

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
SANTA FE, NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CIV 90-02765C

MAY 23 1990

Robert M. Muck

CLERK

STATE OF NEW MEXICO; and
HEALTH AND ENVIRONMENT
DEPARTMENT, Environmental
Improvement Division,

Defendants.

**REPLY TO PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

The State of New Mexico has moved to dismiss this action on the grounds that: (1) this Court does not have subject matter jurisdiction pursuant to 28 U.S.C. § 1345 because that Section does not independently give the United States a federal question claim in the district court; (2) RCRA does not give the United States a claim for relief in the federal district court to challenge state-issued hazardous waste permits and, further, expressly requires the United States to litigate its challenge of the permit conditions in the State Court of Appeals; (3) the United States' declaratory judgment complaint presents a federal defense to a state action and, accordingly, does not confer jurisdiction in the Court; (4) the United States has failed to state claims for which relief can be granted because declaratory relief is essentially equitable and Plaintiff has not alleged and has not demonstrated any harm to it nor any inadequacy of the legal remedies provided by state law; (5) the State is entitled to have the State Court of Appeals construe



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state agency action under the HWA; (6) principles of comity, federalism and judicial economy compel abstention; and (7) this action must be dismissed unless this Court joins the University as a party.

The United States has opposed the motion to dismiss, but for the reasons set forth in the State's initial Motion to Dismiss and supporting Memorandum and in this Reply, resolution of the issues in this matter must be determined by the state court and, thus, this Court must dismiss this complaint.

A. THIS COURT LACKS SUBJECT MATTER JURISDICTION AND PLAINTIFF'S ALLEGATIONS FAIL TO STATE CLAIMS FOR WHICH RELIEF MAY BE GRANTED

1. 28 U.S.C. § 1345 DOES NOT INDEPENDENTLY PROVIDE THIS COURT WITH SUBJECT MATTER JURISDICTION.

The State concedes that 28 U.S.C. § 1345 vests in the United States the right to apply to the federal courts when it seeks to protect its sovereign interest. The United States further claim that Section 1345 in and of itself confers subject matter jurisdiction in the federal courts whenever the United States is a plaintiff.

Plaintiff's contention that the federal court has subject matter jurisdiction over the parties **whenever** the United States is a plaintiff is far from well-settled law. In Janakes v. United States Postal Service, 768 F.2d 1091 (9th Cir. 1985), the Court of Appeals for the Ninth Circuit disagreed. In Janakes an individual brought a declaratory judgment action against a federal agency in federal district court. Plaintiff's claim was made in the face of

an anticipated federal action to collect reimbursement of certain payments made to the plaintiff and was thus an assertion of a federal defense. The federal defendant sought summary judgment based on a lack of federal jurisdiction. The court held that if the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then the court had jurisdiction notwithstanding the declaratory judgment plaintiff's assertion of a federal defense, citing Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). The court also decided that the coercive action must "arise under" federal law, and not be based merely on diversity of citizenship or **another nonsubstantive jurisdictional statute**, and that Section 1345 is a **nonsubstantive jurisdictional statute**, citing Franchise Tax Board, *id.* at 19 n. 19. (**emphasis added**). Thus, the court concluded that jurisdiction based upon Section 1345 alone did not satisfy the requirement that the declaratory judgment defendant's action "arise under" federal law.

2. RCRA ITSELF LIMITS PLAINTIFF'S ALLEGED RIGHT TO LITIGATE IN THIS COURT ITS CHALLENGE OF THE PERMIT CONDITIONS.

The State has found no cases under RCRA determining federal court jurisdiction to review state issued permits. However, the federal courts have uniformly determined that no such jurisdiction exists to review analogous state-issued permits under the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.* Consolidated Edison Co. of New York, Inc. v. New York Department of Environmental Conservation, 726 F.Supp. 1404, 31 E.R.C. 1146 (D.C.

S.D. N.Y. 1989); District of Columbia v. Schram, 631 F.2d 854 (D.C. Cir. 1980); NRDC v. Outboard Marine Corp., 702 F.Supp. 690, 28 E.R.C. 1870 (N.D. Ill. 1988). The federal district court in Consolidated Edison held that it lacked jurisdiction to review the company's CWA challenge to proposed modifications to a state-issued permit, because the Clean Water Act requires challenges to state-issued permits to be brought in state court. The company filed a declaratory judgment action, alleging federal question jurisdiction pursuant to 28 U.S.C. § 1331 because determination of its claim "necessarily depend[ed] on resolution of a substantial question of federal law." Id. at 1149 (quoting plaintiff's memo in opposition). The Court held that the company had no cause of action under the CWA because that statute did not give a permittee the right to directly challenge the state's permit to the federal district court. Thus, its complaint had to be dismissed.

Similarly, in the Outboard Marine case, the court determined that the CWA did not provide direct review of a state-issued permit. The court noted, quoting Mianus River Preservation Comm. v. Administrator, 541 F.2d 899, 906 (2d Cir. 1976), that "federal review of a state-issued permit might involve 'review[ing] issues involving only a state agency's application and interpretation of purely state law.'" Outboard Marine, 28 E.R.C. at 1870 n.9.

The analysis under the CWA is directly applicable here. Once a program is authorized, EPA has no statutory role in the permitting process. 42 U.S.C. § 6925. RCRA does not provide review of state-issued permits. 42 U.S.C. § 6976(b). Absent such

a provision, the permit is not reviewable in federal court, but may only be reviewed in the state forum. Outboard Marine, 702 F.Supp. at 694. RCRA expressly subjects the United States to all State requirements, both substantive and procedural, including any requirements for permits, and Plaintiff must comply with such requirements. 42 U.S.C. § 6961. The HWA expressly requires Plaintiff to appeal the permit decision to the Court of Appeals of New Mexico. Section 74-4-4.2.G. Cf. Alabamians for A Clean Environment v. EPA, 26 E.R.C. 2116 (N.D. Ala. 1987).

3. THE PLAINTIFF'S CLAIMS DO NOT PRESENT A FEDERAL QUESTION AND DO NOT ARISE UNDER THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES.

Plaintiff asserts that its claims arise under federal law, specifically RCRA, and therefore present a federal question for review. The state disagrees. The United States alleges that the State agency issued the permit in violation of the State law by imposing permit conditions which allegedly exceed the scope of that law.

The United States concedes: (1) the validity of the HWA and HWMR (see, e.g., Plaintiff's Opposition to Defendants' Motion to Dismiss, hereinafter "Oppo", Oppo. at 12 n.9); (2) that it applied for and received the challenged permit pursuant to the HWA (see, e.g., Oppo. at 6); (3) that the permit is a hazardous waste permit; (4) that the nonradioactive but hazardous component of any waste is subject to the requirements of RCRA and the HWA (see, e.g., Oppo. at 4); and (5) federal facilities must comply with all state requirements in the same manner and to the same extent as any

person (Oppo. at 5).

The resolution of this case will likely require interpretation and construction of federal law due in significant part to the manner in which the question was framed by the plaintiff. The complaint, however, does nothing more than raise a federal law defense to a cause of action arising under state law. These facts alone do not raise a federal question.

The United States denies that its claims constitute a federal defense to a state law claim. (Oppo. at 12). It argues that the state has "brought no claim against the United States in the state court." (Oppo. at 12). This argument begs the question. The state believes this analysis is not limited to cases in which in which there is an actual state initiated claim pending, and Plaintiff cites no authority for its argument.

There is no pending **state-initiated** claim at this time. But if Plaintiff had violated its permit, the State would have filed an action to enforce the permit requirements in **state court under the HWA**. The United States would then have undoubtedly asserted as defenses the same issues it asserts now. The only difference in the two scenarios is that the LANL incinerator is not currently in operation; any enforcement action is premature; in short, the United States won the race to the courthouse.

4. PLAINTIFF IS NOT ENTITLED TO EQUITABLE DECLARATORY RELIEF BECAUSE IT HAS ALTERNATIVE ADEQUATE REMEDIES AT LAW AND BECAUSE IT HAS NOT DEMONSTRATED ANY PREJUDICE.

The State agrees that the United States does not need to demonstrate irreparable harm to be entitled to declaratory relief.

It is clear, however, that a declaratory judgment remedy is "essentially an equitable cause of action" requiring courts to decide whether to grant or withhold relief on traditional equitable principles. Samuels v. Mackell, 401 U.S. 66, 70 (1971) (quoting Great Lakes Co. v. Huffman, 319 U.S. 293, 300 (1943)). Plaintiff responds to this point only in a footnote (Oppo. at 13 n. 11). The United States still has not alleged **any** harm to it, nor **any** unavailability of legal remedies. Further, Plaintiff has not denied the State's assertions in its Motion to Dismiss at 7-8 that the United States in fact **cannot** establish any immediate, irreparable injury to it, and any inadequacies in the legal remedies available to it under state law. Thus, this Court cannot grant the relief Plaintiff requests for its claims.

B. ANY ABSENCE OF STATE CASE LAW DOES NOT MANDATE FEDERAL COURT CONSTRUCTION OF STATE LAW.

The United States argues that "there is no state law which could be applied to the issues raised in the United States' complaint. Because federal law will provide the rule of decision on the merits, the issues are appropriately decided in a federal forum." Oppo. at 17 (emphasis in original).

The Court of Appeals of New Mexico has not yet been presented with an opportunity to construe state agency action under the HWA. The United States' argument that it is inappropriate for the State court to have that opportunity because it would have to construe federal law is offensive to the State. The issue is not the **application of existing state case law**, the issue is the State's

right to have its own courts **interpret and create** state law.

First, the State does not concede that there is "no" applicable state law. Applicability will depend on the issues raised in the substantive defense of the permit, and state law decisions in analogous areas may be applicable. Second, state courts have just as much right to **create** state case law as they do to **interpret** existing state case law. Third, state courts have the right to consider **other states'** case law as well as federal case law. Fourth, the **existence** of a body of **federal** law does not **require** state determination according to federal law. RCRA gives states flexibility in developing their authorized programs and directs the United States to comply with such programs. See, e.g., 42 U.S.C. §§ 6926(b) and 6929.

The United States also argues that because the HWA closely parallels RCRA and contains a limitation concerning the regulations the Board may adopt, this undercuts the State's claim that it has a right to state court interpretation of agency action under the HWA. *Oppo.* at 16-17, citing § 74-4-4.A. NMSA 1978. This is irrelevant. The point is not whether or not the HWA is more stringent than RCRA. The issue is that RCRA **authorizes** state programs to be more stringent. This means each state may be different from RCRA and it is delegated to each state to construe its state program pursuant to state law. New Mexico has the right to have the Court of Appeals of New Mexico construe agency actions under the HWA, and not the federal court.

C. PRINCIPLES OF COMITY, FEDERALISM AND JUDICIAL ECONOMY MANDATE ABSTENTION.

Plaintiff denies the applicability of the theories of abstention argued in the State's Motion. The United States reiterates the priority of its "national interests in assuring uniform application" and consistent interpretation of RCRA over the "State's interest in being in a state forum." Oppos. at 20. Plaintiff asserts that because LANL is a federal facility, the outcome of its challenge of the state-issued permit "will not affect the State's ability to regulate the numerous hazardous waste facilities within New Mexico which are not federal or which are not engaged in activities which require the management of radioactive waste." Oppos. at 18. This position flies in the face of the Congressional mandate that federal facilities comply with state hazardous waste laws just as any other person. The issue is not which party's forum preference is entitled to greater deference; nor should forum be determined by the race to the court house.

Plaintiff and the University jointly and voluntarily submitted themselves to the State HWA permitting process, including a joint appeal of the permit to the New Mexico Environmental Improvement Board. The State issued the permit to Plaintiff and the University pursuant to their participation in a quasi-judicial proceeding initiated before the United States filed this Complaint, and Plaintiff must exhaust state judicial review before coming to the federal court. Cf. New Orleans Public Serv., Inc v. Council of City of New Orleans, ___ U.S. ___, 109 S.Ct. 2506, 2517-20 (1989) (proceedings before state rate-making authority were not

judicial in nature and not entitled to Younger treatment).

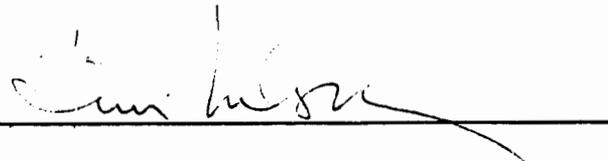
The United States argues that judicial economy supports denial of this motion because "federal adjudication could fully resolve all the issues raised in the state proceeding." Oppo. at 21-22. There are in fact **three** cases filed against the State challenging the same conditions in the same permit; the University's appeal also raises additional issues. Any judicial resource problem caused by Plaintiff and the University by their filing three separate challenges to the exact same permit conditions should and can be solved by the State Court of Appeals, which has before it all three parties and all issues raised regarding the permit.

The State moves for dismissal if the University cannot be joined in this action. The United States denies the necessity of joinder of the University but does not oppose joinder. Oppo. at 22. For the reasons stated in the motion and supporting memorandum, the State and the public will be prejudiced in the absence of the University to any proceeding that purports to seek a complete solution. The United States and the University may also be prejudiced.

V. CONCLUSION.

For all of the foregoing reasons, the State respectfully requests that this Court grant the State's Motion to Dismiss.

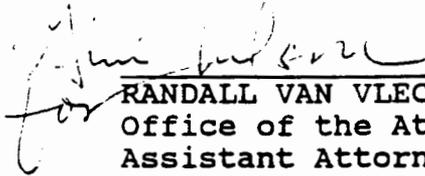
Respectfully submitted,



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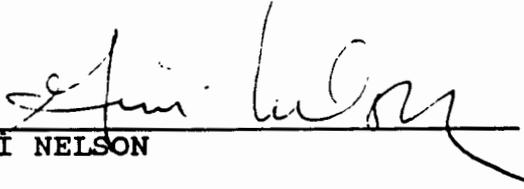
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY TO
PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
was mailed on this 23 day of May, 1990, to the following:

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