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
MOTION FOR SUMMARY JUDGMENT
BY DEFENDANT U.S. DEPARTMENT OF ENERGY

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I. INTRODUCTION.

Plaintiff Nuclear Watch New Mexico ("NWNM") hereby responds to DOE's Opposed Motion for Summary Judgment (Doc. 101) ("MSJ"), filed by the United States Department of Energy ("DOE"), and the accompanying Memorandum in Support (Doc. 101-1) ("MEM").

DOE attempts to address a single issue in its MSJ: the problem with its mootness defense that the Court noted in its Memorandum Opinion and Order ("MO&O") (Doc. 70, at 33). There, the Court declined to dismiss NWNM's claims for civil penalties for RCRA violations because defendants DOE and Los Alamos National Security LLC ("LANS") had not sufficiently explained why those claims didn't fall within the "voluntary cessation" exception to mootness. (*Id.*, at 33; MEM, at 2). DOE's response to this problem is to claim that:

1. DOE did not "just cease" the conduct that violated the CO, the Order itself was replaced, changing the requirements;

2. No DOE recurrence of the previous violations is possible because its obligations under the 2016 Order on Consent ("2016 Order") are, by definition, different from its obligations under the 2005 Consent Order ("2005 CO"); and

3. The 2016 Order adopts a more flexible approach to cleanup requirements, so the possibility of future violations by DOE is nothing but a "speculative contingency." MEM, at 3.

Therefore, DOE concludes, the Court should dismiss NWNM's claims as moot. *Id.*

NWNM will address these arguments 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 DOE's Statement of Material Facts.

NWNM agrees with the following numbered statements from DOE's Statement of Material Facts: 1and 2; 4 through 6.

NWNM disagrees with Statement 3, which is:

> In 2011, as a result of the Las Conchas wildfire, the Governor of New Mexico requested that DOE change the priorities under the 2005 Consent Order. DOE agreed to this request and, in 2012, NMED and DOE entered into a non-binding Framework Agreement that realigned priorities. The change in priorities, however, impaired DOE's ability to meet the schedule in the 2005 Order. DOE's ability to comply was also affected by funding reductions and technical challenges, including complex geology and waste volumes exceeding original estimates.

Specifically, NWNM disagrees with the subjective evaluation that the change in priorities in the Framework Agreement "impaired DOE's ability to meet the schedule in the 2005 Order" and that "DOE's ability to comply was also affected by funding reductions and technical challenges, including complex geology and waste volumes exceeding original estimates."

The funding reduction claim appears to be based on the opinion of DOE Declarant David Rhodes as expressed in his declaration (Doc. 101-2) that the most significant reason for DOE's failure to meet the 2005 CO deadlines was "inadequate funding, evidenced by Congressional action to reduce the President's Fiscal Year (FY) 2012 LANL cleanup budget request by half." Rhodes Declaration, at par. 10.

This statement by Mr. Rhodes does not address the actual basis for the decision by the U.S. Congress to reduce funding for environmental cleanup activities in Fiscal year 2012. According to the House Energy and Water Committee, the cut in funds was due to the failure of DOE and its contractor "to obtain necessary permits, failure to meet safety milestones," and most significantly, the fact that "the Department has yet to develop a comprehensive plan for cleanup

of legacy waste at Los Alamos National Laboratory." Declaration of Robert Alvarez in Support of Nuclear Watch New Mexico's Response to U.S. Department of Energy's Motion for Summary Judgment, at par. 14.

NWNM also disagrees with the last sentence, "DOE's ability to comply was also affected by funding reductions and technical challenges, including complex geology and waste volumes exceeding original estimates." Having already discussed the alleged funding reduction excuse above, we take up the claim that DOE's ability to comply was also affected by "technical challenges, including complex geology and waste volumes exceeding original estimates." As far back as 2007, DOE and LANL were made aware of the shortcomings of the LANL cleanup characterization by a special panel of the National Academies of Sciences. The Committee found that DOE and LANL were not fulfilling the requirement already made in the 2005 CO by recommending that LANL should complete the characterization of major contaminant disposal sites and their inventories. Alvarez Declaration, at par. 13. At any rate, the root causes of DOE's failures to comply with the 2005 CO are certainly not undisputed facts, but rather ones NWNM is prepared to contest at hearing.

B. Additional Undisputed Material Facts Relevant to DOE's Motion.

Plaintiff NWNM submits the following list of additional facts which are relevant and material to the claims made by NMED 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:

No.	Support
1.	Declaration of David S. Rhodes (Doc. 101-22) at ¶¶ 24, 44, 48, re DOE MSJ (Doc. 100).
2.	*Id.*, at ¶¶ 28, 42.
3.	*Id.*, at ¶¶ 26, 30, 32, 36, 38, 40, 42.
4.	*Id.*, at ¶ 46.

IV. DOE'S ATTACK ON THE LAIDLAW "VOLUNTARY CESSATION" EXCEPTION TO MOOTNESS IS CONTRARY TO LAW AND WILL NOT WITHSTAND SCRUTINY

The applicable standard in this case for the defendants' burden in demonstrating that there will not be continued delays in the clean-up of legacy waste at LANL is the one articulated in the Court's MO&O, that is, defendants must demonstrate that it is, "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at p. 31. DOE's advocating for a "reasonably expected" standard is not acceptable. It is a major change from the law of the case in the Court's MO&O. It requires a motion to the Court to reconsider its decision under Rule 59(e). A motion for summary judgment is not the appropriate place to argue for a change in the law of the case. "[W]hen a court has ruled on an issue, that decision should

generally be adhered to by that court in subsequent stages in the same case." *Prisco v. A & D Carting Corp*., 168 F.3d 593, 607 (2d Cir. 1999) (quoting *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991)). At this stage of the proceeding, were the Court to suddenly decide to dilute the *Laidlaw* standard for proof of non-recurrence of the violations, NWNM would have had no advance notice of the Court's decision on that important issue controlling the proof required from the defendants (and, where it joins them, the intervenor). *Id.* That would be highly prejudicial to NWNM.

Moreover, 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) (courts have the power to dismiss or remand cases based on abstention principles *only* where the relief being sought is equitable or otherwise discretionary; applying *Burford* abstention to a damages action is unwarranted). NMED has conceded that DOE and LANS violated the 2005 CO as described herein. NWNM has shown herein the extent of the history of violations, demonstrating, along with Declaration of Robert

Alverez, that the complained of behavior will likely continue. Thus, there is no basis to dismiss or defer this case, let alone dilute the *Laidlaw* standard.

Laidlaw, the controlling law of the case, requires that it be "absolutely certain" that there will not be a recurrence of violations before finding mootness for a fully ripened RCRA violations claim. DOE argues that the standard should be a "reasonable expectation" that the violations will not recur, an absurdly permissive standard that it is not the law. NWNM has demonstrated that DOE's assertion that cleanup will be hastened under the 2016 CO is contradicted by the facts. DOE's and its LANL contractors' pattern of delay will likely recur. Because the issue of likelihood of recurrence is obviously hotly disputed, it is not an appropriate subject for summary judgment and, if the issue must be decided, it would require, and NWNM would insist upon, an evidentiary hearing. That issue need not be decided on summary judgment or at any another time, however, because it is not relevant to any material question in this phase of the litigation.

It is patent that DOE and its LANL contractors cannot meet the *Laidlaw* standard discussed above. Hence, their, and NMED's, arguments for a relaxed standard that would predominantly weigh the degree of optimistic belief instead of undisputable facts regarding DOE's and LANS's history of noncompliance and lack of change in DOE's and its LANL contractors' structural and organizational characteristics. Nevertheless, plaintiff submits that the evidence that the 2016 CO will not hasten cleanup, and the continuing RCRA history of noncompliance at LANL, means, at a minimum, that there is a lack of undisputed factual evidence to support DOE's contention that violations are "reasonably expected" to cease. Thus, even if that were the correct standard, which it is not, DOE's MSJ must fail.

V. THE LIKELIHOOD OF RECURRING VIOLATIONS BY DOE IS FAR MORE THAN A "SPECULATIVE CONTINGENCY."

A. The DOE and LANS Patterns of Delay in Attempts to Avoid Compliance With the Requirements of 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 to 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 7 Contaminated Aggregate Areas.

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. Once 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

NWNM's Complaint also alleges 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 neither completed the installation of regional monitoring Well R-65 nor 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 of 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 9. 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 deadline 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.

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).[1] 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.

1 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

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. Furthermore, 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, 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. Yet, again, when the last deadline ran for doing the investigatory work and submitting the required Report, DOE and

*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).

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. Again, when the extended deadline ran for doing the investigatory work and submitting the required Report, DOE and LANS produced nothing. That, too, 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, 2015, 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, DOE and LANS submitted an Investigation Work Plan for the Lower Water/Indio Canyon Aggregate Area. MSJ, at ¶ 6. DOE's and LANS's submission was 20 months late, but this represents their best performance on the 16 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, and any reasonable person would conclude this dilatory conduct will continue.

3. 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 NWNM did not cite in its Complaint, but which are highly relevant to the true extent of the history of DOE's and LANS's RCRA noncompliance at LANL, certainly one factor in determining whether violations, and patterns of delay, are likely to occur in the future. The violations cited by plaintiff were typical, not unique. A limited list of other 2005 CO violations existing 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

4. 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 DOE and LANS engaged in 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[2], is both informative and authoritative and is incorporated herein by reference. In all, DOE and LANS requested, and NMED approved, more than 160 extensions of 2005 CO deadlines. This extensive effort, in which DOE and LANS engaged 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 a low priority, deserving few resources, and, with one exception, appropriately not appearing on either an enforceable Milestone list or a non-enforceable Target date list. The real-world consequences of this turning away from the cleanup requirements of the 2005 CO are discussed at § VI.B below.

5. 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.[3] 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.*

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):

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

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

Fiscal Year Viols Occurred	No. of RCRA Violations	Source
2011	12	RINR 2011[4]
2012	14	RINR 2012[5]
2013	193	RINR 2013[6]
2014	76	RINR 2014[7]
2015	421	RINR 2015[8]
2016	107	RINR 2016[9]
2017	25	RINR 2017[10]

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

Even if one were to agree with DOE's incorrect disregard of the *Laidlaw* standard and ask whether DOE is "reasonably likely" to fail to meet its commitments under the 2016 Order, a reasonable person could hardly ignore DOE's history, at the LANL site, and elsewhere. As the Alvarez Declaration shows, DOE's consistent history is one of failure to meet environmental cleanup deadlines set by regulatory agencies, even with DOE agreement. Alvarez Declaration at

[4] *Id.*

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

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

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

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

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

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

¶ 10a. The weighting of that history is a matter which is in dispute, and it is certainly incorrect to imagine that the issue could be decided as a matter of law. Plaintiff asserts that the correct standard is that of *Laidlaw*, but if the question is one of whether DOE violations could "reasonably recur" in the future, it is no matter for summary judgment, and if the question must be answered, it could only be done after an evidentiary hearing, which plaintiff insists upon.

Finally, plaintiff notes how far the application of the correct law to the correct facts as described above is different from the simplistic "no further deadlines means no further violations possible" argument of DOE. The law is not so foolish.

B. DOE's Expressed Belief that Violations Will Be a "Speculative Contingency" under the 2016 Order Is: 1) Unsupported By Intervenor NMED's Formal Permitting Actions and Writings; and 2) Ignores that DOE's History of RCRA Noncompliance Is Deep and Broad and that DOE's Priorities, Appropriations Process and Projected Budgets Provide no Factual Support for the Belief that DOE's Patterns of Delay and Ultimate Noncompliance Will Change.

DOE expresses the belief that the "more flexible" 2016 Order will make the possibility of future RCRA violations "nothing but a speculative contingency." MEM, at 3. That is a remarkable claim, and we will fairly consider in the context of DOE's prior patterns of delay in attempts to avoid ultimate compliance with the 2005 CO, its broader history of RCRA violations at LANL, and whether the 2016 Order will make any actual cleanup at LANL more or less likely.

Initially, however, we note that DOE does not accept that *Laidlaw* controls here, arguing instead that plaintiff's claims for civil penalties for violations of RCRA, ongoing at the time of suit, can be mooted by a violator's showing that there is "no reasonable expectation" that it will recur. As we discuss below, whether DOE's violations are or are not "reasonably expected" to recur in the future, is not the correct legal standard from *Laidlaw*. However, a consideration of

the factors that would go into realistically answering that question, from looking at the actual history of DOE and its LANL contractors' RCRA noncompliance at LANL, to the impact of DOE's looming budget problems, and more, shows that, contrary to DOE's relaxed standard, there is a "reasonable expectation" that violations will recur.

1. Recognition of DOE's history of noncompliance by the regulator, NMED.

DOE, in its discussion of the likelihood of recurrence, completely fails to address what must be a central issue in the question – DOE's own deep and broad history of RCRA permit noncompliance, at LANL and elsewhere. This fact certainly continues to be recognized by NMED right up to the present, as evidenced in the actions and writings of its professional staff implementing RCRA permit regulation every day at LANL, and that recognition does not support the expressions of optimism appearing in DOE's brief that it and its LANL contractor will avoid RCRA violations in the future. In fact, 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. 108). 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 the Permittees had committed, in the January 2012 Framework Agreement, to progress in the areas prioritized by the Martinez administration: groundwater and surface water protection, and the accelerated removal of 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. 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 expense for DOE's TRU waste cleanup program and halting all shipments of TRU waste from LANL until August 2018. *See* Rhodes Declaration 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 request 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.

Plaintiff is hopeful that DOE and the new operator at LANL can reverse the well-established history of RCRA noncompliance at LANL, but that is far from recognizing the reality, which is that DOE has a long history of noncompliance extending to the present day, and that history, recognized by the regulator and continuing to the present day, provides no factual support for DOE's claim that there is no "reasonable expectation" that its RCRA violations will not recur.

2. DOE's history of RCRA noncompliance is extensive, and DOE's priorities, appropriations process, and projected budgets provide no support for DOE's claim that there is "no reasonable expectation" that RCRA violations will recur.

NWNM, as stated above, is hopeful that DOE and its new contractor at LANL will avoid the patterns of delay seen in the history of the 2005 CO. MSJ, at p. 5; Declaration of Robert Alvarez in Support of Plaintiff Nuclear Watch New Mexico's Response to New Mexico Environment Department's Motion for Summary Judgment, at par. 7. However, the likelihood of that outcome is a complicated judgment based on a multitude of factors. Above all, it is a complicated question of fact wholly unsuitable for resolution on summary judgment. Nevertheless, plaintiff will directly address the factual question rather than demur, because the facts favor NWNM's position that DOE's and its contractors' patterns of delay are actually more likely to occur under the 2016 Order than under the 2005 CO.

First, due account should be given to the history of RCRA noncompliance at LANL, as detailed above. That RCRA noncompliance, however, is only a part of a much larger context of

DOE's and its contractors' environmental law and regulation violations at LANL, which include consistent failure to timely and adequately address issues of environmental, safety, and health problems. Declaration of Robert Alvarez in Support of Plaintiff Nuclear Watch New Mexico's Response to U.S. Department of Energy's Motion for Summary Judgment, at ¶ 10.a.

Second, as pointed out in sect. III.b. above, DOE's attempts to blame its violations on "technical challenges" and funding reductions do not stand up to scrutiny.

Third, political realities, DOE's own projected ballooning budget requests for weapons work, and the existence of many higher priorities in the DOE cleanup than LANL, mean that patterns of delay in actual cleanup are not only predictable, they are likely. *Id.*, at ¶ 9.a.

Fourth, even though the original final cleanup date for all areas under the 2005 CO has been extended to 2036 – 21 years past the last December 6, 2015 date of the 2005 CO - DOE's own estimate of the probability of it being able to meet that extended deadline is as low as 50 percent. *Id.*, at ¶ 9.b.

Fifth, the structure of the 2016 Order will not reduce the "possibility of future violations of this new Order" to "nothing but a speculative contingency." On the contrary, the structure is such that patterns of delay in actual cleanup by DOE will be expected, because, in addition to DOE's consistent failure to timely and adequately address issues of environmental, safety, and health problems cited above, DOE's policy of reducing cleanup budgets for contaminated sites by the amount of any RCRA fines and penalties that might be imposed for violations at that site means that NMED will have less ability to prevent DOE patterns of delay by imposing fines and penalties under the 2016 Order than it did under the 2005 CO. *Id.*, at ¶ 10.b.

However, that DOE policy, as described by Randall Erickson, declarant for defendant LANS (Doc. 98, at par. 24), will not result in less funding for actual cleanup activities because:

1) 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; 2) in the actual budget process, DOE does not have the unilateral ability to make such reductions; and 3) DOE does not have the political and legal power to unilaterally impose this forced cleanup funds reduction constraint on a state and regulator that are willing to resist. *Id.,* at ¶ 11.

In sum, the available evidence shows strongly that the 2016 CO will not significantly reduce the likelihood of recurrence of pattern of delay by DOE and its contractors at LANL. *Id.*, at ¶ 12. Based on those considerations, it is clear that there is very little support for DOE's claim that there is "no reasonable expectation" of future RCRA violations at LANL. And even if that evidence is not considered the end of the matter, the question surely cannot be decided on summary judgment. DOE's motion must be denied on this basis alone.

VI. DOE'S RELIANCE ON DEFINITIONAL CHANGES CANNOT OBSCURE THE SUBSTANTIVE CLEANUP FAILURES THAT HAVE OCCURRED AND CONTINUE TO OCCUR UNDER THE 2016 ORDER.

DOE's reasoning that there is no reasonable expectation that the 2005 CO violations could recur under the 2016 Order is: 1) The previous violations all "related to deliverables"; 2) Those particular deliverables obligations no longer exist in the 2016 Order; and 3) Therefore, those particular violations are no longer possible. Q.E.D. But that is a reliance on mere definitional, rather than substantive, change: the same action or, in this case non-action, has been redefined from "noncomplying" to "complying," in reliance on the simplistic proposition that "there can't be any deadline violations if there are no deadlines." By this reasoning, the greatest compliance would be realized with the complete absence of any deadlines for cleanup action. However, this sophistry ignores the substantive basis for the schedule: accomplishing the

hazardous waste site remediation in a properly documented and timely manner as required under RCRA and as embodied in the 2005 Consent Order. "[A] defendant's current activity at the site is not a prerequisite for finding a current violation under 42 U.S.C. § 6972(a)(1)(A). The inquiry require[s]. . . the same inquiry required by § 6972(a) (1)(A) -- is whether the defendant's actions--past or present--cause an ongoing violation of RCRA. That question turns on the wording of the prohibition alleged." *S. Rd. Assocs. v. IBM*, 216 F.3d 251, 254-55 (2d Cir. 2000). Here, rather than a prohibition, there was in existence, at the time of the violations, a requirement that certain activities involved in the clean-up at LANL be documented as accomplished within a specific time-frame or else there would be penalties for failure to do so.

This Court's Memorandum Order and Opinion faulted DOE and LANS for failing to meet their formidable burden of demonstrating that the violations alleged in the NWNM Complaint based upon DOE's and LANS's pattern of delay were unlikely to recur. *Nuclear Watch N.M. v. United States DOE*, No. 1:16-cv-00433-JCH-SCY, 2018 U.S. Dist. LEXIS 116716, at *50-51 (D.N.M. July 12, 2018). DOE has not provided this Court with evidence demonstrating that the "numerous remedy completion reports, investigation reports, work plans, and installing two groundwater monitoring wells to address groundwater contaminants and toxic pollutants at and around the Laboratory" required under the 2005 Consent Order will, in fact, be accomplished at any time in the foreseeable future under the new 2016 consent order. In fact, paragraphs 5 and 6 in the DOE MSJ and the Table at pages 15 -17 are a direct admission that there is no plan in place to accomplish those tasks within a fixed time-frame. All that the Table and testimony of Mr. Rhodes show is that at some indeterminate future time DOE plans to include the work that it has so far avoided. In a rational world this cannot possibly be taken to meet the requirement of meeting the formidable burden of demonstrating that the delay of this work will end. Doing that

requires a schedule for completion of the work and some factual basis for accepting that there will be no further delays. Not only has DOE not offered this Court any evidence of a fixed time in which the avoided tasks will be completed, it has not demonstrated that there are any consequence for its failure to put the tasks into the Appendices of the Consent Order. Without DOE providing the Court with facts demonstrating an actual schedule for completing the avoided tasks and consequences for failure to do so, DOE has provided nothing to demonstrate that the 2016 Consent Order prevents a continuous recurrence of the delays documented in NWNM's Complaint. At any rate, this attempt by DOE to recast its failure to perform the substantive actions and work required by the 2005 CO will not bear examination, as we now discuss.

A. Cleanup, Monitoring Wells, and Contaminated Area Investigations Have, With One Exception, Been Indefinitely Delayed under the 2016 Order.

Realistically, however, and directly to the point of this lawsuit, it is the comparison of the actual cleanup schedules in the 2005 CO with those in the 2016 Order for the contaminated areas that were the subject of the violations cited in plaintiff's Complaint that is relevant, and that comparison shows beyond doubt that actual cleanup of the subject areas has already been delayed by years and, in most cases, has been "indefinitely extended," not "hastened."

Remedy Completions and Reports

In three Material Disposal Areas ("MDA") 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, MDA AB, and MDA G. The following table shows the deadlines for accomplishment of remediation of these contaminated areas and reporting of the results to NMED, in both the 2005 CO and the 2016 Order:

Material Disposal Area	RCR Due Date: 2005 CO[11]	RCR Due Date: 2016 Order[12]	Minimum Delay As of Nov 2018
MDA A	June 30, 2014	None	4 years, 3 months
MDA AB	January 31, 2015	None	4 years, 8 months
MDA G	December 5, 2015	None	4 years, 10 months[13]

Clearly, in none of these contaminated areas has the implementation of a remedy and reporting of the results been hastened by the adoption of the 2016 Order.

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.

The 2005 CO, signed by DOE and LANS and NMED, reads, at p. 2 *et seq.*:

The Department makes the following findings of fact:

...15. Contaminants that have been released into, and detected in, groundwater beneath the Facility include, for example, explosives, such as RDX; volatile organic compounds such as trichloroethylene, dichloroethylene, and dichloroethane; metals such as molybdenum, manganese, beryllium, lead, cadmium, and mercury; perchlorate; other inorganic contaminants such as ammonia, nitrate, and fluoride; and other contaminants. Contaminants have been detected beneath the Facility in all four groundwater zones.

11 Due dates shown are pursuant to last approved extension request, if any, and are confirmed by NMED's Answer (Doc. 78, at ¶¶ 54, 88).

12 As of FY2018 Appendix B to the 2016 Order, for either enforceable Milestone deadlines or non-enforceable Target dates. Confirmed by Rhodes Declaration, DOE MSJ Doc. 101-2, at ¶¶ 2, 3, 43).

13 As stated, the 2005 CO mandated final cleanup of MDA G and the submission of the RCR by December 5, 2015. According to NMED, however, that date never became enforceable against DOE and LANS because of the lack of prior selections and approvals by NMED. (MSJ, at ¶ 13) Whether the date stated in the 2005 CO was enforceable or not, however, it is legitimate to note that MDA G now appears on no list of enforceable Milestones or even of non-enforceable Target dates. (Rhodes Decaration, at ¶ 48)

And the state of the groundwater at LANL was not just a concern in 2005; these groundwater monitoring wells, R-65 and R-26i, according to NMED, were a priority of the Martinez administration:

> NMED is concerned over delays that affect the progress of groundwater characterization and remediation. Governor Martinez has prioritized the protection of groundwater, and any delay in completing R-65 is counter to this objective. The Permittee is required to complete the installation of well R-65 as previously scheduled on June 30, 2014. Doc. 108-19.

Despite the recognized need, however, DOE and LANS never did install 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).

Unfortunately, plaintiff cannot present a table as above comparing the due dates for installation of these "high priority" monitoring wells under the 2005 CO and the 2016 CO because the 2016 CO fails to require them at all: as of the date of the FY2018 Appendix B to the 2016 Order, they appear in no planned Campaign. Rhodes Decl., at ¶¶ 28, 42.

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. 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	Invest. Rpt. Due Date: 2016 Order	Minimum Delay As of Nov 2018
Cañon de Valle at TA-15	July 2, 2014	None	4 years, three months
Lower Pajarito Canyon	July 31, 2014	None	4 years, 3 months
Twomile Canyon	August 30, 2014	None	4 years, 2 months
Cañon de Valle at TA-16	December 31, 2014	None	3 years, 10 months
Upper Water Cnyn	December 31, 2104	None	3 years, 10 months
Starmer/Upper Pajarito Canyon	December 31, 2014	None	3 years, 10 months
Chaquehui Canyon	March 31, 2015	September 30, 2019[14]	4 years, 6 months

Every Aggregate Area Investigation Report listed above is omitted from the most recent list of enforceable Milestones under the 2016 Order. Every case except the Chaquehui Canyon Investigative Report is omitted even from the 2016 Order's list of non-enforceable Targets. That Report is scheduled for submission September 30, 2019, some 4 years and 6 months after the last extended deadline under the 2005 CO. For the Chaquehui Canyon Investigative Report, then, it is possible to estimate the delay resulting from adoption of the 2016 Order's schedule for this work – 4 years, 6 months, as noted. However, since deadlines for all the other cited Aggregate Area Investigative Reports do not exist under the 2016 CO, appearing neither in the enforceable Milestones list nor in the non-enforceable Targets list, it impossible for plaintiff to describe the required Reports as being anything other than "indefinitely delayed." And certainly, in no way can one describe cleanup as having been hastened in any of these cases.

14 Non-enforceable Target date. FY2018 Appendix B, 2016 Order. Rhodes Decl., at ¶ 46.

In one other Aggregate Area that was the subject of Plaintiff's Complaint, the Lower Water/Indio Canyon Aggregate Area, DOE and LANS submitted the required Investigation Work Plan on June 23, 2016, the day before the 2016 CO was approved, and the Plan was approved by NMED on 3-30-17. NMED MSJ, at par. 6. The submission by DOE and LANS was 20 months late, so even if it was considered submitted pursuant to the 2016 Order, that Order cannot be said to have hastened the cleanup.

In one other Aggregate Area that was the subject of Plaintiff's Complaint, the Lower Water Indio Canyon Aggregate Area, DOE and LANS submitted the required Investigation Work Plan on June 23, 2016, the day before the 2016 CO was approved, and the Plan was approved by NMED on 3-30-17. NMED MSJ, at p. 6. The submission by DOE and LANS was 20 months late, so even if it was considered submitted pursuant to the 2016 Order, that Order cannot be said to have hastened the cleanup.

B. The Real-World Consequences of NMED's Abandonment of the 2005 CO.

Cleanup of the sites which are the subject of plaintiff's claims of DOE RCRA violations claims did not suddenly occur on the June 24, 2016, the effective date of the 2016 Order. On the contrary, all the 2016 Order did, with respect to these violations, was declare that DOE's continuing substantive failure to perform the required work and submit the report on the same, and was no longer to be deemed non-complying.

Further, DOE can offer no confidence that it will be able to perform the failed cleanups that were at the heart of DOE's 2005 CO violations, even if (or perhaps because) the 2016 Order contains no enforceable or even non-enforceable deadlines in those areas, with but one non-enforceable exception appearing in the App C of the 2016 Order for FY2018. Indeed, only one of the Aggregate Areas that were the subject of the violations claimed by plaintiff are scheduled

in either the enforceable Milestones deadlines list or the Targets non-enforceable list. None of the others are currently identified in the 2016 Order FY 20118 Appendix B as having either an enforceable Milestone deadline even a non-enforceable Target date.

The Court forecast in its MO&O that the evidence defendants and intervenor might offer as to the 2016 Order's treatment of the violations identified by plaintiff could show "that under the 2016 Order's campaign approach, which prioritizes remediation tasks based on risk, resources, and geography, the violations Plaintiff identified could, say, be deemed low-risk or want for resources, and thus remain uncorrected under the campaign approach." (MO&O, at 33). Plaintiff submits that the 2016 Order and its current Appendices B and C, together with the statements of Declarant Rhodes showing in what cleanup Campaigns the areas which are the subject of plaintiff's Complaint are contained, with what action prioritization, do just that.

VII. SUMMARY AND CONCLUSIONS.

As NMED effectively agrees, summary judgment against DOE is appropriate on 16 of Plaintiff's 17 claims in its Second Amended Complaint. NWNM has moved for summary judgment against DOE on the issue of liability for civil penalties on 15 of those 17 claims. Plaintiff disagrees with DOE that its "no reasonable expectation of recurrence" standard for assessing mootness is the law, *Laidlaw* providing the proper "absolute certainty" standard. Even a relaxed standard cannot avail DOE, however, because the relevant facts, including DOE's history of RCRA noncompliance, show that there is actually a "reasonable expectation" that violations will recur. Whatever the resolution of that factual question may be, however, NWNM denies that any of its mootness arguments can be sufficient to require dismissal of claims for violations of RCRA that were ongoing when NWNM filed its Complaint.

DOE'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

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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 Motion For Summary Judgment By Defendant U.S. Department Of Energy Of Plaintiff's Second Amended Complaint* by means of the Court's CM/ECF filing system.

_____
Joanthan M. Block