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**

DOE'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

This Court previously declined to dismiss the civil penalty claim in Nuclear Watch's citizen suit because, in the Court's view, the United States Department of Energy ("DOE") and its operating contractor at the time, Los Alamos National Security, LLC ("LANS") had not "carried their formidable burden to show that it is absolutely clear that [their] conduct challenge here could not reasonably be expected to recur." *Nuclear Watch New Mexico v. United States Dep't of Energy*, Case No. 1:16-cv-00433-JCH-SCY, 2018 WL 3405256, at *15 (D.N.M. July 12, 2018) ("*Nuclear Watch*") (internal quotations and citation omitted). The Court relied on *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("*Laidlaw*") in defining the burden that DOE must meet. DOE has sought to provide the explanation the Court found wanting. DOE's Memorandum in Support of Motion for Summary Judgment (Nov. 9, 2018) ("DOE Memo"), ECF 101-1. Nuclear Watch's Response to Motion for Summary Judgment by Defendant U.S. Department of Energy (Dec. 12, 2018) ("NW Opp."), ECF 119, fails to rebut DOE's arguments.

Nuclear Watch seeks civil penalties for DOE's failure to meet certain deadlines in the 2005 Consent Order issued by NMED. The 2016 Consent Order explicitly superseded the prior Consent Order, extinguishing all of its requirements, and thereby mooted Nuclear Watch's penalty claim. The "voluntary cessation" exception to mootness addressed in *Laidlaw* does not apply because the issuance of that Order was not a unilateral act by DOE and cannot be described as an effort to evade the Court's jurisdiction. Moreover, given that the 2005 Consent Order has been superseded, there is no reasonable expectation that the violations addressed in the complaint could recur. Finally, although Nuclear Watch provides a long discussion of DOE's past performance at LANL or other sites, this discussion is not material in the evaluation of whether the 2016 Consent Order will be implemented successfully.[1] This is because in the 2016 Consent Order, NMED and DOE adopted an entirely new structure intended to avoid the challenges presented by the rigid structure of the 2005 Consent Order. In the end, all Nuclear Watch can do is to speculate that— contrary to DOE's actual performance so far—DOE will violate its obligations under the 2016 Consent Order. This speculation is insufficient to establish the Court's jurisdiction and so DOE's motion for summary judgment should be granted.

DOE'S RESPONSE TO NUCLEAR WATCH'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

DOE does not dispute Nuclear Watch's statement of additional facts. NW Opp. at 4-5. However, the fiscal year 2019 updates to Appendix B of the 2016 Consent Order include non-enforceable Targets for the Twomile Canyon Aggregate Area. Supplemental Declaration of David S. Rhodes at ¶ 11(Feb 28, 2019) ("Rhodes Supp. Decl."). Exhibit 1..

[1] Although DOE does not agree with the accuracy or characterization of many of the purported "facts" set forth by Nuclear Watch, any dispute as to those "facts" is immaterial and does not stand in the way of summary judgment.

ARGUMENT

I. THE VOLUNTARY CESSATION EXCEPTION TO MOOTNESS DOES NOT APPLY TO NUCLEAR WATCH'S PENALTY CLAIM

The Tenth Circuit has explained that the purpose of the voluntary cessation exception is "to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (internal quotation omitted); *see also Brown v. Buhman*, 822 F.3d 1151, 1167 (10th Cir. 2016) (explaining that the exception is intended to avoid jurisdictional "gamesmanship."). The adoption of the superseding 2016 Consent Order, was not a unilateral action by DOE, but rather was the result of a combined effort over several years by DOE and the permitting agency NMED to develop a more effective means of implementing the corrective action at LANL. DOE Memo at 11-12. Furthermore, Nuclear Watch does not, and could not, argue that the 2016 Consent Order was a device to thwart the jurisdiction of this Court. To the contrary, Nuclear Watch agrees with DOE's statement of undisputed material fact number four that DOE and NMED agreed to discuss renegotiations of the 2005 Consent Order as part of the Framework Agreement, the result of which was the 2016 Consent Order. *Compare* DOE Memo at 4 *with* NW Opp. at 3. The Framework Agreement dates back to 2012, *see* Rhodes Decl. at ¶ 10, long before this Court's jurisdiction over Nuclear Watch's citizen suit was an issue.

In addressing plaintiff's claims for injunctive and declaratory relief, the Court has already held that because the schedule in the 2005 Consent Order was superseded and replaced by a different remediation approach in the 2016 Consent Order, "[t]he voluntary cessation exception of the mootness doctrine does not apply." *Nuclear Watch*, 2018 WL 3405256, at *14. By the same logic, the voluntary cessation exception does not apply to plaintiff's penalty claims. As explained above, DOE does not rely on a voluntary cessation of the complained-of conduct that could be

resumed after the litigation, but rather the adoption of a superseding and fundamentally different legal regime as a product of ongoing negotiations between a Federal agency and a New Mexico agency in its capacity as regulator. Moreover, NMED and DOE entered into the 2016 Consent Order to make the corrective action at LANL more effective, not as a means to circumvent the Court's jurisdiction.

Regardless of how strongly Nuclear Watch may disagree with the structure of the 2016 Consent Order, Nuclear Watch does not, and *cannot*, establish that the rationale for the voluntary cessation exception is applicable to the facts before the Court. Therefore, the Court should grant DOE's motion for summary judgment and dismiss the matter as moot.

II. DOE HAS MET *LAIDLAW*'S REQUIREMENTS BY DEMONSTRATING THAT PAST VIOLATIONS CANNOT REASONABLY BE EXPECTED TO RECUR; THUS, PLAINTIFF'S CITIZEN SUIT PENALTY CLAIM IS MOOT

A. Nuclear Watch Misconstrues *Laidlaw*.

The Supreme Court has established that, where a defendant's argument that a claim is moot is based only on that defendant's voluntary conduct, the defendant must show that

> subsequent events made it absolutely clear that the allegedly wrongful behavior *could not reasonably be expected to recur*. The heavy burden of persuading the court that the challenged conduct *cannot reasonably be expected* to start up again lies with the party asserting mootness.

Laidlaw, 528 U.S. at 189 (emphasis added) (internal quotations and citations omitted).

By contrast, Nuclear Watch asserts that

> *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.

NW Opp. at 7 (quotation marks in original; emphasis added). The above quote from *Laidlaw* shows that this description is incomplete. The Supreme Court never used the phrase "absolutely certain" in *Laidlaw*. Moreover, Nuclear Watch has simply ignored the "reasonably be expected"

language in *Laidlaw*. NW Opp. at 7. In excising the "reasonably be expected" and in changing the phrase "absolutely clear" to "absolutely *certain*," Nuclear Watch is advocating for a different legal standard, one premised on the certainty of alleged violations not recurring. *See* NW Opp. at 32 (characterizing *Laidlaw* as providing an "'absolute certainty' standard"). Nuclear Watch's proffered standard is not consistent with the plain language in *Laidlaw* or in the Tenth Circuit's application of that decision. For example, the Tenth Circuit has held that "[a] case ceases to be a live controversy if the possibility of recurrence of the challenged conduct is only a speculative contingency." *Rio Grande Silvery Minnow*, 601 F.3d at 1117. A speculative contingency theoretically could still materialize, in contrast to an absolute certainty of non-recurrence. Thus, Nuclear Watch's proffered standard simply is not the law.

Nuclear Watch's inaccurate representation of *Laidlaw* is not its only error. Nuclear Watch repeatedly suggests that mootness is to be assessed based on the pace of corrective actions at LANL. *See, e.g.*, NW Opp. at 5 (stating the "applicable standard" pertains to "defendants' burden in demonstrating that there will not be continued delays in the clean-up of legacy waste at LANL"), 26 (referring to DOE's "requirement of meeting the formidable burden of demonstrating that the delay of this work will end"). Indeed, a consistent theme in Nuclear Watch's response is a concern with the perceived delay in the environmental remediation activities, and a continuing opposition to the more flexible structure of the 2016 Consent Order.[2]

The applicable standard under *Laidlaw*, however, is whether "it is absolutely clear that the *allegedly wrongful behavior* could not reasonably be expected to recur." 528 U.S. at 190 (emphasis added). The wrongful behavior alleged by Nuclear Watch is the asserted

[2] *See id.* at 8 ("[T]he 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."), 18 (referencing the "real-world consequences of this turning away from the cleanup requirements of the 2005 CO").

noncompliance with deadlines under the 2005 Consent Order. *See Nuclear Watch*, 2018 WL 3405256 at *5-6, 12. Consequently, mootness is to be assessed based on the requirements of the consent order issued by NMED, and not merely on whether there are—in Nuclear Watch's view—delays in cleanup.

Of course, as this Court has already recognized, DOE bears a "formidable," although not insurmountable, burden, to demonstrate that it is "absolutely clear" that the conduct at issue will not recur. *Laidlaw*, 528 U.S. at 189; *Nuclear Watch*, 2018 WL 3405256 at *14; *see also* DOE Memo at 17 (discussing reasons it is "absolutely clear" violations of 2005 Consent Order will not recur). As discussed in its prior briefing, DOE Memo at 13-15, and below, DOE has met its burden to demonstrate that the violations of the 2005 Consent Order identified by Nuclear Watch will not reoccur under the 2016 Consent Order.

B. DOE Has Met Its Burden Under *Laidlaw*.

Nuclear Watch's complaint challenges only DOE's asserted failure to meet certain deadlines in the 2005 Consent Order for the completion of specifically-identified tasks. *Nuclear Watch*, 2018 WL 3405256, at *13 ("Plaintiff identifies no violations independent of the 2005 Order's remediation schedule."). It is impossible for violations of that remediation schedule to recur because, as this Court previously held, that order is "gone." *Id*.

The Court's firm holding that the 2005 Consent Order has been superseded requires the Court to reject Nuclear Watch's argument that its citizen suit penalty claim is not moot unless DOE can demonstrate that: (1) the particular tasks required by the 2005 Consent Order will be completed in accordance with a specific schedule; and (2) DOE will suffer consequences if it fails to meet those deadlines. *See* NW Opp. at 26-27. The Court's inquiry on mootness is not a basis for reviving obligations extinguished by the 2016 Consent Order. Indeed, once the 2016 Consent Order was issued, DOE's *only* obligation was to meet the requirements of that new Order, which

are fundamentally different than those contained in the 2005 Consent Order. *See* DOE Memo at 13-17. Further, DOE has explained that there is no reasonable expectation that DOE will violate the requirements of the 2016 Consent Order because of the manner in which binding Milestones are established annually under the 2016 Consent Order, as compared to the rigid structure of the 2005 Consent Order. *See* DOE Memo at 17-19. *See also* Intervenor New Mexico Environment Department's Motion for Summary Judgement, 5-6 (Nov. 9, 2018). ECF 91.

In its attempt to refute DOE's demonstration that it satisfied the *Laidlaw* burden, Nuclear Watch engages in several errors of reasoning. First, Nuclear Watch claims that DOE's performance under the 2005 Consent Order shows that the likelihood of recurring violations is more than a speculative contingency. NW Opp. at 8-18.[3] Even if the probability of DOE satisfying the enforceable Milestones as they are established under the 2016 Consent Order was the controlling question for mootness, which DOE does not agree it is, *see* DOE Memo at 11–16, DOE's performance under the 2005 Consent Order is not a predictor of DOE's future performance under the 2016 Consent Order. The 2016 Consent Order reflects a fundamentally different structure that was intended to resolve the deficiencies in the approach of the 2005 Consent Order. *See id.* at 17–19. Critically, because enforceable Milestones under the 2016 Consent Order are set on annual basis, rather than years in advance as was true under the 2005 Consent Order, DOE and

[3] DOE disagrees with certain aspects of Nuclear Watch's characterizations of the history of operation under the 2005 Consent Order, including, but not limited to, Nuclear Watch's assertions that DOE engaged in a "pattern of delay" and "attempt[ed] to evade compliance." However, the particulars of why DOE was unable to satisfy certain deadlines under the 2005 Consent Order are not material to the mootness question before the Court. Therefore, the parties' disagreement about the nature of DOE's past performance under the 2005 Consent Order is not a basis to defeat summary judgment. *See, e.g.*, *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1361 (10th Cir. 1993) ("Factual disputes about immaterial matters are irrelevant to a summary judgment determination.").

NMED can take into account continually-evolving circumstances in setting binding deliverables that are actually achievable. *See* Rhodes Dec. at ¶¶ 14-20.

Nuclear Watch's second error in reasoning is suggesting that self-reported or otherwise identified violations of the LANL Hazardous Waste Facility Permit demonstrate more than a speculative contingency that there is a likelihood of violations of the 2016 Consent Order. *See* NW Opp. at 18-20, 21. As explained in the Supplemental Declaration of David Rhodes, ¶ 4, the LANL Hazardous Waste Facility Permit and the 2016 Consent Order are separate documents, each governing distinct activity at LANL. There thus is no logical relationship between alleged violations of that Permit and potential future violations of the 2016 Consent Order.

Finally, in a similar vein, Nuclear Watch makes vague, unsubstantiated references to DOE's supposed performance at other DOE sites. *See e.g.*, NW Opp. at 19 (referring to "DOE's history[] at the LANL site, *and elsewhere*") (emphasis added). Such references are not sufficient to demonstrate that the unique circumstances at other sites would be in any way predictive of the likelihood that DOE would commit future violations of the 2016 Consent Order. Both the 2005 Consent Order, and the 2016 Consent Order, are documents specific to LANL, and even there only with respect to certain tasks. *See* Rhodes Decl. at ¶¶ 6-8; Rhodes Supp. Decl. at ¶¶ 4, 9. There simply is no evidence whatsoever that extraneous matters involving different sites, different cleanup projects, and different materials have any bearing on how DOE reasonably can be expected to perform under the 2016 Consent Order.

In sum, under *Laidlaw*, the relevant question is whether "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." 528 U.S. at 190. The wrongful behavior complained of by Nuclear Watch is DOE not meeting the deadlines under the 2005 Consent Order, conduct that could not possibly recur because the 2005 Consent Order no longer exists. All Nuclear Watch does is to point to inapposite scenarios to speculate that DOE will fall

short under the 2016 Consent Order. And "[t]o defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2006). The only *evidence* before the Court demonstrates that DOE is meeting the obligations set under the 2016 Consent Order. *See* Rhodes Decl. at ¶ 21. DOE has thus satisfied its burden under *Laidlaw*, and Nuclear Watch has not demonstrated otherwise. Accordingly, the Court should grant summary judgment to DOE.

III. NUCLEAR WATCH HAS FAILED TO ESTABLISH THAT AN EVIDENTIARY HEARING IS NECESSARY

In several instances in its response, Nuclear Watch asserts an evidentiary hearing is necessary. NW Opp. at 4, 7, 20. But that would be true only if there were a disputed question of *material* fact. Fed. R. Civ. P. 56(a). The ultimate question before the Court on DOE's motion for summary judgment is whether Nuclear Watch's remaining claim for civil penalties is moot, and, on this question, only a handful of facts are material. Nuclear Watch's response does not identify any such material fact as being disputed.

The only specific statement of material fact set forth by DOE that Nuclear Watch disputes is number three. *Compare* DOE Memo at 4 *with* NW Opp. at 3-4. The essence of Nuclear Watch's disagreement with DOE's statement of fact here concerns "the root causes of DOE's failures to comply with the 2005 [Consent Order]." NW Opp. at 4. But this disagreement cannot defeat summary judgment. The only relevant fact that DOE intended to convey is that DOE and NMED began reconsidering the 2005 Consent Order long before the present citizen suit was filed. The granular details of DOE's performance under the 2005 Consent Order, or, in Nuclear Watch's language, are not themselves material to the mootness analysis. "[O]nly facts that could have an effect on the outcome of a claim qualify as material." *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 965 (10th Cir. 2019).

Nuclear Watch also wrongly suggests an evidentiary hearing is necessary to resolve whether DOE has satisfied the *Laidlaw* standard. Only a few facts are material to the mootness question before the Court, and none of them are in dispute. Nuclear Watch's complaint is premised on alleged violations of the terms of the 2005 Consent Order, which this Court already determined has been superseded by the 2016 Consent Order. *Nuclear Watch*, 2018 WL 3405256 at *12. The structure of the 2016 Consent Order is fundamentally different than the 2005 Consent Order, which Nuclear Watch readily admits. *See* NW Opp. at 3, 27-31. And DOE has not yet failed to meet the binding Milestones established under the 2016 Consent Order. *See* Rhodes Decl. at ¶ 21. On this record, the Court has sufficient, undisputed facts on which to conclude that Nuclear Watch's claim for civil penalties is moot, and therefore should grant DOE's motion for summary judgment.[4]

CONCLUSION

For the reasons stated above and in DOE's opening brief, Nuclear Watch's remaining claim for civil penalties is moot. This Court should grant DOE's motion for summary judgment.

Respectfully submitted,

/s/ Eileen T. McDonough

Eileen T. McDonough
Environmental Defense Section
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3126

[4] Nuclear Watch's inclusion of the Declaration of Robert Alvarez ("Alvarez Decl.") does not create a disputed issue of material fact, because it simply speculates concerning the pace of corrective actions at LANL. *See* Alvarez Decl. at ¶ 9 ("The structure of the 2016 Order will not end DOE's and its LANL contractors' historic patterns of delay . . . ."), *see also id.* ¶¶ 10, 12. Again, Nuclear Watch's complaint is based on asserted violations by DOE of the terms of the 2005 Consent Order. Nuclear Watch's true concern very well may be the pace of corrective actions at LANL, but the only current issue is whether the violations of the 2005 Consent Order are likely to recur. On this point, Mr. Alvarez's statements suffer from the same incorrect focus as do Nuclear Watch's arguments.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on all counsel of record by the Court's electronic filing system on March 6, 2019.

s/ *Eileen T. McDonough*