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'S RESPONSE IN OPPOSITION TO INTERVENOR NMED'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. STANDARD OF REVIEW

A. The Second Amended Complaint Is Well Pled; All Allegations Therein Should Be Taken As True And Viewed In A Light Most Favorable To The Plaintiff's Case.

Plaintiff's complaint, in order to be considered well pled, must comply with Rule 8(a)(2), Fed.R.Civ.P.,which requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Further, a complaint's "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). The complaint "must ... contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'." *Am. Dental Ass'n v. Cigna Corp.,* 605 F.3d 1283, 1289 (11th Cir.2010) (*quoting* Twombly, 550 U.S. at 570). Facial examination of the Second Amended Complaint reveals a clear and sufficiently detailed introductory section of some forty-seven (47) paragraphs, followed by sections carefully describing each of the violations of RCRA, significantly, many of Subchapter III, and setting forth specific types of relief well within the jurisdiction of this Court. *See, generally*, Second Amended Complaint.

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). "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'." *Twombly* at 544. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged" if a claim is to have facial plausibility. *Id*. at 556. In this regard, 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). Therefore, Plaintiff requests this Court to review its Second Amended Complaint, and 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 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 CLEARLY CLAIMED THAT THE 2016 CO WAS EXECUTED IN VIOLATION OF NEW MEXICO LAW.

Despite NMED's claims, the Second Amended Complaint states that the 2016 Consent Order was executed in violation of New Mexico law. However, the Complaint plainly alleges violations of the New Mexico Hazardous Waste Act ("NMHWA") throughout. *See, e.g.*, Second Amended Complaint at ¶¶ 1-47.

III. NEITHER PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF AGAINST DOE NOR PLAINTIFF'S CLAIMS FOR PENALTIES FOR PAST AND ONGOING VIOLATIONS ARE MOOTED BY THE 2016 CONSENT ORDER.

A. Comments Specific to NMED's Motion On This Issue.

NMED separately asserts the invalidity of 1) claims 4 and 6; and 2) claims 1, 2, 3, and 5. However, only one central argument is presented: that the 2016 CO moots all of plaintiff's claims because it "superseded," not "modified" the 20015 CO. Motion, at 2. There are at least three fatal difficulties with this argument.

First, the claim that the 2016 CO, by its terms, wholly supersede the 2005 CO, rendering it void and settling all claims of violations of the 2005 CO, is a matter of substantive interpretation of the 2016 CO, inappropriate 1) in a motion to dismiss context; and 2) when the validity and effect of the 2016 CO have not been determined, are denied by plaintiff, and are the subject of plaintiff's request for the exercise of supplemental jurisdiction by this court to determine them. See, Second Amended Complaint, 4th and 6th claims.

Second, NMED asserts, as support for its argument that plaintiffs 4th and 6th claims fail to state facts sufficient to state a claim and as evidence for the effectiveness of the 2016 CO that, "Plaintiff alleges no facts and provides no authority that would preclude NMED and DOE from agreeing to supersede their first agreed-upon order with a different agreed-upon order." Motion, at 8. This runs afoul of the standard for deciding a motion to dismiss generally and contradicts the proper procedural posture for a mootness challenge, in particular.

Of course, Plaintiff has provided a host of facts and legal claims in the Second Amended Complaint showing precisely that NMED and DOE were precluded from executing the 2016 CO as a replacement for the 2005 CO until the required public participation process, including a public hearing, was accomplished. Further, since Plaintiff's allegations are to be accorded a

presumption of fact for the purposes of a Rule 12(b)(6) motion to dismiss, it borders on captious to suggest that Plaintiff "provides no facts and provides no authority."

More importantly, the statement represents a fundamental error in the applicable burdens during this proceeding. It is not the Plaintiff's job to show that its claims are not moot, it is the moving party who bears the "heavy burden of mootness." "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, No. 89-2291, 93-2381, 2003 (unpublished), U.S. Dist. LEXIS 26779, 2003 WL 23519620, at *11 (D.N.J. Oct. 27, 2003) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

This applies also to NMED's claim that the same mootness argument defeats plaintiff's claims 1, 2, 3, and 5 in their entirety. Motion at 9. Again, the argument is that the 2016 CO should be presumed to be valid and its terms given the interpretation and effect alleged by NMED. Somewhat ironically, NMED relies on *First Nat'l Bancshares v. Geisel*, 853 F.Supp. 1337, 1343 (D. Kan. 1994), which found that a later agreement could supersede an earlier one, "assuming the later agreement was enforceable." (Emphasis added.) Indeed, "assuming the later agreement was enforceable" is exactly what NMED is asking this Court to do. Not only has plaintiff has expressly denied the validity and effectiveness of the 2016 CO, due to NMED's failure to comply with state law in its execution, but plaintiff's allegations in the Second Amended Complaint are to be taken as true--including its interpretation of the validity of the 2016 CO. Moreover, these are the very issues that plaintiff asserts should be decided by this court in the exercise of its supplemental jurisdiction.

Third, NMED confuses its claimed settlement with DOE of claims for violations of the 2005 CO with settlement and dismissal of plaintiff's RCRA claims. NMED does not have the power to settle and dismiss plaintiff's RCRA claims, either for past or ongoing violations of RCRA, and certainly not for the civil penalties owed for past viols and continuing violations.

The prohibition on citizen suits under RCRA only exists where there is a "civil or criminal action" and that is not the same as an administrative, extrajudicial consent order. The violations are on-going, as there is no remedy to the original violations of RCRA being actively pursued and there is no civil or criminal action against DOE/LANS for failure to comply with RCRA. The 2016 CO neither acts as a bar to Plaintiff's federal court action, nor does it implement any clean-up and collection of the owed civil penalties under RCRA. Thus, NMED's mootness argument is entirely misplaced.

Furthermore, NMED, in its assertion that its mootness argument can defeat the entirety of plaintiffs claims, fails to recognize, as both LANS and DOE do, that a distinction must be made, and a separate analysis applied, for plaintiffs injunctive relief claims and its civil penalties claims. This point is covered in the survival of penalties discussion at Sect. IV.C of Plaintiff's Response in Opposition to DOE's Motion to Dismiss, and we respectfully refer the Court to it. Plaintiff incorporates it here by reference, with the same effect as if fully rewritten here.

NMED attempts to cursorily dispose of plaintiff's 4th and 6th claims by arguing that the NMHWA only applies to "permits," and the 2005 CO is not a "permit," so the claim must be error. First, plaintiff notes this is an argument about a substantive point of New Mexico law – the application of the HWA to these circumstances – and properly requires the court's exercise of supplemental jurisdiction over plaintiff's HWA-related claims in order to decide them, as plaintiff has requested. See, Second Amended Complaint, 4th and 6th claims. Second, NMED

misstates and incorrectly summarizes plaintiff's 4th and 6th claims. Plaintiff does not assert that the 2005 CO is a "permit" – rather, it asserts that the 2005 CO incorporated permit-equivalent requirements for public notice and hearing. Second Amended Complaint at ¶¶ 135-137; 141.

Third, NMED's argument that the 2005 CO does not contain final compliance dates, in opposition to plaintiff's claim that it does, is again a matter of substantive interpretation of the 2005 CO inappropriate for disposition until the court exercises supplemental jurisdiction over plaintiff's state law based claims. Furthermore, NMED's claim is incorrect. *See* Second Amended Complaint at ¶ 44 ("The 2005 Consent Order set forth a mandatory schedule for completing more than 80 specific corrective action tasks for the investigation and cleanup of environmental contamination at LANL. 2005 Consent Order § XII. The final corrective action compliance date, for submission to NMED of a remedy completion report for MDA G, was December 6, 2015. *Id.* § XII, Tables XII-2, XII-3 (Oct. 29, 2012)").

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

This subject is discussed in detail in the section of the same name at Sect. IV of Plaintiff's Response in Opposition to Defendant DOE's Motion to Dismiss, and we respectfully refer the Court to it. Plaintiff incorporates it here by reference, with the same effect as if fully rewritten here.

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

Plaintiff's Second Amended Complaint makes numerous claims under RCRA. Second Amended Complaint, 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. 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 6, 2016. The 2016 CO was not executed until June 24, 2016. Thus, plaintiff's claim for penalties will be live whether the 2016 CO is valid or not. *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. *See, e.g.,* Second Amended Complaint at ¶¶ 133, 137, 139, 141 and the Prayer for Relief. Thus, Plaintiff's claims that the 2016 CO was executed in violation of the state HWA 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 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" are those 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). In expounding upon the concept of a "common nucleus of operative fact," the Fourth Circuit has found that 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), but

that supplemental jurisdiction may be found where the claims "revolve around a central fact pattern," *White v. County of Newberry*, 985 F.2d 168, 172. The claim that 2016 CO moots plaintiffs' claims is inseparable from plaintiffs' claims that the 2016 CO invalid.

28 U.S.C. § 1367(a) directs that the Court "*shall* have jurisdiction..." Using 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 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 COCO 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 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 v. Chesapeake Bay Found.*, 484 U.S. 49, 58-66. (1987).

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.

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

As NMED has not contested the jurisdiction of this Court in the matter of entering declaratory judgments under either the federal or state declaratory judgment acts, plaintiff only notes here that NMED's counsel did not obtain an order of the Court in order to make a limited appearance pursuant to enter a limited appearance in accordance with D.N.M.LR-Civ. 83.4(c), so it is fully subject to the jurisdiction of this court for all purposes related to this action.

VI. THERE LEGAL REQUIREMENT FOR PLAINTIFF TO HAVE BROUGHT THIS ACTION AS AN APPEAL TO THE NEW MEXICO COURT OF APPEALS.

Despite NMED's baseless assertions in its Motion to Dismiss, plaintiff was under no obligation to contest in the New Mexico Court of Appeals NMED and DOE's newly-created defense to plaintiff's federal claims which were already being litigated in this court. Moreover, Congress, as noted above, clearly placed actions under RCRA within the jurisdiction of the federal district courts.

VII. CONCLUSIONS.

On the basis of the facts and law set forth above this Court must deny NMED's Motion to Dismiss .

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 14 page *Plaintiff's Response in Opposition to NMED's Motion To Dismiss* to be served on the parties to this proceeding using the CM/ECF digital filing system service.

_____
Jonathan Block