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

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

NEW MEXICO ENVIRONMENT DEPARTMENT'S REPLY TO PLAINTIFF'S RESPONSE TO SECOND MOTION TO DISMISS

The New Mexico Environment Department ("NMED") submits this Reply to Plaintiff Nuclear Watch New Mexico's Response in Opposition to Intervenor NMED's Motion to Dismiss (Doc. #55) ("Response").

I. Plaintiff's Unsupported Legal Conclusions Are Not Entitled to an Assumption of Truth

In attempting to defeat NMED's Motion to Dismiss, Plaintiff asserts that its Second Amended Complaint (Doc. #42) ("Complaint") clearly states that the 2016 Consent Order was executed in violation of New Mexico Law, Response at 4, and that NMED was "precluded from executing the 2016 CO as a replacement for the 2005 CO until the required public participation

process, including a public hearing, was accomplished." Response at 5. Plaintiff argues that such statements are entitled to an assumption of truth for purposes of the Motion.

NMED does not dispute that the Complaint contains the statements identified by Plaintiff. However, Plaintiff's argument that the Court must accept those statements as true confuses factual allegations with legal conclusions. As the U.S. Supreme Court has noted, "[t]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth." *Id. at* 664.

It is because of the incorrect legal conclusions reached by Plaintiff that this Court should dismiss the Complaint. Plaintiff's statements in its Complaint to the effect that the public participation requirements of the 2005 Consent Order applied to the execution of the 2016 Consent Order constitute erroneous legal conclusions, not factual allegations. Even assuming all facts as stated by Plaintiff in its Second Amended Complaint to be true, Plaintiff has provided no legal authority supporting the argument that NMED and the United States Department of Energy ("DOE") were precluded from executing the 2016 Consent Order as they did.

Likewise, the allegation that the 2016 Consent Order was executed in violation of the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -17 ("HWA"), is an erroneous legal conclusion that is not entitled to any assumption of truth. Plaintiff provides no legal authority for the allegation that the public participation requirements of the HWA as applied to the issuance of permits can or should apply to the execution of a consent order. Plaintiff contends that all the "allegations in the Second Amended Complaint are to be taken as true, including its interpretation of the validity of the 2016 CO." Response at 6. However, Plaintiff provides no legal authority to support this statement, and indeed, it is a direct contradiction of clear U.S. Supreme Court

authority. *See Iqbal*, 556 U.S. at 678 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

II. Plaintiff Provides no Legal Support for Its Claim that the 2016 Consent Order is Invalid

As demonstrated in NMED's Motion, assuming all of Plaintiff's well-pled factual allegations as true, the 2016 Consent Order is valid as a matter of law. The Complaint alleges the 2016 Consent Order was executed in violation of the HWA because a public hearing was not held. As explained in NMED's Motion, both the 2005 Consent Order and the 2016 Consent Order were executed as negotiated settlements pursuant to NMED's authority under NMSA 1978, Section 74-4-10 (the statutory title of which is "Enforcement; Compliance Orders; Civil Penalties"), in order to compel DOE to comply with mandatory corrective actions. *See* Motion to Dismiss at 7-8. While the 2005 Consent Order incorporated some public notice provisions that could be considered "permit-equivalent requirements," those requirements were negotiated terms, and did not apply to execution of a subsequent consent order, nor were such provisions carried over to the 2016 Consent Order. Therefore, Plaintiff's unsupported conclusory allegation that a public hearing was required before the 2016 Consent Order could be executed is without merit.

In its Response, Plaintiff argues that it does "not assert that the 2005 CO is a 'permit.'" Response at 8. Yet it then draws the unsupported legal conclusion that the 2016 Consent Order somehow had to comply with the "permit-equivalent requirements" regarding public notice and hearing that were contained in the 2005 Consent Order. In attempting to address NMED's argument that Plaintiff alleged no facts and provided no authority that would preclude NMED and DOE from agreeing to supersede their first agreed-upon order with a second agreed-upon order,

Plaintiff asserts that it "has provided a host of facts and legal *claims* in the Second Amended Complaint showing precisely that NMED and DOE were precluded from executing the 2016 CO as a replacement for the 2005 CO" without a public hearing (emphasis added). However, the legal claims set forth in Plaintiff's Complaint are not authority. Certainly Plaintiff makes a number of legal claims in the Complaint, and repeats them in the Response. Yet Plaintiff cites no legal authority to back up those claims, nor does it provide any rationale as to how the public participation processes set forth in the 2005 Consent Order (which do not indicate that they apply to execution of any subsequent consent order), or the permitting process of the HWA would apply to execution of the 2016 Consent Order. In the absence of any legal support, such claims must be viewed as unsupported legal conclusions that are not entitled to an assumption of truth.

NMED agrees with Plaintiff that there is "no complex issue of state law in this case." Response at 10. The Court need look no further than the plain terms of the 2016 Consent Order, the relevant statutory authority, and the complete absence of legal authority provided by Plaintiff in both the Complaint and Response in order to dismiss Plaintiff's claim that the 2016 Consent Order was executed in violation of state law.

III. NMED Has the Authority to Settle Alleged Violations of the 2005 Consent Order

Plaintiff claims "NMED does not have the power to settle and dismiss Plaintiff's RCRA claims, either for past or ongoing violations of RCRA, and certainly not for the civil penalties owed for past viols [sic] and continuing violations." Response at 7. This represents yet another erroneous legal conclusion.

Plaintiff's Complaint does not assert any independent violations of the federal Resource Conservation and Recovery Act ("RCRA"); rather, all of Plaintiff's claims are based on alleged violations of the 2005 Consent Order, which was executed pursuant to NMED's regulatory authority under RCRA and the HWA. It is uncontested that NMED was a party to the 2005 Consent

Order, and therefore had the right to "settle and dismiss" any alleged violations of the 2005 Consent Order. And indeed, NMED did just that through the 2016 Consent Order. *See* 2016 Consent Order at § II.A ("[the 2016 Consent Order] settles any outstanding alleged violations under the 2005 Consent Order."). As explained in NMED's Motion, once those alleged violations were settled, Plaintiff's claims for violations of the 2005 Consent Order became moot and are subject to dismissal under Fed. R. Civ. P. 12.

IV. NMED Did Not Raise the Issue of Supplemental Jurisdiction in its Motion

Plaintiff includes an argument regarding supplemental jurisdiction in its Response to NMED's Motion to Dismiss. NMED did not raise that issue in its Motion. This argument is appropriately addressed to the issue raised by DOE in its Second Motion to Dismiss (Doc #47). NMED concurs with the reasoning as set forth by DOE in that motion.

CONCLUSION

For the foregoing reasons, and as explained in NMED's Motion to Dismiss, the Court should dismiss Plaintiff's Second Amended Complaint in its entirety.

Respectfully submitted,

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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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