designed to avoid) of substituting its judgment for the technical decisions and expertise of NMED regarding the proper remedies and deadlines for Laboratory remediation activities. *See* Section IV, *infra*.

The Court also lacks subject matter jurisdiction to consider Plaintiff's claims on three other legal grounds. First, the Complaint reveals that Plaintiff lacks standing under Article III of the United States Constitution to assert these claims because it has not suffered actual injury, it has not demonstrated that causation exists, and its alleged injuries cannot be redressed by the Court. Second, Plaintiff's failure to wait 60 days before filing the claims asserted in its second pre-lawsuit notice letter is an absolute bar to the First Claim for Relief. Third, the Court does not have jurisdiction to adjudicate the new Third Claim for Relief because no federal question is raised, no diversity jurisdiction exists, no supplemental jurisdiction can be invoked and Plaintiff has or had available State court remedies. *See* Section V, *infra*.

Finally, Plaintiff's Third and Fourth Claims for Relief must be dismissed under Rule 12(b)(6) for failure to state a claim on which relief can be granted. Plaintiff's new Third Claim for Relief seeking a declaration that the 2016 Order is invalid fails to state a cognizable legal claim. Plaintiff's Fourth Claim for Relief for attorneys' fees and costs is only a remedy and not an independent legal claim. *See* Section VI, *infra*.

In sum, Plaintiff's attempt to utilize the deadlines in the superseded 2005 Order as a platform for a RCRA citizen enforcement action is legally unsustainable. NMED has replaced this eleven year-old order with the 2016 Order that contains new corrective action approaches, priorities and deadlines. Plaintiff's attempt to resurrect the 2005 Order is groundless and is

merely an improper attempt to ask a Court to substitute Plaintiff's alternative remediation views for the considered judgment of the State agency that is continuing to exercise its regulatory jurisdiction over the Laboratory cleanup.

II. BACKGROUND FACTS

A. The 2005 Consent Order, 2012 Framework Agreement And 2016 Consent Order

1. 2005 Consent Order

On March 1, 2005, NMED, DOE and the Regents of the University of California (the entity that operated LANL prior to LANS) entered into the 2005 Order. Compl. ¶ 41; Dolan Decl., Ex. A. The primary purpose of the 2005 Order was to investigate, evaluate and take corrective action to address contaminants at certain locations within the Laboratory. Dolan Decl., Ex. A at 10. The 2005 Order was issued by NMED pursuant to the New Mexico Hazardous Waste Act ("HWA"), N.M. Stat. Ann. § 74-4-10 (1978) and the New Mexico Solid Waste Act, N.M. Stat. Ann. § 74-9-36(D) (1978). *Id*. at 1. The 2005 Order was modified five times, with the last one occurring on October 29, 2012. Dolan Decl., Ex. E at 21 (¶ 7(n)).

2. Framework Agreement

In January 2012, DOE and NMED entered into an agreement relating to Laboratory cleanup activities entitled "Framework Agreement: Realignment of Environmental Priorities" ("Framework Agreement"). Dolan Decl., Ex. F. In the Framework Agreement, at the request of New Mexico Governor Susana Martinez, DOE agreed to prioritize the removal of 3706 cubic meters of above-ground transuranic ("TRU") waste in TA-54 and to focus its Laboratory remediation efforts on accelerating the off-site shipment and disposition of this material at the earliest feasible time ("3706 Campaign"). The genesis of this Agreement was explained in the 2016 Order as follows:

> (k) On June 21, 2011, the Las Conchas wildfire began burning in the Santa Fe National Forest. The fire burned over 150,000 acres and threatened the Facility

> and the town of Los Alamos. The proximity of the fire to above-ground stored wastes in TA-54 prompted New Mexico Governor Susana Martinez to request that the Respondent prioritize removing non-cemented above-ground wastes. The Respondent agreed to realign waste management priorities.
>
> (l) As a result of the agreed upon realignment of priorities, the Respondent and the State of New Mexico entered into a non-binding Framework Agreement in 2012 that realigned environmental priorities.
>
> (m) In the course of negotiating the 2012 Framework Agreement, the Respondent acknowledged that meeting the milestones of the 2005 Consent Order was difficult, if not impossible, given past and anticipated funding shortfalls. As part of the 2012 Framework Agreement negotiations, the Parties agreed to discuss renegotiation of the 2005 Consent Order at a future date.

Dolan Decl., Ex. E at 18.

As a result of this cleanup realignment requested by the Governor, DOE and LANS made the removal and off-site shipment of this TRU waste a top priority and reprogrammed significant resources from 2005 Order work to the 3706 Campaign over several years to accomplish this task.

3. 2016 Consent Order

On June 24, 2016, NMED issued the 2016 Order. Compl. ¶ 51; Dolan Decl., Ex. E. The parties to the 2016 Order are DOE and NMED, but not LANS. Dolan Decl., Ex. E at § V. The 2016 Order completely replaces the 2005 Order that is the subject of Plaintiff's Complaint: "This Consent Order supersedes the 2005 Compliance Order on Consent (2005 Consent Order) and settles any outstanding alleged violations under the 2005 Order." *Id*. at § II.A. It further provides: "The parties agree that this Consent Order encompasses all scope included within the 2005 Consent Order, including that which has already been completed and that which has been identified subsequent to the effective date of the 2005 Consent Order." *Id*. at § II.C.

It is undisputed from this text that all corrective action, and associated milestones and deadlines, for both the interim compliance dates and the final MDA G remedy report tasks in the 2005 Order (and asserted in Plaintiff's First and Second Claims for Relief) are replaced by new

tasks and deadlines in the 2016 Order. The corrective action requirements for different areas of the Laboratory have been reprioritized and organized into different sets of campaigns.[4]

B. Plaintiff's Notice Letters

Plaintiff served DOE and LANS with two written notice letters prior to filing the original complaint. These Notices purport to utilize a RCRA citizen suit section which provides that a citizen can file a lawsuit against a person "who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective" pursuant to RCRA. 42 U.S.C. § 6972(a)(1)(A).[5] RCRA specifies that no lawsuit can be commenced prior to 60 days after plaintiff has given proper written notice, unless it meets stringent requirements for an action "respecting a violation of subchapter III of this chapter." 42 U.S.C. § 6972(b)(1)(A)(iii).

The first Notice, dated January 20, 2016, alleges only one RCRA violation: that DOE/LANS failed to submit the "remedy completion report for MDA G" by its alleged due date of December 6, 2015. Dolan Decl., Ex. B at 2. This Notice is the asserted basis for the Second Claim for Relief in the Complaint. Plaintiff's second Notice, dated May 5, 2016, alleges that DOE/LANS did not meet twelve other "interim compliance date" milestones in the 2005 Order for investigation reports, an investigative work plan, well installations and remedy completion reports. Dolan Decl., Ex. C. Plaintiff waited only seven days after service of the second notice before filing suit on these alleged violations, which form the First Claim for Relief.

C. Plaintiff's Complaints

On May 12, 2016, Plaintiff filed its original complaint. ECF No. 1. The complaint was silent on the 2012 Framework Agreement and the pendency of the Draft Order. It alleges in two

[4] The 2016 Order was preceded by an extensive public notice and comment process. Compl. ¶¶ 48, 49.

[5] The other major RCRA citizen suit provision is 42 U.S.C. Section 6972(a)(1)(B), the so-called "imminent and substantial endangerment" section. That section is not at issue in this action.

claims for relief under RCRA Section (a)(1)(A) that DOE and LANS missed thirteen deadlines in the 2005 Consent Order.

On July 19, 2016, Plaintiff filed its First Amended Complaint. The major change reflected in this document is that Plaintiff mentions for the first time the pendency and then NMED issuance of the 2016 Order and it asserts a new Third Claim for Relief in which it seeks to have the Court declare the 2016 Order to be "invalid." Compl. ¶¶ 48-52, 100-107. Plaintiff contends that NMED was required by the New Mexico Hazardous Waste Regulations to hold a public hearing before executing the 2016 Order. *Id.* ¶ 107.

III. NMED'S ADOPTION OF THE 2016 ORDER , WHICH SUPERSEDES THE 2005 ORDER AND RESOLVES ANY POTENTIAL LIABILITY, MOOTS ALL CLAIMS IN PLAINTIFF'S COMPLAINT.

The United States Constitution limits the exercise of federal judicial authority to "cases and controversies." U.S. Const. art. III, § 2, cl.1. Moreover, "[a]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Frulla v. CRA Holdings, Inc.*, 543 F.3d 1247, 1250-51 (11th Cir. 2008).

In this case, Plaintiff alleges that DOE and LANS failed to meet thirteen initial milestones for remediation reports or activities in the 2005 Order. But on June 24, 2016, NMED and DOE entered into and NMED then issued the 2016 Order. Compl. ¶ 51. It is undisputed that the 2016 Order vacated the 2005 Order and, by its terms, "settles any outstanding alleged violations under the 2005 Consent Order." *Id.*

Thus, there is no longer a live controversy regarding Plaintiff's claims, all of which seek enforcement of deadlines in the vacated 2005 Order. NMED had the discretion under its statutory authority to adopt the 2005 Order and it similarly has authority to negotiate and adopt

the 2016 Order. Since the sole basis for Plaintiff's RCRA citizen suit claims is the 2005 Order itself, rather than any alleged direct RCRA violations or endangerment condition, the validity of the claims is uniquely dependent on the continued viability of the 2005 Order. Now that the 2005 Order and all of its deadlines have been superseded, and all alleged liability settled and resolved, there is no remaining "case or controversy."

Plaintiff seeks two major types of relief relating to the 2005 Order: (1) an injunction seeking compliance with thirteen identified deadlines in the 2005 Order on "a reasonable but aggressive schedule ordered by this Court," and (2) an award of civil penalties for alleged past RCRA violations. Compl., Prayer at 28. However, each form of relief has now been mooted as explained below.

The Court does not have authority under the RCRA citizen suit provision to order injunctive relief to enforce or establish new deadlines for an administrative consent order that NMED has voided and replaced with a new order because this action would merely supplant the enforcement decisions of the State agency with primacy in this area. As the Supreme Court has stated, "the citizen suit is meant to supplement rather than to supplant" government enforcement action. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). Many courts have found citizen suit injunctive relief claims to be moot in similar circumstances. *See, e.g., WildEarth Guardians v. Pub. Serv. Co. of Colorado*, 690 F.3d 1174, 1190 (10th Cir. 2012) (injunctive relief claims moot when "there is nothing left to enforce"); *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 530 (5th Cir. 2008) (claims for injunctive relief moot); *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 354-55 (8th Cir. 1998) (in suit for violations of Clean Water Act permit, claim for injunctive relief moot "when [defendants'] NPDES permit terminated and [state agency] approved the Stipulation Agreement").

Plaintiff's request for civil penalties is also mooted by issuance of the 2016 Order. We appreciate that, in its decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 192-94 (2000), the Supreme Court stated in the context of a Clean Water Act ("CWA") citizen suit that the mooting of injunctive relief does not automatically also moot a claim for civil penalties. The Court stated that a deeper look should be taken at the nature of the violations and the need for deterrence. It also pointed out that the general exception to application of the mootness doctrine based on voluntary cessation of an illegal activity could be implicated in some cases and, if it was, the alleged violator would need to bear the necessary burden to show that it was "absolutely clear" that the illegal conduct would not recur. *Id.* at 189-90; *see also WildEarth Guardians*, 690 F.3d at 1186.

However, Plaintiff's request for civil penalties here cannot survive a mootness challenge. Court imposition of a civil penalty for violations of 2005 Order deadlines would not have any deterrent value against future violations because that Order was vacated and there is no future deadline to meet. Plaintiff might theoretically claim that penalties should be imposed to deter LANS from violating 2016 Order deadlines. This argument is inapplicable to LANS because LANS is not a party to the 2016 Order. But, in any event, courts reject attempts to look to speculative and potential future violations not alleged in a complaint to defeat mootness. *See, e.g., Miss. River Revival, Inc. v. City of Minneapolis*, 319 F.3d 1013, 1016-17 (8th Cir. 2003) (where the plaintiff alleged discharges without CWA permit and defendant obtained CWA permit, court rejected argument that case not moot because defendant could violate permit in the future because "[t]he only violations alleged were the Cities' discharges without a permit" which "cannot reasonably be expected to recur"); *WildEarth Guardians*, 690 F.3d at 1187-88 (civil penalty claims moot where "even if successful, would have no deterrent value, and would only serve the public's generalized interest in Clean Air Act compliance by power utilities").

The "Campaign Approach" adopted in the 2016 Order represents a new and different paradigm to legacy waste cleanup at the Laboratory that is not tied to prescribed deadlines. Rather, the parties will jointly discuss "campaigns" and then NMED will determine enforceable "milestones," as well as "targets" as part of the campaign. *See* Dolan Decl., Ex. E at 26-31. This new structure ameliorates any concern that DOE will miss future deadlines and militates against speculating about future deadline violations. Thus, under this significantly different enforcement approach, deadline violations are unlikely in the future.

Allowing Plaintiff's Complaint to go forward to seek civil penalties would interfere with NMED's determination as to penalties, and it would disincentivize entities from negotiating consent orders with regulatory agencies. Accordingly, many courts have held that a claim for civil penalties is moot in situations when, after filing of the citizen suit, a State agency issues a consent order or takes other enforcement action that resolves the same alleged violations. *See, e.g.*, *Envtl. Conservation Org.*, 529 F.3d at 531 (civil penalties moot following entry of consent decree, in part because "[a] private attorney general is no longer needed to raise the issue of the proper civil penalty"); *Comfort Lake*, 138 F.3d at 357 (civil penalties claims moot following agency order because, as "a final agency enforcement action, that Agreement is entitled to considerable deference if we are to achieve the Clean Water Act's stated goal of preserving 'the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'" and because entities "will be disinclined to resolve disputes by such relatively informal agreements if additional civil penalties may then be imposed in pending citizen suits"); *Benham v. Ozark Materials River Rock, LLC*, No. 11-CV-339-JED-FHM, 2013 WL 5372316, at *8 (N.D. Okla. Sept. 24, 2013) (dismissing CWA suit where state agency issued consent order after suit filed); *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 637 F. Supp. 2d 983, 990 (N.D. Ala. 2009) (claim for civil penalties moot because it "would call upon this court to second-guess ADEM's evaluation of the proper penalty").

This is not a situation involving the "voluntary cessation" exception to the mootness doctrine. As many courts have recognized, the issuance of an administrative agency enforcement order is not a voluntary cessation event and the standards relating to that exception are inapplicable. *See, e.g., Envtl. Conservation Org.*, 529 F.3d at 528 (voluntary cessation standards are inapplicable to compliance resulting from government enforcement action); *Benham*, 2013 WL 5372316, at *7 (CWA claims mooted by subsequent consent order entered into by the Oklahoma Department of Environmental Quality, declining to apply the voluntary cessation exception).

Plaintiff's First Amended Complaint adds a Third Claim for Relief which seeks a declaration that NMED's adoption of the 2016 Order failed to comply with procedural requirements of state law. *See* Compl. ¶¶ 101-107. Clearly Plaintiff did so because (1) it recognizes that the 2016 Order otherwise presents a fatal mootness problem, and (2) it wants NMED to exercise its authority and expertise regarding corrective actions in a different way than NMED did in the 2016 Order. However, as described in Sections V and VI herein, since the Court does not have subject matter jurisdiction of this claim and the claim fails to state a claim on which relief can be granted, Plaintiff cannot use this claim to escape a dismissal based on mootness.

IV. THE COURT SHOULD ABSTAIN FROM ADJUDICATING ANY CLAIMS IN PLAINTIFF'S COMPLAINT.

Pursuant to the doctrines of primary jurisdiction and Burford Abstention, the Court should abstain from exercising any jurisdiction it may have in light of NMED's ongoing regulatory authority over LANL corrective action and its issuance of the 2016 Order. "Abstention is a judicially created exception to the general grant of jurisdiction set forth in Article III of the Constitution" which "permits federal courts to decline or postpone the exercise of jurisdiction so that a state court will have the opportunity to decide the matters at issue." *Ada-Cascade Watch Co. v. Cascade Res. Recovery, Inc.*, 720 F.2d 897, 901 (6th Cir. 1983) (quoting

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)).

Court intervention at this time will require the court to tackle the same technical policy issues being addressed by NMED and will interfere with the ongoing State agency process. *See McCormick v. Halliburton Co.*, No. CIV-11-1272-M, 2012 WL 1119493, at *2 (W.D. Okla. Apr. 3, 2012); *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349 (D.N.M. 1995); *Davies v. Nat'l Co-op. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997).

A. The Doctrine Of Primary Jurisdiction Warrants Abstention And Dismissal.

The doctrine of primary jurisdiction authorizes a court to decline to decide "issue[s] within the special competence of an administrative agency." *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 857 F. Supp. 838, 841 (D.N.M. 1994). "'Primary jurisdiction is invoked in situations where the courts have jurisdiction over the claim from the very outset but it is likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body.'" *Mical Commc'ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1038 (10th Cir. 1993) (quoting *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1376 (10th Cir. 1989)); *see also Friends of Santa Fe Cty.*, 892 F. Supp. at 1349 (primary jurisdiction appropriate where "the court believes it prudent to decline to exercise its jurisdiction in favor of the agency's expertise"). The basic wisdom of the doctrine is that in "cases requiring the exercise of administrative discretion" or "raising issues of fact not within the conventional experience of judges," the court should not pass over administrative agencies created for regulating the subject matter. *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952).

There is no uniform test to determine when to apply primary jurisdiction, but relevant factors include: (1) whether a court "is being called upon to decide factual issues which are not within the conventional experience of judges"; (2) "whether Defendant could be subjected to conflicting orders of both the Court and the administrative agency"; (3) "whether relevant

agency proceedings have actually been initiated" and the agency has been diligent in resolving the issue and (4) whether the plaintiff seeks damages (in which case the doctrine is less applicable) or rather is seeking injunctive relief that requires technical expertise (in which case "the doctrine is more readily applicable"). *Schwartzman*, 857 F. Supp. at 842-43; *Friends of Santa Fe*, 892 F. Supp. at 1349-50.

Plaintiff has squarely implicated the first factor by its request to have the Court order "a reasonable but aggressive schedule" for the 2005 Order milestones (Compl., Prayer ¶ 1), which requires technical factual determinations as to what "reasonable but aggressive" deadlines are in fact reasonable or even possible. NMED is uniquely qualified and statutorily authorized to make these factual determinations, and it already has in the 2016 Order. *See McCormick*, 2012 WL 1119493, at *2 ("[P]laintiffs' RCRA Claim unquestionably raises issues that are outside the conventional experience of judges and that fall within the special expertise of the [Oklahoma Department of Environmental Quality]."); *Davies*, 963 F. Supp. at 997 ("There can be no question that plaintiffs' RCRA claim raises issues that are within the special expertise of the [Kansas Department of Health and Environment].").

Plaintiff's request for court-ordered deadlines and penalties based on the 2005 Order will inevitably result in conflicting legal obligations for DOE and LANS. If the Court were to impose new deadlines based on the 2005 Order, they would conflict with the 2016 Order, which vacates all of those deadlines and imposes new priorities, tasks and scheduling based on a "campaign" remediation approach. It may foreclose DOE from performing a remediation or investigation task that NMED considers a higher priority and mandates in the 2016 Order. It would override NMED's decisions and require the Court to undertake the technical task of determining whether DOE/LANS were in compliance with the Court-ordered deadlines. *See Schwartzman*, 857 F. Supp. at 842 ("If Plaintiff's ultimate goal is remediation of the site, this goal would be achieved faster and more efficiently through the joint efforts of the EPA and the

NMED without interference from the Court.").

Any Court award of civil penalties would also conflict with NMED's decision not to impose civil penalties. NMED was authorized to decide what, if any, penalties were effective or appropriate under its own 2005 Order because it has intimate familiarity with the entire history of remediation at LANL and with the re-prioritization that began with the Framework Agreement and continued with the negotiation and issuance of the 2016 Order.

As to the third factor, NMED has completed administrative proceedings and issued the 2016 Order, which now serves as the future blueprint for Laboratory corrective action of the covered legacy waste. NMED has diligently established a revised remediation program based on its current priorities and approaches. On the fourth factor, Plaintiff does not seek money damages, which in other cases sometimes militates against a court dismissal based on primary jurisdiction. Plaintiff seeks only a now-mooted injunction and civil penalties, which NMED has always had the authority to impose.

This is exactly the kind of environmental agency expertise and enforcement situation in which numerous courts have dismissed a case on primary jurisdiction grounds. *See, e.g.*, *Schwartzman*, 857 F. Supp. at 841 (court abstains in nuisance case on primary jurisdiction grounds because EPA/NMED were "undertaking efforts to investigate and remediate the tie-treatment site" and were "currently negotiating or have already finalized an administrative order on consent."); *McCormick*, 2012 WL 1119493, at *2 (abstaining under primary jurisdiction doctrine where "pursuant to the Consent Order, Halliburton is currently investigating/characterizing and remediating the Site and surrounding areas that may have been impacted under ODEQ oversight"); *Davies*, 963 F. Supp. at 998 (abstaining under primary jurisdiction where consent order obligates defendants "to cooperate with KDHE in investigating and remediating the potential threat to health and the environment from the contamination at the site").

B. Abstention And Dismissal Is Also Appropriate Pursuant To The Burford Abstention Doctrine.

Burford Abstention should occur where "the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern'" and "timely and adequate state-court review" of State agency action is available. *Coal. for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1194 (6th Cir. 1995) (quoting *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989)); *and see Ada-Cascade Watch Co.*, 720 F.2d at 903 ("The key question is whether an erroneous federal court decision could impair the state's effort to implement its policy.").

These requirements are met here. First, if the Court were to exercise jurisdiction, it will "be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Coal. for Health Concern*, 60 F.3d at 1194 (quoting *New Orleans Pub. Serv.*, 491 U.S. at 359). New Mexico implemented a policy to address remediation at LANL by entering into the 2005 Order, and then entered into the 2012 Framework Agreement based on a reassessment of its priorities. In that Agreement, NMED recognized the "need to prioritize and dedicate available funding to the Governor's highest environmental priorities" even though that meant "some lower priority cleanup work cannot be completed . . . as currently scheduled in the Consent Order." Dolan Decl., Ex. F. ¶ 6. NMED and DOE thereby agreed to accelerate the removal of high-risk TRU waste, while also working to improve upon and reduce inefficiencies in the 2005 Order. After entering into the Framework Agreement, NMED and DOE followed the Governor's cleanup priorities. NMED has declined to impose penalties for alleged violations of the 2005 Order and has now exercised its discretion to enter into and issue the 2016 Order.

Thus, NMED has demonstrated that the "coherent policy" of New Mexico regarding remediation at the Laboratory has been first to move beyond the 2005 Order in the Framework Agreement and then to enter into the 2016 Order. Instead, Plaintiff asks this Court to impose injunctive relief that may compete with or preclude remedies specified in the 2016 Order,

thereby reversing NMED's approach and forcing DOE to focus its resources where NMED has not chosen to apply them. *Davies*, 963 F. Supp. at 999 (finding Burford Abstention proper because "review by this court of the issues involved in investigating and determining an appropriate remedy would undercut efforts by the state of Kansas to establish a coherent policy concerning remediation of hazardous wastes").

Second, New Mexico law provides sufficient State court review of the actions of NMED, thus providing protection for Plaintiff's rights. For example, and without limitation, Plaintiff could have sought review of the 2016 Order in the New Mexico Court of Appeals. *See* N.M. Stat. Ann. § 74–4–14 (1978); *Citizen Action New Mexico v. New Mexico Env't Dep't*, 2015-NMCA-058, 350 P.3d 1178, 1179 (2015) (noting state appeal of NMED decision directly to Court of Appeal pursuant to Section 74-4-14).

V. PLAINTIFF'S COMPLAINT MUST BE DISMISSED BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION.

A. Plaintiff Cannot Demonstrate Article III Standing.

The Court should dismiss this action because Plaintiff cannot plead facts sufficient to establish Article III standing. As an association suing on behalf of its members, Plaintiff must plead facts showing "its members would . . . have standing to sue in their own right." *Friends of the Earth*, 528 U.S. at 181.

To establish standing, Plaintiff's members must have: (1) "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 180-81. "Where, as here, 'the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.'" *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1155 (10th Cir. 2013) (quoting

Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992)).[6]

In the Complaint, Plaintiff asserts that it has standing to bring the case because of its overall mission statement and because it "has been an active participant in hazardous waste management and cleanup issues at the Laboratory." Compl. ¶ 4. However, the only immediate personal stake alleged is that Plaintiff's executive director "is an avid hiker and rock climber, and he often enjoys these activities in the canyons and on the cliffs around the Laboratory, in the neighboring town of White Rock, and in the adjacent Bandelier National Monument and Santa Fe National Forest." *Id.* These allegations fall far short of establishing Article III "standing."

First, Plaintiff cannot establish any cognizable actual injury to its members, who cannot use MDA G or any other area of LANL in question because it is a secure federal facility that is not open to the public. Although "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity," *see Friends of the Earth*, 528 U.S. at 183, it is not enough to use areas only in the general vicinity of the affected land. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-89 (1990) (it is insufficient to allege use of area roughly in the vicinity of affected land); *Defs. of Wildlife*, 504 U.S. at 565 (rejecting argument that standing exists in "any person who uses any part of a 'contiguous ecosystem' adversely affected …").

Second, Plaintiff does not (and cannot) allege that any contamination at the Laboratory affected its members' alleged use of the nearby lands because this case is about purportedly missed reporting deadlines. But there is no allegation that Plaintiff's members have refrained

[6] RCRA's citizen suit provision does not (and cannot) do away with Plaintiff's constitutional burden of establishing Article III standing. *Am. Forest & Paper Ass'n v. U.S. E.P.A.*, 154 F.3d 1155, 1158 (10th Cir. 1998) (despite Clean Water Act citizen suit provision, "a plaintiff must nevertheless satisfy the standing requirements of Article III of the U.S. Constitution"); *New Mexico Cattle Growers v. U.S. Fish & Wildlife Serv.*, No. CIV. 98-367M/JHG, 1999 WL 34797509, at *7 (D.N.M. Oct. 28, 1999) (noting that "a statutory right of action by itself does not confer jurisdiction on a district court" and "Plaintiffs must first establish standing to sue").

from using or enjoying an area allegedly affected by contamination, planned to do so after cleanup is completed by a certain date, but then had their plans frustrated by DOE/LANS's non-compliance with a deadline. Therefore, DOE/LANS's alleged missing of deadlines did not cause any "standing" injury to Plaintiff. *Cf. Friends of the Earth*, 528 U.S. at 181-82 (finding standing where members used river prior to facility's pollution, but stopped using river due to pollution).

Third, Plaintiff's claims do not meet the redressability prong of Article III standing. Since the 2005 Order on which the claims are based is no longer valid, the Court lacks authority to predicate injunctive relief on alleged violations of these deadlines and an award of civil penalties would not provide such redress. Although at the time Plaintiff filed its suit there allegedly were on-going violations of the 2005 Order's deadlines, all such alleged violations are non-existent now because the predicate deadlines are vacated. *Cf. Friends of the Earth*, 528 U.S. at 185-86.[7] In this case, we have reached the "point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing." *Id.* at 186.

B. Since Plaintiff Failed To Provide The Mandatory RCRA Notice, The Court Lacks Subject Matter Jurisdiction Of The First Claim For Relief.

RCRA bars this type of citizen suit unless the plaintiff has provided notice of the alleged violation at least sixty days prior to filing the action. 42 U.S.C. § 6972(b)(1)(A). This requirement is jurisdictional. *Covington v. Jefferson Cty.*, 358 F.3d 626, 636 (9th Cir. 2004). In this case, Plaintiff did not wait 60 days to sue after sending its May 5, 2016 Notice, *see* Dolan Decl. at ¶ 4 and Ex. C, which now comprises the First Claim for Relief.

When a plaintiff "suing under the citizen suit provisions of RCRA fails to meet the notice

[7] Moreover, in the Framework Agreement, NMED realigned the Laboratory cleanup priorities for New Mexico. The Governor and NMED requested that Defendants reprioritize the 2005 Order work. Defendants complied with the reprioritization -- a fact known by NMED as it has declined to issue civil penalties under the 2005 Order against Defendants. An award of civil penalties now cannot have any deterrent effect against future violations of those deadlines.

and 60–day delay requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 33 (1989); *see Covington*, 358 F.3d at 636 (notice and 60-day delay rules are jurisdictional); *New Mexico Citizens for Clean Air & Water v. Espanola Mercantile Co.*, 72 F.3d 830, 833 (10th Cir. 1996) (strictly construing Clean Water Act notice provision parallel to Section 6972(b)(1)(A)); *see also Karr v. Hefner*, 475 F.3d 1192, 1206 (10th Cir. 2007).

There is one exception to this 60-day notice rule: a suit under 6972(a)(1)(A) "may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter." 42 U.S.C. § 6972(b)(1)(A)(iii). Subchapter III of "this chapter" is entitled "Hazardous Waste Management" and encompasses RCRA Sections 6921 to 6939g. A plaintiff may not avail itself of the subchapter III exception to the 60-day delay rule merely "because the storage and disposal of hazardous waste is at issue." *See AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1350 (7th Cir. 1997). As explained by the Second Circuit, with regard to RCRA Section (a)(1)(B) claims:

> a plaintiff seeking to take advantage of section 6972(b)(2)(A)'s exception to the otherwise applicable ninety-day notification delay period before filing suit under section 6972(a)(1)(B) must do more than allege generally that 'hazardous waste' has been disposed of by a defendant or that the defendant is somehow regulated by RCRA's hazardous waste management provisions. . . . Section 6972 thus appears to require more to excuse statutory delay than that a suit generally involves hazardous waste or hazardous waste management; the action must also be one 'respecting a violation' of the provisions of subchapter III or the regulations promulgated thereunder.

Bldg. & Constr. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 155-56 (2d Cir. 2006).[8]

The *Building and Construction Trades Council* court found that dismissal was proper

[8] Although the language quoted above was discussing the (b)(2)(A) exception to the 90-day delay rule for "imminent and substantial endangerment" claims, it is applicable to the (b)(1)(A) 60-day exception at issue here because Sections 6972(b)(1)(A) and (b)(2)(A) both contain the same "respecting a violation of subchapter III of this chapter" language. *See* 42 U.S.C. §§ 6972(b)(1)(A) and (b)(2)(A).

because there was no such allegation. *Id*. at 156. Likewise, in *Datacard,* the Seventh Circuit found that a Section (a)(1)(B) claim did not trigger the exception to the notice rule, and agreed with the defendant's argument that "only claims alleging specific violations of RCRA's subchapter III hazardous waste regulations" trigger the exception. *Datacard*, 106 F.3d at 1350.[9]

Here, there is no Complaint allegation that DOE or LANS violated a specific subchapter III statute or regulation. Instead, Plaintiff alleges only that DOE and LANS violated thirteen initial deadlines in the 2005 Order, but that is not the same thing as a violation of a hazardous waste statute or regulation. Thus, all that can be said of Plaintiff's Complaint is that "hazardous waste is at issue," (*see id.*), or that "the defendant is somehow regulated by RCRA's hazardous waste management provisions." *Bldg. & Const. Trades Council*, 448 F.3d at 155-56. But that is not enough. *Datacard*, 106 F.3d at 1350; *Bldg. & Const. Trades Council*, 448 F.3d at 155-56.[10] Therefore, the Court must dismiss the First Claim for Relief.

C. Plaintiff Cannot Establish This Court's Jurisdiction Over Plaintiff's New Third Claim For Relief.

In its Complaint, Plaintiff asserts a new Third Claim for Relief in which it asks the Court to enter a declaratory judgment that NMED's adoption of the 2016 Order is "invalid" because NMED supposedly did not follow applicable State law "public hearing" procedures before

[9] It did find, however, that the plaintiff's (a)(1)(A) claim respected a violation of subchapter III, where the plaintiff "alleged a specific RCRA hazardous waste violation." The court explained that this violation arose from "AMI's repeated spills of tetrachloroethylene, a chemical covered by RCRA's hazardous waste regulations" and "that AMI was in violation of 40 C.F.R. § 262.34, which prohibits generators from accumulating hazardous wastes for more than 90 days, as well as 40 C.F.R. parts 264, 265, and 270, which provide the operating rules and permit requirements for hazardous waste treatment, storage, and disposal facilities." *Datacard*, 106 F.3d at 1350.

[10] Section (a)(1)(A) is broader than section (b)(1)(A). Here, Plaintiff alleges that LANS violated an "order," the 2005 Order, but that does not equate to an allegation that it is violating a statute or regulation from subchapter III. *See Bldg. & Const. Trades Council*, 448 F.3d at 155 ("That the Trades Council has adequately stated a claim under section 6972(a)(1)(B), however, does not necessarily mean that this claim 'respect[s] a violation of subchapter III,' 42 U.S.C. § 6972(b)(2)(A), as required in order for the ninety-day notification delay period to be excused.").

adopting it. Compl. ¶¶ 101-107. Rather than pursuing its prescribed State law remedies in a State court, Plaintiff attempts to make an "end run" around these remedies by asserting this claim here.

This Court also does not have subject matter jurisdiction of this new claim. The claim cannot be based on diversity jurisdiction because there is not complete diversity of parties. *See* 28 U.S.C. § 1332. Moreover, there is no federal question jurisdiction under 28 U.S.C. Section 1331 to support the claim. Plaintiff appears to predicate the claim on the Federal Declaratory Judgment Act, 28 U.S.C. Section 2201. Compl. ¶¶ 2, 107. However, it is undisputed that Section 2201 does not confer any independent or additional federal subject matter jurisdiction. *McGrath v. Weinberger*, 541 F.2d 249, 252 (10th Cir. 1976) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950)); *see also Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 822 (10th Cir. 1981) ("It is settled that 28 U.S.C. § 2201 does not itself confer jurisdiction on a federal court where none otherwise exists" and "does not extend subject matter jurisdiction to cases in which the court has no independent basis for jurisdiction").

The Court does not have jurisdiction under the RCRA citizen suit provision because there is no RCRA "requirement" that conceivably could have been violated by NMED, and even if there were, Plaintiff never met the jurisdictional requirement of providing DOE and LANS with a RCRA 60-day notice relating to issuance of the 2016 Order. *See* 42 U.S.C. § 6972(b)(1)(A). If any federal question jurisdiction were possible, Plaintiff's failure to do so deprives this Court of jurisdiction. *Covington*, 358 F.3d at 636.[11]

[11] The fact that Plaintiff's third claim serves as a purported rejoinder to LANS's mootness attack on Plaintiff's RCRA claims, which do arise under federal law, does not make Plaintiff's claim one "arising under" federal law for purposes of 28 U.S.C. § 1331. Pursuant to the well-pleaded complaint rule, plaintiff's claim controls. *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) ("Under the longstanding well-pleaded complaint rule, however, a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law]'" and thus "[f]ederal jurisdiction cannot be predicated on an actual or anticipated defense" nor "an actual or anticipated counterclaim").

Supplemental jurisdiction pursuant to 28 U.S.C. Section 1367 also does not lie. Plaintiff's claim that NMED failed to comply with public hearing procedural rules before issuing the 2016 Order involved different rules, different documents, and different actors than Plaintiff's First and Second claims, and thus is not is not "so related" to its 2005 Order claims so as to "form part of the same case or controversy under Article III of the United States Constitution." *Cf.* 28 U.S.C. § 1367(a). Plaintiff's new claim addresses whether state law mandates that NMED hold a public hearing before it could adopt the 2016 Order (not the 2005 Order), which improperly attempts to import new 2016 Order procedural issues into this litigation. The other claims are against LANS and DOE, not NMED, and do not arise under State law.

"[W]hen a court exercises federal jurisdiction pursuant to a rather narrow and specialized federal statute it should be circumspect when determining the scope of its supplemental jurisdiction." *Lyon v. Whisman*, 45 F.3d 758, 764 (3d Cir. 1995). The only connection between the third and other claims is LANL itself, but that is not enough. *See id.* at 763 (claim for overtime wages under FLSA not sufficiently related to state law contract and tort claims for unpaid bonus; employment relationship not sufficient); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 456 (11th Cir. 1996) (ERISA claim based on pension benefits not sufficiently related to state law contract claims for benefits not granted in pension plan).

To the extent Plaintiff disagrees with NMED's process for adopting the 2016 Order, Plaintiff should have pursued its available relief in State court, instead of launching a collateral attack here. *See, e.g.*, N.M. Stat. Ann. § 74-4-14A, B.3 (1978). But now, where this Court lacks jurisdiction to hear Plaintiff's claims, and unless and until a State court with jurisdiction strikes down the 2016 Order as a matter of law, it must be accepted as a binding legal order, duly issued by NMED. In short, this Court lacks jurisdiction to declare the 2016 Consent Order invalid and thus Plaintiff cannot escape its mooting effect or obtain the relief Plaintiff seeks.

VI. TWO OF PLAINTIFF'S CLAIMS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Third Claim For Relief

Even if this Court had jurisdiction to adjudicate this claim (which it does not as explained in Section V.C herein), Plaintiff's third claim fails to state a claim because as a matter of law NMED was not required to hold a public hearing. New Mexico Statute Section 74-4-4.2 is entitled "*Permits*; issuance; denial; modification; suspension; revocation." (emphasis added). Section (H) of that statute provides that "[n]o ruling shall be made on *permit* issuance, major modification, suspension or revocation without an opportunity for a public hearing." N.M. Stat. Ann. § 74-4-4.2 (1978) (emphasis added). The 2016 Order, however, is not a "permit;" rather, it is an administrative consent order. Section 74-4-4.2(H) on its face thus does not mandate any public hearing before NMED can issue an administrative order such as the 2016 Order.

Nothing in the 2005 Order compels a public hearing here either. Section III.J.1. of the 2005 Order addresses "*modifications*" of the 2005 Order, and references various state regulations.[12] But none of these regulations are pertinent here because the 2016 Order, with its revised Campaign Approach, is not a "modification" of the 2005 Order. Instead, it is an entirely different order and completely supersedes the 2005 Order. Section III.W.5 of the 2005 Order also does not provide that any supersession of the 2005 Order is to be governed by the same rules that apply to revocation of a permit. The regulations cited by Plaintiff do not provide for any right of public participation in the event that the NMED elects to supersede an existing administrative consent order with a different administrative consent order.

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[12] The 2005 Order refers to 20.4.1.900 NMAC (which incorporates 40 C.F.R. § 270.42) and 20.4.1.901 NMAC. *See* Dolan Decl., Ex. A at III.J.1; *id.* at III.W.5. New Mexico Administrative Code Sections 20.4.1.900 and 901 provide for various rights in the case of "permit modifications." For example, 40 C.F.R. § 270.42 (incorporated by NMAC 20.4.1.900) categorizes certain types of modifications as class 1, 2, or 3 modifications and provides for escalating procedural protections for each category.

B. Fourth Claim For Relief

Plaintiff's Fourth Claim for Relief seeks attorneys' fees and expert witness fees pursuant to the RCRA citizen suit provision, 42 U.S.C. § 6972(e), which authorizes an award of fees to a prevailing party, in the court's discretion. This claim is actually only a remedy that duplicates the Prayer and not a substantive claim. It must be dismissed because it cannot stand as an independent claim and cannot be maintained once the two RCRA citizen suit claims are dismissed.

VII. CONCLUSION

For the reasons set forth above, Defendant LANS requests that the Court dismiss Plaintiff's lawsuit.

Dated: August 31, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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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