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

NUCLEAR WATCH NEW MEXICO,
Plaintiff,
v.

UNITED STATES DEPARTMENT OF ENERGY,
and

LOS ALAMOS NATIONAL SECURITY, LLC,
Defendants
and

NEW MEXICO ENVIRONMENT DEPARTMENT,
Intervenor

No. 1:16-cv-00433-JCH-SCY

PLAINTIFF NUCLEAR WATCH NEW MEXICO'S RESPONSE TO DEFENDANT DOE'S MOTION TO DISMISS

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INTRODUCTION

This action is a claim under the Resource Conservation and Recovery Act ("RCRA" concerning violations of the Act by the United States Department of Energy ("DOE") and its contractor at the Los Alamos National Laboratory ("LANL"). The contractor, an entity known as Los Alamos National Security, LLC, ("LANS"), and DOE entered into a Consent Order ("CO") in 2005 with the New Mexico Environment Department ("NMED"). The violations plaintiff Nuclear Watch New Mexico is complaining of are failures to comply with the 2005 CO, cleanup requirements. These failures to comply are violations of RCRA's Subchapter III requirements governing the handling of hazardous wastes and are particularly egregious given the history of repeated environmental releases of contaminants into the air, soil, and water surrounding and under LANL.

The grim state of environmental contamination in the areas surrounding the laboratory in 2005 is evidenced by the descriptions, in the CO itself, of the extent of the contamination. The CO's description of the vast array of contaminants that have been released into the environment at and surrounding LANL are daunting. Contaminants, as specified in plaintiff's Complaint, that have been released into, and detected in, soils and sediments at LANL include, explosives, such as RDX, HMX, and trinitrotoluene (TNT); volatile organic compounds and semi-volatile organic compounds; metals such as arsenic, barium, beryllium, cadmium, hexavalent chromium, copper, lead, mercury, molybdenum, silver, and zinc; and polychlorinated biphenyls (PCBs).

Hazardous wastes that have been released into, and detected in, groundwater beneath the Laboratory include explosives, such as RDX; volatile organic compounds such as trichloroethylene, dichloroethylene, and dichloroethane; metals such as molybdenum, manganese, beryllium, lead, cadmium, hexavalent chromium, and mercury; and perchlorate.

Hazardous wastes and hazardous constituents have been detected beneath LANL in all four groundwater zones.

Unsurprisingly, the intervenor in this case, NMED, has admitted (in its motion to dismiss Plaintiff's claims), that the CO was entered into by NMED, DOE and LANS "following a determination that corrective action was necessary at LANL to protect human health and the environment." That necessity has not dissipated with the repeated failures by DOE and LANS to accomplish required cleanup.

Plaintiff strongly disagrees with of the defendants and intervenor on the seriousness of this case and of the violations alleged by plaintiff. This was not a mere failure to meet a few paperwork and report filing deadlines set forth in a now-irrelevant consent order, but rather a systematic and systemic failure by defendants DOE and LANS to meet crucial cleanup deadlines for sites with known, admitted and ongoing environmental discharges of contaminants classified as "hazardous wastes" under RCRA. Plaintiff has made claims for injunctive relief against DOE and LANS, and these claims are not mooted by the execution of a 2016 consent order between DOE and NMED ("2016 CO").

The seriousness of an environmental statute violation is not always clear, but in this case a fair measure may be the amount of fines and penalties that could potentially be assessed against DOE and LANS if plaintiff prevails. Plaintiff's Second Amended Complaint points out that DOE and LANS are jointly liable, potentially, for the maximum penalty for each day of violation of $37,500. That sobering amount should give even repeat polluters, such as DOE and LANS, pause. It also shows that these violations are too serious to be mooted or otherwise denied a hearing on them.

Plaintiff looks forward to preparing for an evidentiary hearing on its claims.

I. THIS COURT HAS JURISDICITION OVER PLAINTIFF'S RCRA CLAIMS.

DOE argues, citing *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992), that it enjoys sovereign immunity from plaintiff's RCRA claims. DOE Motion, at 11. It is not clear whether DOE's reliance on *USDOE v. Ohio* is intended to argue for the specific result of that case: that DOE was not liable for civil penalties for past violations of environmental statutes. In any case, that result no longer obtains and DOE is fully subject to RCRA penalties for current and past violations, an outcome accomplished by the Congressional amendment of U.S.C. § 6961 to correct the result in *USDOE v. Ohio*. The amended version reads, as relevant:

> Each department, agency, and instrumentality of the [F]ederal Government [e]ngaged in any activity resulting, or which may result, in the disposal . . . of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including [a]ny provisions or injunctive relief and such sanctions as may be imposed by a court to enforce such relief)[.] The [S]tate [r]equirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines[.] The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any substantive or procedural requirement (including, but not limited to, any injunctive relief, any administrative order or civil or administrative penalty[.]

The effect of the amendment has been widely recognized:

> The 1992 amendment was a clear effort on behalf of Congress to equally apply environmental standards to private citizens and the federal government. This is evidenced by both the House Committee Report and the Statement by President George Bush Upon Signing H.R. 2194. *See, House Conference Report* No. 102-111, 102nd Cong., 2nd Sess. 4, *reprinted in* 1992 U.S.C.C.A.N. 1287, 1337-1. In particular, the House Report prepared by the Committee on Energy and Commerce endorsed the decisions in *State of Ohio v. United States Dep't Of Energy*, 689 F. Supp. 760 (S.D. Ohio 1988) (holding that Congress intended to waive sovereign immunity to civil penalties under the RCRA), and *State of Maine v. Department of Navy*, 702 F. Supp. 322 (D. Me. 1988) (similarly holding that RCRA waives sovereign immunity for civil penalties imposed by state law). The House Report also expressly rejected the Ninth Circuit's holding in *United States v. Washington*, 872 F.2d 874 (9th Cir. 1989).

Crowley Marine Servs. v. FEDNAV, Ltd., 915 F. Supp. 218, 222-223 (E.D. Wash. 1995); *accord, City of Jacksonville v. Dep't of Navy*, 348 F.3d 1307, 1319 (11th Cir.2003). Therefore, this Court should find, based upon the statutory language of the amendment, as well as the legislative history, that 42 U.S.C. § 6961 waived DOE's sovereign immunity and plaintiff's First, Second, Third, and Fourth causes of action set forth in its Second Amended Complaint state a valid claim upon which relief may be granted against the DOE.

DOE also claims that this Court has no jurisdiction over it in relation to the execution of the 2016 CO. However, that claim also fails because the 2016 Consent Order ("CO") was executed between the NMED and the DOE (which employs LANS as its agent to operate the Los Alamos National Laboratory). The Consent Order -- which plaintiff contests in this matter as an illegal action on the part of the defendants and the intervenor -- is pursuant to RCRA. Congress specifically provided the federal district courts with RCRA jurisdiction. 42 U.S.C. § 6972.[1] Plainly, a consent order under RCRA and the NMHWA either falls within the ambit of § 6972 or is an evidentiary issue for the Court to resolve at hearing. In either case, this claim by the DOE is meritless.

II. PLAINTIFF IS ENTITLED TO THIS COURT'S EXERCISE OF SUPPLEMENTAL JURISDICTION OVER ITS INTEGRALLY RELATED STATE LAW CLAIM THAT THE 2016 CO WAS EXECUTED BY NMED AND DOE IN VIOLATION OF STATE LAW.

Plaintiff, Nuclear Watch New Mexico, filed its Complaint on May 12, 2016. After the NMED and DOE entered into the 2016 CO, plaintiff filed its First Amended Complaint on July

[1] "The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g) [42 USC 6928(a) and (g)]."

19, 2016, adding claims related to and against the validity and effect of the new CO. After LANS, DOE and NMED filed motions to dismiss, plaintiff Nuclear Watch New Mexico amended its Complaint a second time, filing its Second Amended Complaint on September 21, 2016. LANS's second motion to dismiss followed on October 21, 2016.[2]

Plaintiff has made numerous claims under RCRA in its Second Amended Complaint. *See, e.g.,* Second Amended Complaint at ¶¶ 1-47. Defendants DOE and LANS and Intervenor NMED assert that the 2016 CO, by giving effect to its terms, moots Plaintiff's RCRA claims for injunctive relief and for penalties for past and allegedly ongoing violations. First, plaintiff notes that it filed its Complaint alleging ongoing violations of RCRA on May 12, 2016. The 2016 CO was not executed until June 24, 2016. Plaintiff's claim for penalties will be live whatever the effect of the 2016 CO. See, e.g., *Atl. States Legal Found. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1019-22 (2d Cir. 1993). ("[E]ven if the defendant comes into compliance with a consent order after the initiation of a citizen-suit, and even if there is no prospect of continuing violations, the citizen-plaintiffs' action will only be moot with respect to injunctive relief").

Second, the effect of the 2016 CO is strongly disputed by the parties, Plaintiff claiming that it was executed in violation of the terms of RCRA, the 2015 CO and the NM HWA, and that the court should bar its implementation until the legally mandated public hearing is held. Thus, plaintiff's claims that the 2016 CO -- offered by defendants DOE and LANS and intervenor NMED as a complete defense to all of the plaintiff's claims -- was executed in violation of the New Mexico Hazardous Waste Act ("NMHWA"), are claims that "are so related to the federal claim that they form part of the same case or controversy." 28 U.S.C. § 1367(a). A claim is part

[2] DOE and LANS claim that the Second Amended Complaint violated Rule 15 as filed without leave. Plaintiff has addressed this matter in footnote 1 of its Response In Opposition to LANS's Motion To Dismiss. We incorporate that explanation and cited cases herein by reference. Plaintiff filed a First Amended Complaint with leave of the parties and the Court but did not use its right to one amendment without leave; therefore, the Second Complaint was made utilizing that absolute right.

of the same case or controversy if it " 'derive[s] from a common nucleus of operative fact'." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). Claims that share a "common nucleus of operative fact," such that it would ordinarily be expected that the plaintiff try the claims in the same proceeding, form part of the same case or controversy. United Mine Workers of America, 383 U.S. at 725; see also *White v. County of Newberry*, 985 F.2d 168, 171 (4th Cir.1993).

Supplemental jurisdiction does not envelop claims when one count is "separately maintainable and determinable without any reference to the facts alleged or contentions stated in or with regard to the other count. *Hales v. Winn–Dixie Stores, Inc.*, 500 F.2d 836, 848 & n. 12 (4th Cir.1974). However, supplemental jurisdiction may be found where the claims "revolve around a central fact pattern," *White v. County of Newberry*, 985 F.2d at 172. Here, one effect of this basis for finding supplemental jurisdiction has a direct, adverse impact upon defendants' and intervenor's mootness claims. They claim that the 2016 CO moots out the plaintiff's claim--but their claim of mootness is, in fact, inseparable from the plaintiff's allegation in the Second Amended Complaint that the 2016 CO is invalid.

28 U.S.C. § 1367(a) directs that the Court "shall have jurisdiction[.]" By use of the word "shall," the statute makes clear that if power is conferred under section 1367(a), and its exercise is not prohibited by section 1367(b), a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in section 1367(c) applies. These are:

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Concerning the first consideration, there is no complex issue of State law in this case. This is predominantly a RCRA case and nearly all of the State law involved is, as explained in the Second Amended Complaint at ¶¶ 1-47, that which was implemented to adopt RCRA within the state statutes as the NMHWA in order to obtain implementation and enforcement authority from the U.S. EPA, Region 6. There is one difference in that the NMHWA provide additional notice, comment and hearing opportunities for the public. The other aspect of State law that would be involved is New Mexico law governing agreements, such as the Consent Orders at issue here. There is no special technical knowledge necessary to adjudicate such agreements, given that federal district Courts are often called upon to interpret contracts and other forms of agreement. Such issues are well within the ambit of the Court's expertise.

The same facts apply to the second consideration, as the Consent Order issues intertwine with the RCRA violations. Examining the Second Amended Complaint reveals that these violations – for which, significantly, no civil penalties were obtained, and, arguably on the face of the facts presented in the Second Amended Complaint, are, in many instances, continuing violations—predominate. However, as the Second Amended Complaint points out, these violations were, in effect, amplified, by the 2016 CO wiping out all deadlines. The result is that NMED has given DOE/LANS a free pass to avoid several hundred million dollars in potential civil penalties that had accrued up to the signing of that CO (which plaintiff contends are continuing violations). Consideration (3) does not apply, as there has been no district court action to date. Consideration (4) would not apply either, as there is no compelling reason for this Court to refuse supplemental jurisdiction of the State law claims at issue in this matter.

Thus, to deny supplemental jurisdiction, DOE must argue that one or more of these four factors apply. DOE does not appear to argue factors 1) or 4), but does directly allege factor 2) – that plaintiff's state law claims predominate over its federal claims. Indeed, DOE says that all questions as to the validity and effect of the 2016 CO questions of state law and that these state law questions predominate, so supplemental jurisdiction is not warranted. Motion, at 12. But DOE also argues to this Court, not a state court, for mootness of plaintiff's federal claims based on a substantive interpretation of the terms of the 2016 CO, which necessarily presumes its validity and particular effects, strongly denied by plaintiff. This is a clearly inconsistent position: DOE cannot consistently argue that this Court should in effect determine the validity and effect of the 2016 CO by concluding its terms moot Plaintiff's RCRA violations claims and, at the same time, say a state court should determine the validity and effect of the 2016 CO.

Plaintiff submits this tortuous logic betrays the defendants' reluctance to admit a simple fact: plaintiff has federal claims, and the questions of the validity and effect of the 2016 CO are entwined with those federal claims, entitling plaintiff to this Court's exercise of supplemental jurisdiction to decide them.

DOE claims that Plaintiff's state law claims predominate over its federal ones and that the amendments to the complaint show that. Motion, at 11. Plaintiff' claims do not predominate. It was the defendants and intervenor who brought the 2016 CO to this Court as a mootness defense to plaintiff's federal claims. Thus, plaintiff's claim that the 2016 CO is invalid as a matter of state law is inextricably entwined with the federal claim; hence supplemental jurisdiction is appropriate. There is a need to resolve all these related questions now, in one forum, without risk of an inconsistent state court judgment regarding a state law defense to a federal claim.

DOE also refers to exception 3) above, although presumptively rather than substantively, when it says that supplemental jurisdiction fails here because there is no primary jurisdiction federal claim on which to premise supplemental jurisdiction. Motion, at 12. DOE assumes here that the court will first dismiss all of the plaintiff's federal claims due to the adoption of DOE's 2016 CO mootness argument, then 3) would apply, due to the lack of any remaining federal claims to support supplemental jurisdiction. Of course, as noted above, this approach begs the central question that the plaintiff's complaint has raised in this matter: what is the validity and effect of the 2016 CO on plaintiff's federal (and state) claims.

The actual question presented here is whether, on the basis of plaintiff's existing federal claims, it has shown that it is entitled to have the court hear and determine its closely related state law claims regarding the validity and effect of the 2016 CO. Defendants deny this entitlement in the context of a motion to dismiss, so it is sufficient that plaintiff point out that it filed its Complaint on May 12, 2016, alleging ongoing violations of the 2005 CO, and requesting injunctive relief and civil penalties. Under the *Gwaltney* standard, plaintiff Nuclear Watch New Mexico has established a claim for civil penalties which will survive any determination that the injunctive relief claims have been mooted by agency action. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 58-66 (citizen-suit provision allows citizens to abate pollution when the government cannot or will not command compliance).

Thus, DOE's premise is unfounded, and the corollary is irrelevant: plaintiff has shown the existence of federal claims to support its request for supplemental jurisdiction over its closely related state law claims.

III. PLAINTIFF IS ENTITLED TO A DECLARATORY JUDGMENT UNDER BOTH STATE AND FEDERAL DECLARATORY JUDGMENT ACTS.

The Federal Declaratory Judgment Act gives a federal district court the authority, in any "case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2006). Plaintiff has clearly claimed that LANS has violated RCRA by failing to comply with the deadlines set forth in the 2005 CO, and that as of the date of filing of Plaintiff's Complaint, those violations were ongoing. [cites to Complaint] Further, Plaintiff claims that the 2005 CO is still valid and effective and that LANS's obligations under it for cleanup by dates certain also still exists and is ongoing. It can hardly be doubted that for this Court, this is a "case of actual controversy within its jurisdiction," which has not been dismissed or abandoned by Plaintiff. Therefore, the FDJA applies and Plaintiff is entitled to a declaration from this Court that that the 2005 CO is still valid and effective and that LANS is still obligated thereunder. See, Seneca Nursing v Kansas ("When the declaratory judgment was entered on state grounds the federal claims had not been dismissed or abandoned. In these circumstances and in view of the complexity of the intertwined federal issues, the exercise of pendent jurisdiction was within the reasonable discretion of the trial court.") Such a declaration would go far to accomplish the intended purposes of the FDJA, those being "to afford a speedy and inexpensive method of adjudicating legal disputes ... and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships." Aetna Casualty and Surety Co. v. Quarles, 92 F.2d 321 (4th Cir.1937).

Defendants LANS and DOE and intervenor NMED assert that the 2016 CO moots, at a minimum, all of Plaintiff's claims for injunctive relief. LANS' Motion at 7, DOE Motion at 2,

NMED Motion at 1. Plaintiff responds to this assertion that:1) how the 2016 CO, even if it is valid, affects Plaintiff's claims, is a question of federal, not state law and 2) the 2016 CO is invalid, because it was executed in violation of the HWA. As noted above, Plaintiff is entitled to have the Court exercise supplemental jurisdiction over this state law-based claim which is clearly "part of the same case or controversy" and "derives from a common nucleus of operative fact." Given such a state law-based claim, the New Mexico Declaratory Judgment Act ("NMDJA") makes available the remedy of declaratory judgment:

> In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and shall have the force and effect of a final judgment or decree.

NMAC 1978, 44-6-2. As described here, the NMDJA, like its federal counterpart, provides the district courts of the state with jurisdiction to declare "rights, status and other legal relations whether or not further relief is or could be claimed." Under this Court's supplemental jurisdiction, it could use either the federal authority to determine the meaning, validity (or lack thereof) of an agreement (the 2016 CO) that was entered into by a federal agency and an agency of state government, or, it could use that same supplemental jurisdiction and the, under the authority of the state NMDJA make that interpretation.

IV. PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES ARE NOT MOOT.

A. Overview.

Plaintiff has made two types of claims under RCRA against defendants DOE and LANS. First, plaintiff claimed that DOE and its contractor, LANS, have extensively and repeatedly failed to comply with the requirements of the 2005 CO requiring cleanup of specific sites or

installation of required monitoring wells and filing reports documenting that each site cleanup or well installation had been accomplished in accordance with the substantive requirements of the CO and within the time mandated by it. *See generally*, Second Amended Complaint ¶¶ 1-99. Second, plaintiff has demanded that the Court assess against DOE and LANS penalties of up to $37,500 per day per specified past and ongoing violation. *Id.* at ¶¶ 25, 55, 58, 63, 66, 69, 72, 75, 78, 81, 86, 89, 92, 97 and the second paragraph of the Prayer for Relief.

As stated above, DOE and LANS have argued that the execution of the 2016 CO, a document to which it was not a party, moots all of plaintiff's claims against them, both the claims for injunctive relief and for penalties. As plaintiff will show, the execution of the 2016 CO in fact did not moot plaintiff's claims for injunctive relief against LANS, and it certainly does not moot plaintiff's claim for penalties for LANS's past egregious violations of the 2005 CO.

DOE and LANS argue for a mootness finding by relying on *Rio Grande Minnow* (court finds no further relief possible) and *Covington* (no redressability). However, the Court could simply order compliance with the 2005 CO, or compliance until a consent order that was the product of diligent prosecution and required public participation was obtained. Thus we have injury, causation and redressability, no mootness.

On mootness generally, the court in *WildEarth Guardians v Lamar* stated, referencing the "Public Service" case:

> The Tenth Circuit acknowledged that, "[i]n most Clean Air Act citizen suits, mootness is difficult to establish because the plaintiff's interest in deterring the defendant from future violations is sufficient to sustain a constitutional case or controversy between the parties." *Id*. at 1178–79; *see also id*. at 1186–87. And the defendant's burden to show mootness resulting from the defendant's own voluntary cessation of the offending conduct is "formidable." Id. at 1183–84 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).

> "Public Service " required the defendant to establish mootness by showing that "it is 'absolutely clear' that its 'conduct could not reasonably be expected to recur,' thereby negating the potential deterrent value of the suit."*Id.* at 1186 (quoting *Laidlaw*, 528 U.S. at 189, 120 S.Ct. 693.)

WildEarth Guardians v. Lamar Utils. Bd., 932 F. Supp. 2d 1237, 1248-49 (D.Colo. 2013). With this general introduction to the mootness claims in this case, we turn to specifics.

B. The 2016 CO Does Not Moot Plaintiff's Claims for Injunctive Relief against DOE and LANS.

There are two threshold reasons why the 2016 CO, in the context of a motion to dismiss, cannot be relied upon to moot Plaintiff's RCRA claims. The first is that it appears questionable whether the CO is valid, when judged by the purposes of the statutes which authorize it – namely, RCRA and the HWA. The second is that the 2016 CO is not a product of an enforcement action filed in court and pursued to penalties. It is not the product of diligent prosecution, and it does meet the statutory requirements for a diligent prosecution bar under RCRA. We examine these separately.

1. The 2016 CO Must Be Judged By the Statutory Purposes of RCRA and the NMHWA.

Plaintiff claims that the 2016 CO is not an arms-length agreement and it is not to be interpreted according to the usual laws of contract, but it is to be interpreted in light of the purposes of the statutes under which authority it is issued. "A consent decree is a judicial act. It is not a contract, although some principles governing consent decrees overlap with the laws of contracts." *Gibson v. Allen*, Civil Action No. 2:78-2375, 2011 U.S. Dist. LEXIS 60172, 2011 WL 2214919, at *6 (S.D. W. Va. June 3, 2011); see also *Chase Manhattan Bank, N.A. v. Boris Kroll Fabrics, Inc.*, Civil Action No. 91-2796, 1991 U.S. Dist. LEXIS 17296 (D.N.J. Nov. 13, 1991) (Consent Order not a contract). The interpretation of the CO comes from the statute under

which it is issued — which would apply to both the federal (RCRA) and state (NMHWA) use of a CO:

> The authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change brings those terms in conflict with statutory objectives.

State v. Peppertree Resort, Villas, 651 N.W.2d 345, 354-55 (WI.App.2002).

NMED has argued most strenuously for the CO-as-contract view; however, none of the cases cited by NMED are RCRA cases, *viz. US v ITT*, *US v Armour*, *DeLorme v ITC*, *Shawnee v Dow*, *1st Natl v Geisel*. We have one baked-goods manufacturer (ITT), one meatpacker (Armour), one satellite communications company (ITC), and one bank holding company (1st National). NMED's citation to *1st National* is slightly ironic, as the court in that case opines on the effectiveness of a later agreement over an earlier one, "asuming the validity " of the later one. Defendants and Intervenor in this case are asking this court to do precisely the same thing: assume the validity of the (later) 2016 CO over the (earlier) 2015 CO, despite Plaintiff's claim that its execution violated New Mexico law.

2. The 2016 CO is not a product of diligent prosecution, but rather represents a polluter veto power and regulatory capture

Plaintiff has already pointed out that NMED neither filed an enforcement action in court nor extracted any fines or penalties from LANS for the violations of the 2005 CO cleanup deadlines. Those facts, already fatal to any claim of diligent prosecution, also make it unclear whether the 2016 CO, even if valid, is so ineffective an enforcement and cleanup tool as to be in conflict with the purposes of RCRA and HWA.

That concern is heightened by the fact that an inspection of the terms of the 2016 CO reveal no enforceable obligations on the DOE or its contractors (or its agent LANS) to

accomplish any of the cleanup tasks cited by plaintiff in its list of violations. Further, the 2016 CO contains no enforceable obligations of any kind on DOE past 2019, unless DOE explicitly agrees to them. In other words, under the 2016 CO, the regulated entity has a veto power over the regulator. This is indeed, in the language of the Fifth Circuit, "a sterling example of regulatory capture at its worst." See, *Env't Tex. Citizen Lobby, Inc. v. Exxon Mobil Corp.,* 824 F.3d 507, 526 (5th Cir. 2016). Further, the argument of the Environment Texas plaintiffs that "the agreement merely imposed toothless and overdue requirements in an attempt by Exxon and complicit TCEQ officials to "undercut more stringent citizen enforcement," as evidenced by the fact that the agreement "was negotiated, at Exxon's instigation, only after" Plaintiffs gave notice of their intent to file suit, sounds much like the circumstances of the present case. *Id.*

Altogether, these facts show two things. First, the 2016 CO is not entitled, at least at this stage of the proceedings, to the weight sufficient to be considered as a possible mootness defense to plaintiff's claims, or whether it is little more than no-court-action, no-penalties no-enforcement negotiated only after plaintiffs filed notice and suit . See, e.g.*, Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (no deference is given when an agency's interpretation "appears to be nothing more than an agency's convenient litigation position") (quoting *SEC v. Chenery Corp*., 318 U.S. 80, 97, 63 S. Ct. 454, 87 L. Ed. 626 (1943)). Second, since defendants have raised the 2016 CO as worthy of mooting plaintiff's federal claims, plaintiff is entitled to a hearing, after opportunity for discovery, for the purpose of determining whether it is entitled to such weight.

Plainly, that is a determination requiring the Court to make a decision based upon facts that each contending party has an opportunity to place in the record of the proceeding -- and, significantly, likely requires an opportunity to take discovery in order that the court is

provided with as complete a factual record as possible, upon which it would make a decision concerning the meaning of the consent decree or order at issue. Moreover, the Supreme Court has held that a "consent decree or order is to be construed for enforcement purposes basically as a contract." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975); accord *Sinclair Oil Corp. v. Scherer*, 7 F.3d 191, 194 (10th Cir. 1993) .

The significance to the case at bar is that if the new consent order does not, as plaintiff contends, achieve the congressional objectives undergirding the RCRA, it does not effectuate or enforce the provisions of that statute for its intended purposes, it may be void on its face. When a court is called upon to interpret an agreement that is made allegedly under, and in furtherance of, statutory objectives, it is up to the court to determine if, in fact, that is the case. In such a setting, plaintiff Nuclear Watch New Mexico claims, and would expect to show through discovery of the defendants and intervenor, that the Consent Order vitiates all meaningful action pursuant to RCRA in relation to continued cleanup of the Los Alamos National Laboratory, eliminates all deadlines, suspends all existing all clean-up efforts previously scheduled to take place, in fine, wiping clean a large slate of DOE/LANS violations of RCRA and the NMHWA without exacting a dime of civil penalties or taking any meaningful steps to keep the cleanup process on course.

3. The 2016 CO, being of disputed validity and effect, cannot moot Plaintiff's 2005 CO violations claims.

LANS first raises the mootness claim at p. 7 of its Motion to Dismiss, citing R*io Grande Sivery Minnow* for the proposition that, like the 2000 Biological Opinion at issue in *Minnow*, the 2005 CO became void and its obligations of no effect when the 2016 (resp. 2006 Biological Opinion) was executed. DOE makes the same argument. DOE Motion, at 17. But *Minnow* is inapposite, because the 2003 BO in *Minnow* was legislatively approved by Congress, and the

plaintiff therein was not contesting its validity, as plaintiff Nuclear Watch New Mexico is doing here in relation to the 2016 CO. LANS argues that the 2016 CO relieved it of all responsibility for past or future violations of the 2005 CO, even though it is not a party to that agreement. LANS Motion at 8. But Plaintiff has specifically claimed that the 2016 CO is invalid because it was executed in violation of New Mexico law. Second Amended Complaint at ¶¶ 100-139 and, generally, the Prayer for Relief. If plaintiff is correct, then the provisions of the 2016 CO upon which LANS relies will be of no effect, and LANS's obligations to clean up the contaminated sited as required by the 2005 CO continue through the present.

In fact, a review of the relevant law shows that plaintiff's claims for injunctive relief are in no way mooted by the execution of the 2016 CO, whether or not that document is eventually determined to have been executed in accordance with New Mexico law. In *Borough of Upper Saddle River v. Rockland County Sewer Dist. #1*, 16 F. Supp. 3d 294 (S.D.N.Y 2014), the court considered "defendant's assertion that the 2006 Consent Order rendered Plaintiffs' claims moot (and without redress)." *Id*. at 324-325. It noted that the Supreme Court "has stated clearly that it is the party claiming mootness that bears the 'heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again,'" and that "Courts do not shift the burden of proving mootness upon the plaintiff in the event that the defendant's theory of mootness is based on anticipated compliance with state-ordered remedial measures." *Id*. at 316-17 (quoting *Laidlaw*, 528 U.S. 181, 189).

Furthermore, a case is not moot if the court can offer some relief, no matter how small. See *Hispanic Leadership Fund v. Walsh*, *Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp. 3d 365, 373-74 (N.D.N.Y. 2014) (a case is moot when it is impossible to grant any effectual relief whatever to the prevailing party); accord, *Chico Serv. Station, Inc. v. SOL P.R. Ltd.,* 633

F.3d 20, 36 (1st Cir. 2011) (plaintiff need not establish availability of full relief sought, even a partial remedy is sufficient to prevent mootness); see also *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992).

Plaintiff in the instant case seeks remedies under RCRA Subchapter III for DOE's and LANS's failure to comply with the terms of a state consent order, the 2005 CO. DOE and LANS argue that the execution of the 2016 CO, by the terms of the CO, moots all of Plaintiff's claims. But, as the court in *Interfaith* noted, in language strikingly applicable to this case,

> PPG argues that because the Consent Judgment expressly resolved—through the claim release provision—all of the DEP's RCRA claims against PPG, Plaintiffs' claims are now moot. This overlooks the central issue in mootness: the availability of remedies. Plaintiffs seek remedies outside of those provided in the Consent Judgment.

Interfaith Community Org., Inc. v. PPG Indus., 702 F. Supp. 2d 295, 301-302 (D.N.J. 2010).

Here, plaintiffs seek remedies outside those of the 2016 Consent Order. Furthermore, just as in *Interfaith*, there is effectual relief that this Court may grant outside of the scope of relief provided for in the 2016 CO. Thus, Plaintiff's claims for injunctive relief are not mooted even if the 2016 CO is determined to be fully valid and effective. See *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259-60 (3d Cir. 2005) (holding a court may grant relief "as necessary" to abate endangerment, regardless of state standards).

More importantly, the defendants' argument that plaintiff's claims are moot because there is no likelihood of future violations meets two difficulties at this stage of the litigation, one procedural, the other substantive. First, the law provides that the burden is on the party alleging no likelihood of future violations to show the same by evidence that makes it "absolutely clear" that the challenged conduct cannot reasonably be expected to recur. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 62 (citizen-suit provision allows citizens to abate pollution when the government cannot or will not command compliance). That evidence, which

will no doubt be hotly disputed, is in no way appropriate for consideration in the context of a motion to dismiss. Here, there is no question that neither LANS nor DOE will perform the required cleanup tasks required by the 2005 CO anytime in the near future, so those violations are apparently ongoing, but Defendants and Intervenor will certainly have their opportunity at hearing to make their case.

Second, whether the execution of the 2016 CO or other action of the regulatory agency, NMED, is sufficient to meet the standard of "diligent prosecution" necessary to bar Plaintiff's claims is a question for this Court's interpretation of federal law and not a matter of interpreting the 2016 CO according to state law. By the applicable federal standards, NMED's actions fall far short of the diligent prosecution required to bar Plaintiff's claims. Dispositive, is the fact that NMED has failed to bring an enforcement action in any court relating to defendants DOE's LANS's failure to comply with the 2005 CO. Plaintiff contends this Court will find that this is fatal to any claim of diligent prosecution as a matter of law.

Defendants' argument that the 2016 CO mooted Plaintiff's claims for injunctive relief is not in accord with the law, and the Court should so find. Should the Court not choose to apply the law as described here to deny Defendants' mootness argument as a matter of RCRA law, the Court should allow for adequate discovery by all parties to prepare for an evidentiary hearing to establish the nature and context of the agency enforcement actions taken, or not taken, whether good faith attempts to comply were made, and the relations between the regulator and the regulated.

As noted, both DOE and LANS argue *Minnow* and *Wyoming v USDA*. In *Rio Grande Silvery Minnow v. Bureau of Reclamation,* the Tenth Circuit noted that"[t]he crucial question is whether granting a present determination of the issues offered will have some effect in the real

world." , 601 F.3d 1096, 1109 (10th Cir. 2010) (citations omitted). The Tenth Circuit found that the standard was not satisfied in *Minnow* and *Wyoming*, as it concluded that the mooting of plaintiffs' claims left no room for action that would "have some effect in the real world."

However, the present case differs fundamentally from *Minnow* and *Wyoming* in that in both those cases, the validity, interpretation and effect of the later documents were not at issue. In Minnow, the later document, the 2003 BO, had been approved by Congress –its validity was not in question. Similarly, in Wyoming, the successor to the "Roadless Rule" was promulgated through a new rulemaking process and its validity was not questioned.

Here, the validity, interpretation and effect of the 2016 CO are central. Plaintiff alleges that the 2016 CO was executed in violation of NM law, including the 2005 CO and the HWA. Further, plaintiff has shown that the features of the new CO suggest that it is not entitled, at least at this stage of the proceedings, to any weight.

4. Even if the 2016 CO is valid, DOE and LANS cannot meet their heavy burden re recurrence.

LANS argues that Plaintiff's claims are mooted due to future violations being "speculative and potential", citing the *Miss. River Revival* case. LANS Motion at 8. The court in *Miss. River* heard the claim of NPDES violations before permits issued; the claims were found moot when the permits did issue. The court adopted the *Laidlaw* standard of "absolutely clear wrongful behavior could not reasonably be expected occur." But in the case at bar, we have a question as to whether the 2016 CO is valid and, if so, whether it should it be interpreted as mooting the claim of 2005 CO violations. Further, LANS argues for a lower standard, the standard in *Unified Sch. Dist. No. 259 v. Disability Rights Ctr.,* 491 F.3d 1143, 1147 (10th Cir. 2007) . *Unified* is a case where school requests for information were withdrawn, mooting the

cases. *Unified* stated the standard for determining whether the harm was likely to recur as follows:

> For a case to dodge dismissal for mootness under the "capable of repetition, yet evading review" exception, "two prerequisites must be satisfied: (1) the duration of the challenged action must be too short to be fully litigated prior to its cessation or expiration; and (2) there must be a reasonable expectation that the same complaining party will be subjected to the same action again." *Hain v. Mullin*, 327 F.3d 1177, 1180 (10th Cir.2003) (en banc) (citing *United States v. Seminole Nation*, 321 F.3d 939, 943 (10th Cir.2002)).

Id. However, the use of that standard is unjustified in this case. Given the history of environmental contamination at LANL, the need for the 2005 CO to be adopted to mitigate the contamination was done under the imminent and substantial endangerment to public health and safety standard in RCRA and the NMHWA, NMSA 1978 § 74-4-10.1 and 74-4-13 (May 2, 2002). As the plaintiff's claims in this matter are that DOE repeatedly violated the cleanup requirements of the 2005 CO, DOE and LANS must be considered to be repeat polluters and must bear the stringent burden of meeting the "absolutely clear" voluntary cessation standard. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 174 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.,* 393 U.S. 199, 203 (1968)).

LANS argues that the "voluntary cessation" standard is not applicable, but cites cases where the agency took diligent enforcement action. See, e.g. *Env't Conservation Org. v City of Dallas*, 529 F.3d 519 (5th Cir. 2008), cited by LANS. Therein the court recognized that the "stringent" standard is appropriate when considering voluntary cessations of CWA violations because it "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." In *Env't Conservation Org. v City of Dallas*, 529 F.3d 519 (5th Cir. 2008), the court determined that where EPA had filed an enforcement action before the plaintiff filed suit for violations, that "[f]ar from voluntary, the City's compliance with the

terms of its MS4 Permit and the CWA has been compelled by an EPA enforcement action and the resulting court-approved consent decree." *Id.* at 528. The contrast with the present case is obvious: NMED has brought no enforcement action against DOE and LANS.

LANS inappositely also cites *Benham* and *Black Warrior v Cherokee Mining*, cases where there was diligent prosecution resulting in a CO with penalties. While the court in *Black Warrior v Cherokee* recognized but did not apply the "absolutely clear" standard of *Gwaltney,* based on the fact of diligent agency enforcement and a $15,000 fine, *Black Warrior v Shannon LLC* not only approved and applied the "absolutely clear" test, but found, in spite of penalties extracted from the polluter, that the "wholly past" standard was not met where an additional factual record was required. See *Black Warrior v. Shannon;* see also *Atlantic States Legal*.

The *Black Warrior Riverkeeper v Shannon* approach is the correct one here: as long as defendants continue to argue that they meet the *Gwaltney* or some other standard, plaintiffs are entitled to discovery and an opportunity to develop the factual record, including evidence bearing on whether it is "absolutely clear" that the RCRA violations complained of by plaintiff are "wholly past." See *Black Warrior v Shannon*, where the court, noting that "[l]ess than a year has passed since the entry of the consent order between ADEM and Defendant, and there is little evidence before the court that speaks to the extent of Defendant's compliance with the order, ...on the present record, Defendant has yet to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"; see also, *Atlantic States v Eastman Kodak* (even where penalty of $1M imposed, court remanded for determination of likelihood of recurrence).

Ay hearing in this case, plaintiff would expect to explore such items of major importance as LANS's and DOE's history of RCRA violations at LANL, good faith attempts to comply, and

the relations of the regulator and the regulated. Significantly, to make a credible showing to the "absolutely clear" standard, the defendants must put on evidence and the plaintiffs must have an opportunity to rebut that evidence. Thus, defendants' arguments concerning the effect of the terms of new Consent Order of "superseding" those of 2005 Consent Order cannot be given credence absent a hearing in which this Court takes the defendants' evidence and, if they meet that heavy burden, plaintiff is given an opportunity to rebut that evidence before the Court makes a decision on the mootness.

C. The 2016 CO Cannot Moot Plaintiff's Claims for Penalties Against LANS.

LANS admits, as it must, that the law requires a separate analysis of whether claims for penalties for past violations of RCRA are mooted when either when there are no claims for injunctive relief, or when such claims have been denied. LANS Motion at 9. Therefore even if the 2016 CO is given full effect, which plaintiff asserts would be contrary to New Mexico and federal law, and this Court were to determine that its terms moot Plaintiff's claims for injunctive, plaintiff's claims for penalties for past violations must still be considered, as the law provides that those claims are still valid even if the possibility of future violation exists. See, *Borough of Upper Saddle River*:

> Defendant's proposed standard is particularly unsupportable in light of the Second Circuit's decision in Pan American Tanning. There, the Court held that, even if the defendant comes into compliance with a consent order after the initiation of a citizen-suit, and even if there is no prospect *326 of continuing violations, the citizen-plaintiffs' action will only be moot with respect to injunctive relief. *Pan Am. Tanning,* 993 F.2d at 1019–22. The well-reasoned basis for this rule is that "mooting an entire suit based upon post-complaint compliance would weaken the deterrent effect of the Act by diminishing the incentives for citizen plaintiffs to sue and by encouraging defendants to use dilatory tactics in litigation." *Id.* at 1021.

Further, even if the Court were to determine that Plaintiff's claims for penalties are mooted after the execution of the 2016 CO on June 24, it is well established that Plaintiff's claims for penalties for violations occurring prior to that date would not be mooted, since plaintiff filed its original Complaint alleging ongoing violations on May 12, 2016, well prior to June 24, 2016. *Borough of Upper Saddle River v. Rockland Cty. Sewer Dist. #1,* 16 F. Supp. 3d 294, 325-326 (S.D.N.Y. 2014) ("Because courts assess the existence of a continuing violation based upon the filing date of the complaint, *Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co*., 989 F.2d 1305, 1311 (2d Cir.1993), *Gwaltney* does not bar citizen suits where, after the commencement of the lawsuit, the defendant eliminates the source of its pollutants; the relevant question remains whether the citizen-plaintiff can establish ongoing violations at the time of the filing of the complaint").

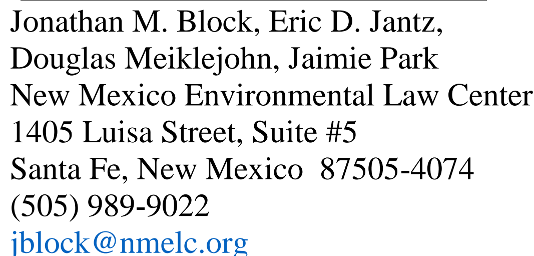
Plaintiff's claims for penalties for past violations therefore are not moot and this Court should, in addition to addressing the need for a required schedule of cleanup activities, should also determine the magnitude of penalties for LANS's past violations.

IV. CONCLUSION.

For the reasons stated above, DOE's Motion to Dismiss must be denied.

Respectfully submitted:

NUCLEAR WATCH NEW MEXICO

BY: 

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CERTIFICATE OF SERVICE

On this 21st day of November 2016, I, Jonathan Block, caused the foregoing 24 page *Plaintiff's Response in Opposition to DOE'S Motion To Dismiss* to be served on the parties to this proceeding using the CM/ECF digital filing system service.

Jonathan Block