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 IN OPPOSITION TO DEFENDANT LANS'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's 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 descriptions 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 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. APPLICABLE STANDARD OF REVIEW UNDER RULE 12(b)(1) and 12(b)(6).

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 19, 2016 adding claims related to the validity and effect of the new CO. After LANS, DOE and NMED filed motions to dismiss, plaintiff amended its Complaint a second time, filing the Second Amended Complaint on September 21, 2016. LANS's second motion to dismiss followed on October 21, 2016. The Second Amended Complaint was properly filed under Fed.R.Civ.P. 15.[1] In its motion to dismiss, LANS has argued both Rule 12(b)(6) and 12(b)(1).

A complaint must have "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Further, the "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) A complaint "must ... contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Id.* at 570.

When considering motions to dismiss a complaint, the court should "accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkar*i, 7 F.3d 1130, 1134 (4th Cir. 1993). The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable

[1] LANS and DOE mention their position that plaintiff violated Rule 15 by filing a second amended complaint subsequent to filing a first amended complaint by consent. Plaintiff did obtain consent of the parties and acquiescence of the Court for the filing of the First Amended Complaint. *See*, Consent Motion to Modify Schedule. Doc 27. When a plaintiff amends a complaint with leave of the Court and subsequently makes a second amendment "as of right" without leave, it has been held that the plaintiff, having not yet exercised the right to amend without leave and there being no responsive pleading filed, the amendment is allowed. *See Thompson v. Jiffy Lube Int'l, Inc*., 505 F Supp 2d 907, 913 (D.Kansas 2007); see also, on the "absolute right" to amend once, J*ames V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 282-83 (D.C. Cir. 2000) (Rule 15(a) provides an absolute right to amend complaint once at any time so long as defendant has not served responsive pleading and court has not decided motion to dismiss); *De La Cruz-Saddul v. Wayne State University*, 482 F Supp 1388 (E.D. Mich. 1980). Under the circumstances, no leave to amend was required here, else plaintiff would have sought it.

for the misconduct alleged" if a claim is to have facial plausibility. *Bell Atlantic v. Twombly*, 550 U.S. 544,556 (2007). . The law is well settled that:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232 (U.S. 1974); *overruled on other grounds, Davis v. Scheuer*, 468 U.S. 183 (1984).

NMED and LANS have moved to dismiss some or all of the claims in plaintiff's Second Amended Complaint pursuant to Rule 12(b)(6), "failure to state a claim." LANS Motion at 23, NMED Motion at 1. Both find the alleged failure due to the argument that the 2016 CO wholly supersedes the 2005 CO and "settles any outstanding alleged past violations under the 2005 CO." NMED Motion, at 6. On the issue of "well pleaded" and "plausible, plaintiff stands on its Second Amended Complaint and asks this Court to review it. Plaintiff contends that review will reveal that it is well-pleaded and contains sufficient factual matter, accepted as true, to state a claim to relief that is facially plausible. *See generally*, Second Amended Complaint, Document 42 at ¶¶ 1-47, 54-94, 96-99, 101-133, and 135-137. Moreover, plaintiff contends, as will be elaborated below, that this Court has subject matter jurisdiction to hear this complaint and that plaintiff has Article III standing. Second Amended Complaint at ¶¶ 1-3 and 4-8.

II. PLAINTIFF HAS STANDING UNDER RCRA.

A. Jurisdiction Under RCRA.

1. RCRA generally in relation to this matter.

Courts have recognized that the Resource Conservation and Recovery Act ("RCRA" or "the Act"), codified at 42 U.S.C. §§ 6901 *et seq*., is "a comprehensive environmental statute under which EPA is granted authority to regulate solid and hazardous wastes." *Am. Mining Cong. v. EPA* (AMC I), 824 F.2d 1177, 1179 (D.C.Cir.1987). The Act also governs "Hazardous Waste Management." Subtitle C, 42 U.S.C. §§ 6921–39g. To do so, it "establishes a 'cradle to grave' federal regulatory system for the treatment, storage, and disposal of hazardous wastes." *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 211 (D.C.Cir. 2007) (quotation marks and citation omitted). "Hazardous waste," under RCRA, is defined as "a solid waste, or combination of solid wastes" which, because of its characteristics, may "cause, or significantly contribute to an increase in mortality or ... serious ... illness [or] pose a substantial present or potential hazard to human health or the environment when improperly ... managed." 42 U.S.C. § 6903(5).

RCRA contemplates and authorizes enforcement of the Act by citizens' suits, 42 U.S.C. § 6972. Congress clearly indicated that citizen groups are not to be treated as pariahs, "but rather as welcomed participants in the vindication of environmental interests." *See Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir.1976) (citizen suit provisions designed not only to 'motivate government agencies' but also make to citizens partners in enforcement of the Act); see also *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).

2. This Court has subject matter jurisdiction to hear this case.

The federal district courts have subject matter jurisdiction to adjudicate violations of RCRA that citizens bring to the courts pursuant to 42 U.S.C. § 6972. Plaintiff's Second Amended Civil Complaint filed in this matter has been brought pursuant to that section. Second Amended Complaint, Document 42 at ¶¶ 1, 2. This Court has subject matter jurisdiction to adjudicate this complaint.

3. There is a factual basis for the plaintiff's standing to bring suit.

In the instant case, plaintiff Nuclear Watch New Mexico ("NWNM") has brought suit under the citizen suit provisions of RCRA because the defendant, United States Department of Energy ("DOE"), by and through its agent, Los Alamos National Security LLC ("LANS"), operator of the Los Alamos National Laboratory in Los Alamos New Mexico and agent of the DOE, and the intervenor, State of New Mexico Environment Department ("NMED"), have violated RCRA in the ways set forth in its Civil Complaint. *See generally* Second Amended Complaint at ¶¶ 1-47, 54-94, 96-99, 101-133, and 135-137.

Nuclear Watch New Mexico is a project of the Southwest Research and Information Center, a not-for-profit corporation organized under the laws of the State of New Mexico. *Id.* at ¶ 4. Nuclear Watch New Mexico is a "person" within the meaning of sections 1004(15) and 7002(a) of RCRA, 42 U.S.C. §§ 6903(15), 6972(a). *Id.* Its members include Jay Coghlan, executive director, and his associate, Scott Kovac. The mission statement of Nuclear Watch New Mexico includes citizen action to promote environmental protection and cleanup at nuclear facilities. Nuclear Watch New Mexico has been an active participant in hazardous waste management and cleanup issues at the Laboratory. *Id*. Moreover, Mr. Coghlan has a personal interest in cleanup of environmental contamination at the Laboratory. He 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*. Mr. Coghlan often rock climbed in a canyon just downstream of the Laboratory site until he learned that there were a variety of pollutants from LANL's legacy waste in the intermittent stream bed. He no longer climbs there as he believes that these pollutants are dangerous to his health. However, he would like to do so again. Were this Court to hold LANS to the schedule for remediation of legacy waste that was in the original Consent Order, he would in time be able to do so again without worry about the potential effects upon his health. *Id*.

4. Nuclear Watch New Mexico has personal and associational standing.

To meet the Article III constitutional requirement for standing, a plaintiff must demonstrate 1) a concrete, particularized, actual or imminent injury in fact; 2) that the injury is fairly traceable to the challenged action of the defendants; and 3) that the injury likely will be redressed by a favorable decision of the Court. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 629 F.3d 287, 396 (4th Cir. 2011) ("Gaston II"). In the context of environmental litigation, however, the requirements for demonstrating standing are not at all "onerous." *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003). Instead, "[i]f the plaintiff can show that his [sic] claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and adjudication of his [sic] rights." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 155 (4th Cir. 2000) ("Gaston I").

An association, such as Nuclear Watch New Mexico, has standing to bring suit on behalf of its members when: (1) members have standing to sue, (2) the interests at stake are germane to

the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),* Inc., 528 U.S. 167, 181 (2000).

5. Nuclear Watch New Mexico has standing.

The allegations in the Second Amended Complaint referenced above make plain the nature of the contamination at defendant DOE's nuclear laboratory run by its agent LANS and regulated under RCRA and the New Mexico Hazardous Waste Act ("NMHWA") by NMED. Second Amended Complaint at ¶¶ 1-47, 54-94, 96-99, 101-133, and 135-137. Mr. Coghlan, as executive director of NWNM, is both member and director of the organization and has set forth his personal injuries in relation to the failure of defendants to obey federal law and remediate, pursuant to RCRA and the NMHWA, the conditions that interfere with his recreational use and aesthetic enjoyment of rock climbing in the canyons below the laboratory and a rational fear of being contaminated if he continued to do so – a situation that could be remedied by NMED holding LANL to clean-up deadlines; a clean-up that would eliminate the contamination. *Id*. at ¶4. Mr. Coghlan has a concrete, particularized injury that is fairly traceable to DOE, LANS and NMED in relation to their respective duties under RCRA and the New Mexico Hazardous Waste Act ("NMHWA"). Plaintiff adequately alleges injury under the Act when it uses the allegedly affected area and is a person "for whom the aesthetic and recreational values of the area will be lessened" as a result of the violations. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-185 (2000).

The allegations of the Complaint regarding Mr. Coghlan's use of areas potentially affected by Defendants' RCRA violations and his cessation of use due to concerns about those effects are precisely of the form required by *Laidlaw*. Further, at this stage of the proceedings,

Plaintiff is entitled to have these factual allegations accepted as true. "Given that there has been no discovery and no evidence presented in connection with the standing question, the Court "presume[s] the general factual allegations embrace those facts necessary to support the claim, ... and [is] constrained not only to accept the truth of the plaintiffs' jurisdictional allegations, but also to construe all reasonable inferences to be drawn from those allegations in plaintiffs' favor." *N.Y. Communities for Change v. N.Y.C. Dep't of Educ., No. 11 CV 3494 (SJ),* 2012 U.S. Dist. LEXIS 187437 at *43 (E.D.N.Y. Aug. 29, 2012); see also *PennEnvironment et al. v PPG Industries*, 964 F.Supp. 2d 429 (W.D. Pa. 2013) (general allegations in a complaint embrace those specific facts necessary to support the claim when reviewing a motion to dismiss).

Moreover, the interests at stake in this litigation are germane to the purposes of the plaintiff. Nuclear Watch New Mexico's purposes include advocacy and action to achieve the cleanup of contaminated sites at LANL, for the benefit of its members and the residents of the potentially affected areas. Those purposes dove-tail with Mr. Coghlan's desire to have the LANL waste cleaned up so he and others may again enjoy recreational activities without fear of contamination.

Finally, Mr. Coghlan need not participate as a plaintiff in this litigation, as neither the penalties claim asserted nor the injunctive relief sought requires the participation of the individual members of Nuclear Watch New Mexico. *Interfaith v Honeywell*, 399 F.3d 248 (3d. Cir. 2005). Were this Court to reach a favorable adjudication of the Second Amended Complaint, or, were the defendants to enter into a binding agreement to remedy the alleged violations of law in the Second Amended Complaint, Mr. Coghlan would soon be able to enjoy rock climbing without fear of contamination, as his interests will be vindicated and injuries remedied if

prevails. Thus, Nuclear Watch New Mexico may stand in the climbing shoes of Mr. Coghlan for purposes of associational standing.

III. PLAINTIFF'S SUBCHAPTER III VIOLATIONS MADE THIS A HYBRID COMPLAINT THAT DID NOT REQUIRE A SIXTY DAY NOTICE.

LANS argues that plaintiff failed to provide sixty (60) day notice of its claims. In point of fact, no notice was required to be provided by plaintiff, since plaintiff has alleged numerous violations of Subchapter III of RCRA. The consequence of even one Subchapter III violation being included in a set of claims is that none of the claims require notice. The applicable section of RCRA provides an exception for claims brought under Subchapter III. See 42 U.S.C. Section 6772(b)(1)(iii) (an action may be brought immediately after notification in the case of an action under this section respecting a violation of subchapter III of this chapter.)

In *Dague v. City of Burlington*, 935 F.2d 1343, 1349-1352 (2d Cir.1991); *reversed only as to amount of fee award, City of Burlington v. Dague*, 505 U.S. 557 (1992), the Court found that where a Complaint is a *hybrid* of RCRA Subchapter III allegations and violations of other portions of RCRA, the exception for notice under Subchapter III claims applies to all claims in the complaint so long as they are closely related. In this case, plaintiff contends that the factual basis of the claims links them together. In fact, the defendants' claims that new consent order "moots" the very large number of violations of the pre-existing consent order of 2005 amply demonstrate that this is so.

Here, on January 20th and May 5, 2016, plaintiff Nuclear Watch New Mexico gave notice to the appropriate parties identified in the statute, and then filed its "hybrid" complaint on May 12, 2016, alleging violations of both subchapter III and non-subchapter III provisions. In this case, plaintiff's subchapter III and non-subchapter III claims all arose from the operation of a single facility and are based on the same core of interrelated facts. Paragraphs 1 through 47 of

the Second Amended Complaint reveals seven paragraphs describing the Subchapter III claims that are realleged throughout the complaint--paragraphs 11, 12, 13, 15, 25, 37 and 43. The first claim for relief realleges the claims of paragraphs 1 through 47 and further alleges Subchapter III violation at paragraphs 55, 58, 63, 66, 69, 72, 75, 78, 81, 86, and 89. The second claim realleges paragraphs 1 through 47 and alleges violations of Subchapter III at paragraphs 92 and 97. Additionally, the Subchapter III violations are realleged in the third, fourth, fifth and sixth claims. Clearly, the Second Amended Complaint is a hybrid subchapter III RCRA complaint.

IV. ABSTENTION AND PRIMARY JURISDICTION DO NOT APPLY HERE.

A. Plaintiff's RCRA Claims Are Not Barred By 42 U.S.C. § 6972(b)(1)(B).

Defendant LANS argues that this Court should abstain from hearing plaintiff's federally-based RCRA claims on the basis of one or more of the doctrines known as "primary jurisdiction" *and Burford Abstention*. Courts rarely invoke these doctrines, as they are in conflict with the oft-cited "virtually unflagging obligation" of the federal courts to exercise their statutory jurisdiction. *See, e.g., Interfaith v PPG* (abstention is an extraordinary and narrow exception to the unflagging obligation of federal courts to exercise the jurisdiction they have been given); *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992); *United States v. Fairway Capital Corp.*, 483 F.3d 34, 44 (1st Cir.2007). Plaintiff is prosecuting this action as a citizen's suit under §6972 of RCRA, and Congress has narrowly limited the circumstances under which a federal court may bar such a citizen's suit under RCRA. *Id.* None of the exceptions listed in §6972(b)(1)(B) apply here —and significantly, there has been no diligent prosecution in this case. Thus, LANS's argument for abstention "essentially reads the citizen-suit provision out of the RCRA in direct contravention of Congressional intent." *Apalachicola Riverkeeper v Taylor Energy Co., LLC*, 954 F.Supp. 2d 448, 459-60 (E.D.La. 2013).

Courts are reluctant to use common law doctrines to defeat Congressionally authorized citizen's suits jurisdiction. "Where jurisdiction is found as defined by congressional action, a court cannot abdicate its "authority or duty in any case in favor of another jurisdiction." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989). "Only in exceptional cases may a court exercise its discretion to withhold otherwise authorized equitable relief." *Id*. at 359 "[W]hen Congress has set forth the conditions under which state or administrative action will preclude a federal claim, as it did in § 6972(a)(1)(B), a federal district court must be cautious about refusing to exercise jurisdiction when those conditions are not present lest it frustrate Congress' scheme for vindicating important federal interests." *Davies v. Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990 at 997 (D. Kan. 1997); *N.Y. Communities. for Change v. N.Y.C. Dep't of Educ.*, No. 11 CV 3494 (SJ), 2012 U.S. Dist. LEXIS 187437 at *36 (E.D.N.Y. Aug. 29, 2012) (courts are reluctant to apply primary jurisdiction to a RCRA claim as RCRA confers jurisdiction by providing for citizen suits); *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1170 (D. Wyo. 1998) (overriding reason for courts to hear RCRA cases: Congress has told us to do so); see also *California Sportfishing Protection Alliance v. City of West Sacramento*, 905 F.Supp. 792, 807 n. 21 (E.D.Cal.1995) (where Congress expressly set forth ground rules for citizen suits [in the Clean Water Act], there is no basis for the doctrine of primary jurisdiction).

Thus, RCRA, at 42 U.S.C. § 6972(b)(1)(B), is the exclusive bar. Under that section, prosecution of the citizen suit is barred only if, before plaintiff files suit, a state or federal agency "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance." *Sierra Club v. United States Dep't of Energy*, 734 F. Supp. 946, at 951-952 (D. Colo. 1990); see also *Proffitt v. Rohm & Haas, 850 F.2d 1007, 1012*

(3d Cir.1988) ("[I]t is questionable whether the EPA can bar a citizen's suit by any means other than its own diligent prosecution"). When Congress wants to explicitly limit citizen suits where there are administrative or judicial proceedings underway, it knows how to do so. See *Friends of the Earth v. Consolidated Rail Corp*, 768 F.2d 57, 62-63 (2d Cir. 1985) (citizens suit precluded only where there is plain and unambiguous language precluding it); *Jones v. City of Lakeland*, 224 F.3d 518 * (6th Cir. Tenn. 2000); *Marrero Hernandez v. Esso Std. Oil Co.*, 597 F. Supp. 2d 272, 280 (D.P.R. 2009) (the only state action capable of precluding a citizen suit under § 6972 (a)(1)(A) is a civil or criminal action in a court—administrative actions are not preclusive) .

The cases cited by LANS on this point are not apt. For example, in *City of Dallas*, there was diligent EPA court enforcement action. Again, in *Karr v. Hefner*, diligent EPA prosecution barred the suit. Plaintiff contends that the law, in a majority of courts, is profoundly opposed to the use of common law abstention doctrines, of whatever type, to defeat citizen suits that Congress has authorized.

B. There Has Been No Diligent Prosecution In This Matter.

Because NMED never took court action regarding the 2005 CO violations that are the subject of Plaintiff's claims and never assessed penalties, the law says there has been no diligent prosecution.

1. NMED did not take court action against DOE and LANS: there was no diligent prosecution of the violations alleged here.

Plaintiff Nuclear Watch New Mexico filed notice of intent to sue on January 20th and on May 5, 2016, after the final compliance date, December 6, 2015, was missed. NMED took no action. On May 12, 2016, plaintiff filed its Complaint. NMED entered into an administrative Consent Order with the DOE on June 24, 2016 without ever taking court action. The Court decisions in Every one of the cases LANS cites on this issue – *ECO v City of Dallas*, *Comfort*

Lake, Mississippi River, Benham, Black Warrior, Karr v Hefner -- and the *Glazer* case DOE cites – are all based upon there being diligent prosecution. This is a dispositive difference making all these cases inapposite.

2. No Penalties against LANS or DOE means no diligent prosecution.

The *Comfort Lake* case that LANS cites on this issue, Motion at 9, is not only inapt, but it provides a further reason why the bar in §6972 does not apply here. In *Comfort Lake*, there was diligent prosecution as demonstrated to the court's satisfaction because civil penalties had been applied along with an informal agreement. Again, on the facts as set forth in the Second Amended Complaint, that is not the case here.

C. The Primary Jurisdiction Doctrine Does Not Apply Here.

LANS argues that the Court should invoke the doctrine of "primary jurisdiction" to abstain from determining plaintiff's federally-based RCRA claims. Motion at 12. The doctrine of primary jurisdiction may be invoked where "issues of fact in the case: (1) are not within the conventional experience of judges; (2) require the exercise of administrative discretion; or (3) require uniformity and consistency in the regulation of the business entrusted to the particular agency." *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1238 (10th Cir. 2007). We consider these factors *seriatim*.

The primary jurisdiction doctrine should not be applied to RCRA citizen suits, as argued above, a position with which the majority of courts agree. The primary jurisdiction doctrine is not listed among the specifically delineated circumstances under which RCRA suits may be barred. That Congress did not do so means the doctrine is not included among the bars to a citizen suit. *Apalachicola*, 954 F.Supp.2d at 459–60 ("[I]n those cases where Congress has determined by statute that the courts should decide the issue in the first instance, primary

jurisdiction should not be invoked"). Even on its merits, as opposed to being statutorily barred from consideration, the primary jurisdiction doctrine is obviously inapplicable here.

First, violations of federal environmental statutes are well within the competency and conventional experience of federal judges. Indeed, the fact that RCRA contains provisions allowing for citizen suits to be filed in federal court speaks to the view that Congress believed that federal judges were capable of adjudicating these types of violations. In addition, the section under which plaintiff is proceeding, 42 U.S.C. § 6972(a)(1)(B), is an enforcement provision and deals with questions of the relief to be awarded by the courts, and not by the agency. *N.Y. Communities for Change v. N.Y.C. Dep't of Educ., No. 11,* CV 3494 (SJ), 2012 U.S. Dist. LEXIS 187437 at *37-38 (E.D.N.Y. Aug. 29, 2012). Nor is it the case that the determination of Plaintiff's RCRA claims will involve technical matters uniquely within the agency's expertise and discretion. The question of whether LANS violated RCRA by failing to comply with the terms of the 2005 CO do not involve any technical expertise whatsoever: the violations are well pled in plaintiff's Second Amended Complaint. Plaintiff expects to show at an evidentiary hearing that they are also well-documented by intervenor NMED's records, including its own notices to LANS of intent to assess stipulated penalties for non-compliance with the 2005 CO.

Second, it is clear that defendant LANS's violations of RCRA by its failure to comply with the 2005 Consent Order, ongoing at the time Plaintiff filed its Complaint, are not matters of administrative discretion. The agency here, intervenor NMED, failed to go to court to enforce any of the 2005 CO deadlines missed by LANS. The CO itself, to which NMED is a party, asserts on behalf of the state, that citizen suits under RCRA are expressly authorized as a means of enforcement of the CO. 2005 CO, Sect. III.U at 29. Plaintiff is doing exactly what NMED, in

the 2005 CO, expressly contemplated and authorized, but in any case, plaintiff, by proceeding directly under RCRA, is availing itself of the enforcement rights that Congress granted to citizens in 43 U.S.C. § 6972.

Third, this Court's determination of plaintiff's federal RCRA violations claims in no way implicates the "uniformity and consistency in the regulation of the business entrusted to the particular agency." See *Williams Pipe Line Co. v. City of Mounds View*, 651 F.Supp. 551, 565 n. 29 (D.Minn.1987) (primary jurisdiction allows agencies to render opinions on issues underlying and related to the cause of action; even where it applies it does not defeat the court's jurisdiction but delays judicial consideration of a claim until the regulatory agency has given its views on the matter); *Martin v. Behr Dayton Thermal Prods., LLC,* No. 3:08cv00326, 2009 U.S. Dist. LEXIS 131399, *13-*17 (S.D. Ohio Apr. 22, 2009) (applying the doctrine of primary jurisdiction, "federal courts ... abstain from hearing certain administrative-related matters until the appropriate agency has had the opportunity to interpret unanswered technical and factual issues").

All of the cases cited by LANS needed to wait for agency input prior to adjudication: *Schwartznman* (wait until agency position known), *Mical* (same, pending agency views), *Friends of Santa Fe County* (factors), and *Davies v Nat'l* (allow completion of RCRA application). The fact is that there is nothing for the state regulatory agency to consider in this matter. That proverbial ship sailed and sank when NMED decided to allow LANS and DOE to engage in wholesale violations of the 2005 Consent Order without any consequences, write up a new Consent Order without any enforceable deadlines for cleaning up the waste that had triggered the imminent danger findings of the 2005 Consent Order, and do all this without any public

hearings. The idea that plaintiff must take these flagrant RCRA and NMHWA violations to the state Court of Appeals is ludicrous.

As the Court noted in *Martin v. Behr*, primary jurisdiction "is to be 'invoked sparingly, as it often results in added expense and delay.' *Martin v. Behr* at *20. However, if the agency to which the Court would refer the issue for clarification has already made its position clear, there is no need to apply the doctrine. *WildEarth Guardians v. IRG Bayaud, LLC,* Civil Action No. 14-cv-01153-MSK-KLM, 2014 U.S. Dist. LEXIS 134482, at *24-26 (D. Colo. Sep. 24, 2014); see also *Fontan–de–Maldonado v. Lineas Aereas Costarricenses, S.A.*, 936 F.2d 630, 631 (1st Cir. 1991) ("Of course, if the agency has already announced its views, there is no need to apply the doctrine"). In this case, NMED has already announced its views on LANS's and DOE's RCRA violations by executing the 2016 CO and arguing here that Plaintiff's claims are moot. There is no occasion for the application of the doctrine, as the agency's position is already known. In short, there is every reason to conclude that the extreme abstention doctrine of primary jurisdiction is not warranted here.

D. *Burford* Abstention Is Not Applicable In This Case.

Defendant LANS alleges that the Court does not have subject matter jurisdiction to hear plaintiff's claims, but that if it does, it should abstain from doing so under the *Burford* doctrine. However, as set forth above, there is subject matter jurisdiction under RCRA. Thus, defendant must overcome the burden of demonstrating to the Court that there is a reason to forgo the jurisdiction Congress provided under RCRA. This is because it is well settled law that, "when a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction .... [and t]he right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909).

Obtaining *Burford* abstention, therefore, requires defendant LANS to demonstrate that this litigation involves "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the results in the case then at bar," or that the federal case "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, at 361 (1989) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814 (1976)). NWNM contends that they have not and cannot make such a showing.

As set forth in the Second Amended Complaint, the law is rather straight forward. RCRA is a federal statute which is administered by the United States Environmental Protection Agency ("EPA"). RCRA allows the EPA Administrator to place administrative authority in the hands of a state agency (such as NMED) if the state has enacted its own hazardous waste act that is at least as stringent in its requirements as the federal act. Second Amended Complaint at ¶¶ 11-26. Determining whether *Burford* abstention applies requires that a court determine: (1) Whether the suit is based on a cause of action which is exclusively federal; (2) Whether difficult or unusual state laws are at issue; (3) Whether there is a need for coherent state doctrine in the area; and (4) Whether stated procedures indicate a desire to create special state forums to adjudicate the issues presented. *Time Warner Cable v. Doyl*e, 66 F.3d 867, 874 n. 6 (7th Cir.1995). Plainly, the facts of this matter do not meet these requirements.

First, RCRA is a federal law and a cause of action for violation of RCRA, per the citizen suit provision cited above, is in the federal district courts. Second, any "state law" at issue here – other than in the final count of the complaint asking for declaratory relief – is not any more or less difficult or unusual to adjudicate than RCRA, as the state law is, essentially, an adoption of RCRA – and any casual comparison of the NMHWA will reveal the adoption of RCRA and EPA

regulations. See, e.g., NMAC § 20.4.1.100, Adoption of 40 CFR Part 260 ("Except as otherwise provided, the regulations of the United States environmental protection agency ("EPA") set forth in 40 CFR Part 260 through July 1, 2008 are hereby incorporated by reference"). Third, given the isomorphic nature of the federal and state law, there should be no issue in the development of coherent state law regarding the interpretation of RCRA. Moreover, as a review of the sections of the Second Amended Complaint as noted above will show, the allegations of violations in this case nearly all concern the failure of the DOE, LANS and the NMED to meet the schedule for cleanup work in compliance with a Consent Order governing remediation of the legacy waste at LANL.

The other issues – and they are few in relation to the number of violations of scheduled remediation activities – concern: (1) NMED, DOE and LANS (as the DOE's agent) failing to follow that portion of state RCRA (NMHWA) requiring notice, comment and hearing opportunities for the public prior to NMED, DOE and LANS moving beyond the December 6, 2015, final compliance date for attainment of remediation at LANL, and (2) a related failure to use the same procedures and allow for hearing on the proposed alteration of the entire Consent Order to eliminate all hard and fast remediation schedules and put them on a one-by-one negotiated basis.

LANS argues the applicability of *Ada-Cascade Watch Co. v. Cascade Res. Recovery, Inc.*, 720 F.2d 897 (6th Cir. 1983); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995) ; *Davies v. Nat'l Co-op. Refinery Ass'n,* 963 F. Supp. 990 (D. Kan. 1997); and *Coal. for Health Concern v. LWD, Inc.*, 60 F.3d 1188 (6th Cir. 1995. In *Ada-Cascade*, the court found the Burford abstention appropriate because of the complexity of two arguably inconsistent state law provisions and concluded that attempting to answer the question

posed – regarding initial RCRA permitting and possibly necessary further permitting – would be disruptive of state efforts in an area of public concern. By contrast, no complex permitting questions are presented in this case and enforcement would certainly not be disruptive to state efforts.

In *Davies*, the court invoked *Burford* abstention to allow the agency to complete its investigation, clearly a situation that does not obtain here.

Similarly, the court in *Coalition for Health Concern* concluded that its action would interfere with the permitting process, also a situation which does not obtain in the present case. *WildEarth Guardians v. Lamar Utils. Bd.*, 899 F. Supp. 2d 1067, 1072 (D.Colo.2012) (claim that presented "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case," or because federal consideration of this case "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern," rejected).

Regardless of the complexities of LANL's activities, the adjudication of the alleged violations in this matter can be done strictly under RCRA and the isomorphic NMHWA – it is not legal or any other kind of "rocket science." Finally, there is no indication that the NMHWA was intended to create any kind of special state forum to adjudicate the disputes in this matter. These are, rather, the plain language types of RCRA disputes that are paralleled in the NMHWA's adoption of RCRA and the EPA's RCRA Regulation. See, e.g., NMAC 20.1.4.100 (adopting RCRA regulation at 40 CFR part 260). This last consideration is also put forward to claim that there is primary jurisdiction for the state agency. However, there is no question here to answer under the technical expertise of state agency employees or within a state agency adjudicatory hearing. In fact, the need for this case would have been averted had the state

chosen to pursue the legal path to change the deadlines at issue, the final compliance date of December 6th, and to undertake to change the Consent Order. These were all modifications requiring, under the RCRA and NMHWA, public notice, comment, taking of hearing requests, and the holding of public hearings in which participants could adduce evidence and cross-examine the evidence of the other parties.

Thus, neither *Burford* abstention nor primary jurisdiction has any relation to the issues in this case.

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

LANS, DOE, and NMED have made virtually identical arguments on this subject so plaintiff will respond in one place to all three motions: *Plaintiff's Response in Opposition to DOE's Motion to Dismiss,* at Section IV therein. Plaintiff respectfully incorporates those arguments as if fully made here.

VI. THIS COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S INTEGRALLY RELATED STATE LAW CLAIMS.

Plaintiff has made numerous claims under RCRA. See generally, Second Amended Complaint. 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. DOE Motion at 2, LANS Motion at 7, NMED Motion at 1. 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 whether the 2016 CO is valid or not. *Pan Am. Tanning*, 993 F.2d at 1019–22. ("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 of continuing violations, the citizen-plaintiffs' action will only be moot with respect to injunctive relief").

The effect of the 2016 CO is strongly disputed by the parties. Defendants and Intervenor claim that its effect is to wholly moot plaintiff's claims. Plaintiff claims that the 2016 CO was executed in violation of the terms of RCRA, the 2005 CO, and the NMHWA, and requests this Court to bar its implementation. Thus, plaintiff's claims that the 2016 CO was executed in violation of the NMHWA are claims "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 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). Claims that share a "common nucleus of operative fact" are those which the plaintiff would ordinarily try in the same proceeding and are part of the same case or controversy. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966); supplemental jurisdiction may be found where the claims "revolve around a central fact pattern"; see also *White v. County of Newberry*, 985 F.2d 168 (4th Cir.1993), at 172 (supplemental jurisdiction exists where claims "revolve around a central fact pattern"). The argument of the defendants and intervenor that the 2016 CO moots plaintiff's claims show that these issues are inseparable from plaintiff's claims that the 2016 CO is invalid.

The use of the word "shall" in 28 U.S.C. § 1367(a) makes clear that power is conferred under the section, and if its exercise is not prohibited by section 1367(b), then, a court may 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. None of these are bars to the assertion of supplemental jurisdiction in this case. *See Executive Software v US District Court,* 24 F.3d 1545, 1555 (9th Cir. 1994) (Congress intended section 1367(c) to provide the exclusive means by which supplemental jurisdiction can be declined by a court). Plaintiff has, thus, more than adequately demonstrated its entitlement to this Court's exercise of supplemental jurisdiction over plaintiff's state law based claims.

VII. PLAINTIFF IS ENTITLED TO 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's Second Amended Complaint claims that DOE and LANS violated RCRA by failing to comply with the deadlines set forth in the 2005 CO. As of the date of filing of the Complaint, the violations were ongoing. Furthermore, plaintiff claims that the 2005 CO is still valid and effective, and that DOE's and LANS's obligations for cleanup by dates certain under that CO still exist and are ongoing.

Thus, 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. See *Rio Grande Silvery Minnow,* 601 F.3d at 1109-1110 (declaratory judgment action proper in settling some disputes where there will be a real-world effect in doing so and the matter still exists and is ongoing); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014). Nor can it be doubted that a declaration that the 2005 CO is still valid and effective and that LANS's obligations under it for cleanup by dates certain also still exist and are ongoing "will have some

effect in the real world." Thus, the Federal Declaratory Judgment Act 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. A declaration would go far to accomplish the intended purposes of the Federal Declaratory Judgment Act: affording "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). Plaintiffs incorporate by reference the section of Plaintiff's Response in Opposition to DOE's Motion to Dismiss at 10-11 concerning the use of the New Mexico Declaratory Judgment Act.

VIII. CONCLUSION.

For the foregoing reasons, LANS's Motion To Dismiss must be denied.

Respectfully submitted:

NUCLEAR WATCH NEW MEXICO

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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 LANS's Motion To Dismiss* to be served on the parties to this proceeding using the CM/ECF digital filing system service.

_____
Jonathan Block