

FILED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

02 DEC 26 PM 2: 20

Permit - Order

Robert M. Marshall
CLERK-SANTA FE

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Plaintiff,

v.

JOHN R. D'ANTONIO, JR., Cabinet Secretary of
the New Mexico Environment Department,

Defendant.

Civil No. CIV 02 1631 LFG WWD

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND FOR
REVIEW OF ADMINISTRATIVE
ACTION

Plaintiff The Regents of the University of California complains as follows:

NATURE OF THE CASE

1. On November 26, 2002, the Cabinet Secretary ("Secretary") of the New Mexico Environment Department ("NMED") issued a 277-page administrative Order ("Order") attempting to impose an extensive series of investigative, monitoring and corrective action obligations on the Los Alamos National Laboratory ("Laboratory"). By this lawsuit, The Regents of the University of California ("University"), which operates the Laboratory under a contract with the United States Department of Energy ("DOE"), seeks judicial review of the legal validity and factual basis of this Order.

2. The University challenges the Order on the grounds that the Secretary's assertion of jurisdiction over the Laboratory pursuant to the New Mexico Hazardous Waste Act is preempted by federal law, exceeds the applicable waiver of federal sovereign immunity and is *ultra vires* or otherwise in violation of federal and state law. The University, in conjunction with DOE, is currently performing a comprehensive, multi-media, integrated environmental restoration plan at the Laboratory. This plan was developed with input from a wide range of governmental, private and other stakeholders and has been successfully implemented for several



years. The environmental restoration plan encompasses and is consistent with the Laboratory's legal obligations under both the Laboratory's existing NMED-issued Hazardous Waste Facility Permit and the comprehensive federal statutory regimes governing the Laboratory's environmental functions. The University is committed to completing this environmental restoration as expeditiously as possible.

3. In this action, the University requests that the Court declare that the Order is invalid, in whole or in part, because it violates federal and state law, it is arbitrary, capricious, and an abuse of discretion, and it is not supported by substantial evidence in the record. The University also requests that the Court issue all appropriate injunctive relief.

PARTIES

4. Plaintiff The Regents of the University of California ("University" or "Plaintiff") is a constitutional agency and an arm of the State of California. The University operates the Laboratory under a contract with DOE.

5. Defendant John R. D'Antonio, Jr. is presently the Cabinet Secretary ("Secretary" or "Defendant") of NMED, an agency of the State of New Mexico, and he is sued herein in his official capacity.

JURISDICTION AND VENUE

6. The Court has subject matter jurisdiction of the claims for relief set forth herein pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1367 (supplemental jurisdiction).

7. Venue is properly laid in this judicial district pursuant to 28 U.S.C. § 1391(b) because this civil action is not founded on diversity of citizenship, a substantial part of the events or omissions giving rise to the claims herein occurred in this judicial district, and the property relating to the claims is located in this judicial district.

GENERAL BACKGROUND FACTS

8. The Laboratory is a scientific institution owned by the United States government and has, since January 1943, been operated by the University (a non-profit educational institution). Since its founding, the Laboratory's activities have played a critical role in national defense and global security. It is one of several national laboratories that support DOE's responsibilities for national security, energy resources, environmental quality and science. The Laboratory's historic mission focused on the development of both nuclear and conventional weapons. Today, the Laboratory's central missions are to ensure the safety and reliability of the nation's nuclear weapons stockpile, to develop the technical means for reducing the global threat from weapons of mass destruction and terrorism, and to solve national problems in energy, environment and health security. The Laboratory conducts research, development and limited production (including testing) of nuclear and conventional weapons components.

9. The 43-square mile Laboratory is situated on the Pajarito Plateau northwest of Santa Fe in northern New Mexico. It is divided into 47 technical areas that are used for building sites, experimental areas, support facilities, roads and utility rights-of-way. These uses account for only a small part of the total land area because there are large buffer areas for security and safety. The area surrounding the Laboratory is largely undeveloped.

10. As a federal facility engaged in national defense activities, the Laboratory is subject to federal statutes, regulations and orders regulating materials, discharges and wastes at the facility. These statutes, regulations and orders are administered by DOE or the United States Environmental Protection Agency ("EPA"), and include the Atomic Energy Act of 1954, 42 U.S.C. §§ 2014, *et seq.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901, *et seq.*, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.*, and Toxic Substances Control Act, 15 U.S.C. §§ 2601, *et seq.*

THE NOVEMBER 26, 2002 ORDER

11. On November 26, 2002, Defendant issued an administrative Order ("Order"), specifically identified as a Proceeding Under the New Mexico Hazardous Waste Act §§ 74-4-10.1 and 74-4-13, to both the University and DOE relating to the Laboratory. This Order consists of two major parts: (1) a series of findings of fact and conclusions of law attempting to create a legal basis for the Order; and (2) a lengthy group of sections purporting to impose a complex array of investigation, monitoring and corrective action obligations. A true and correct copy of the Order is attached hereto as Exhibit "A" and incorporated herein by reference.

12. The first major portion of the Order (section II) contains purported findings of fact and conclusions of law that attempt to address the legal requirements of sections 74-4-10.1 and 74-4-13 of the New Mexico Hazardous Waste Act ("HWA"). Defendant asserts that he is in receipt of information or evidence that the University's and DOE's storage, treatment and disposal of materials and substances at the Laboratory constitute the "release" of "hazardous waste" that "may present a substantial hazard to human health or the environment" (section 74-4-10.1) and of "solid" or "hazardous" waste that "may present an imminent and substantial endangerment to health or the environment" (section 74-4-13).

13. The remainder of the Order (sections III through XIII) purports to impose on the University a complex series of detailed work plans and time schedules setting forth specified investigation, monitoring and corrective action obligations at locations throughout the Laboratory.

14. The Order imposes joint and several liability on the University and DOE for carrying out the obligations contained in the Order, and threatens to impose civil and criminal penalties for any violation of the Order.

15. Defendant's assertion of HWA jurisdiction pursuant to the Order is based primarily on the alleged presence, releases and potential dangers posed by materials, substances and wastes that federal law has placed beyond Defendant's HWA authority, including

radionuclides, materials originating in Laboratory point source discharges, and undiscarded military explosives and munitions-related compounds.

16. The Order constitutes “final administrative action” under New Mexico law. Accordingly, the Order is now ripe for judicial review. Pursuant to HWA section 74-4-14.C, this administrative action must be set aside if it is “arbitrary, capricious or an abuse of discretion, not supported by substantial evidence in the record or otherwise not in accordance with law.” Although the University chooses to have all of the claims contained in this Complaint adjudicated by this Court, it will also file a protective notice of appeal in the New Mexico Court of Appeals after filing this Complaint.

STATUTORY AND REGULATORY FRAMEWORK

17. The Resource Conservation and Recovery Act of 1976 (“RCRA”), 42 U.S.C. §§ 6901, *et seq.*, governs the treatment, storage and disposal of hazardous waste in the United States. Pursuant to RCRA, EPA has the authority to approve individual state hazardous waste programs, or portions thereof, that meet the minimum federal requirements set forth in RCRA and its implementing regulations. When approved, the state regulatory agency has primary responsibility to implement and enforce such approved program in lieu of RCRA. EPA has authorized NMED to implement and enforce the HWA as meeting the federal minimum RCRA requirements in the State of New Mexico.

18. The New Mexico legislature adopted the HWA, which mirrors many RCRA provisions and governs the treatment, storage and disposal of hazardous waste in New Mexico. NMSA 1978, §§ 74-4-1 to 74-4-14 (2002). The HWA provides the New Mexico Environmental Improvement Board (“EIB”) with jurisdiction over “hazardous” wastes as defined in the HWA, NMSA 1978, § 74-4-4 (2002), and also provides Defendant with authority to enforce the EIB’s regulations. Defendant is granted limited authority by the HWA to issue orders and take administrative or judicial action upon finding the “release” of specified waste that “may present a substantial hazard to human health or the environment” (section 74-4-10.A) or based on a

finding that there may be an “imminent and substantial endangerment” (section 74-4-13 .A) from the treatment, storage, transportation or disposal of “hazardous waste” and “solid waste,” as defined in the HWA.

19. Orders issued by NMED under section 74-4-10.1 of the HWA may require “such monitoring, testing, analysis and reporting with respect to such facility or site as the [Secretary of NMED] deems reasonable to ascertain the nature and extent of such hazard” and may be issued only after the Secretary provides the owner or operator of the facility an opportunity to confer with the Secretary on a proposal to carry out the required monitoring, testing, analysis and reporting. Orders issued under section 74-4-13 of the HWA may be issued to restrain the “handling, storage, treatment, transportation or disposal of solid waste or hazardous waste” creating the “imminent and substantial endangerment” and such other action “to protect health and the environment.”

20. RCRA defines “solid waste” as “any garbage, refuse, sludge . . . and other discarded material . . . resulting from industrial, commercial, mining, and agricultural operations, and from community activities,” but excluding “solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923)[.]” 42 U.S.C. § 6903(27).

21. The HWA adopts the RCRA definition of “solid waste” in closely similar, although not identical, language. NMSA 1978, § 74-4-3.O (2002).

22. The New Mexico Legislature has evinced an intent that the HWA be interpreted no more broadly than the federal RCRA statute upon which it is based. For example, the Legislature precluded the EIB from listing as a hazardous waste any solid waste which has not been designated as a hazardous waste by EPA. NMSA 1978, § 74-4-4.A(1). This limitation applies to any rules adopted for the purposes of requiring corrective action for releases of

hazardous waste or constituents from solid waste management units. NMSA 1978, § 74-4-4.A(5)(h) & (i).

23. Consistent with RCRA, the HWA further provides that “[n]othing in the Hazardous Waste Act shall be construed to apply to any activity or substance which is subject to the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1251 *et seq.*), the Safe Drinking Water Act, as amended, (42 U.S.C. 300f *et seq.*) or the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2011 *et seq.*) except to the extent that such application or regulation is not inconsistent with the requirements of such acts[.]” NMSA 1978, § 74-4-3.1 (1981).

24. On November 8, 1989, pursuant to its delegated authority under RCRA, the Environmental Improvement Division of the New Mexico Health and Environment Department (now NMED) issued the Laboratory a Hazardous Waste Facility Permit (“HWA/RCRA Permit”) addressing the treatment and storage of RCRA-defined hazardous wastes at the Laboratory. On March 9, 1990, Region 6 of EPA issued a Hazardous and Solid Waste Amendments Module to the Laboratory’s RCRA permit (“Module VIII”). Module VIII prescribes both a specific corrective action program and provides the requirements for environmental restoration activities at the Laboratory. EPA substantially modified Module VIII on April 8, 1994. Effective January 2, 1996, EPA delegated to NMED its authority to implement the Hazardous and Solid Waste Amendments, and NMED assumed jurisdiction over Module VIII.

DECLARATORY JUDGMENT AUTHORITY

25. The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, authorizes the Court to declare the rights or other legal relations of any interested party seeking such a declaration. Any necessary or proper relief based on a declaratory judgment may be granted against any adverse party whose rights have been determined by such judgment.

FIRST CLAIM FOR RELIEF

(Federal Preemption – Supremacy Clause)

26. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 25 of this Complaint.

27. The Supremacy Clause in the United States Constitution mandates that the United States' laws and treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. The Supremacy Clause thus provides the federal government with explicit authority to preempt state law.

28. The federal government may preempt state regulation either expressly or impliedly through field or conflict preemption. Field preemption will be found when, among other things, the federal government enacts a pervasive scheme of federal regulation or when the field is one in which there is such a dominant federal interest that federal law precludes enforcement of state laws on the same subject. When a field is preempted by the federal government, federal law preempts all state law – not only state laws that conflict with the federal law in question. Conflict preemption will be found when, even though federal law has not occupied the subject field, the state law in question stands as an obstacle to the accomplishment of the purposes and objectives of federal law, or makes it impossible to comply with both federal and state law.

29. Congress enacted the Atomic Energy Act ("AEA") in 1954 to promote the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. The AEA establishes a pervasive, cradle-to-grave scheme for federal regulation of radioactive materials. The AEA grants DOE and the Nuclear Regulatory Commission exclusive authority for regulating radioactive materials. Pursuant to this authority, DOE has developed and implemented an extensive regulatory regime for managing radioactive materials from the standpoint of health and environmental safety.

30. Consistent with the AEA, Congress limited the scope of statutory authority over "solid" and, hence, "hazardous" waste in RCRA by excluding from its coverage any "source, special nuclear or byproduct material" as defined by the AEA. 42 U.S.C. §§ 6903(5), 6903(27). RCRA further provides that it does not "apply to (or authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to . . . the Atomic Energy Act of

1954” except to the extent that such application or regulation is not inconsistent with the requirements of the statute. 42 U.S.C. § 6905. The HWA contains these same jurisdictional limitations. NMSA 1978, § 74-4-3.1.

31. Since the AEA occupies the field for regulation of radioactive materials, and since Defendant’s purported regulation of radioactive materials otherwise conflicts with federal law, Defendant’s Order, which is based on the regulation of radioactive materials, including the alleged presence, releases and potential dangers of radioactive materials and the imposition of investigation, monitoring and other corrective action provisions pertaining to radioactive materials, is preempted by the AEA pursuant to the Supremacy Clause of the Constitution.

32. The Federal Water Pollution Control Act (“FWPCA”), 33 U.S.C. §§ 1251-1387, establishes a comprehensive federal statutory scheme for the protection of water quality in the United States. Among other things, the FWPCA prohibits the discharge of pollutants from a point source into waters of the United States unless a person has received a National Pollutant Discharge Elimination System (“NPDES”) permit to do so under the FWPCA. 33 U.S.C. §§ 1311 & 1342. NPDES permits are issued by EPA, unless EPA has delegated such permit authority to an individual state. Since the State of New Mexico has not been granted such permit authority, EPA administers the NPDES permit program in New Mexico.

33. Consistent with the FWPCA, Congress limited the scope of statutory authority over “solid” and, hence, “hazardous” waste in RCRA by excluding from its coverage any “solid or dissolved material” in sewage, return flows or industrial discharges “which are point sources subject to permits” under section 402 of the FWPCA, 33 U.S.C. § 1342. 42 U.S.C. §§ 6903(5), 6903(27). RCRA further provides that it does not “apply to (or authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act” except to the extent that such application or regulation is not inconsistent with the requirements of the statute. 42 U.S.C. § 6905. The HWA contains these same jurisdictional limitations. NMSA 1978, § 74-4-3.1.

34. Defendant's Order, which is based on the assertion of jurisdiction over the presence, releases and potential dangers of materials emanating from point source discharges and of activities and substances subject to the FWPCA, is preempted by the FWPCA pursuant to the Supremacy Clause of the Constitution.

35. An actual controversy has arisen and now exists between the University and Defendant regarding Defendant's jurisdictional authority to predicate the Order on: (A) the presence, alleged releases and potential dangers posed by radionuclides whether alone, in mixed waste or in the environment; (B) solid or dissolved materials originating in discharges from point sources at the Laboratory; and (C) on the regulation of activities and substances subject to the AEA or FWPCA.

WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

SECOND CLAIM FOR RELIEF

(HWA/RCRA Jurisdiction)

36. Plaintiff realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 through 35 of the Complaint.

37. Section 1006(a) of RCRA and section 74-4-3.1 of the HWA limit the scope of statutory authority over "solid waste" and, hence, "hazardous waste" in those Acts by excluding from their coverage any "source, special nuclear or byproduct material" as defined in the AEA. Federal and state regulations also exclude from the definition of "solid waste" "source, special nuclear or by-product material" as defined by the AEA. 40 C.F.R. § 261.4(a)(4); 20.4.1.200 NMAC (incorporating by reference 40 C.F.R. § 261).

38. Section 1006(a) of RCRA and section 74-4-3.1 of the HWA also exclude from "solid" and, hence, "hazardous" waste, any "solid or dissolved material" in discharges which are "point sources subject to permits" under section 402 of FWPCA. 42 U.S.C. § 6903(27); NMSA 1978, § 74-4-3.O. Federal and state regulations also exclude from the definition of "solid waste" any Laboratory point source discharges subject to section 402 of the FWPCA. 40 C.F.R. § 261.4(a)(2); 20.4.1.200 NMAC (incorporating by reference 40 C.F.R. § 261).

39. RCRA and the HWA further provide that they do not apply to or authorize state regulation of "any activity or substance" subject to the AEA or FWPCA if such regulation would be inconsistent with either of those Acts. 42 U.S.C. § 6905(a); NMSA 1978, § 74-4-3.1. Therefore, Defendant lacks authority under RCRA or the HWA to regulate activities or substances which are subject to regulation under either the AEA or FWPCA if such inconsistencies have developed or will develop.

40. Defendant's Order is based on the alleged presence, releases and potential dangers of materials, substances and activities at the Laboratory that are governed by the AEA and FWPCA. Accordingly, the Order is void as an *ultra vires* action and of no force and effect, in whole or in part, because it encompasses materials, substances and activities of which Defendant lacks jurisdiction under the HWA.

41. Defendant's Order is based on the alleged presence of military explosives and munitions-related compounds. The presence of such military explosives and munitions-related compounds has resulted from their intended use in the testing and development of weapons components or in various experiments, studies or training exercises relating to such testing and development. Such military explosives and munitions-related compounds are located in areas that are part of the Laboratory's active military ranges, *i.e.*, are currently used for firing ranges, or are currently active restricted area buffer zones within the impact area of and appurtenant to active firing ranges. The munitions and munitions-related compounds have not left the military range. The explosives and munitions-related compounds are not discarded, and are not solid waste under the HWA. Accordingly, the Order is void and of no force and effect, in whole or in part, because it encompasses military munitions and munitions-related compounds over which Defendant lacks jurisdiction under the HWA.

42. An actual controversy has arisen and now exists between the University and Defendant regarding Defendant's authority to predicate the Order on the alleged presence, releases and potential dangers of materials, substances and activities beyond its HWA jurisdiction, including, but not limited to, materials, substances and activities subject to the AEA

or FWPCA, materials originating in discharges from Laboratory point sources and military explosives and munitions-related compounds.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

THIRD CLAIM FOR RELIEF

(Sovereign Immunity)

43. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 42 of this Complaint.

44. The federal government is immune from state regulation except to the extent that it waives such immunity. Since the Laboratory is a federal facility owned by DOE, an agency of the federal government, it is covered by the federal government's sovereign immunity.

45. RCRA contains a limited waiver of the federal government's sovereign immunity from state regulation for federal facilities. 42 U.S.C. § 6961. RCRA provides, among other things, that any executive agency having jurisdiction over any solid waste management facility or disposal site shall be subject to, and comply with, all Federal, State, interstate, and local "requirements," both substantive and procedural, respecting "control and abatement of solid waste or hazardous waste disposal, in the same manner and to the same extent, as any person is subject to such requirements." *Id.*

46. Neither the AEA nor any other federal law waives federal sovereign immunity from regulation of DOE facilities by states with respect to activities and materials covered by the AEA. Both RCRA and the HWA expressly exclude regulation of activities and materials covered by the AEA. In addition, because the HWA imposes no "requirements" regulating radioactive materials, the Order exceeds RCRA's limited waiver of sovereign immunity for federal facilities.

47. Any materials discharged pursuant to, or any activities or substances subject to, the authority of the FWPCA, and military explosives and munitions-related compounds which

are not "solid waste" under RCRA or the HWA, are also outside the limited waiver of sovereign immunity contained in RCRA for federal facilities.

48. An actual controversy has arisen and now exists between the University and Defendant regarding whether the Order, in whole and in part, is invalid because it contravenes the federal government's sovereign immunity.

WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

FOURTH CLAIM FOR RELIEF

(Judicial Review of Administrative Action)

49. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 48 of this Complaint.

50. In this Claim for Relief, Plaintiff requests that this Court undertake judicial review of the legal and factual adequacy of the Order pursuant to its supplemental jurisdiction set forth in 28 U.S.C. § 1367. This claim arises out of the same common nucleus of operative facts as the federal question jurisdiction claims set forth in this Complaint, and they are so closely related so as to form part of the same case or controversy.

51. New Mexico law provides for judicial review of the Order, which constitutes final administrative action, using three standards. Specifically, the Order must be invalidated if it is "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." NMSA 1978, § 74-4-14.C.

52. The Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2692, regulates certain aspects of chemical substances and mixtures, including polychlorinated biphenyls ("PCBs"). PCBs are regulated at the Laboratory pursuant to EPA's regulations implementing TSCA and EPA's TSCA Authorization for the Laboratory.

53. The New Mexico Legislature adopted the Radiation Protection Act ("RPA") to regulate the health and environmental aspects of the use, management, storage and disposal of radioactive material. NMSA 1978, §§ 74-3-1 to 74-3-16 (2000). The RPA establishes the EIB as the radiation protection consultant for all agencies and institutions of the state. NMSA 1978,

§ 74-3-5.A (2000). The New Mexico Legislature intended to limit the State's authority over the health and environmental aspects of radioactive materials by limiting the RPA's coverage over such materials owned by the United States, only "to the extent required or permitted by the authority in control of such materials" NMSA 1978, § 74-3-10.B.

54. The New Mexico Legislature adopted the Water Quality Act ("WQA") to prevent and abate water pollution in the State. NMSA 1978, §§ 74-6-1 to 74-6-17 (2001). The WQA establishes the Water Quality Control Commission ("WQCC") as the state water pollution control agency "for all purposes of the... [FWPCA] and the wellhead protection and sole source aquifer programs of the federal Safe Drinking Water Act. . . ." NMSA 1978, § 74-6-3.E (1997). The WQA establishes a specific remedy where evidence that a pollution source or combination of sources pose "an imminent and substantial danger to public health." NMSA 1978, § 74-6-11 (1993). The WQA authorizes a constituent agency, including NMED, to file an action in district court "for the county in which such a source is located" to restrain any person "from further causing or contributing to the condition" or "[i]f it is not practicable to assure prompt protection of public health solely by the commencement of a civil action as set forth in [§ 74-6-11.A], to issue such orders as it deems necessary to protect public health." NMSA 1978, § 74-6-11.B (1997). The WQA further provides that any such order "shall be effective for not more than seventy-two hours unless the constituent agency brings an action within seventy-two hours or for a longer period of time as authorized by the court." *Id.*

55. The Order is arbitrary, capricious and an abuse of discretion because, among other things:

(A) It fails to establish that the "release" of hazardous waste from the Laboratory "may present a substantial hazard to human health or the environment" as required by section 74-4-10.1 of the HWA and corresponding federal law;

(B) It fails to establish that the past or current handling, storage, treatment, transportation or disposal of solid waste or hazardous waste "may present an imminent and substantial endangerment to health or the environment" as required by section 74-4-13 of the

HWA and corresponding federal law;

(C) It is based, in whole or in part, on alleged soil and groundwater contamination without a corresponding demonstration of a “substantial hazard” or “imminent and substantial endangerment” to human health or the environment as required by federal and state law;

(D) It is based, in whole or in part, on asserted contamination levels and concentrations that conflict with established federal regulatory standards including, but not limited to, those set by the federal Safe Drinking Water Act, 42 U.S.C. §§ 300, *et seq.*;

(E) It is based, in whole or in part, on Defendant’s improper shifting of the legal and factual burden of proof under federal and state law by requiring the University to “demonstrate” to Defendant’s satisfaction that Defendant lacks HWA jurisdiction over materials, substances and activities at the Laboratory;

(F) It attempts to regulate substances, the regulatory authority for which has been granted to other agencies of federal and state government and not to NMED under the HWA, such as radionuclides by the DOE under the AEA, point source discharges by EPA under the FWPCA, PCBs by EPA under TSCA and water pollution by the WQCC under the WQA;

(G) It attempts to impose investigation, monitoring and other corrective action obligations under section 74-4-10.1 of the HWA, but not in accordance with the procedural requirements specified by that section;

(H) It attempts to impose investigation, monitoring and other corrective action obligations to remedy alleged water pollution that poses an imminent and substantial danger to public health, but not in accordance with the process specified in section 74-6-11 of the WQA;

(I) It attempts to impose asserted contamination cleanup levels and concentrations that conflict with established federal and New Mexico regulatory standards including, but not limited to, those set by the WQCC under the WQA and the EIB under the HWA;

(J) It is based on purported legal findings under sections 74-4-10.1 and 74-4-

13 of the HWA and attempts to impose investigation, monitoring and other corrective action obligations and schedules that are inconsistent with and contradictory to federal regulatory standards and permit requirements including, but not limited to, the standards and requirements contained in the Laboratory's TSCA Authorization issued by EPA;

(K) It impermissibly attempts to regulate radioactivity, the regulatory authority for which has been excluded from NMED authority pursuant to the RPA, section 74-3-1 0.B, since DOE, "the authority in control of such materials," has not required or permitted such authority;

(L) It attempts to impose investigation, monitoring and other corrective action obligations and schedules that are inconsistent with, and contradictory to, the Laboratory's existing HWA/RCRA permit and other permits issued by NMED;

(M) It attempts to impose investigation, monitoring and other corrective action obligations and schedules that preempt and effectively modify the Laboratory's existing RCRA permit without complying with the procedures contained in the EIB's regulations and section O of the Laboratory's HWA/RCRA permit; and

(N) It is otherwise arbitrary, capricious and an abuse of discretion, and violates principles of fundamental fairness, for all of the reasons, and on all of the grounds, set forth in this Complaint.

56. The Order is not in accordance with law for all of the reasons, and on all of the grounds, set forth in this Complaint, including those set forth in paragraph 55 herein.

57. The Order is not supported by substantial evidence in the administrative record.

WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff The Regents of the University of California prays for judgment against Defendant John R. D'Antonio, Jr. as follows:

1. On its First Claim for Relief, for a declaratory judgment that: (A) Defendant's attempted regulation in the Order of radioactive materials, as well as substances and activities

subject to the AEA, is preempted pursuant to the Supremacy Clause by the AEA; (B) Defendant's attempted regulation in the Order of solid or dissolved materials in discharges subject to permits under the FWPCA, as well as activities and substances subject to the FWPCA, is preempted pursuant to the Supremacy Clause by the FWPCA; and (C) the Order is invalid, in whole or in part, because it constitutes prohibited regulation of materials, substances and activities governed by the AEA and FWPCA.

2. On its Second Claim for Relief, for a declaratory judgment that: (A) Defendant does not have authority under the HWA to regulate radioactive materials or activities and substances governed by the AEA; (B) Defendant does not have authority under the HWA to regulate materials discharged from Laboratory point sources or activities and substances subject to the FWPCA; (C) Defendant does not have authority under the HWA to regulate certain military explosives and munitions-related compounds that are not "solid waste" pursuant to RCRA and the HWA; (D) the Order is based, in whole or in part, on the alleged presence, releases and potential dangers of radioactive materials, of materials originating in Laboratory point sources discharges, of military explosives and munitions-related compounds and of other materials beyond Defendant's HWA authority; and (E) the Order is invalid, in whole and in part, because it constitutes prohibited regulation of such activities and materials.

3. On its Third Claim for Relief, for a declaratory judgment that the Order is invalid, in whole and in part, because it contravenes the federal government's sovereign immunity.

4. On its Fourth Claim for Relief, for a declaratory judgment that the Order is invalid, in whole and in part, because it is arbitrary, capricious and an abuse of discretion, it is not supported by substantial evidence in the administrative record, and it is otherwise not in accordance with law.

5. On all Claims for Relief:

(A) For temporary, preliminary and permanent injunctive relief to enjoin Defendant from utilizing or taking action based upon the Order until this Court has completed its judicial review;

(B) For temporary, preliminary and permanent injunctive relief against Defendant, and any person acting in concert with Defendant, to effectuate or enforce the Court's orders;

(C) For its costs in connection with this action;

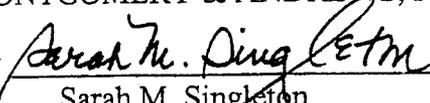
(D) For its reasonable attorneys' fees, to the extent allowed by law; and

(E) For such other and further relief as may be just and proper.

Respectfully submitted,

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