UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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

DEFENDANT LOS ALAMOS NATIONAL SECURITY, LLC'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

By this Brief, Defendant Los Alamos National Security, LLC ("LANS") replies to the Response Brief of Plaintiff Nuclear Watch New Mexico ("Plaintiff") in opposition to LANS's motion for summary judgment on the remaining claims in Plaintiff's Second Amended Complaint ("Complaint") made on the basis that: (1) all claims are moot; (2) the Burford Abstention and primary jurisdiction doctrines compel dismissal of all claims; (3) Claim II must be dismissed because Plaintiff cannot establish a key element of its claim; (4) the period of potential civil penalties ended on June 23, 2016; and (5) the Seventh Claim must be dismissed because it is only a remedy. ECF Nos. 97-100.[1]

Plaintiff agrees that LANS should prevail on two of these five motion grounds. First, Plaintiff concedes that Claim II (also identified as "Violation P") relating to submittal of a Remedy Completion Report for Material Disposal Area G must be dismissed. Plaintiff agrees with LANS Material Facts 36-41, which demonstrate that the deadline date for this task was extended indefinitely, and Plaintiff did not contest in its Response Brief LANS's dismissal argument. Thus, Claim II must be dismissed. Second, Plaintiff agrees that LANS could not have any liability for civil penalties after June 23, 2016. Pl.'s Resp. Br. ("ECF No. 118") at 31.

Plaintiff also admits the facts demonstrating that (1) LANS ceased its role as the legacy waste remediation contractor for Los Alamos National Laboratory ("LANL" or "Laboratory") on May 1, 2018; (2) LANS's role as the Laboratory's management and operations contractor terminated on October 31, 2018; and (3) LANS is no longer a co-permittee in the Laboratory's Resource Conservation and Recovery Act ("RCRA") permit. LANS Material Fact Nos. 4, 5, and 8-10, ECF No. 97. Indeed, as Plaintiff agrees, LANS was formed solely to manage and operate the Laboratory, has no other business activity outside of its work at LANL, and it is closing out

[1] It is important to note that Plaintiff and Defendants did *not* make cross-motions for summary judgment on "RCRA liability." Although Plaintiff did make this motion, the only LANS or U.S. Department of Energy ("DOE") motion specifically focused on RCRA liability is LANS's motion on Claim II.

its contract with DOE and winding down its business. *Ibid*. Nos. 2, 3 and 6. As a result, LANS "no longer has any authorization from DOE to conduct legacy waste cleanup work, or any other work beyond Prime Contract closeout activities, at the Laboratory." *Ibid*. No. 7.

These undisputed facts compel dismissal of the civil penalty claims against LANS on mootness grounds because it is both "reasonably expected" and "absolutely clear" (the two potential mootness burdens of proof) that these alleged violations by LANS could never recur. *Id.* at 13-15. Notably, Plaintiff makes no attempt in its Response Brief to argue that an award of civil penalties against LANS will have any deterrent effect *on LANS*. The case is also moot against both DOE and LANS because the dramatically revised architecture of the legacy waste cleanup embodied in the 2016 Compliance Order on Consent ("2016 Order") makes the potential recurrence of any alleged deadline violations extremely remote.

Plaintiff incorrectly asserts that imposing civil penalties against LANS for alleged violations of the 2005 Compliance Order on Consent ("2005 Order") could deter third parties. To the contrary, settled Supreme Court and Tenth Circuit case law firmly rejects this generalized deterrence rationale. Plaintiff also makes a "pattern of delay" argument which wrongly ignores the undisputed facts and is no more than fictional flights of rhetoric. Finally, Plaintiff improperly raises alleged RCRA issues outside of its Complaint which are unproven and wholly immaterial to this motion. In sum, the undisputed facts and settled law compel a dismissal of the civil penalty claims against LANS on mootness grounds.

Plaintiff fails to convincingly counter LANS's abstention argument. Plaintiff contends that abstention should not occur when civil penalties are requested. In fact, this is a classic case for Court abstention. The New Mexico Environment Department ("NMED") properly exercised its authority to waive civil penalties for these exact same alleged violations and adopted a new consent order with a different structure, approach and task completion framework that better aligns with New Mexico's legacy waste cleanup priorities. Plaintiff's real civil penalty agenda is

to nullify NMED's penalty decision and thereby undermine the 2016 Order. However, Plaintiff is too late. It failed to challenge the 2016 Order in New Mexico state court and this Court has already found that the 2016 Order supersedes the 2005 Order.

II. RESPONSE TO PLAINTIFF'S ADDITIONAL ALLEGED MATERIAL FACTS

LANS hereby responds to Plaintiff's "additional undisputed material facts" (which were not "lettered" as required by D.N.M.LR-Civ. 56.1(b)) asserted in its Response Brief:

> **Plaintiff's Additional Undisputed Material Fact No. 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.
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> **Plaintiff's Additional Undisputed Material Fact No. 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.
>
> **Plaintiff's Additional Undisputed Material Fact No. 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.
>
> **Plaintiff's Additional Undisputed Material Fact No. 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.
>
> **LANS Response to Additional Undisputed Materials Facts 1, 2, 3 and 4**: All four alleged material facts are DISPUTED because Plaintiff has not supplied LANS with sufficient information to admit or deny them. LANS cannot identify what "FY2018 update" Plaintiff is referring to. Plaintiff's supporting authority cites to the Declaration of DOE's David Rhodes, which refers to the "current" Appendix B on NMED's website, which is dated November 2018 and therefore applies to FY 2019, not FY 2018. LANS has not been the legacy waste remediation contractor for LANL since April 30, 2018 and has no *personal* knowledge of milestones and targets established thereafter. LANS does admit that the annual Appendix B documents for the 2016 Order adopted by NMED and DOE speak for themselves.

III. PLAINTIFF'S CLAIMS FOR CIVIL PENALTIES AGAINST LANS ARE MOOT BECAUSE THE ALLEGED VIOLATIONS CANNOT RECUR AND NO DETERRENCE RATIONALE EXISTS.

Plaintiff fails to properly address the undisputed facts that moot Plaintiff's claims: (1) LANS is no longer the LANL legacy waste remediation contractor, management contractor, or RCRA permit holder and has no ongoing role in the legacy waste remediation; and (2) the 2016 Order dramatically revised the structure and approach to LANL remediation. Based on the clear law concerning mootness in the civil penalty context, this Court should dismiss the Complaint.

A. Plaintiff Errs In Claiming That Civil Penalty Claims For "Ongoing" RCRA Violations Are Not Dismissible Thereafter On Mootness Grounds.

Plaintiff now takes the position that civil penalties for any alleged violations that were "continuing" when its complaints were filed "are not dismissible for mootness." ECF No. 118 at 14. However, Plaintiff is wrong. To the contrary, such claims can become moot later in a lawsuit. *See, e.g., WildEarth Guardians v. Pub. Serv. Co. of Colorado,* 690 F.3d 1174, 1181-87 (10th Cir. 2012) ("*WildEarth Guardians*"). The seminal case on this point is *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) ("*Laidlaw*"), where the Supreme Court recognized that civil penalty claims can be mooted in a pending action. Thus, Plaintiff is not insulated from a mootness dismissal if its claims are ongoing when it filed suit.[2]

Indeed, if a citizen suit violation is *not* "ongoing" when a complaint is filed, it is barred by the "*Gwaltney* doctrine." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-67 (1987)(a court lacks jurisdiction of citizen suits "for wholly past violations"). Plaintiff concedes that two of its 17 total alleged violations were not "ongoing." ECF No. 118 at 12. Accordingly, these two violations must be immediately dismissed on *Gwaltney* grounds.[3]

[2] Plaintiff's attempt to cite the concurring opinion in *Laidlaw* is unavailing. *Id*. at 196. Instead, the opinion of the Court clearly stated that, if the appropriate burden of proof of mootness was sustained by a defendant, civil penalty claims should be dismissed on mootness grounds.

[3] Plaintiff asserts that one of the violations not "ongoing" was submission of an Investigation/Work Plan for Lower Water/Indio Canyon Aggregate Area (ECF No. 118 at 10, n.1). The other appears to be for Claim II, which Plaintiff concedes should be dismissed.

B. Plaintiff Is Incorrect That NMED's Alleged "Agreement" With Plaintiff Regarding Summary Judgment On Liability Provides Any Basis For Summary Judgment Against LANS.

Plaintiff asserts that NMED "effectively agrees" with Plaintiff that summary judgment is appropriate on RCRA liability against LANS on 15 alleged claims. ECF No. 118 at 10-12. It is unclear if NMED has actually taken that position. However, to the extent it has, LANS filed a memorandum opposing any such claim by NMED and controverting NMED's key material undisputed facts. ECF No. 116. LANS also filed an Answer denying that any such violations occurred and asserting affirmative defenses to RCRA liability. ECF No. 78. Accordingly, NMED's alleged positions do not assist Plaintiff's liability motion.

C. The Mootness Doctrine Bars Plaintiff's Civil Penalty Claims.

Events occurring after the filing of a citizen suit can moot a claim for civil penalties. *WildEarth Guardians*, 690 F.3d at 1185. To demonstrate mootness, a defendant must show that "'there is no reasonable expectation' that the alleged violation will recur." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010), quoting *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979). This burden is heightened when the defendant argues that its voluntary compliance moots the case, requiring the defendant to prove "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190; *WildEarth Guardians*, 690 F.3d at 1186. The heightened burden is justified because the defendant "should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *Chihuahuan Grasslands All. v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008) (internal quotation marks omitted).

Plaintiff has admitted all of the facts which demonstrate that the roles of LANS as the legacy waste remediation contractor, management contractor, and RCRA permit holder at LANL have terminated. There is no credible argument that these role terminations occurred to evade compliance with 2016 Order deadlines or to temporarily escape lawsuit liability. Rather, they are permanent DOE decisions and LANL role changes which cannot be undone.

Plaintiff argues that its claims for civil penalties are not moot because there theoretically exists an exception to mootness under the voluntary cessation doctrine, citing *Laidlaw* and *Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp*., 993 F.2d 1017, 1021 (2d Cir. 1993). ECF No. 118 at 14. However, Plaintiff makes no argument for how the voluntary cessation doctrine *actually applies* to LANS. Though LANS agrees that this mootness exception exists, this heightened burden of proof does not apply to LANS because LANS did not "voluntarily cease" the purportedly offending conduct.[4] Plaintiff also incorrectly argues *Laidlaw*'s heightened "absolutely clear" burden of proof must apply to both DOE and LANS rather than the appropriate "reasonable expectation" standard because applying a different standard would somehow change the Court's reasoning in its Dismissal Order. ECF No. 119 at 8.[5]

However, as Plaintiff implicitly concedes by not arguing otherwise, no matter which mootness burden of proof is applied, Plaintiff's civil penalty claims against LANS are moot because under *either* the "reasonable expectation" or absolutely clear" standards, LANS's purportedly offending conduct (allegedly missing remediation deadlines) *cannot* recur.

D. No Cognizable And Required Deterrent Purpose Exists To Warrant Civil Penalties Against LANS.

Plaintiff improperly resorts to "smoke and mirrors" to argue that Court assessment of civil penalties against LANS would have a deterrent effect on LANS. Its two arguments, neither of which is factually or legally valid, are (1) that penalties against LANS would deter third

[4] Plaintiff also cites the case of *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) to support this mootness assertion. However, *Quackenbush* is entirely inapposite in the context of mootness because it only concerns the unrelated doctrine of Burford Abstention.

[5] Plaintiff asserts that any attempt to argue that the voluntary cessation exception to mootness does not apply to civil penalties here would contravene "law of the case." However, Plaintiff is mistaken. The Court found that the voluntary cessation exception was *not* applicable in the context of mooting Plaintiff's injunctive and declaratory relief. ECF No. 70 at 29-30. The Court did not make a final decision on mootness in the civil penalty context, but said that DOE and LANS needed to provide more information on the facts that they allege moot civil penalties, which LANS has now done. Now that these facts have been provided, the Court certainly could choose to apply the usual mootness "reasonable expectation" standard.

parties, and (2) that a member of LANS is involved with the LANL legacy waste cleanup.

The assessment of civil penalties is personal to each party on which they are assessed. Thus, in *Laidlaw*, the Supreme Court articulated the relevant voluntary cessation test to be whether the subsequent events "made it absolutely clear that *Laidlaw's permit violations* could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 193 (emphasis added). The case law is clear that "'a general interest common to all members of the public' does not satisfy Article III." *WildEarth Guardians*, 690 F.3d at 1187-1188, quoting *Lance v. Coffman*, 549 U.S. 437, 440 (2007), citing *Laidlaw*, 528 U.S. at 181 and *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108-109 (1998). For example, the Tenth Circuit held that "the public's generalized interest in Clean Air Act compliance by power utilities" was insufficient to warrant civil penalties against a company for alleged past violations where the court found the conduct would not likely recur. *WildEarth Guardians*, 690 F.3d at 1187-1188.

Contrary to this clear legal authority, Plaintiff argues that imposing civil penalties on LANS will deter DOE and future LANL legacy remediation waste contractors from violating 2016 Order milestones and targets. The Court should disregard this argument. Since DOE is a defendant here, the outcome of the case *against DOE* will determine any deterrent effect – a LANS civil penalty award would be irrelevant. Not only does the precedent above disallow awarding penalties against LANS to deter third parties such as later LANL contractors, but such contractors would be working under the 2016 Order, which has its own robust civil and stipulated penalty and RCRA lawsuit provisions that should provide strong deterrence.[6] Thus, Plaintiff's general deterrence argument fails.

Finally, Plaintiff makes a spurious "last-ditch" argument that civil penalties against LANS are somehow appropriate because an asserted "partner" of LANS is the new remediation contractor. However, Plaintiff has gotten its facts wrong. LANS and the new remediation

[6] Declarant Randall Erickson describes the "rigorous civil penalty and stipulated penalty provisions" of the 2016 Order. Erickson Reply Decl. ¶¶ 6 and 15, and Attach. 1.

contractor (Newport News Nuclear BWXT Los Alamos, LLC) are wholly independent and unrelated entities. One of the four partners in the LANS LLC has a corporate relationship with the new remediation entity, but that fact is completely immaterial in this context.

Federal environmental liability is not transferable among separate and independent legal entities. Thus, in the closely similar corporate context, the law is well settled that parent corporations cannot be liable for the acts of their subsidiaries. *See, e.g.*, *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries."); *Sonora Diamond Corp. v. Super. Ct.*, 83 Cal. App. 4th 523, 538 (2000) ("Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations."). There is no support for an argument that penalties against LANS – whose conduct will not recur – could deter future conduct of an entirely separate legal entity merely because a member of that entity was affiliated with LANS. Since civil penalties against LANS would serve no specific deterrence purpose, the Court should dismiss Counts I and II as moot.

IV. PLAINTIFF'S ASSERTION OF A "PATTERN OF DELAY" AND ALLEGED "OTHER" RCRA VIOLATIONS ARE ERRONEOUS, IMMATERIAL TO A MOOTNESS DETERMINATION, AND PREMATURE.

Plaintiff's Response Brief argues that DOE and LANS have a "pattern of delay" and supposedly have committed "other" legal violations outside Complaint allegations which the Court should consider on mootness. ECF No. 118 at 15-31. However, these assertions are unsupported and largely untrue. Moreover, these are arguments that a Court might (or might not) entertain in connection with civil penalties, but they are not germane for mootness purposes. LANS will briefly address these issues herein and has also filed concurrently a Reply Declaration of Randall Erickson as Exhibit 1 hereto to rebut many of these assertions.

This "pattern of delay" argument attempts to paint LANS as a legacy waste remediation

contractor that evaded compliance with the 2005 Order, refused to take actions, and "produced nothing." However, this recitation is complete nonsense.

As the undisputed facts and prior briefing establish, the two-year time extensions for almost all 2005 Order tasks covered by the Complaint were necessary under the Framework Agreement when New Mexico's Governor requested that DOE change the 2005 Order priorities and divert funds from 2005 Order tasks to the packaging and shipment of transuranic waste from Area G. Other alleged deadlines were not met because radionuclide issues outside the 2005 Order arose, because NMED did not make predicate decisions in the remediation task sequence, or because Plaintiff mistakenly identified task deadlines. Moreover, DOE did not authorize LANS to conduct such work during the relevant period and Congress did not appropriate funds to accomplish all 2005 Order tasks. *See* Erickson Reply Decl. ¶¶ 24-27.

Thus, LANS worked tirelessly to carry out the scope of work authorized by DOE within the financial appropriation decisions made by Congress. Mr. Erickson states: "As a general observation, the alleged 'pattern of delay' is contrary to my experience at LANL. I have found the workforce to be highly motivated to expedite the cleanup activities, given the proximity of the legacy contamination to their homes and families, and a strong sense of responsibility to rectify the environmental consequences of historic Laboratory operations." *Id*. ¶ 25.

Plaintiff also attempts to raise matters wholly outside the Complaint through use of footnotes to unidentified online documents. It purports to identify "other" alleged violations of the 2005 Order that were not included in the Complaint, recites other "extensions" of tasks under the 2005 Order unrelated to alleged Complaint violations, and alleges non-cleanup RCRA violations to supposedly show that legacy waste cleanup violations will occur in the future.

These assertions have no place in this summary judgment briefing. First, these assertions are outside the scope of the Complaint and are unsupported and unproven by documents in the record. Further, the receipt of an extension of time from NMED is not evidence of a RCRA

violation. Second, Plaintiff fails to show how these matters pertain in any way to future conduct or violations *by LANS*. Since LANS is not the LANL legacy waste contractor, management contractor, or RCRA permit holder, it is absolutely clear that LANS will never violate any future legacy waste milestones/targets or commit any future LANL RCRA permit violations.

Finally, this type of "bad faith" argument is premature. If the Court does not dismiss the case as moot or abstain, the parties will enter a discovery phase on liability and civil penalty factors. If Plaintiff establishes any liability, the Court *potentially* might entertain these types of assertions when evaluating civil penalties. Thus, besides being inaccurate and beyond the Complaint's scope, these unproven allegations are inapplicable in the current motion context.

V. PLAINTIFF HAS FAILED TO COUNTER LANS'S ARGUMENT THAT THE COURT SHOULD ABSTAIN FROM ADJUDICATING PLAINTIFF'S CLAIMS ON BURFORD ABSTENTION AND PRIMARY JURISDICTION GROUNDS.

LANS explained in its Opening Brief why this is a classic situation for dismissal of RCRA civil penalty claims under the Burford Abstention and primary jurisdiction doctrines. ECF No. 97 at 20-24. In response, Plaintiff argues (1) that this is now a "damages" case and not an equitable case in which abstention can be used, and (2) that the case does not meet the Burford Abstention criteria. ECF No. 118 at 31-34. However, neither argument is accurate.

First, this is not a private "damages" case. Civil penalties involve a monetary payment, but they are awarded and paid to the U.S. Treasury if liability is proven based on a court's discretionary weighing of civil penalty factors. Although the equitable aspects of this case have already been dismissed by the Court, civil penalty claims are not immune from judicial abstention. In fact, the *Quackenbush* case relied on by Plaintiff rejects Plaintiff's premise. The Supreme Court declined to adopt a *per se* rule limiting Burford Abstention only to "equitable cases" and instead recognized extension of "the doctrine to all cases in which a federal court is asked to provide some form of discretionary relief." *Quackenbush*, 517 U.S. at 730. The award and amount of civil penalties is a form of discretionary relief.

Second, Plaintiff has confused the two different types of Burford Abstention in arguing that the criteria cannot be met here. Burford Abstention occurs *either* when a case presents "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' *or* if the adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Quackenbush*, 517 U.S. at 726-727 (emphasis added), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

In this case, LANS has consistently asserted the second type of abstention. NMED has responsibility over hazardous waste cleanups in New Mexico and determined that it would adopt a new and dramatically different enforcement order for cleanup of LANL's legacy waste. To achieve these goals and as part of its RCRA enforcement authority, NMED elected to waive all civil and other penalties for the alleged RCRA violations that Plaintiff now asks the Court to nullify by a civil penalty award. As NMED asserts: "NMED's ability to enforce existing regulations, and to negotiate settlements and consent orders in the future, would be severely undermined if the Court were to impose civil penalties where NMED has already explicitly settled them." ECF No. 91 at 4.

This result would constitute a major disruption of NMED's articulated policy on an important and prominent New Mexico legacy waste cleanup issue. Since Plaintiff bases its lawsuit on enforcement of the 2005 Order itself, Plaintiff is asking the Court to explicitly overrule an NMED regulatory decision that civil penalties would *not* be assessed for these particular violations. This is exactly the kind of situation hypothetically posed by the Supreme Court in the *Gwaltney* case, where the Court postulated that the EPA Administrator "agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action," but citizens then file a citizen suit "to seek the civil penalties that the Administrator chose to forgo." 484 U.S. at 60-61. The Court observed that this situation would

"change the nature of the citizens' role from interstitial to potentially intrusive," thereby violating the precept that "the citizen suit is meant to supplement rather than to supplant government action." The Court added that "[t]he same might be said of . . . state enforcement authorities." *Id.*

Although the Supreme Court was not addressing Burford Abstention in this hypothetical, it was explaining the limited role that citizen suits are designed to play in our modern federal environmental laws. Plaintiff is misusing the citizen suit provisions here and has crossed the line into "supplanting" government action. After all, its objective from the start has been to overturn the 2016 Order and resurrect the 2005 Order in direct contravention of NMED's enforcement policy choices. As such, its parallel attempt to directly overturn NMED's penalty decisions should be rejected under both Burford Abstention and primary jurisdiction principles.

VI. CONCLUSION

For these reasons,[7] LANS requests that the Court grant its summary judgment motion.

Dated: March 6, 2019

FARELLA BRAUN + MARTEL LLP

By: */s/ Paul P. Spaulding, III*
Paul P. Spaulding, III

Attorneys for Defendant LOS ALAMOS NATIONAL SECURITY, LLC

[7] Plaintiff's Seventh Claim must also be dismissed. RCRA's attorneys' fee provision allows a court to award attorneys' fees to a prevailing plaintiff or defendant in a citizen suit. 42 U.S.C. § 6972(e). However, RCRA attorneys' fees are collected as "costs" and are not generally treated as parts of the merits judgment. *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200-201 (1988) ("[a] claim for attorney's fees is not part of the merits of the action to which the fees pertain."). Plaintiff's opposition is inapposite because a "contribution" claim under CERCLA, unlike RCRA attorneys' fees, is a cognizable legal claim that provides court jurisdiction. *See Lone Star Indus., Inc. v. Horman Family Trust*, 960 F.2d 917, 919 (10th Cir. 1992).

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2019, the foregoing document was filed via the U.S. District Court of New Mexico's CM/ECF electronic filing system and a copy thereof was served via the CM/ECF electronic transmission upon all counsel of record, and reflected by the Court's CM/ECF system.

/s/ Paul P. Spaulding, III
Paul P. Spaulding, III