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

NWNM'S REPLY TO LANS'S RESPONSE BRIEF OPPOSING MPSJ

Nuclear Watch New Mexico ("NWNM") responds to Los Alamos National Security, LLC's ("LANS's") *Response Brief in Opposition to NWNM's Motion for Partial Summary Judgment* (Doc. 117) ("Resp."). NWNM's *Motion for Partial Summary Judgment Against Los Alamos National Security, LLC* (Doc. 94) with supporting Memorandum (Doc. 95) ("MPSJ"), seeks judgment against LANS on the issue of its liability for 16 violations of Subchapter III.[1] The order with which LANS failed to comply was the 2005 Consent Order, amended October 29, 2012 ("2005 CO"). NWNM's MPSJ against LANS is founded on its Statement of Undisputed Material Facts ("UMFs"), MPSJ at 3, which showed that LANS, with DOE, requested extensions of deadlines for obligations under the 2005 CO and NMED, relying on LANS's DOE's representations justifying extensions of deadlines, either set a new deadline or denied the request. In 14 out of 16 cases NWNM cited, LANS and DOE requested extensions

[1] The Citizen Suit provisions of Subchapter VII allow suit against any person alleged to be in violation of any "permit, standard, regulation, condition, requirement, prohibition, or order[.]"

pursuant to and in reliance on 2005 CO provisions. NWNM's position on LANS's liability is simple: (1) LANS's requests for and NMED's granting extensions of 2005 CO deadline created enforceable obligations on LANS; (2) LANS did not perform the required work by the new deadlines, and (3) LANS's failures to comply with 2005 CO requirements violated RCRA, subchapter III.

II. NWNM RELIES ON NMED DECISIONS.

To establish that legally enforceable deadlines existed for LANS under the 2005 CO, NWNM's MPSJ against LANS relies on the legally binding effect of LANS's requests for extensions of deadlines under the 2005 CO and NMED's agreement resetting of those deadlines. LANS admits, see *infra*, that it signed the amended 2005 CO. All of NWNM's claimed violations of the 2005/2012 Consent Order began later than that date. Any distinction is irrelevant. For over 9 years, 2006 through 2015, LANS acted as a party to the 2005 CO, complying with deadlines, resubmitting to NMED documents and plans that were disapproved, and requesting and receiving deadline extensions. It received over 160 of them, from 2012 through 2015, for compliance with the 2005 CO requirements. NWNM's response to LANS's MSJ, Doc. 118 at Pp. 23-24. Nowhere in its Response does LANS claim that any of NWNM allegations is invalid because "LANS was not a party to the 2005 CO." Resp. at 4

Table 1, Exhibit 1, attached hereto shows the history of LANS's and DOE's requests for extensions of deadlines for the 16 violations cited in NWNM's MPSJ. In each case, the operative language of the requesting parties explicitly relies, in identical terms on many occasions, on the extensions provisions of the 2005 CO and demonstrates beyond question that LANS was representing to NMED that it was bound by the 2005 CO and that it would comply with its terms in the future. NMED, acting on a request under Sect. III.J of the 2005 CO, in each case, issued a written decision either setting a new deadline or declining to do so. By Sect. III.G of the 2005 CO, as

discussed *infra*, those decisions, in writing, by NMED, established legally binding obligations on LANS for performance of the tasks cited in NWNM's MPSJ. The 2005 CO states that the Respondents (i.e., DOE and LANS) shall be jointly and severally responsible and liable for any failure to carry out, all their obligations under the Order. Section III.G of the CO states that revised deadlines approved by NMED in writing pursuant to a request for modification under Sect. III.J, *must* be met. *See* 2005 CO at III.G.4.

III. UNDISPUTED MATERIAL FACTS.

Of the 66 items in NWNM's Statement of UMFs in its MPSJ, LANS does not dispute the following numbered statements: **4, 6, 7, 8, 10, 11, 12, 13, 14, 20, 21, 22, 23, 25, 26, 27, 28, 30, 31, 32, 33, 36, 37, 38, 39, 42, 43, 44, 45, 46, 48, 49, 50, 51, 58, 59, 60, 61, 62, 63,** and **64.** LANS agreed, with modifications, to the following numbered UMFs: **1, 5, 9, 15, 17, 19, 24, 29, 35, 40, 41, 47, 52, 54,** and **56**. These admissions establish that NMED notified LANS of the deadline for submitting: 1) an RCR, Investigation or Remediation Report for: MDA A; Cañon de Valle Aggregate Area at TA-15; Lower Pajarito Canyon AA; Twomile Canyon; Cañon de Valle AA at TA-16; Upper Water Canyon AA; Starmer/Upper Pajarito Canyon AA; MDA AB; and Chaquehui Canyon AA; and 2) for completing the installation of GW monitoring wells R-65 and R-26i. (LANS Responses to UMFs:1): 4, 5; 8, 9; 13, 14, 15; 23, 24; 27, 28, 29; 32, 33; 38, 39, 41; 44, 45, 47; 58, 59; 62, 63, 65; 2): 17, 19; 51, 52). LANS did not meet any of these deadlines.

LANS disputes UMFs **16, 18, 53,** and **54** relating to LANS's obligation to file Well Completion Summary Fact Sheets and Well Completion Reports for monitoring wells R-65 and R-26i, claiming that the obligation to file these reports never arose because of its own failure to perform prerequisite tasks. LANS disputes UMF **57**, relating to the obligation to submit an RCR for MDA AB, claiming that "the Date had changed." But changed dates under the 2005 CO are binding on LANL – *see supra* Sect. II.A.2. Finally, LANS disputes UMF **66**, relating to the

requirement to file a RCR for MDA G, claiming that the deadline appearing in the 2005 CO was never effective because NMED had failed to perform the prerequisite task of selecting a remedy. NWNM agrees. This discussion merely confirms what NWNM, NMED, and DOE – all the parties to this case except LANS – have said: there is no genuine dispute about the virtually all of the facts surrounding NWNM's claims.

Response to LANS's Proposed Additional Undisputed Material Facts.

LANS proposed additional UMFs responding to NWNM's UMFs. NWNM discusses these by reference to the attached Exhibit 2, Table 2, setting out LANS's proposed additional UMFs.

NWNM's Response to LANS's Proposed Additional Material Facts In Table 2

Nos. **5, 9, 15, 29, 35, 41, 47, 52, and 59** – is "Disputed." These proposed additional material facts purport to represent that DOE did not provide LANS with "necessary" funds to enable it to perform the required work, nor did it have a contractual scope of work that authorized it to perform the same. The extent to which these statements are true cannot be assessed on summary judgment.

NWNM's Response to LANS's Proposed Additional Material Facts In Table 2

Nos. **34, 40, 46,** and **64** – is "Disputed." The text of the 2005 CO is undisputed. NWNM denies that NMED issuance of a Notice of Intent to Assess Stipulated Penalties, without any further action prior to June 23, 2016, represented no waiver of penalties and certainly did not represent a waiver of the violations.

IV. LANS'S PRINCIPAL DEFENSE TO NWNM'S CLAIMS IS INADEQUATE.

The 2016 Order on Consent does not purport to waive NMED's claims against LANS. Only NMED and DOE are parties to the 2016 Order. It only binds them. *Id.,* Sect. V. There is no

evidence the 2016 Order waived claims NMED had against LANS. NMED's waiver of claims against DOE cannot be a general waiver of claims NMED might have against LANS, because LANS has not met the two key legal requirements for estoppel. There must be (1) reasonable reliance (2) in a manner forcing a detrimental change in position. *Idaho Conservation League v. Atlanta Gold Corp*, 844 F. Supp. 2d 1116 (D. Idaho 2012). LANS's sole factual claim is that NMED was aware LANS would rely and knew it would be detrimental to LANS if the 2016 Order were overturned. LANS fails to claim that detrimentally altered its position. The omission is fatal. *Idaho, supra.* Even LANS's claim of reliance fails. It is unreasonable to claim reliance on the applicability of an Order to which LANS was not a party.

LANS also argues that NWNM is in the shoes of NMED and bound by NMED's 2005 CO elections. Resp. at 30; *see also*, LANS, 16th and 17th affirmative defenses at 32. RCRA does not support LANS's argument. As to the allegations NWNM has made in its Complaint. NMED *did not enforce* RCRA against LANS. *See generally*, Second Amended Complaint. LANS's argument that NMED's alleged waiver bars NMED from prosecuting refers to an action NWNM was not party to and in which it could not participate. *United States v. Envtl. Waste Control, Inc.*, 710 F. Supp. 1172, 1196 (N.D. Ind. 1989). NWNM was not (and is not) in "privity" with NMED. NMED *did not pursue* the alleged violations NWNM raised. There can be no estoppel or issue preclusion for NWNM when the issues raised in the Complaint were not previously litigated. *United States v. Envtl. Waste Control, Inc., supra*, 1196-1201. Thus, NMED's actions or inactions do not bind NWNM.

V. LANS'S "APPLICABLE PENALTIES" DEFENSE IS MERITLESS.

LANS claims that the 2005 CO's Stipulated penalty provisions bar any liability for violations in four cases in which NMED sent Notices of Intent to Assess Stipulated Penalties.

Resp. at 24. These are the violations NWNM lettered H, I, J, and O in its MPSJ. LANS asserts that "it is undisputed that NMED formally initiated the stipulated penalty process for these four alleged violations[.]"*Id.* There is no evidence that NMED ever took any further steps to assess stipulated penalties for these violations. The 2005 CO gives NMED the *ability* to reduce or waive stipulated penalties. Taking no further action to pursue stipulated penalties for these four violations, NMED *did not* determine to reduce or waive them. A waiver or reduction in penalties for a violation is *not* a waiver *of* the violation. LANS relies on Sect. III.G.3 of the 2005 CO to argue that when NMED executed, with DOE, the 2016 Order, *that act* represented an exercise of discretion under III.G.3 and a waiver settling "outstanding alleged violations under the 2005 CO." Resp. at 22. But NWNM filed its Complaint citing these ongoing violations on May 12, 2016, before NMED's alleged waiver on June 23, 2016.

LANS also quotes Sect. III.G.7 of the 2005 Consent Order to claim that NMED made such decisions *and* that they are binding on plaintiff NWNM. Resp. at 25; also LANS's 11th affirmative defense, Resp. at 32. NMED did not assess stipulated penalties against LANS. The entire sentence cited is irrelevant to the violations. Even if NMED had assessed stipulated penalties for the violations of the 2005 CO, that action could not prevent or moot NWNM's claims for violations which were ongoing when the Complaint was filed. NWNM does not stand in NMED's shoes because NWNM's claims sound directly in RCRA.

VI. LANS'S DEFENSES BASED ON ITS "STATUS" HAVE NO SUPPORT IN LAW.

LANS, in its 22nd affirmative defense, invokes its "status" as no longer the LANL operator and co-permittee under RCRA with DOE. LANS argues that this allows it to escape liability for RCRA violations it may have committed prior Triad Nuclear Security, LLC, replacing LANS. Significantly, the mere continued presence of hazardous waste may constitute a

"current violation" of a RCRA regulation or standard, despite the fact that the operator's actual conduct occurred in the past. *See, e.g., Cameron v. Peach Cty.*, No. 5:02-CV-41-1 (CAR), 2004 U.S. Dist. LEXIS 30974, at *80-82 (M.D. Ga. June 28, 2004) (the majority rule is that "disposal of wastes can constitute a continuing violation" so long as the "waste has not been cleaned up"); *Gache v. Town of Harrison*, N.Y., 813 F. Supp. 1037, 1041-42 (S.D. N.Y. 1993); *Fallowfield Dev. Corp. v. Strunk*, 1990 U.S. Dist. LEXIS 4820, 1990 WL 52745 at 10 (E.D. Pa. April 23, 1990).

LANS also maintains as its 29th affirmative defense that its changes in status, i.e., no longer legacy waste contractor and no longer co-holder of RCRA permit, in and of themselves moot NWNM's claims. Merely alleging those facts in the face of violation that were on-going from the time NWNM filed notice letters and Complaint does not rebut the evidence of LANS's liability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (In most cases, a defendant's voluntary cessation is not enough to moot a plaintiff's claims and the defendant has the heavy burden of demonstrating that "subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."); *see also N.Y. Public Interest Research Group v. Whitman*, 321 F.3d 316, 327 (2d Cir. 2003); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990) (A CWA case applying the same standard); *and see Anderson v. Farmland Indus.*, 70 F. Supp. 2d 1218, 1234-36 (D. Kan. 1999) (at time plaintiff suit filed, defendant had not remedied violations, thus the violations were continuous).

VII. LANS'S DEFENSE BASED ON HWA "PREEMPTION" HAS NO MERIT.

LANS makes the claims that 1) it is not saying that the "mere existence" of the HWA bars NWNM's suit; but 2) rather, NMED actions under the 2005 CO, issued pursuant to the

HWA, are binding on plaintiff NWNM according to its arguments in Sects. III(B) and III(E) of its Response, that NMED waived claims against it and that NMED's waiver was binding on NWNM. For almost 40 years, the EPA has interpreted RCRA to allow Citizen Suits after EPA recognized state regulations as equivalent to RCRA and operating "in lieu" of EPA's direct regulation. *See, e.g.,* 45 Fed. Reg. 85016 (Dec. 24, 1980). *See City of Hattiesburg v. Hercules, Inc*., No. 2:13-CV-208-KS-MTP, 2014 U.S. Dist. LEXIS 40993, at *11-*14 (S.D. Miss. Mar. 27, 2014) (["A]ccording to the plain language of Section 6926, EPA-approved state regulatory programs 'become effective pursuant to' RCRA, and citizens may enforce them via a citizen-suit under Section 6972(a)(1)(A)").

VIII. SOME LANS CLAIMS MAY BE RELEVANT AT A PENALTIES PHASE.

LANS asserts five affirmative defenses which, it argues, are effective against all of NWNM's claims. Resp. at 25. Those are: (1) DOE did not give LANS funding, contractual authority or remediation control; (2) LANS was prevented from performing by DOE; (3) LANS also excused due to intervening and/or superseding causes; (4) LANS also excused b/c impossible – "doctrine of impracticability"; and (5) LANS's obligations conditioned on DOE authorizing LANS's work and continued funding, so LANS excused from any alleged nonperformance. In all of the foregoing LANS depend upon viewing the 2005 CO and 2016 Order predominantly as contracts rather than regulatory instruments. LANS relies on *US v ITT* for the proposition that the 2005 CO (and 2016 Order) is "basically a contract," and that its meaning must be found "in the four corners" of the document, citing *Sinclair Oil*. Resp. at 25. NWNM disagrees with that position. However, even under principles of contract law in the sources LANS cites there is no justification for LANS's alleged excuses

LANS's first two defenses cited above both assert that DOE prevented it from performing because DOE gave LANS no funds and no contract authorization for tasks under the

2005 CO, which prevented LANS from performing those tasks, and that this circumstance excused its performance of its obligations under the 2005 CO. This argument suffers from two fatal deficiencies: 1) whatever LANS's contractual relationships with DOE, LANS was jointly and severally liable under the 2005 CO, with DOE, for timely performance of its requirements; 2) LANS's claim that it had no influence over the funding ignores the realities of its position and the history of its relationship with DOE; and 3) any claim of "financial impossibility" must fail, by law.

With respect to LANS's claim that an alleged lack of funding and contractual authorization from DOE "prevented" it from performing and that its obligations under the 2005 CO were therefore excused, the most obvious rebuttal is that LANS's obligations under the 2005 CO (as modified in 2012 and signed then by LANS) were explicitly *not* dependent on the actions of DOE – rather, LANS was "jointly and severally responsible[.]" Sect. III.J, 2005 CO. If LANS was not prepared to take on the statutory and regulatory burdens of operating a RCRA-permitted facility, it should not have become a co-permittee with DOE on the facility's RCRA permit and should not have signed on to the obligations of the 2005 CO.

Second, LANS's attempt to pretend that it had no influence on funding for Laboratory cleanup activities and prioritization of that funding is belied by the facts of LANS's position as the operating contractor of the facility, and by the historical relationship between DOE and LANS. *Declaration of Robert Alvarez,* (Doc. #118-1) at p. 7, ¶ 15, contradicts this assertion.

Third, LANS cites to the Restatement 2d of Contracts. Therein, however, a contractual party is *not* excused for the breach of an agreement merely because the party alleges impossibility for financial reasons *unless* that specific situation was contemplated in the contractual agreement. *Id.* at § 261 b. (2nd 1981). Unless there is evidence the parties

contemplated financial impossibility of performance in the 2005 Consent Order--which provides the "four corners" to examine--LANS has no excuse for failure to perform the requirements of that Order. While the 2005 CO has many provisions to modifying requirements in changed circumstances, there is *no* provision contemplating excusal to perform because monies were not available. This defense fails on its own terms.

To effectuate the fourth claimed defense above (impracticability or impossibility) LANS must show that (1) a supervening event made performance on the contract impracticable, (2) the non-occurrence of the event was a basic assumption on which the contract was based, (3) the occurrence of the event was not LANS's fault, and (4) LANS did not assume the risk of the occurrence. *Summit Properties, Inc. v. Pub. Serv. Co.*, 2005-NMCA-090, ¶ 32, 118 P.3d 716; *see also Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GMBH*, 765 A.2d 1226, 1238 (R.I. 2001) (one cannot create an impossibility preventing performance and then be shielded from obligations hiding behind self-created impossibility). The case LANS cited, *Summit Properties*, states that impossibility is only available to a defendant when a task "is made impracticable without his fault." *Summit Properties, supra* ¶ 32. However, the *Alvarez Declaration* (*supra*, Doc. #118-1) makes clear that the cleanup funding shortfalls LANS claimed as the primary cause of an inability to meet 2005 CO deadlines *were caused by DOE''s and LANS's failures to perform under the 2005 CO* – as Congress explicitly found. *Id.* at p. 5, ¶ 11. Compliance with the deadlines imposed in the 2005 Consent Order (amended 2012) pursuant to RCRA was mandatory. *See United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 288 (W.D. Mich. 1988) (citations omitted) (rejecting the impossibility defense, as compliance with RCRA deadlines is mandatory and citing cases supporting that position).

NWNM has met the burden of a *prima facie* case for strict liability under RCRA by providing material facts showing LANS's responsibility under RCRA and the 2005 Consent Order. Neither the 2005 one (as amended) nor the new one in 2016 can relieve LANS or DOE of RCRA obligations or excuse failures to comply with RCRA. *See United State v. Production Plated Plastics*, 742 F. Supp. 956, 960-961 (W.D. Mich. 1990). Neither and "impossibility" defense nor even "good faith efforts" to comply with RCRA avoid strict liability. *See Id.* at 961-962 and the cases cited therein stating that such efforts are pertinent to appropriate remedies or imposition of sanctions.

Although none of the above defenses are available to LANS to avoid its obligations under the 2005 CO (as amended 2012), NWNM does not dispute that many factual aspects of the subject would be relevant in a penalties assessment and apportionment proceeding. Whether and to what extent DOE's and LANS's visions of cleanup funding differed, and the extent, if any, by which actual funding fell short of anticipated needs, whether the shortfall was material with respect to completion of the work, and the extent to which DOE and LANS sought invoked the extraordinary provisions of the 2005 CO, are complex but relevant issues which can only be explored after an opportunity for discovery in this matter.

IX. LANS'S RADIOLOGICAL MATERIALS DEFENSE WAS WAIVED.

LANS claims that the DOE's Regulation of Radiological Materials caused a conflict with the schedule for remediation of the site. Resp.at 29. LANS cites there to the 2005 CO excluding radionuclides. LANS contends it had no liability for missing the MDA AB deadline. LANS did not provide the complete language: "If such an inconsistency arises, the Respondents *shall* provide appropriate documentation demonstrating the inconsistency." *Id*. at III.K.2 (emphasis added). LANS was required to inform NMED of the regulatory inconsistency. Doing so is

essential to the success of the dual-regulation system for mixed waste. *United States v. Manning*, 527 F.3d 828, 833; *United States v. Kentucky*, 252 F.3d 816, 822 (6th Cir. 2011); *Washington v. Moniz*, No. 2:08-CV-5085-RMP, 2015 U.S. Dist. LEXIS 182232, at *9 (E.D. Wash. May 11, 2015) (citations omitted).

X. RCRA CITIZEN SUITS ALLOW PENALTIES PAYABLE TO THE TREASURY.

Section 6972(a) states that under § 6972(a)(1)(B), the district court has jurisdiction to restrain any person who contributed or who is contributing to past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste. 42 U.S.C. § 6972(a); *see also* Section 6928(a); *and see City of Evanston v. N. Ill. Gas Co.*, 229 F.Supp.3d 714, 724-725 (N.D.Ill.2017) (a plaintiff may obtain civil penalties under sec. 6928(a) or (g)). Thus, NWNM's claims of Subchapter III violations are properly within the civil penalties authorization.

XI. CONCLUSION.

For the reasons stated in this Reply and NWNM's pleading in this matter referenced herein above, NWNM requests this Court to grant the Motion for Partial Summary Judgment against LANS.

Respectfully submitted:

NUCLEAR WATCH NEW MEXICO

BY: _____ _____

Jonathan M. Block, Eric D. Jantz,
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Suite #5
Santa Fe, New Mexico 87505-4074
(505) 989-9022
jblock@nmelc.org

John E. Stroud
Stroud Law Office
533 Douglas Street
Santa Fe, NM 87505-0348
(505) 670-5639
jestroud@comcast.net

Co-counsel for Nuclear Watch New Mexico

CERTIFICATE OF SERVICE

On this 11th day of March 2019, I, Jonathan M. Block, caused the foregoing *Nuclear Watch New Mexico's Reply to Defendant Los Alamos National Security LLC's Response Brief In Opposition To Plaintiff's Motion for Partial Summary Judgment* to be served on the parties of record in this proceeding using the CM/ECF electronic filing system.

Jonathan M. Block