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

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

DOE'S REPLY IN SUPPORT OF MOTION TO DISMISS
THE SECOND AMENDED COMPLAINT

Nuclear Watch New Mexico ("Nuclear Watch") filed this action pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a). This statute authorizes civil actions in the federal district courts against any person, including a federal agency such as the United States Department of Energy ("DOE"), alleged to be in violation of an order that is in effect pursuant to RCRA. 42 U.S.C. § 6972(a)(1)(A). Nuclear Watch alleges that DOE, Los Alamos National Security, LLC ("LANS"), and the New Mexico Environment Department ("NMED") have violated various obligations in a compliance order on consent issued by NMED in 2005 to DOE and LANS ("2005 Consent Order") to govern the cleanup of hazardous waste ("corrective action") at the Los Alamos National Laboratory ("Facility").

Because the Court lacks subject-matter jurisdiction to hear these claims, the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Nuclear Watch's allegations regarding

violations of the 2005 Consent Order became moot when NMED issued a new compliance order on consent on June 24, 2016 ("2016 Consent Order").[1] Because the 2016 Consent Order expressly "supersedes" the 2005 Consent Order and "settles any outstanding alleged violations under" the 2005 Consent Order, 2016 Consent Order, II.A (p.5), there is no longer a live controversy regarding compliance with the 2005 Consent Order.[2] Nuclear Watch maintains that its claims are not moot because the 2016 Consent Order is invalid. That claim, however, is a matter of state law and is outside the scope of this Court's jurisdiction.[3]

[1] The relevant portions of both the 2005 and 2016 Consent Orders are exhibits to DOE's Memorandum In Support of Motion to Dismiss the Second Amended Complaint (Oct. 21, 2016), ("DOE Memo") ECF 47-1.

[2] Nuclear Watch suggests that DOE has argued that sovereign immunity bars RCRA citizen suits against federal agencies. Nuclear Watch's Response to DOE's Motion to Dismiss, 3-4 (Nov. 21, 2016), ECF 56 ("NW Resp."). This suggestion is an error, as DOE does not take such a sweeping position. Rather, DOE argues that Nuclear Watch has failed to identify a cause of action or a basis for jurisdiction with respect to its claim that DOE violated RCRA by consenting to the 2016 Consent Order issued by NMED and that Nuclear Watch's efforts to rely on jurisdictional sources other than the RCRA citizen suit provision must fail. 28 U.S.C. 1331. DOE Memo at 11. As DOE previously explained, Nuclear Watch has failed to articulate any basis for its claim that DOE's (or NMED) could have violated RCRA by signing the 2016 Consent Order. The questions of whether NMED should have taken additional procedural steps allegedly required by state law before issuing that Order or that DOE should have insisted that NMED take such steps before signing the Order are not matters within the scope of RCRA's citizen suit provision and so the waiver provided by that provision is inapplicable.

[3] Nuclear Watch could have, but did not, appeal NMED's action in issuing the 2016 Consent Order to the New Mexico Court of Appeals within thirty days after NMED's final action. N.M.S.A. 1978 § 74-4-14(A). *See Citizen Action New Mexico v. New Mexico Env't Dep't*, 350 P.3d 1178, 1184 (N.M. App. 2015), *cert. denied*, 367 P.3d 440 (2015) (declining to consider untimely appeal of NMED action). Nuclear Watch did not file an appeal, but instead chose to proceed exclusively in federal court. By failing to at least file a protective appeal in the state court, Nuclear Watch may well have waived the only avenue for judicial review of the 2016 Consent Order.

ARGUMENT

I. THE COURT IS WITHOUT JURISDICTION TO HEAR NUCLEAR WATCH'S CLAIM THAT THE 2016 CONSENT ORDER IS INVALID

Nuclear Watch argues that the 2016 Consent Order cannot moot its claims regarding the alleged violations of the 2005 Consent Order because the 2016 Consent Order is invalid. NW Resp. at 5. Nuclear Watch, however, fails to establish that this Court has jurisdiction to hear this claim -- which is a challenge by a New Mexico plaintiff against a New Mexico executive department for action taken by that department pursuant to New Mexico law. At one point, Nuclear Watch asserts that the 2016 Consent Order was issued pursuant to RCRA, NW Resp. at 4, but that assertion is belied by the Order itself, which explicitly specifies that it was issued pursuant to state law. *Id.* at I.A (citing HWA section 74-4-10; section 74-9-36(D) of New Mexico's Solid Waste Act and NMAC 20.9.9.14); *see also United States v. Richter*, 796 F.3d 1173, 1183 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2046 (2016) ("When a state program is authorized under RCRA, federal regulations are displaced or supplanted by state regulations."); *id*. at 1185 ("Because Colorado administers its own hazardous waste program under RCRA, we apply Colorado law . . . ."). In addition, Nuclear Watch's primary objection to the 2016 Consent Order is that NMED did not hold a public hearing before issuing the order, *see* NW Resp. at 5, an alleged requirement based in state law, and not federal law. Indeed, Nuclear Watch repeatedly refers to its challenge to the validity of the 2016 Consent Order as being a state law claim. *See, e.g.*, NW Resp. at 8 ("[P]laintiff[] claim[s] that the 2016 CO is invalid as a matter of state law . . . ."), 11 (referring to its "state law-based claim").

Given that Nuclear Watch's challenge to the 2016 Consent Order is a state law claim, Nuclear Watch must establish that the Court has supplemental jurisdiction over this claim under

28 U.S.C. § 1367. But Nuclear Watch's arguments for supplemental jurisdiction fail.[4] *See* NW Resp. at 4-9. Notably, the assertion of supplemental jurisdiction presumes that the Second Amended Complaint currently includes federal claims that are within the Court's jurisdiction, which is a fundamental requirement for the exercise of supplemental jurisdiction. *Carroll v. Lawton Independent School Dist. No. 8*, 805 F.3d 1222, 1230 (10th Cir. 2015). The claims regarding the 2005 Consent Order, however, are moot based on the plain language of the 2016 Consent Order, which "supersedes" the 2005 Consent Order "and settles any outstanding alleged violations under" the 2005 Consent Order. 2016 Consent Order, II.A (p.5). The mere fact that Nuclear Watch has alleged that the 2016 Consent Order is invalid is not a sufficient basis for the Court to disregard its effect.[5] The Supreme Court has recognized that the actions of federal agencies are entitled to a presumption of regularity pending judicial review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Nuclear Watch gives no reason why NMED's action should not be afforded the same presumption.

Instead, before Nuclear Watch can pursue violations of the 2005 Consent Order, Nuclear Watch must first establish that, as a matter of state law, the 2016 Consent Order is invalid *and* that the 2005 Consent Order would again be in effect. Nuclear Watch appears to assume that, if it can establish that NMED failed to comply with state law procedural requirements before

[4] Nuclear Watch argues that it is entitled to relief under the Declaratory Judgment Act and the New Mexico Declaratory Judgment Act. NW Resp. 10-11. The federal Declaratory Judgment Act, 28 U.S.C. § 2201, is not a basis for jurisdiction and so has no bearing on the present motion to dismiss. *Fry Bros. Corp. v. Dep't of Housing &Urban Dev.*, 614 F.2d 732, 733 (10th Cir. 1980). Because federal court jurisdiction can be conferred only by the Constitution or Congress, the New Mexico Declaratory Judgment Act is also irrelevant here. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

[5] While allegations of fact in the complaint will be accepted as true at this stage of these proceedings, legal conclusions are not entitled to such treatment. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).The contention that the 2016 Consent Order is not valid is a conclusion of law.

issuing the 2016 Consent Order, the 2005 Consent Order will necessarily be again in effect and the claims alleging violations of that Order could proceed. This assumption is overly simplistic and relies on speculation as to the outcome of future proceedings. Even if Nuclear Watch were allowed to proceed in the New Mexico court with a challenge to the 2016 Order that is, on its face, untimely (*see supra* at 2 n.3), and even if Nuclear Watch prevailed on that challenge, the state court could choose to remand the matter to NMED with instructions to hold further proceedings. After such proceedings, NMED could decide to again issue a superseding order. This uncertainty as to whether the requirements of the 2005 Consent Order would ever again be in effect makes clear that claims regarding violations of that first order do not now present a live controversy. Accordingly, such claims cannot serve as an anchor for the assertion of supplemental jurisdiction.

Nuclear Watch also seeks to justify supplemental jurisdiction based on the fact that it filed the original complaint before the 2016 Consent Order was issued. The first complaint was filed on May 5, 2016, and the 2016 Consent Order was not signed until June 24, 2016. Nuclear Watch reasons that, because the Court allegedly had jurisdiction over the claims alleging violations of the 2005 Consent Order when the first complaint was filed, and because the Defendants were the first to raise an issue regarding the 2016 Consent Order by asserting it as a grounds for dismissing the complaint, the Court supposedly has supplemental jurisdiction to hear the later-arising claim that the 2016 Consent Order is invalid. NW Resp. at 7-8.

Nuclear Watch's convoluted argument as to who alleged what and when is simply not relevant. The timing of complaints and amended complaints cannot be used to manipulate

federal jurisdiction.[6] The Court is subject to a continuing obligation to ensure it has jurisdiction throughout the course of the litigation. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *United States v. Seminole Nation of Oklahoma*, 321 F.3d 939, 943 (10th Cir. 2002). The relevant question is whether there is *now* a live federal claim within the jurisdiction of this Court that could provide a basis from which the Court could exercise supplemental jurisdiction to hear Nuclear Watch's claim that NMED failed to comply with state law before issuing the 2016 Consent Order. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."). For the reasons stated above, the answer is no. Nuclear Watch can pursue its state remedies and, if (and only if) the 2005 Consent Order is ultimately reinstated, Nuclear Watch could then pursue its citizen suit claims as appropriate.

Moreover, even if there were valid federal claims in the Second Amended Complaint that could provide a basis for supplemental jurisdiction, under 28 U.S.C. § 1367(c) the federal courts should decline supplemental jurisdiction where the state law claims predominate. *See Schutza v. McDonalds Corp.*, 133 F. Supp. 3d 1241, 1247-48 (S.D. Cal. 2015). Nuclear Watch argues that the major issue in this matter is the alleged violations of the 2005 Consent Order, and that the 2016 Consent Order is only relevant because DOE and LANS raised it as grounds for dismissing this action. What is significant is not who pled what first, but rather the order in which Nuclear

[6] In the Second Amended Complaint, ¶¶ 48-49, Nuclear Watch correctly asserts that on March 30, 2016, NMED posted on its website the proposed draft order that would supersede the 2005 Consent Order on its web site. On May 16 and May 31, 2016, Nuclear Watch submitted to NMED comments objecting to the proposed order in part on the ground that NMED was required to hold a hearing. Thus, when Nuclear Watch commenced this action on May 5, 2016, it was plainly aware that NMED was proposing to issue an order superseding the 2005 Consent Order in the near future.

Watch's claims must be decided. The 2005 Consent Order is not currently in effect. Unless Nuclear Watch prevails on a claim that the 2016 Consent Order is invalid, *and* the 2005 Consent Order again becomes effective—both of which, as already discussed, are matters to be pursued under *state* law in *state* court—Nuclear Watch cannot pursue claims regarding alleged violations of the 2005 Consent Order. Thus, resolution of the state law questions is both logically first and the necessary antecedent to ever reaching the remaining claims in the Second Amended Complaint.[7] Given these realities, Nuclear Watch's contention that the federal law issues pertaining to the alleged violations of a facially-superseded state order predominate in this case cannot be sustained. Rather, it is the state law questions that predominate.

The Supreme Court has emphasized that the exercise of supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. at 726. This case presents circumstances that would indicate against exercising such discretion. As an initial matter, the sequence of events leading up to the filing of the original complaint suggests that Nuclear Watch's primary goal may well have been to secure a federal forum for its challenge to the 2016 Consent Order. The first complaint was filed in the interim between NMED's publication of notice of the proposed superseding consent order and Nuclear Watch's submission of its comments on NMED's proposal. Thus, when Nuclear Watch filed this action, it was well aware that the 2005 Consent Order could soon be superseded. *Infra* at 6 n.6. In addition, exercising supplemental jurisdiction over NMED's action in issuing the 2016 Consent Order is inconsistent with Congress' intent that in authorized states such as New Mexico, the

[7] Contrary to Nuclear Watch's assertion, there is no overlapping or intertwining of issues or facts pertaining to the validity of the 2016 Consent Order and the alleged violations of the 2005 Consent Order. Under state law, the 2016 Consent Order is subject to judicial review based on the administrative record compiled by NMED. *See* N.M.S.A. 1978, § 74–4–14. In contrast, the claimed violations of the 2005 Consent Order would involve questions of fact to be decided either by summary judgment or a trial.

state program operates in lieu of the federal hazardous waste management program. 42 U.S.C. § 6926. Challenges to the actions of NMED are best heard in the state courts. For this reason as well, the Court should be cautious about supplanting the New Mexico Court of Appeal's supervision of NMED's actions.

II. THE CLAIMS ALLEGING VIOLATIONS OF THE 2005 CONSENT ORDER ARE MOOT

Under RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(A), this Court's jurisdiction to issue injunctive relief is limited to *ongoing* violations. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987) (emphasis added). Nuclear Watch argues that the claims alleging violations of the superseded 2005 Consent Order are in fact claims of ongoing violations – and are therefore not moot -- because the 2016 Consent Order is allegedly not valid. Although Nuclear Watch launches a barrage of criticism at the 2016 Consent Order, the fact remains that, under state law, the 2016 Consent Order is deemed valid unless an administrative or judicial appeal results in a holding to the contrary. *See supra* at 5. Nuclear Watch can attempt to seek review of the 2016 Consent Order in the appropriate state forum, but has not provided any basis—nor could it provide any basis—for its suggestion that this Court can simply ignore the 2016 Consent Order and take action to enforce the superseded 2005 Consent Order. At this point, Nuclear Watch's challenge to the validity of the 2016 Consent Order is nothing but an unproven allegation (and one that, for reasons discussed in the preceding section, is not properly before this Court). Unless Nuclear Watch prevails on that state law claim *and* the superseded 2005 Consent Order ultimately again becomes effective, there can be no ongoing

violations of the provisions of the 2005 Consent Order. Therefore, Nuclear Watch's claims seeking to enforce the 2005 Consent Order are moot and must be dismissed.[8]

Nuclear Watch also complains that the 2016 Consent Order cannot moot its claims because it is not the result of "diligent prosecution" by NMED. NW Resp. at 14-16. This phrase comes from a section of the RCRA citizen suit provision that is not relevant here. Nuclear Watch's complaint is based on 42 U.S.C. § 6972(a)(1)(A), which authorizes citizen suits to enforce an order which has become effective under RCRA. The term "diligent prosecution" is used in section 6972(b)(1)(B), which prohibits citizen suits under section 6972(a)(1)(A) "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such . . . order. DOE, however, has not argued that Nuclear Watch's complaint is prohibited by an ongoing prosecution. Instead, DOE is arguing that NMED's 2016 Consent Order rendered moot Nuclear Watch's effort to enforce the superseded 2005 Consent Order. Accordingly, Nuclear Watch's argument regarding diligent prosecution is simply inapposite.

Finally, Nuclear Watch contends that its claim for penalties for violations that predate the 2016 Consent Order is not moot because *Gwaltney* does not bar citizen suits where the plaintiff can establish ongoing violations when the complaint was filed. NW Resp. at 23-24 (citing *Borough of Upper Saddle River, N.J. v. Rockland County Sewer Dist. # 1*, 16 F. Supp. 3d 294, 326 (S.D.N.Y. 2014)). *Saddle River* relied on a decision by the Second Circuit holding that a

[8] Nuclear Watch cites to *Interfaith Community Organization v. Honeywell Int'l., Inc*., 399 F.3d 248, 268 (3d Cir. 2005), to support its argument that its claims alleging violations of the 2005 Consent Order are not moot. NW Resp. at 18. That case is readily distinguishable, however, because the plaintiffs there were not seeking to enforce a particular order, much less an order that had been superseded.

defendant should not be able to moot a claim for penalties by coming into compliance after the complaint has been filed. *Atlantic States Legal Found. Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020 (2d. Cir. 1993).

These decisions, however, are not consistent with the Tenth Circuit's holdings. For example, in *WildEarth Guardians v. Public Service Co. of Colorado*, 690 F.3d 1174 (10th Cir. 2012), the court dismissed as moot a claim for civil penalties in a citizen suit under the Clean Air Act, reasoning:

> [Defendant] has demonstrated that its alleged unlawful conduct is not reasonably likely to recur. Because of this, [plaintiff's] claim for civil penalties, even if successful, would have no deterrent value, and would only serve the public's generalized interest in Clean Air Act compliance by power utilities. But a general interest common to all members of the public does not satisfy Article III.

Id. at 1187-88. As thoroughly explained by the Tenth Circuit in *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010), changes in government policies or practices often will moot citizen suits. *Id.* at 1116-19;[9] *see also Mississippi River Revival, Inc. v. City of Minneapolis, Minn.*, 319 F.3d 1013, 1016 (8th Cir. 2003) (citizen suit penalty claim must be dismissed as moot where alleged violation will not recur).

[9] In *Rio Grande*, the Tenth Circuit held that a claim seeking to compel the Bureau of Reclamation to consult with the Fish and Wildlife Service regarding biological opinions issued in 2001 and 2002 pursuant to the Endangered Species Act, 16 U.S.C. § 1536(a)(2) became moot when a superseding biological opinion was issued. Nuclear Watch asserts that *Rio Grande* is inapplicable because the superseding biological opinion was congressionally-approved and the plaintiff in the case was not challenging the validity of the superseding opinion. *See* NW Resp. at 16-17. This asserted distinction, however, is both wholly unsupported and inconsistent with the reasoning in the opinion itself. Legislative action is not required for a change in government practice to moot a citizen suit. *Rio Grande*, 601 F.3d at 1117 ("[T]he withdrawal or alteration of administrative policies can moot an attack on those policies.") (internal quotations and alteration omitted). And, as previously noted, the mere fact that a government action is challenged does not automatically negate the challenged action. Although a legal challenge could result in some future government action, that possibility does not allow a plaintiff to escape mootness. *See id.* ("[T]he mere possibility that an agency might rescind amendments to its actions or regulations does not enliven a moot controversy.") (internal quotations omitted).

Pursuant to the terms of the 2016 Consent Order, the 2005 Consent Order has been superseded and any outstanding alleged violations of the 2005 Consent Order have been settled. Because the 2016 Consent Order has established a substantially different approach and process for corrective action as compared to the 2005 Consent Order, there is effectively no possibility that violations of the 2005 Consent Order could recur. *See Rio Grande*, 601 F.3d at 1111–12 ("After [plaintiffs] filed their third amended complaint, the FWS issued the 2003 B.O., which superseded both [the 2001 B.O. and 2002 B.O.]. . . . We must conclude that the FWS's issuance of the 2003 B.O. mooted the [plaintiffs'] prayer for both injunctive and declaratory relief."). Even if Nuclear Watch believes that DOE may someday violate the terms of the 2016 Consent Order, that cannot salvage Nuclear Watch's claims regarding the 2005 Consent Order because, as in *Rio Grande*, it is the new, materially different terms in the 2016 Consent Order that now govern DOE's corrective actions at the Facility. *See id.* at 1118 ("This 2003 B.O. superseded and rendered obsolete the two biological opinions that provided the framework for the [plaintiffs'] challenge . . . . This 2003 B.O. established a new regulatory context for assessing the propriety of [defendant's] conduct . . . ."). Moreover, any assertions regarding the likelihood of violations of the 2016 Consent Order are only speculation. *See id.* at 1117 ("A case ceases to be a live controversy if the possibility of recurrence of the challenged conduct is only a speculative contingency.") (internal quotations and alteration omitted). Under these circumstances, the Court should follow *WildEarth Guardians* and *Rio Grande* by dismissing Nuclear Watch's claim for civil penalties.

CONCLUSION

DOE's motion to dismiss the Second Amended Complaint should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by all counsel of record by the Court's ECF system on December 15, 2015.

/s/ *Eileen T. McDonough*