

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

<p>NUCLEAR WATCH NEW MEXICO,</p> <p>Plaintiff,</p> <p>vs.</p> <p>UNITED STATES DEPARTMENT OF ENERGY, and LOS ALAMOS NATIONAL SECURITY, LLC,</p> <p>Defendants,</p> <p>and</p> <p>NEW MEXICO ENVIRONMENT DEPARTMENT,</p> <p>Intervenor.</p>	<p>Case No. 1:16-cv-00433-JCH-SCY</p>
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**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT LOS ALAMOS
NATIONAL SECURITY, LLC'S MOTIONS TO DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT OR ALTERNATIVELY FOR COURT ABSTENTION**

INTRODUCTION

Defendant Los Alamos National Security, LLC (“LANS”), by the undersigned counsel and pursuant to Rule 201(b) of the Federal Rules of Evidence, hereby files its Request for Judicial Notice in Support of Defendant LANS’s Motions To Dismiss Plaintiff’s First Amended Complaint Or Alternatively For Court Abstention.

Pursuant to Federal Rule of Evidence 201(b), LANS respectfully requests that this Court take judicial notice of the following documents, which are attached as Exhibits to the concurrently-filed Declaration of Timothy A. Dolan in support of this Request for Judicial Notice:¹

Exhibit A: Excerpts from the Compliance Order on Consent dated March 1, 2005 as amended through October 29, 2012 (“2005 Order”);

Exhibit B: Letter from New Mexico Environmental Law Center on behalf of Nuclear Watch New Mexico, dated January 20, 2016;

Exhibit C: Letter from New Mexico Environmental Law Center on behalf of Nuclear Watch New Mexico, dated May 5, 2016;

Exhibit D: Excerpts from the Nuclear Watch New Mexico comment letter, dated May 31, 2016;

Exhibit E: Excerpts from the Compliance Order on Consent, issued on June 24, 2016 (“2016 Order”); and

Exhibit F: Los Alamos National Laboratory Framework Agreement: Realignment of Environmental Priorities.

The 2005 and 2016 Compliance Orders on Consent (Exhibits A and E) are very lengthy documents, not all of which are relevant to LANS’s motions. The full text of each Order can be found on the New Mexico Environment Department website as identified below. Therefore,

¹ All exhibit references correspond to the exhibits attached to the Declaration of Timothy A. Dolan.

LANS has included as Exhibits A and E selected pages from each of the Orders that it believes are particularly relevant to the pending motions. LANS can certainly provide the Court with full written copies of these documents if the Court requests.

Pursuant to the Court's Local Rule of Civil Procedure § 7.1(a), LANS's counsel conferred with Plaintiff's counsel regarding this request. Plaintiff's counsel confirmed that Plaintiff intends to oppose this request.

LEGAL ARGUMENT

A. Applicable Legal Standard

Judicial notice is proper where a fact is “not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b); *A.M. v. New Mexico Dep't of Health*, 148 F. Supp. 3d 1232, 1245 (D.N.M. 2015). In deciding a motion to dismiss, the Court should consider the “information contained in the complaint and documents appropriately subject to judicial notice.” *Nichols v Danley*, 266 F. Supp. 2d 1310, 1312 (D.N.M. 2003).

B. The Court Should Take Judicial Notice Of Exhibits A Through F.

Judicial Notice of Exhibits A through F is appropriate here. Exhibits A to E are referred to in the First Amended Complaint (“Complaint”) and are central to Plaintiff's claims. And for all exhibits, their existence and contents cannot be reasonably disputed because they can be easily determined from undeniably accurate sources.

1. Exhibits A Through E Are Judicially Noticeable Because they Are Referred to in the Complaint and Central to Plaintiff's Claims.

The Court may properly consider and take judicial notice of Exhibits A through E because each document is referred to extensively in the Complaint and is central to Plaintiff's claims, and is of unquestioned authenticity. On a motion to dismiss, “the district court may

consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.” *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002); *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013); *New Mexico Dep't of Health*, 148 F. Supp. 3d at 1245 n.7; *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 354-55 (2d Cir. 2010) (“We may take judicial notice of the full contents of the SEC's filings relating to this enforcement action because plaintiffs rely upon portions of them in their pleadings and, in any event, these proceedings are a matter of public record.”); *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (“[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff’s claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.”).

The Complaint refers to the 2005 Order (Ex. A) extensively (Compl. ¶¶ 41-47, 101, 105-106) and it is central to the claims, as Plaintiff requests the Court to enforce deadlines from the 2005 Order, as well as relies on it as a basis to invalidate the 2016 Order (Ex. E).

Exhibits B and C are Plaintiff's formal notice letters under the Federal Resource, Conservation and Recovery Act ("RCRA") that are likewise referred to in the Complaint (Compl. ¶¶ 94, 98). They are central to Plaintiff's claims because they are a jurisdictional prerequisite to Plaintiff's Claims for Relief. 42 U.S.C. § 6972(b)(1)(A); *Covington v. Jefferson Cty.*, 358 F.3d 626, 636 (9th Cir. 2004).

Exhibits D and E are also referred to in the Complaint and are central to Plaintiff's claims. See Compl. ¶¶ 1, 49, 51-52. Plaintiff's Third Claim for Relief seeks to strike down Exhibit E, the 2016 Order.

There can be no debate as to the authenticity of Exhibits A through E for the reasons set forth below and in the accompanying Declaration of Timothy A. Dolan.

2. Exhibits A, D, E and F Are Judicially Noticeable As Public Agency Records.

Exhibits A, D, E and F constitute official public NMED records that are available on the New Mexico Environment Department (“NMED”) website. Specifically:

- the entirety of Exhibit A is available online at:
https://www.env.nm.gov/HWB/documents/LANL_10-29-2012_Consent_Order_-_MODIFIED_10-29-2012.pdf;
- the entirety of Exhibit D is available online at:
<https://www.env.nm.gov/HWB/documents/NWNMComments5-31-2016.pdf>;
- The entirety of Exhibit E is available online at: https://www.env.nm.gov/wp-content/uploads/2015/12/LANL_Consent_Order_FINAL.pdf;
- Exhibit F is available online at:
https://www.env.nm.gov/HWB/documents/LANL_Framework_Agreement.pdf.

Because these documents are public documents available on the website of NMED, they are self-authenticating and their existence and contents are judicially noticeable. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Comty. v. California*, 547 F.3d 962, 968-69 n.4 (9th Cir. 2008) (taking judicial notice of public records located on official website); *S.E.C. v. Goldstone*, 952 F. Supp. 2d 1060, 1221 (D.N.M. 2013) (taking judicial notice of “SEC publications, Financial Accounting Standards, and government reports” that are “publicly available”); *Paralyzed Veterans of Am. v. McPherson*, No. C064670SBA, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 9, 2008) (“It is not uncommon for courts to take judicial notice of factual information found on the world wide web.” *O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007)). This is particularly true of information on government agency websites, which have often been treated as proper subjects for judicial notice.”) (collecting cases); and see *Qiu Yun Chen v. Holder*, 715 F.3d 207, 211-12 (7th Cir. 2013) (“A document

posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself.”).

C. Judicial Notice Does Not Convert These Motions Into Motions For Summary Judgment.

Taking judicial notice of and considering Exhibits A through F as requested in adjudicating LANS’s motions to dismiss under Rule 12(b)(6) and 12(b)(1) is not intended to and does not convert LANS’s motions into motions 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].”); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (“[A] court may take judicial notice of matters of public record without converting a motion to dismiss [under Rule 12(b)(6)] into a motion for summary judgment.”) (internal citations omitted); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (documents on file with administrative agency and appropriately subject to judicial notice may be considered on Rule 12(b) motion without converting motion to dismiss to motion for summary judgment).

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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