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

NUCLEAR WATCH NEW MEXICO'S RESPONSE TO
DEFENDANT LOS ALAMOS NATIONAL SECURITY LLC'S
MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. INTRODUCTION.

Plaintiff Nuclear Watch New Mexico ("NWNM") hereby responds to the Motion for Summary Judgment (Doc. 96) ("MSJ") filed by defendant Los Alamos National Security, LLC ("LANS") and the accompanying Memorandum of Points and Authorities (Doc. 97) ("MEM").

LANS makes five arguments in its MSJ:

1. The Court lacks subject matter jurisdiction because the remaining claims are moot.
2. Count II of the Complaint relating to Area G should be dismissed because no violation of a correct deadline occurred;
3. *Burford* and primary jurisdiction arguments require dismissal;
4. June 23, 2016, is the last day for application of penalties for violations of the 2005 CO; and
5. Plaintiff's Seventh Claim in its Complaint should be dismissed as it already appears as a prayer for relief.

We will address these in turn.

II. STANDARD OF REVIEW.

Rule 56(a) of the Federal Rules of Civil Procedure provides: "A party claiming relief may move … for summary judgment on all or part of the claim." *Id.* Subsection (c) of the Rule in turn provides, "The judgment sought should be rendered if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991). Once the moving party has shown the absence of a genuine issue of material fact, the nonmoving party must identify specific disputed facts and supporting evidence sufficient to show

the presence of a genuine issue requiring trial. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Turner v. Public Service Co.* 563 F.3d 1136, 1142 (10th Cir. 2009). Assertions contained in a motion for summary judgment are to be supported by "citing to particular parts of materials in the record, including . . . documents . . . admissions, . . . or other materials." FRCP 56 (c)(1)(A). NWNM's assertions herein are fully supported by attached documents, cited documents already in the record, and by defendant DOE's admissions and those of the intervenor regulatory agency NMED.

Partial summary judgment is appropriate here. Federal law controls this claim, the decisions in the Court's Memorandum Opinion and Order ("MO&O") (Doc. 70) are the law of the case, and the material facts are proven by indisputably authentic documents prepared by the defendants DOE and LANS, and the intervenor NMED. Accordingly, this motion presents an opportunity for the expeditious and judicially economical disposition of an important subset of NWNM's claims, thereby substantially narrowing the issues that must ultimately be tried in this case.

III. UNDISPUTED MATERIAL FACTS.

A. NWNM's Response to LANS's Statement of Material Facts.

NWNM agrees with the following numbered statements from LANS's Statement of Material Facts: 1 through 26; 28; 34 through 41.

NWNM disagrees with Statement 27, which is: "The 2016 Order supersedes the 2005 Order." Whether the 2016 Order superseded the 2005 CO is a question of law, not a question of fact, and NWNM claims that the 2016 Order did not legally supersede the 2005 CO. The Court, in its MO&O, at p. 28, ruled against NWNM on this legal question, but that does not make Statement 27 true as a matter of fact.

NWNM disagrees with Statement 29, which is:

> The 2016 Order completely changed the previous architecture of the legacy waste cleanup. Rather than having prescriptive deadlines for every task, it adopted a risk-based "campaign approach." NMED and DOE established different sets of campaigns and prioritized them based on various risk factors, including the overall risk to human health or the environment, the location of the waste areas within the Laboratory, the proximity of the areas to off-site structures or areas, the type of chemicals involved, the potential transport mechanisms, and any personnel or contractor limitations. The overall concept was to tackle the most serious issues first."

Specifically, NWNM disagrees with the subjective evaluation contained in the last sentence: "[t]he overall concept was to tackle the most serious issues first." In fact, as shown by the schedules in the 2016 Order for the serious issues declared to be a priority of the Martinez administration as late as April 15, 2015, the 2016 Order is a capitulation to DOE and delays indefinitely the accomplishment of these tasks. At any rate, it is certainly not an undisputed fact, but rather one NWNM is prepared to contest at hearing.

NWNM disagrees with Statement 30, which is:

> The 2016 Order provided greater flexibility as unexpected issues arose during investigation that required more investigation or evaluation of a different potential remediation approach. It established sets of annual (rather than 10-15 year) milestones that are revisited each year to address new developments as the work proceeds. These improvements were in direct response to weaknesses in, and "lessons learned" from, the 2005 Order, which had no provisions for addressing emerging threats to public health and safety.

Specifically, NWNM disagrees with the conclusory statement that "[t]he 2016 Order provided greater flexibility as unexpected issues arose during investigation that required more investigation or evaluation of a different potential remediation approach, and that portion of the last sentence which asserts that the 2005 Order "had no provisions for addressing emerging threats to public health and safety." In fact, as shown by the history of administration of the 2005 CO though extensions and changes of priorities, the 2005 CO does not lack any of the

flexibility claimed for the 2016 Order. At any rate, it is certainly not an undisputed fact, but rather one NWNM is prepared to contest at hearing.

NWNM disagrees with Statement 31, which is:

> The 2016 Order established a list of "Future Campaigns" in Appendix C to this Order, which is intended to cover all of the previous tasks in the 2005 Order. Appendix C demonstrates sound risk-based prioritization and logical sequencing of the cleanup work scope.

Specifically, NWNM disagrees with the last sentence's subjective evaluation of the scheduling of tasks under the 2016 Order as demonstrating "sound risk-based prioritization and logical sequencing of the cleanup work scope." In fact, as shown by a comparison of the schedule of 15 tasks cited as violations by NWNM under the 2005 CO and the 2016 Order, below, at §VI.a.2., the 2016 Order is not based on coherent risk prioritization, but rather on DOE funding projections and unwillingness to commit to accomplishing actual cleanup in the areas cited by NWNM. See also, NWNM's Additional Undisputed Material Facts, §. III.b., above, which show that neither of the two Remedy Completion reports that were the subject of the violations claimed by plaintiff are scheduled for submission in either the current list of enforceable Milestones deadlines or the current list of non-enforceable Target dates, neither of the two groundwater monitoring wells appear in either current list, none of the Investigation Reports for seven Aggregate Areas named by NWNM appear on the current list of enforceable Milestones, and only one of the seven has an Investigation Report currently scheduled as an unenforceable Target date. *Id.*

At any rate, it is certainly not an undisputed fact, but rather one NWNM is prepared to contest at hearing.

NWNM disagrees with Statement 32, which is:

> The 2016 Order provisions for annually establishing enforceable milestones for the coming year (once federal budgets are set) and targets for subsequent years (to demonstrate where increase federal funds can accelerate risk-reduction) have been successful in supporting the need for strong funding for environmental cleanup activities at LANL.

Specifically, NWNM disagrees that the "2016 Order provisions... have been successful in supporting the need for strong funding for environmental cleanup activities at LANL." In fact, as shown by the Declaration of Robert Alvarez in Support of Plaintiff Nuclear Watch New Mexico's Response to Defendant Los Alamos National Security LLC's Motion for Summary Judgment, attached, at ¶¶ 11, 12, 13, and 14, the 2016 Order provisions have not been successful: further patterns of delay and ultimate noncompliance are likely to occur, and the 2016 Order leaves NMED powerless to force any enforceable deadline upon DOE without DOE's consent. At any rate, it is certainly not an undisputed fact, but rather one NWNM is prepared to contest at hearing.

NWNM disagrees with Statement 33, which is:

> The 2016 Order contains important opportunities for public involvement in key legacy waste cleanup decisions, such as 1) conferences with municipalities, counties, and pueblos on the "new proposed organization and sequence of campaigns"; (2) public meetings to "present any changes to the milestones and targets"; (3) a public hearing on selection of proposed remedies; and (4) accessible public records.

Specifically, NWNM disagrees that the "contains important opportunities for public involvement in key legacy waste cleanup decisions." In fact, as shown by a comparison of the provisions for public involvement in the 2005 CO and the 2016 Order, the 2016 Order falls far short of providing the meaningful and "important" opportunities for public involvement that the 2005 CO provided. At any rate, it is certainly not an undisputed fact, but rather one NWNM is prepared to contest at hearing.

B. Additional Undisputed Material Facts Relevant to LANS's MSJ.

Plaintiff NWNM submits the following list of additional facts which are relevant and material to the claims made by LANS in its MSJ and which cannot reasonably be disputed:

1. As of the FY2018 update of Appendix B to the 2016 Order, no Remedy Completion Report is scheduled with either an enforceable Milestone deadline or non-enforceable Target date for any of the three Material Disposal Areas A, AB, and G.

2. As of the FY2018 update of Appendix B to the 2016 Order, there is no requirement or plan to install either monitoring well R-65 or R-26i in any Campaign at any time.

3. As of the FY2018 update of Appendix B to the 2016 Order, no Investigation Report is required with an enforceable Milestone deadline for any of the seven Aggregate Areas named in NWNM's Complaint.

4. As of the FY2018 update of Appendix B to the 2016 Order, only one of the seven named Aggregate Areas – Chaquehui Canyon Aggregate Area - has a non-enforceable Target date for the submission of an Investigation Report.

C. Support for Plaintiff's Additional Undisputed Material Facts.

Assertions contained in a motion for summary judgment are to be supported by "citing to particular parts of materials in the record, including . . . documents . . . admissions . . . or other materials." FRCP 56 (c)(1)(A). NWNM's assertions herein are fully supported by the attached documents, cited documents already in the record, and by defendants DOE's and LANS's admissions and those of the intervening regulatory agency NMED. NWNM identifies support in these categories for its additional undisputed material facts as follows:

Number	Support
1.	Declaration of David S. Rhodes, at ¶ ¶ 24, 44, 48, re DOE MSJ (Doc. 101-2).
2.	*Id.*, at ¶ ¶ 28, 42.
3.	*Id.*, at ¶ ¶ 26, 30, 32, 36, 38, 40, 42.
4.	*Id.*, at ¶ 46.

IV. NMED EFFECTIVELY AGREES SUMMARY JUDGMENT IS APPROPRIATE AGAINST DOE AND LANS ON 16 OF NWNM'S 17 CLAIMED VIOLATIONS.[1]

Plaintiff alleged 17 specific RCRA violations by DOE and LANS in Counts I and II of its Complaint:

1. Failure to timely submit a RCR for MDA A (Complaint, Doc. 42, at ¶ 54);

2. Failure to timely submit an Investigation Report for the Cañon de Valle at TA-15 Aggregate Area (*Id.*, at ¶ 57);

3. Failure to timely complete the installation of monitoring well R-65. (*Id.*, at ¶ 60);

4. Failure to timely submit the Well Completion Summary Fact Sheet for monitoring well R-65 (*Id.*, at ¶ 61);

5. Failure to timely submit the Well Completion Report for monitoring well R-65 (*Id.*, at ¶ 62);

6. Failure to timely submit the Investigation Report for the Lower Pajarito Canyon AA (*Id.*, at ¶ 65);

7. Failure to timely submit the Investigation Report for the Twomile Canyon AA (*Id.* at ¶ 68);

8. Failure to submit the Investigation Work Plan for the Lower Water Canyon/Indio Canyon AA (*Id.* at ¶ 70);

9. Failure to timely submit an Investigation Report for the Cañon de Valle at TA-16 AA (*Id.* at ¶ 74);

10. Failure to timely submit an Investigation Report for the Upper Water Canyon AA (*Id.* at ¶ 77);

11. Failure to timely submit an Investigation Report for the Starmer/Upper Pajarito Canyon AA (*Id.* at ¶ 80);

12. Failure to timely complete the installation of monitoring well R-26i (*Id.* at ¶ 83);

---

1 To attempt to avoid any confusion, NWNM notes that its motions for summary judgment address only 15 of the 17 violations described in its Complaint, while NMED states that summary judgment is appropriate on 16 of those 17. The difference is that NWNM has asked for summary judgment on 15 of defendants' violations that were ongoing at the time NWNM filed its First Amended Complaint (Doc. 30). NWNM has not asked for summary judgment on DOE's and LANS's violation of the deadline for submission of the Investigative Work Plan for the Lower Water/Indio Canyon AA, while NMED sees that violation as ripe for summary judgment.

13. Failure to timely submit the Well Completion Summary Fact Sheet for monitoring well R-26i (*Id.* at ¶ 84);

14. Failure to timely submit the Well Completion Report for monitoring well R-26i (*Id.* at ¶ 85);

15. Failure to timely submit a RCR for MDA AB (*Id.* at ¶ 88);

16. Failure to submit an Investigation Report for the Chaquehui Canyon Aggregate Area (*Id.* at ¶ 91); and

17. Failure to timely submit a RCR for MDA G (*Id.* at ¶ 96).

As to all claims except number 8 above, NMED confirms that the described actions were not taken by defendants DOE and LANS. NMED MSJ, Doc. 91, at 2, 3. As to all claims except number 14 above, NMED confirms that the described actions or omissions were taken or omitted in violation of the deadlines set by the 2005 CO and any applicable extensions. DOE Answer, Doc. 77, at ¶ ¶ 54, 57, 60, 61, 62, 65, 68, 70, 74, 77, 80, 83, 84, 85, 88, 91.

According to the 2005 CO, DOE and the University of California and its successors "shall be jointly and severally responsible for, and liable for any failure to carry out, all their obligations under this Consent Order."[2] Further, NMED agrees that summary judgment is appropriate against defendants on 16 out of 17 of Plaintiff's claims (excepting only claim number 14 above of deadline violation for the submission of the RCR for MDA G, see below) for violations of RCRA prior to June 24, 2016. (MSJ at 4)[3]. Agreement between a RCRA citizen plaintiff and the RCRA regulator on the appropriate legal determination to be made is no small matter. The Court should act accordingly and grant NWNM's motions for summary

[2] https://www.env.nm.gov/HWB/documents/LANL_10-29-2012_Consent_Order_-_MODIFIED_10-29-2012.pdf at page 16 (as of 12/12/2018).

3 NMED does request, however, that the Court, for various reasons, defer imposing penalties for the violations. As discussed in NWNM's Response to New Mexico Environment Department's Motion for Summary Judgment, that request is factually and legally on unsound footing and should be denied.

judgment against DOE and LANS for RCRA violations prior to June 24, 2016 (Docs. 92, 94, *resp.*).

V. THE LAW FAVORS NWNM'S CLAIMS FOR CIVIL PENALTIES PRIOR TO JUNE 24, 2016.

A. 1. Fifteen Of Defendants' RCRA Violations Were Ongoing When Plaintiff Filed Its First Amended Complaint.

Plaintiff alleged in its First and Second Amended Complaints 17 specific violations: failures to timely submit 3 Remedy Completion Reports, to complete 2 monitoring wells and their associated reports (a total of 6 violations), to timely submit 7 Investigation Reports, and to timely submit 1 Investigation Work Plan. We discuss below the 15 violations that were ongoing when NWNM filed its First Amended Complaint citing these violations and requesting injunctive relief and the imposition of fines and penalties by the Court.

Remedy Completions and Reports

In two Material Disposal Areas cited by plaintiff in its Complaint, defendants DOE and LANS were required to complete implementation of a remedy and report the results to NMED: MDA A and MDA AB. The following table shows the deadlines for accomplishment of remediation of these contaminated areas and submission of the Remedy Completion Report (RCR) to NMED pursuant to the 2005 CO:

Material Disposal Area	RCR Due Date: 2005 CO[4]
MDA A	June 30, 2014
MDA AB	January 31, 2015

Neither LANS nor DOE has ever remediated either MDA A or MDA AB nor has either entity ever submitted a Remedy Completion Report for either MDA.

4 Due dates shown are pursuant to last approved extension request, if any, and are confirmed by NMED's Answer to Plaintiff's Second Amended Complaint (Doc. 77).

Given that NWNM's First Amended Complaint (Doc. 30) was filed on July 19, 2016 and specifically cited these two violations (*Id.*, at ¶ ¶ 54, 88), it is clear that these violations were ongoing at the time plaintiff asked the Court to enjoin the defendants for these violations and to impose penalties for the continuing violations. (*Id.*, at p. 28)

Groundwater Monitoring Wells

Plaintiff's First Amended Complaint also alleged violations relating to DOE's and LANS's failure to install required groundwater monitoring wells. Specifically, DOE and LANS failed to install either the regional groundwater monitoring well designated R-65 or the intermediate perched-aquifer monitoring well designated R-26i.

Neither LANS nor DOE ever installed monitoring wells R-65 and R-26i and, of course, did not submit the required Well Completion Summary Fact Sheets and Well Completion Reports. NMED MSJ, Concise Statement of Undisputed Material Facts, ¶ ¶ 3, 10; NMED Answer, at ¶ ¶ 61, 62, 84, 85. The due dates for installation of wells R-65 and R-26i under the 2005 CO, confirmed by NMED, were June 30, 2014 and December 31, 2014 respectively (Doc. 77, at ¶ ¶ 60, 83).

Given that NWNM's First Amended Complaint (Doc. 30) was filed on July 19, 2016 and specifically cited these two violations (*Id.*, at ¶ ¶ 60, 83), it is clear that these violations were ongoing at the time plaintiff asked the Court to enjoin the defendants for these violations and to impose penalties for the continuing violations. (*Id.*, at p. 28).

Investigative Field Work and Reports

Substantial investigative field work is necessary before the following table shows the deadlines for these fundamental investigations to be completed and reported on to NMED, in

both the 2005 CO and the 2016 Order, for seven of the Aggregate Areas where plaintiff, in its Complaint, had alleged violations by DOE and LANS:

Aggregate Area	Invest. Rpt. Due Date: 2005 CO
Cañon de Valle at TA-15	July 2, 2014
Lower Pajarito Canyon	July 31, 2014
Twomile Canyon	August 30, 2014
Cañon de Valle at TA-16	December 31, 2014
Upper Water Canyon	December 31, 2014
Starmer/Upper Pajarito Canyon	December 31, 2014
Chaquehui Canyon	March 31, 2015

To date, not one of these Investigation Reports has ever been submitted by LANS or DOE. Given that NWNM's First Amended Complaint (Doc. 30) was filed on July 19, 2016 and specifically cited these seven violations (*Id.*, at ¶ ¶ 57, 65, 68, 74, 80, 91) it is clear that these violations were ongoing at the time plaintiff asked the Court to enjoin the defendants for these violations and to impose penalties for the continuing violations. (*Id.*, at p. 28).

2. NWNM's Claims for Penalties for Violations that Were Ongoing at the Time of Filing Are Not Dismissible for Mootness.

Although the Court dismissed the portions of the NWNM complaint seeking equitable relief, the claims for civil penalties remain: "As the [United States] Courts of Appeals . . . have uniformly concluded, a polluter's voluntary postcomplaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties even if it is sufficient to moot a related claim for injunctive or declaratory relief." *Laidlaw Envtl. Servs.*, 528 U.S. at 196 (Stevens, J., concurring); *see also Atl. States Legal Found. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993) (a defendant's ability to show, after suit is filed but before judgment, that it has come into compliance does not render a citizen suit for civil penalties moot; they may still be imposed for

post-complaint violations and violations that were ongoing at the time suit was filed). While the Court has discretion regarding the amount of penalties, if any, to assess, the decision at this stage is a matter of law where the facts are indisputable. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728-31 (1996) ("Under our precedents, courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the Burford doctrine"). Despite LANS's attempt to get a second bite at the *Burford* apple, abstention is not appropriate where the equitable portions of the Complaint have been removed.

VI. ASSESSMENT OF PENALTIES AGAINST LANS IS APPROPRIATE GIVEN DOE'S AND LANS'S MULTI-YEAR PATTERN OF DELAY AND THEIR HISTORY OF CONTINUING RCRA NONCOMPLIANCE.

A. The DOE and LANS Patterns of Delay in Attempts to Avoid Compliance with the 2005 CO.

1. Overview.

Because it is important to document, for the purposes of this Response, the patterns of delay that DOE and LANS engaged in an attempt to evade compliance with the 2005 CO, we will document that history in detail, but we first provide a brief overview of what that evidence shows, and the consequences to date.

In two of the violations documented by NWNM in its Complaint, at Material Disposal Area ("MDA") A and MDA AB, DOE had performed necessary investigative work, a remedy had been selected and approved by NMED, and DOE had agreed to the deadline for accomplishing the remedy and for submitting the required Remedy Completion Report. Indeed, DOE even requested and received extensions of time for completion of the remedies and submission of the Reports. (Docs. 108-2 through 108-5, Corrected Exhibits 2 through 5 to

NWNM's MSJ (Doc. 93)). And, after the repeated extensions and repeated commitments, DOE and LANS delivered nothing. That is a pattern of delay. And the failure of DOE to do the required work and submit to NMED the required reports on completion of the work resulted in a serious, not a trivial outcome: the significant detriment to the public is not the lack of an expected piece of paper, it is the failure to have the chosen and agreed-upon environmental contamination remedy accomplished, a failure of the needed substantive cleanup. Plaintiff submits that no attempted redefinition can obscure the fact of that loss to public health and safety

DOE's and LANS's pattern of delay was also evident in its ultimate refusal to install two groundwater monitoring wells which had been deemed a high priority by the Martinez administration. As in the case of the remedies and Remedy Completion Reports for the Material Disposal Areas described above, DOE and LANS procured repeated extensions of the deadlines for installing those wells and, in the end, did nothing, exhibiting the same pattern of delay. The result is the same as for DOE's failure to remedy the contamination at MDA A and MDA AB: the significant loss to the public is not an additional document, but the fact that it suffered and continues to suffer the lack of the expected and agreed-upon groundwater contamination monitoring.

Finally, the same pattern of delay appears in DOE and LANS's response to its obligations to perform investigations and report the results in seven contaminated Aggregate Areas in numerous sensitive watersheds: obtain extension after extension for the work and, in the end, deliver nothing. The result is the same as for DOE's failure to remedy the contamination at MDA A and MDA AB: the significant loss to the public is not an additional document, but the fact that it suffered and continues to suffer the lack of the expected and agreed-upon remediation of the contaminated areas. We now consider this history in greater detail.

2. DOE's and LANS's Patterns of Delay in Detail for: 1) Actual Cleanup of two MDAs; 2) Actual Installation Two Groundwater Monitoring Wells; and 3) Actual Investigations of the Contaminated Aggregate Areas in Six Watersheds.

Remedy Completions and Reports

In two Material Disposal Areas cited by plaintiff in its Complaint, defendants DOE and LANS were required to complete implementation of a remedy and report the results to NMED: MDA A and MDA AB.

Under the 2005 Consent Order, DOE and LANS were scheduled to submit to NMED the Remedy Completion Report for MDA A at TA-21 (SWMU 21-014) on March 11, 2011. 2005 Consent Order § XII, Tables XII-2. Doc. 108-1, of NWNM's Corrected Exhibits for its Motion for Summary Judgment (Doc. 93) This report was recast as a "Phase II Investigation/Remediation Report," and the March 11, 2011 deadline was extended three times at the request of DOE and LANS, the last extended deadline being June 30, 2014 (Doc. 108-5; Doc. 77, at ¶ 54).

Yet when the time came for DOE and LANS to report on the remediation of the contaminated area, they produced nothing. That is a pattern of delay. As of this date, DOE and LANS have not submitted to NMED a Remedy Completion Report (or Phase II Investigation/Remediation Report) for MDA A. (NMED MSJ, at ¶ 1).

Under the 2005 Consent Order, DOE and LANS were scheduled to submit to NMED the Remedy Completion Report for MDA AB, Areas 1, 3, 4, 11, and 12 at TA-49 (SWMUs 49-001(a-g) and 49-003, and AOC C-49-008(d)) on January 31, 2015 (Doc. 108-44; Doc. 77, at ¶ 88).

Again, when the time came for DOE and LANS to report on the remediation of the contaminated area, they produced nothing. That is also a pattern of delay. As of this date, DOE

and LANS have not submitted to NMED a Remedy Completion Report for MDA AB, Areas 1, 3, 4, 11, and 12.

Groundwater Monitoring Wells

Plaintiff's Complaint also alleged violations relating to DOE's and LANS's failure to install required groundwater monitoring wells. Specifically, DOE and LANS failed to install either the regional groundwater monitoring well designated R-65 or the intermediate perched-aquifer monitoring well designated R-26i.

According to NMED's letter approving the Drilling Work Plan for Regional Aquifer Wells MW-14 (R-64) and MW-10 (R-65), dated March 18, 2011 (Doc. 108 -15), DOE and LANS were scheduled to complete the installation of monitoring Well R-65 into the regional aquifer by September 30, 2011. This deadline was extended five times at the request of DOE and LANS, the last extended deadline being June 30, 2014 (Doc. 108 -19; Doc. 77, at ¶ 60).

Yet when the last extended deadline ran for installing monitoring well R-65 and submitting the required Well Completion Summary Fact Sheet and Well Completion Report, DOE and LANS produced nothing. That is a pattern of delay. As of this date, DOE and LANS have not completed the installation of regional monitoring Well R-65 or submitted the Well Completion Summary Fact Sheet or the well Completion Report.

According to NMED's letter approving the Drilling Work Plan for Perched-Intermediate Well R-26i, dated August 8, 2012, DOE and LANS were scheduled to complete the installation of monitoring Well R-26i into the intermediate perched aquifer by October 31, 2013. (Doc. 108-39). This deadline was extended twice at the request of DOE and LANS, the last extended deadline being December 31, 2014 (Doc. 108-42; Doc. 77, at ¶ 85).

Again, when the last extended deadline ran for installing monitoring well R-26i and submitting the required Well Completion Summary Fact Sheet and Well Completion Report, DOE and LANS produced nothing. That is a pattern of delay. As of this date, DOE and LANS have not completed the installation monitoring Well R-26i.

Investigative Field Work and Reports

Substantial investigative field work is necessary before an informed selection of remedy can be made for a contaminated area and then implemented. NWNM alleged that DOE and LANS had failed to timely submit required Investigation Reports for seven Aggregate Areas: 1) the Cañon de Valle AA at TA-15; 2) the Lower Pajarito Canyon AA; 3) the Twomile Canyon AA; 4) the Cañon de Valle AA at TA-16; 5) the Upper Water Canyon AA; 6) the Starmer/Upper Pajarito Canyon AA; and 7) the Chaquehui Canyon AA. (Doc. 42, ¶ ¶ 57, 65, 68, 74, 77, 80, 91, *resp.*). We will consider the extensions history of each of these separately.

According to NMED's letter approving the Investigation Work Plan for the Cañon de Valle Aggregate Area, dated February 9, 2007, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Cañon de Valle Aggregate Area at TA-15 on June 15, 2012. Doc. 108-7. This deadline was extended twice at the request of DOE and LANS, the last extended deadline being July 2, 2014 (Doc. 108-12; Doc. 77, at 57).

Yet when the last deadline ran for doing the investigatory work and submitting the required Report, DOE and LANS produced nothing. That is a pattern of delay. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Cañon de Valle Aggregate Area at TA-15.

According to NMED's letter approving the Investigation Work Plan for the Lower Pajarito Canyon Aggregate Area, dated December 8, 2010, DOE and LANS were scheduled to

submit to NMED the Investigation Report for the Lower Pajarito Canyon Aggregate Area on July 31, 2012. This deadline was extended once at the request of DOE and LANS, to July 31, 2014 (Doc. 108-24; Doc. 77, at 65).

Yet when the extended deadline ran for doing the investigatory work and submitting the required Report, DOE and LANS produced nothing. That is a pattern of delay. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Lower Pajarito Canyon Aggregate Area.

According to the approved Investigation Work Plan for the Twomile Canyon Aggregate Area, dated January 31, 2010, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Twomile Canyon Aggregate Area on August 15, 2012. (Doc. 108-25). This deadline was extended twice at the request of DOE and LANS, the last extended being August 30, 2014 (Doc. 108-27; Doc. 7, at ¶ 68).

Yet when the last extended deadline ran for doing the investigatory work and submitting the required Report, DOE and LANS produced nothing. That is a pattern of delay. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Twomile Canyon Aggregate Area.

According to NMED's letter approving the Investigation Work Plan for the Cañon de Valle Aggregate Area, dated February 9, 2007, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Cañon de Valle Aggregate Area at TA-16 on December 15, 2012. This deadline was extended once at the request of DOE and LANS, to December 15, 2014 (Doc. 108 -29; Doc. 77, at 74).

And when the last deadline ran for doing the investigatory work and submitting the required Report, DOE and LANS produced nothing. That is a pattern of delay, and it was

considered so by NMED, which found: 1) that no good excuse existed for DOE and LANS's failure to do the required work and report the results (Doc. 108-30); and 2) that DOE and LANS's failures were egregious enough that it was taking the extraordinary step of notifying them that it intended to seek stipulated penalties for those violations (*Id.*). The date of this Notice of Intent to Seek Stipulated Penalties, March 5, 2015, demonstrates conclusively that LANS's contention that "by 2012 NMED avoided enforcing the 2005 Order because the parties viewed it as increasingly inefficient," is false – that, in fact, "as late as 2014 and 2015, NMED *was* enforcing the 2005 Order against LANS and DOE, finding no good cause to extend certain deadlines..." MO&O, at 32 (emphasis in original).[5] As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Cañon de Valle Aggregate Area at TA-16.

According to NMED's letter directing DOE and LANS to modify the Upper Water Canyon Investigation Work Plan (Revision 1), dated February 18, 2011, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Upper Water Canyon Aggregate Area on December 31, 2012. Doc. 108-31. This deadline was extended once at the request of DOE and LANS to December 31, 2014 (Doc. 108-33; Doc. 77, at 77).

And when the last deadline ran for doing the investigatory work and submitting the required Report passed, just as in the Cañon de Valle Aggregate Area at TA-16 case above, DOE and LANS produced nothing. That is a pattern of delay, and it was considered so by NMED,

5 Unfortunately, NMED's attempts at enforcing the requirements of the 2005 CO were ineffective – in only one case out of the 17 violations discussed herein was NMED able, even with the threat of stipulated penalties, to get DOE and LANS to perform their obligations, even belatedly, before NWNM's First Amended Complaint (Doc. 30) was filed, citing these violations. In no case did NMED actually prosecute DOE and LANS, in court, for those violations. Such an actual prosecution, in a court of law, is necessary before NMED can be deemed to have "diligently prosecuted" the violations for the purpose of determining under what circumstances regulatory agency action can bar RCRA citizens' suits. *See, e.g., Sierra Club v. Chem. Handling Corp.*, Civil Action No. 91-C-1074, 1992 U.S. Dist. LEXIS 21791, at *14-15 (D. Colo. Apr. 8, 1992) (the RCRA, 42 USC § 6972(b)(1)(B), bars a citizen suit when the State is "diligently prosecuting" a civil or criminal action *in a Court of the United State or a State* -- and this does not include an out of court settlement between the facility operator and the state).

which found: 1) that no good excuse existed for DOE and LANS's failure to do the required work and report the results (Doc. 108-34); and 2) that DOE and LANS's failures were egregious enough that it was taking the extraordinary step of notifying them that it intended to seek stipulated penalties for those violations (*Id.*). The date of this Notice of Intent to Seek Stipulated Penalties, March 13, 2015 is even later than the Cañon de Valle Aggregate Area at TA-16 Notice, and demonstrates again that LANS is wrong and NMED *was* enforcing the 2005 Order against it and DOE. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Upper Water Canyon Aggregate Area.

According to NMED's letter approving the Investigation Work Plan for the Starmer/Upper Pajarito Canyon Aggregate Area, dated March 29, 2011, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Starmer/Upper Pajarito Canyon Aggregate Area on December 31, 2012. (Doc. 108-35). This deadline was extended once at the request of DOE and LANS, to December 31, 2014 (Doc. 108-37; Doc. 77, at ¶ 80).

And again, when the last deadline ran for doing the investigatory work and submitting the required Report, DOE and LANS produced nothing. That again, is a pattern of delay, and it was considered so by NMED, which found: 1) that no good excuse existed for DOE and LANS's failure to do the required work and report the results (Doc. 108-38); and 2) that DOE and LANS's failures were egregious enough that it was taking the extraordinary step of notifying them that it intended to seek stipulated penalties for those violations. *Id.* The date of this Notice of Intent to Seek Stipulated Penalties, March 16, 2015, is even later than the two previous examples and again, demonstrates conclusively that as late into 2015 as this Notice, NMED *was* enforcing the 2005 Order against LANS and DOE. As of this date, DOE and LANS have not

submitted to NMED an Investigation Report for the Starmer/Upper Pajarito Canyon Aggregate Area.

According to the approved Revised Investigation Work Plan for the Chaquehui Canyon Aggregate Area, dated November 1, 2010, DOE and LANS were scheduled to submit to NMED the Investigation Report for the Chaquehui Canyon Aggregate Area on March 31, 2013. This deadline was extended once at the request of DOE and LANS, to March 31, 2015 (Doc. 108-47; Doc. 77, at 91).

And again, when the extended deadline ran for doing the investigatory work and submitting the required Report, DOE and LANS produced nothing. That again, is a pattern of delay, and it was considered so by NMED, which found: 1) that no good excuse existed for DOE and LANS's failure to do the required work and report the results (Doc. 108-48); and 2) that DOE and LANS's failures were egregious enough that it was taking the extraordinary step of notifying them that it intended to seek stipulated penalties for those violations (*Id.*). The date of this Notice of Intent to Seek Stipulated Penalties, April 15, 205, is even later than the three previous examples and again, demonstrates conclusively that as late into 2015 as this Notice, NMED *was* enforcing the 2005 Order against LANS and DOE. As of this date, DOE and LANS have not submitted to NMED an Investigation Report for the Chaquehui Canyon Aggregate Area.

Under the 2005 Consent Order, DOE and LANS were scheduled to submit to NMED the Investigation Work Plan for the Lower Water/Indio Canyon Aggregate Area on September 30, 2012. This deadline was extended once at the request of DOE and LANS, to September 30, 2014 (Doc. 78, at 70). On June 23, 2016, the day before effective date of the 2016 Order, and LANS submitted an Investigation Work Plan for the Lower Water/Indio Canyon Aggregate

Area. MSJ, at ¶ 6. The submission by DOE and LANS was 20 months late, but this represents the best performance by them as to the thirteen discussed requirements and violations. When that totality of circumstances is considered, there can be no reasonable doubt that DOE and LANS engaged in a multi-year pattern of delay in an attempt to avoid ultimate compliance with the requirements of the 2005 CO.

But DOE's and LANS's history of RCRA noncompliance extends far beyond the dozen-plus violations of the 2005 CO cited by NWNM in its Complaint. There are two other relevant histories. One is the history of the many violations of the 2005 CO by DOE and LANS which were not cited by plaintiff in its Complaint, but were documented in detail by NMED. We will discuss that history below. Also highly relevant is the history of DOE's and LANS's RCRA noncompliance in areas not covered by the 2005 CO, but which likewise have been fully documented both by NMED, and by DOE and LANS through the required annual self-reporting of violations. We will also discuss that history below.

3. LANS's Claimed Excuses Are Unpersuasive and Legally Ineffective.

LANS, through the opinions of Randall Erickson, as expressed in his Declaration in Support of LANS's MSJ (Doc. 101-2), finds numerous reasons why LANS is not responsible for the 2005 CO violations. One of his opinions is that "the 2005 Order failed in a primary objective of compelling increased funding for the cleanup of the Laboratory's environmental legacy."

In fact, the 2005 CO cannot be said to have "failed" in an attempt to increase cleanup budgets by the imposition of enforceable deadlines because the question was never put to the test: NMED, despite its repeated threats to do so, never imposed fines and penalties against DOE and LANS for the violations of the 2005 CO cited by NWNM. Alvarez Declaration, at ¶ 12. In Mr. Alvarez's experience, the imposition of fines and penalties pursuant to enforceable cleanup

deadlines has been effective in securing additional cleanup funds beyond those that would have been obtained had those enforceable deadlines not been in place. *Id.*

Further, because the sites in the nuclear weapons complex operate under cost-plus contracts, providing incentives to the Energy Department to reduce safety costs, legally binding environmental enforcement requirements imposed by states with legal authority outside of DOE's system of self –regulation are the most effective counter. *Id.,* at ¶ 13.

Mr. Erickson at ¶ 26 of his declaration, also expresses the opinion that, during the period 2014 to 2018, "LANS had no influence or control over the funding requested by Congress for LANL's legacy waste cleanup each fiscal year." That is implausible. As Mr. Alvarez points out, and noted by the Government Accountability Office:

> "…DOE must respond to Executive Order 12088, which directs executive agencies to ensure that they request sufficient funds to comply with pollution control standards. Accordingly, each year DOE's sites develop budget estimates that also identify the amount needed to meet compliance requirements."[6]

These budget estimates for compliance are prepared, in the first instance, by DOE's LANL contractor, and Mr. Alvarez's experience, LANS and previous LANL contractors have always had a great deal of influence over DOE's prioritization of programs and requested. *Id.,* at ¶ 15.

4. Violations of the 2005 CO By DOE and LANS, Not Cited in Plaintiff's Complaint But Documented by NMED.

NWNM notes that DOE and LANS were cited by NMED for many violations of the 2005 CO which Plaintiff did not cite in its Complaint, but which are highly relevant to the true extent of the history of RCRA noncompliance by DOE and LANS at LANL, certainly one factor in determining whether violations, and patterns of delay, may occur in the future. The violations cited by plaintiff were common, not unique. A limited list of other 2005 CO violations existing

6 Op Cit. Ref 5, P. 10

on June 23, 2016, shows the extent of DOE's non-compliance, and is surely relevant to the question of whether DOE's non-compliance is likely to recur.

See footnote 10, *infra*, referencing the complete table.

A. Additional Remedy Completion Report (RCR) submission Violations:

Aggregate Area	Last Extended IR Deadline	Submitted by 6/23/16
MDA C	No extensions	No

B. Additional Investigation Report Submission Violations:

Aggregate Area	Last Extended IR Deadline	Submitted by 6/23/16
DP Site	December 31, 2014	No
Upper Los Alamos Canyon	June 30, 2104	No
Middle Los Alamos Canyon	January 19, 2008	No
Upper Mortendad Canyon	January 31, 2015	No
Upper Canada del Buey	December 28, 2014	No
Lower Mortandad/Cedro Canyon.	June 23, 2012	No
Water Canyon/Canyon de Valle	January 31, 2015	No
S-Site	September 15, 2014	No
Sandia Canyon	July 31, 2012	No
Lower Sandia Canyon	June 30, 2014	No
TA-57 Canyon	December 31, 2014	No
Potrillo/Fence Canyon	June 30, 2014	No
North Ancho	September 30, 2014	No

C. Additional Investigation Work Plans Submissions Violations:

Aggregate Area	Last Extended IR Deadline	Submitted by 6/23/16
Potrillo/Fence Canyon	June 30, 2014	No
North Ancho	September 30, 2015	No

5. DOE and LANS requested and obtained from NMED over 160 extensions of deadlines for compliance with the requirements of the 2005 CO.

In assessing the breadth and depth of the patterns of delay engaged in by DOE and LANS to attempt to avoid ultimate compliance with the requirements of the 2005 CO, the number of

extensions requested and obtained for extensions of deadlines for requirements of the CO is certainly relevant. The list, available at the NMED website[7], is both informative and authoritative and is incorporated herein by reference.

In all, more than 160 extensions of 2005 CO deadlines were requested by DOE and LANL and approved by NMED. This extensive effort, engaged in by DOE and LANL for years, to attempt to ultimately avoid the requirements of the 2005 CO, was unfortunately extremely successful. NMED now relies on the 2016 CO to conclude that the cleanup requirements of the 2005 CO, which NMED attempted to enforce as late as April 15, 2015 as priorities of the Martinez administration, are now of low priority, deserving of few resources, and, with one exception, appropriately not appearing on either an enforceable Milestone list or a non-enforceable Target date list.

6. Violations of RCRA at LANL By DOE and LANS, Documented by DOE's and LANS's Own Self-reporting.

DOE and LANS were required, by the provisions of LANL's Hazardous Waste Permit, Sections 1.9.13 and 1.9.14, to report instances of noncompliance and releases. *See, e.g.*, DOE's and LANS's "Fiscal Year 2011 Reporting of Instances of Noncompliance and Releases - Los Alamos National Laboratory Hazardous Waste Facility Permit" ("RINRS") at page 2.[8] Specifically, these sections require reporting of "any release from or at a permitted unit that the Permittees do not deem a threat to human health or the environment", and "all instances of noncompliance" with the Permit that are not already reported. The report must be submitted by December 1 of each year. *Id.*

7 https://www.env.nm.gov/HWB/documents/LANL_Consent_Order_Extensions_5-3-2016.pdf (as of 12/12/2018).

8 https://permalink.lanl.gov/object/tr?what=info:lanl-repo/eprr/ERID-208370 (as of 12/12/2018).

The following table shows the number of RCRA violations DOE and LANS self-reported as having occurred in the listed fiscal years (the titles of the fiscal year reports are abbreviated):

Fiscal Year Viols Occurred	No. of RCRA Violations	Source
2011	12	RINR 2011[9]
2012	14	RINR 2012[10]
2013	193	RINR 2013[11]
2014	76	RINR 2014[12]
2015	421	RINR 2015[13]
2016	107	RINR 2016[14]
2017	25	RINR 2017[15]

These data show that DOE and LANS's self-reported RCRA violations began to skyrocket after 2012, reaching a total number of self-reported violations of 421 in FY 2015. That is a pattern and a history of noncompliance, as the regulator recognized.

Finally, NWNM notes, as merely the latest example of the documentation of the history of DOE's and LANS's RCRA noncompliance, that NMED issued a Notice of Violation to DOE and LANS as late as March 13, 2018 (NMED ID ESHID-602962), finding that DOE and LANS have committed numerous failures to properly store hazardous waste. The language of the Notice was in complete agreement with previous determinations, finding that, "Due to the nature and severity of the violations listed above, and LANL's past history of noncompliance, NMED will propose a civil penalty for these violations in the Notice of Proposed Penalty Letter." *Id.*

[9] *Id.*

[10] https://permalink.lanl.gov/object/tr?what=info:lanl-repo/eprr/ERID-232286 (as of 12/12/2018).

[11] https://permalink.lanl.gov/object/tr?what=info:lanl-repo/eprr/ERID-251534 (as of 12/12/2018).

[12] https://permalink.lanl.gov/object/tr?what=info:lanl-repo/eprr/ESHID-600049 (as of 12/12/2018).

[13] https://permalink.lanl.gov/object/tr?what=info:lanl-repo/eprr/ESHID-601071 (as of 12/12/ 2018)

[14] https://permalink.lanl.gov/object/tr?what=info:lanl-repo/eprr/ESHID-602018 (as of 12/12/2018)

[15] https://permalink.lanl.gov/object/tr?what=info:lanl-repo/eprr/ESHID-602740 (as of 12/12/2018)

7. Regulator NMED's recognition of DOE's and LANS's history of noncompliance.

NMED's expressions of optimism that DOE and its LANL contractor will avoid RCRA violations in the future is not supported by the actions and writings of its professional staff implementing RCRA permit regulation every day at LANL. Rather, NMED has consistently expressed in formal Notices of Violation to DOE and LANS, from at least March 2015 to October 2018, that these defendants' continuing "history of noncompliance" requires formal violation sanctions. For examples from 2015 regarding violations of the 2005 CO, see plaintiff's Exhibits E-30, E34, E-38, and E-48 (Docs. 108-30, 108-34, 108-38, 108-48, *resp.*) to NWNM's Memorandum in Support of Motion for Partial Summary Judgment Against DOE (Doc. 93). Indeed, NMED, in eleven cases of violations under the 2005 CO, admonished DOE and LANL that it granted extensions of deadlines for required work because in the January 2012 Framework Agreement the Permittees had committed to progress in the areas the Martinez administration prioritized: groundwater and surface water protection, and accelerated removal of radioactive transuranic (TRU) waste from MDA G. Doc.108-4, re MDA A; Doc. 108-11, re the Cañon de Valle at TA-15 AA; Doc. 108-17, re monitoring well R-65 and its associated Well Completion Summary Fact Sheet and Well Completion Report; Doc. 108-23, re the Lower Pajarito Canyon AA; Doc. 108-26, re the Twomile Canyon AA; Doc. 108-28, re the Cañon de Valle at TA-16 AA; Doc. 108-32, re the Upper Water Canyon AA; Doc. 108-36, re the Starmer/Upper Pajaroto Canyon AA; Doc. 108-40, re monitoring well R-26i and its associated Well Summary Fact Sheet and Well Completion Report; Doc. 108-45, re MDA AB; and Doc. 108-46, re the Chaquehui Canyon AA.

In fact, DOE and LANS, instead of progressing on acceleration of TRU waste from MDA G, violated RCRA remediation, packing, and labeling requirements, resulting in an explosion of

one of the TRU drums shipped by DOE and LANS to the WIPP facility on February 14, 2014, contaminating the facility, requiring its closure for four years, adding over a billion dollars in additional for expense for DOE's TRU waste cleanup program and halting all shipments of TRU waste from LANL until August 2018. Rhodes Declaration (Doc. 101-2, at ¶ 12).

Nor did DOE and LANS progress in protection of groundwater or surface water, failing to install monitoring wells R-65 and R-26i, and failing to perform required investigations and report the results for Aggregate Areas in numerous watersheds. As a consequence, NMED denied further extensions for the above deadlines, specifically stating that DOE's and LANS's admissions that they could not perform under the Framework Agreement had removed the sole justification for those extensions. Docs, 108-5, 108-12, 108-19, 108-24, 108-28, 108-33, 108-37, 108-42, 108-45, and 108-47, *resp*. The language of Doc. 108-5 is typical:

> NMED has granted extensions based on the Permittees' need to divert resources to remove transuranic waste in accordance with the Framework Agreement. Based on the Permittees' statement that they will not be able to meet the deadlines committed to in the Framework Agreement, the rquest is hereby denied.

Id. In four of the cases mentioned, NMED found DOE's and LANS's continued failure to perform as required even after the last requested extension had been clearly denied, to be sufficiently egregious as to justify the imposition of stipulated penalties, and it formally declared its intent to levy the same against DOE and LANS. Docs. 108-30, re the Cañon de Valle at TA-15 AA; 108-34, re the Upper Water Canyon AA; 108-38, re the Starmer/Upper Pajarito AA; and 108-48, re the Chaquehui Canyon AA.

B. LANS's Argument that Assessing Penalties Would Have No Deterrence Rationale is Wrong, Because a Member of the LANS Group, BWXT, is Still a Cleanup Contractor at LANL.

LANS claims at p. 13 of its Memorandum, with respect to the imposition of penalties, that since "[t]he alleged violations by LANS cannot recur," "[t]here is absolutely no deterrence rationale to support such penalties." That argument is wrong in the general and in the particular.

First, it is generally wrong because there is deterrence value on others by the imposition of fines and penalties for violations of RCRA, including on DOE and on any DOE contractor responsible for the generation, handling, packaging, shipping, and disposal of hazardous waste and mixed waste, and the remediation and monitoring of contaminated and threatened areas at LANL. Declaration of Robert Alvarez, at ¶ 9.

The argument is also incorrect in the particular because a partner of LANS LLC is also a current DOE cleanup contractor at LANL. Specifically, the new Environmental Management contractor is 3MB, a consortium which includes BWXT Technical Services Group, Inc., the same entity that was a partner in LANS. *Id.*; see N3B, Executive Summary at http://n3b-la.com/executive-summary/; *see also* LANS Prime Contract, Appendix A page 8-9 (PDF pages 253-54), Unofficial Conformed Copy as of 10/12/17 through Mod No. 400.

VII. LANS'S *BURFORD* AND PRIMARY JURISDICTION DOCTRINES ARGUMENTS OFFER NOTHING NEW AND CANNOT AFFECT NWNM'S LEGAL, AS OPPOSED TO ITS EQUITABLE, CLAIMS.

NWNM notes that after this Court's decision, Memorandum Opinion and Order (ECF No. 70), to dismiss the equitable relief portions of the NWNM Complaint, what remains is a case at law for damages: violations of the RCRA and appropriate penalties. Although the Court has discretion regarding the amount of penalties to assess, if any, the decision at this stage is a matter of law where the facts are indisputable. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706,

728-31 (1996) ("Under our precedents, courts have the power to dismiss or remand cases based on abstention principles *only* where the relief being sought is equitable or otherwise discretionary") (emphasis added). In a recent decision in the 10th Circuit a District Court did apply Burford abstention and primary jurisdiction in a RCRA case. *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194 (W.D. Okla. 2017). As application of these principles involved equitable consideration of comity, the Court noted that plaintiff Sierra Club was only seeking equitable relief (injunctive and declaratory), and that the matter at issue, quite distinct from that in the case at bar, involved complex scientific questions, the existence of state statutes related to the subject matter, and an agency specially equipped to deal with the issues raised. *See Id.* at 1203 (Court's first consideration in taking *Burford* abstention was that the "plaintiff has only requested declaratory and injunctive relief in its amended pleading" and, thus, "the court is 'sitting in equity' for purposes of plaintiff's RCRA action"); as to the considerations for rejecting primary jurisdiction, *see generally Id*. at 1205-08. Moreover, even within the ambit of factors to be considered in taking Burford abstention, such a course is inappropriate.

The United States Court of Appeals for the First Circuit, in deciding that a district court had erred in dismissing a case using *Burford* abstention, there are three criteria that must be met to warrant abstaining from exercising the court's congressionally conferred jurisdiction under the statute: "(1) the availability of timely and adequate state-court review, (2) the potential that federal court jurisdiction over the suit will interfere with state administrative policymaking, and (3) whether conflict with state proceedings can be avoided by careful management of the federal case." *Chico Serv. Station, Inc. v. SOL P.R. Ltd.*, 633 F.3d 20, 32 (1st Cir. 2011); see also, *Sierra Club v. Chem. Handling Corp*., Civil Action No. 91-C-1074, 1992 U.S. Dist. LEXIS 21791, at *15-16 (D. Colo. Apr. 8, 1992) (referencing the invocation of Burford abstention, all forms of

abstention are the exception, not the rule, and only exceptional circumstances, where "resort to state proceedings clearly serves an important countervailing interest" warrant the use of abstention). The RCRA dictates the content and standards of a state's hazardous waste program. *Chico Serv. Station, Inc.* 633 F.3d at 33.

The RCRA only provides the state with the discretion to "enact regulations no less stringent than those developed by the EPA." *Id.* Therefore, questions of law in a RCRA case will be "only marginally" questions of New Mexico law, "with a strong federal cast." *Id.* They will not be of any special difficulty as, "Federal courts regularly interpret EPA regulations" and those courts have an "affirmative interest in ensuring that corresponding state regulations are interpreted in a consistent manner." *Id.; see also Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 973-74 (7th Cir. 2002). Furthermore, the RCRA was enacted because Congress wanted to enact a *national* policy regulating hazardous waste disposal that would be consistent and provide federal control over state and or local decisions regarding hazardous waste disposal. *Chico Serv. Station, Inc.*, 633 F.3d at 32-33. Thus, rather than there being a concern with allowing states and localities to craft their own policies, the purpose of the RCRA was to avoid the situation where reviews of fifty different state agencies with fifty different sets of statutes and regulations would "ensure non-uniformity" in the enforcement and interpretation of hazardous waste laws and regulations. *Id.* at 33 (quoting from *County of Suffolk v. Long Island Lighting Co.*, 907 F. 2d 1295, 1310 (2d Cir. 1990)).

Applying the First Circuit's tests here, first, there is no timely and adequate state-court review available for the violations alleged in the Complaint. If there ever was, the proverbial ship would have sailed in most cases within 30 days of any final order or decision on each violation. Such orders do not exist in this case under the circumstances set forth in NWNM's

complaint. Second, also based upon the facts in the complaint, there is no "administrative policymaking" in which this Court's actions on the issue would interfere. This is a RCRA case involving penalties for violations that will likely continue. Whether under the state law (where the state has completely abdicated its responsibility to enforce RCRA on the penalties at issue) or the RCRA, there is no policymaking going on. Finally, again, no party has or could allege that there is a parallel state proceeding in which this Court's actions would interfere.

Therefore, abstention of any kind was not and is not appropriate for this case. Thus, neither *Burford* abstention nor primary jurisdiction would be appropriate, given that the current does not turn on equitable relief or considerations of comity.

VIII. NWNM AGREES WITH LANS THAT THE LATEST DAY FOR APPLICATION OF CIVIL PENALTIES FOR ITS VIOLATIONS IS JUNE 23, 2016.

As noted, the Court's decision in its MO&O dismissed NWNM's claims for injunctive relief because it found the 2016 Order's provisions controlled and mooted all of plaintiff's claims after the effective date of the 2016 Order – June 24, 2016. Plaintiff NWNM therefore agrees that the last day for application of civil penalties against LANS would be the preceding day, June 23 2016.

IX. NWNM'S CLAIM FOR ATTORNEYS' FEES AND COSTS IS DIRECTLY SUPPORTED BY STATUTE.

NWNM seventh claim provided for attorney's fees and costs in its complaint. LANS argues that this is not appropriate given the repetition in the prayer for relief. LANS offered no foundation for its claim that NWNM's Seventh Claim should be dismissed due to the repetition. In a CERLA contribution case, the court held that the complaint -- which contains both a count for contribution based on the statute repeated in the prayer for relief -- was well pleaded and withstood a Rule 12(b) motion. *See generally, Lone Star Industries, Inc. v. Horman Family*

Trust, 960 F. 2d 917 (10th Cir. 1992). NWNM contends there is likely no merit to LANS's unsupported argument and it must fail.

X. SUMMARY AND CONCLUSIONS.

As NMED agrees, summary judgment against LANS is appropriate on 15 of plaintiff's 17 claims in its Second Amended Complaint. Plaintiff disagrees with LANS that its mootness arguments can be sufficient to require dismissal of claims for violations that were ongoing when NWNM filed its First Amended Complaint. Plaintiff also does not agree that LANS's argument that assessing penalties would have no deterrence rationale, because a member of the LANS group, BWXT Technical Services, Inc., is still a cleanup contractor at LANL as a partner in the consortium N3B.

NWNM further disagrees with LANS's B*urford* and primary jurisdiction arguments for dismissal or abstention, which offer nothing new and cannot affect NWNM's legal claims for fines and penalties, as opposed to its equitable claims.

Plaintiff agrees with LANS that the last day for application of penalties to it for violations of the 2005 Consent Order is June 23, 2016.

Finally, LANS has offered no foundation for its claim that NWNM's Seventh Claim in its Complaint should be dismissed because it also appears as part of a prayer for relief. NWNM's Seventh Claim is founded directly on federal statutory law, and it is procedurally valid.

LANS's MSJ should therefore be denied, and NWNM's motions for summary judgment against DOE and LANS for liability for civil penalties for violations prior to June 24, 2016 (Docs. 92, 94) should be granted, so that this portion of the case can move expeditiously to the penalties determination phase.

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 Plaintiff Nuclear Watch New Mexico

CERTIFICATE OF SERVICE

On this 12th day of December 2018, the undersigned Jonathan M. Block filed with the Court and served on the parties of record the foregoing *Nuclear Watch New Mexico's Response To Defendant Los Alamos National Security LLC's Motion For Summary Judgment* by means of the Court's CM/ECF filing system.

_____
Joanthan M. Block