

COPY

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

United States of America, )  
)  
Plaintiff, )  
)  
v. )  
)  
Sparton Technology, Inc., )  
)  
Defendant. )

Civil Action No.  
CIV 97 0210-M

The City of Albuquerque & )  
The Bernalillo County Commissioners, )  
)  
Plaintiffs, )  
)  
v. )  
)  
Sparton Technology, Inc., )  
)  
Defendant. )

Civil Action No.  
CIV 97 0206-LH

State of New Mexico, )  
New Mexico Environment Department, & )  
New Mexico Office of the Natural )  
Resources Trustee, )  
)  
Plaintiffs, )  
)  
v. )  
)  
Sparton Technology, Inc., )  
)  
Defendant. )

Civil Action No.  
CIV 97 0208-JC

**PLAINTIFFS' JOINT OPPOSED MOTION FOR PRELIMINARY INJUNCTION AND  
MEMORANDUM IN SUPPORT**

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## INTRODUCTION

Plaintiffs in the above captioned actions hereby move for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65. This Motion and Memorandum in Support is submitted by the City of Albuquerque and the Bernalillo County Commissioners ("the Municipal Plaintiffs"); the State of New Mexico, the New Mexico Environment Department ("NMED"), and the New Mexico Office of the Natural Resources Trustee ("ONRT") ("the State Plaintiffs"); and the United States (collectively "Plaintiffs"). Plaintiffs' Motion seeks to compel defendant Sparton Technology, Inc. ("Sparton") to perform certain actions which are necessary to abate an "imminent and substantial endangerment" to human health and the environment presented by groundwater contaminated with hazardous waste emanating from Sparton's plant on Coors Road in Albuquerque, New Mexico ("the Sparton facility").

The United States' action was commenced on behalf of the U.S. Environmental Protection Agency under the Resource Conservation and Recovery Act ("RCRA") Section 7003, 42 U.S.C. § 6973, and Safe Drinking Water Act ("SDWA") Section 1431, 42 U.S.C. § 300i.<sup>1</sup> The State and Municipal Plaintiffs commenced their actions under RCRA Section 7002, 42 U.S.C. § 6972.<sup>2</sup> An opposed motion to consolidate these actions was served on Sparton on March 18, 1997 and is pending under Local Rule 7.3(a).

The actions allege that solid and hazardous waste from Sparton's facility has entered the soil and groundwater and created a plume of groundwater contaminants which is migrating off-

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<sup>1</sup>No. CIV-97-02100M (filed February 19, 1997).

<sup>2</sup>Nos. Civ-97-02089-JC and CIV-97-0207-LH (both filed February 19, 1997).

site. The groundwater through which the contaminant plume is spreading is part of an aquifer that is the sole source of drinking water for the City of Albuquerque, and the Plaintiffs filed these actions in order to protect that drinking water supply.

In this Motion, the Plaintiffs ask this Court to order Sparton to take the first, critical steps needed to abate the imminent and substantial endangerment, namely: 1) to install monitoring wells and 2) to conduct an aquifer pump test to gather data concerning underground conditions. These measures are urgently needed to design a containment system to prevent further migration of the contaminated groundwater. These steps are more particularly described in Attachment A to the Plaintiffs' proposed Order.

The relief sought in this motion is distinct from the administrative order issued by EPA on September 16, 1996 ("the 1996 AO") pursuant to RCRA Section 3008(h), 42 U.S.C. § 6928, requiring Sparton to perform a "corrective action" for the Sparton facility, which would provide a full remedy for the soil and groundwater contamination caused by Sparton. Sparton is currently contesting the 1996 AO through an administrative hearing process. If, at the end of that process, the 1996 AO is affirmed and Sparton does not comply with the order, the United States will amend the complaint to add a claim under RCRA Section 3008(h) for enforcement of the administrative order.

While implementation of much of the final remedy set forth in the 1996 AO can await completion of the administrative process, a system to prevent further expansion of the contaminant plume must be installed as soon as possible. Every hour that goes by means that another 500 to 4,000 gallons of groundwater become contaminated by the ever expanding plume. Current data about the contaminant plume leaves great uncertainties regarding the size,

volume and location of the plume. This preliminary injunction motion addresses the urgent need for Sparton to immediately acquire additional information that will further describe and delineate the plume, so that a proper containment system can be designed to protect public health and the environment.

### STATEMENT OF FACTS

#### **I. THE SPARTON FACILITY: DESCRIPTION AND OPERATIONS**

The Sparton facility is located at 9261 Coors Road NW in Albuquerque, New Mexico. The facility is approximately one half mile west of the Rio Grande River and sits approximately sixty to seventy-five feet above the groundwater table. The groundwater underlying the facility is a part of the Santa Fe Group of aquifers, which is the sole source of drinking water for the Albuquerque municipal area. The groundwater under the Sparton facility flows generally in a northwest direction— towards a municipal water well. Residential developments, both existing and planned, are located on the hills to the west of the facility. Declaration of Vincent E. Malott (“Malott Decl.”) ¶ 5, 6, 7, & 25 (Exh. 1); Affidavit of Norman Gaume (“Gaume Aff.”) ¶¶ 4 & 8 (Exh. 2); Affidavit of Dr. Robert Morrison ¶ 3 (Exh. 3); Answer in No. CIV 97-0210M ¶ 11,12, & 13.

Manufacturing operations at the Sparton facility extended from 1961 to 1994.<sup>3</sup> Sparton’s operations generated aqueous plating wastes containing heavy metals and waste solvents. From approximately 1961 to 1983, hazardous wastes were stored in surface

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<sup>3</sup>The name of the company was originally Sparton Southwest, Inc. On March 14, 1983, Sparton Southwest, Inc. amended its corporate charter to change its name to Sparton Technology, Inc. Malott Decl. ¶ 15 (Exh. 1). Since the corporation merely changed its name, all statements by Sparton Southwest, Inc. apply equally to Sparton Technology, Inc.

impoundments and in a sump. Until 1981, Sparton also stored drums containing hazardous wastes on the ground. Malott Decl. ¶¶ 27 & 21 (Exh. 1); Answer in No. CIV-97-0210-M ¶ 18.

## II. REGULATORY HISTORY AND SITE INVESTIGATIONS

Pursuant to RCRA requirements, in 1980 and 1983, Sparton submitted various notices and applications to EPA stating that it generated, treated, stored, or disposed of hazardous wastes at its facility. On February 22, 1984, Sparton and EPA signed an Administrative Order on Consent in which Sparton agreed to maintain a groundwater monitoring program which complied with EPA regulations. Once implemented, the monitoring program showed that hazardous wastes from the Sparton facility had been released into the groundwater under the facility. Malott Decl. ¶¶ 11-19; Answer in No. CIV-97-0210-M ¶¶ 18-19.

On October 1, 1988, Sparton and EPA signed a second Administrative Order On Consent ("the 1988 AOC") requiring Sparton to (1) install an on-site groundwater recovery system, (2) conduct a RCRA facility investigation of groundwater contamination, and (3) conduct a Corrective Measures Study ("CMS") of clean-up alternatives. Sparton complied with the first requirement of the 1988 AOC by completing installation of the on-site groundwater recovery system in 1988.<sup>4</sup> Malott Decl. ¶¶ 25-26 (Exh. 1); Answer in No. CIV-97-0210-M ¶¶ 20-21.

On May 14, 1992, Sparton submitted a RCRA facility investigation report showing

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<sup>4</sup>While EPA has determined that the on-site recovery system has not been shown to address groundwater beyond the borders of the facility, it remains in operation. Malott Decl. ¶ 31 (Exh. 1).

inorganic and organic contaminants in the on and off-site groundwater including trichloroethylene ("TCE") and chromium. The data showed that, as of 1992, contaminated groundwater was moving northwesterly and extended at least 2,100 feet from the facility and at least seventy feet below the water table. The report did not determine the full depth of the plume or the exact location of its leading edge. Malott Decl. ¶ 27 (Exh. 1); Morrison Aff. ¶ 7 (Exh. 3).

On May 13, 1996, Sparton submitted its Corrective Measures Study report under the 1988 AOC. In the report, Sparton recommended a limited corrective action for the site and did not propose any off-site extraction wells to contain the plume. EPA approved Sparton's study on June 24, 1996 but included a detailed, nineteen page discussion challenging the methodology and analysis in the CMS. Malott Decl. ¶¶ 29-31 (Exh. 1).

Also on June 24, 1996, pursuant to RCRA Section 3008(h), 42 U.S.C. § 6928(h), EPA issued a RCRA Corrective Action Final Decision which selected a more comprehensive remedy than Sparton had suggested. EPA's selected corrective action consists of:

- Continued operation of the on-site ground water extraction and treatment systems;
- Further characterization of the extent (including depth and size) of contamination in the ground water and vadose (subsurface area above the water table) zone;
- After characterization, installation of additional groundwater extraction wells at the leading edge of the plume. Additional extraction wells would later be installed within the plume to remove contaminants and restore the ground water. Water from the extraction wells would be treated and disposed; and
- Installation and operation of an on-site soil vapor extraction ("SVE") system to extract volatile organic contaminants remaining in the soil.

Mallot Decl. ¶ 32 (Exh. 1). EPA's selected remedy differs from the remedy set forth in Sparton's CMS in that it calls for further efforts to locate the leading edge of the plume and for

the installation of off-site extraction wells both to contain and clean-up the contaminated groundwater plume. The number of additional extraction wells needed to accomplish that objective was not specified because there is not sufficient data to determine that number at present.<sup>5</sup>

On September 16, 1996, after unsuccessfully attempting to reach an agreement with Sparton to implement its selected corrective action, EPA issued an administrative order to Sparton pursuant to RCRA Section 3008(h), 42 U.S.C. 6928(h) ("the 1996 AO"). The 1996 AO requires Sparton to implement the corrective action selected by EPA in June 1996. Sparton filed an administrative appeal on October 18, 1996.<sup>6</sup> An administrative hearing was held on March 27, 1997. Malott Decl. ¶ 33 (Exh. 1). Under the applicable regulations, the 1996 AO will not become a final, enforceable order until the administrative process is completed. 40 C.F.R. § 24.02(a). Since it is uncertain when the administrative process will be completed, injunctive relief ordered by this Court is the only vehicle whereby immediate action can be secured.

During the fall of 1996, Plaintiffs attempted to reach an agreement with Sparton to

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<sup>5</sup>On August 7, 1996, Sparton sued the EPA regarding the 1996 Corrective Action Decision. Sparton Technology, Inc. v. United States Environmental Protection Agency, No. 3-96CV2229-G (N.D. Tex.). The United States moved to Dismiss the complaint on November 15, 1996. On February 27, 1997 Sparton moved to amend its complaint to add, *inter alia*, a claim seeking a stay of the administrative action. The United States moved to dismiss the amended complaint on March 20, 1997. These motions are pending. On March 20, 1997, Sparton filed a motion for preliminary injunction seeking to stay an administrative hearing scheduled for March 27, 1996. On March 26, 1997, that motion was denied.

<sup>6</sup>Hearing procedures applicable to administrative orders under RCRA Section 3008(h) are governed by regulations at 40 C.F.R. Part 24. These regulations do not provide for immediate injunctive relief equivalent to a preliminary injunction under FRCP 65..

conduct the aquifer pump test and install the additional monitoring wells sought in this motion.

No agreement was reached.

### III. IMMINENT AND SUBSTANTIAL ENDANGERMENT DETERMINATIONS

On February 14, 1997, EPA issued a determination that the contaminant plume emanating from the Sparton facility may present an "imminent and substantial" endangerment to public health and the environment. Malott Decl. ¶ 36 (Exh. 1). EPA's determination was based on the following findings:

- Contaminants present in the soil at the site include: Trichloroethylene ("TCE"), 1,1,1-trichloroethane, 1,1-Dichloroethylene, and tetrachloroethylene.
- Contaminants present in the groundwater at the site include: trichloroethylene ("TCE"), 1,1,1-trichloroethane, methylene chloride, 1,1-dichloroethylene, tetrachloroethylene, toluene, benzene, and chromium.
- The contaminant plume from the Sparton facility is located in the Santa Fe Group aquifer which is the sole source of drinking water for the City of Albuquerque and Bernalillo County.
- A drinking water well, New Mexico Utilities Well No. 2, is located approximately two miles from the leading edge of the contaminant plume and the direction of groundwater flow is towards the well.
- The plume of contaminated groundwater extends approximately one-half mile northwest of the facility and reaches a depth of at least seventy feet.
- The contaminant plume is flowing with the groundwater in a northwesterly direction at a rate of approximately 100 to 300 feet per year.
- The contaminants in the groundwater far exceed federal drinking water standards and state groundwater standards. See Table E in Malott Decl. ¶ 36.

As shown in Table E of the Malott Declaration, the groundwater contaminants from the

Sparton facility far exceed federal safe drinking water and state groundwater standards<sup>7</sup> and render the affected portion of the Santa Fe aquifer unfit for drinking purposes. Based upon this, EPA concluded that the contaminant plume emanating from the Sparton facility may present an imminent and substantial endangerment to human health and the environment pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973 and Section 1431 of the SDWA, 42 U.S.C. § 300i. Malott Decl. ¶ 36 (Exh. 1).

Based on similar information, on February 14, 1997, NMED and ONRT jointly issued a determination that the Sparton facility may present an imminent and substantial endangerment to health or the environment within the meaning of RCRA Section 7002, 42 U.S.C. § 6972, and analogous state law. (Exh. 4).

## ARGUMENT

### **I. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION**

Traditionally, courts apply a four-part test when considering applications for preliminary injunctive relief. Under that test, the movant must establish:

- (1) substantial likelihood that the movant will prevail on the merits;

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<sup>7</sup>The federal regulations were promulgated pursuant to the SDWA at 40 C.F.R. Part 141. Those regulations set forth Maximum Contaminant Levels Goals ("MCLGs") and Maximum Contaminant Levels ("MCLs") for certain contaminants in water. MCLGs are the level at which the agency has determined that "no known or anticipated adverse effects on the health of persons occur and which allow an adequate margin of safety." 42 U.S.C.A. § 300g-1(b)(4)(A) (1996). MCLs are enforceable standards for public water supply systems which are set as close to the MCLGs as feasible. In determining feasibility, the EPA considers the level that can be achieved using the best available treatment technology considering cost. *Id.* at § 300g-1(b)(4)(B). The New Mexico Water Quality Control Commission ("WQCC") has also promulgated regulations establishing the maximum allowable concentration of contaminants in groundwater. 20 NMAC 6.2, Section 3103.

- (2) that the movant will suffer irreparable injury if the injunction is not issued;
- (3) that the threatened injury to the movant outweighs any damage that the injunction would cause to the opposing party; and
- (4) that the injunction would not adversely affect the public interest.

Lundgrin v. Claytor, 619 F.2d 61, 73 (10th Cir. 1980).<sup>8</sup> We demonstrate below that all four prongs of this test are met in this case.

**A. There Is More Than A Substantial Likelihood That The United States Will Prevail On The Merits**

There is more than a substantial likelihood that Plaintiffs will prevail on the merits in this action. In their Complaints, the Plaintiffs claim:

- (1) Sparton is liable to take actions necessary to abate the imminent and substantial endangerment at the Sparton facility under RCRA Sections 7002 and 7003, 42 U.S.C. §§ 6972 and 6973;

and the United States further claims:

- (2) Sparton is liable to take all actions necessary to protect the health of persons from the imminent and substantial endangerment resulting from contaminants present in the

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<sup>8</sup>Several decisions in this Circuit have dispensed with the showing of irreparable harm in cases involving statutory violations or statutes specifically authorizing injunctive relief. See Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1036 (10th Cir. 1993) (in action under the federal Communications Act, "[w]hen the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown"); Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288-89 (10th Cir. 1996) (in a copyright infringement case, "because the financial impact of copyright infringement is hard to measure and often involves intangible qualities such as customer goodwill, we join the overwhelming majority of our sister circuits and recognize a presumption of [irreparable] injury at the preliminary injunction stage once a copyright infringement plaintiff has demonstrated a likelihood of success on the merits."). However, see Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) (irreparable harm could not be presumed from agency's failure to comply fully with statutory requirements for environmental impact assessment).

groundwater pursuant to SDWA Section 1431, 42 U.S.C. § 300i.

While the actions which would be required of Sparton under each of these claim are essentially identical, Plaintiffs are substantially likely to prevail on all claims.

1. **Plaintiffs Are Substantially Likely To Prevail Upon Their Claims Under The Resource Conservation And Recovery Act**

Plaintiffs are substantially likely to prevail upon their claims under RCRA Sections 7002 and 7003, 42 U.S.C. §§ 6972 and 6973.<sup>9</sup> RCRA Section 7003(a) states:

[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including . . . any past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or is contributing to such handling, storage, treatment, transportation, or disposal to restrain such person . . . [or] to order any person to take such other action as may be necessary, or both . . . .

42 U.S.C. § 6973(a). In enacting Section 7003, Congress "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes." U.S. v. Price, 688 F.2d. 204, 214 (3rd Cir. 1982). "Congress broadly drafted these provisions to give appropriate government officials the right to seek judicial relief, or take other appropriate action to avert imminent and substantial threats to the environment or public health." U.S. v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1107 (D. Minn. 1982).

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<sup>9</sup>The Tenth Circuit has held that if a movant satisfies elements two (2) through four (4) of the preliminary injunction standard, the movant may prevail by showing "questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation." Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1199 (10th Cir. 1992) (quoting Tri-State Generation v. Shoshone River Power, Inc., 805 F.2d 351, 358 (10th Cir. 1986).

In language virtually identical to that in Section 7003, RCRA Section 7002(a) states:

[A]ny person may commence a civil action on his own behalf--

(1) . . .

(B) against any person, . . . including . . . any past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a). In enacting this provision, Congress intended to provide citizens with a cause of action identical to that under RCRA Section 7003:

These amendments are intended to allow citizens exactly the same broad substantive and procedural claims for relief which is already available to the United States under section 7003. . . . Any differences in language between these amendments and section 7003 are not intended to reflect a difference in such claims, but merely to clarify that citizens will have the same claims presently available to the United States.

S. Rep. No. 284, 98th Cong. at 56-57 (1983), reprinted in 2 A Legislative History Of The Solid Waste Disposal Act as Amended at 2082-83 (1991). Accordingly, the courts have interpreted RCRA Sections 7002 and 7003 as having identical scope.

Under Sections 7002 and 7003, "past operators, generators and transporters may be held to a standard of strict liability for their activities." U.S. v. Conservation Chem. Co., 619 F. Supp. 162, 198 (W.D. Mo. 1985). This holding is consistent with legislative intent underlying the 1984 amendments to RCRA. The House Committee on Energy and Commerce stated "[t]he [1984] amendments clearly provide that anyone who has contributed or is contributing to the creation, existence, or maintenance of an imminent and substantial endangerment is subject to the equitable authority of Section 7003, without regard to fault or negligence." H.R. Rep. No. 198, 98th Cong. at 48 (1984), reprinted in 1984 U.S.C.C.A.N.

5576, 5607.

In order to establish that Sparton is liable under RCRA Sections 7002 and 7003, the Plaintiffs need only establish (1) that handling, storage, treatment, transportation or disposal of solid waste or hazardous waste at the Sparton facility (2) may present an imminent and substantial endangerment to health or the environment and (3) Sparton contributed to such handling storage, treatment, transportation or disposal of solid waste or hazardous waste. 42 U.S.C. §§ 6972(a) & 6973(a). See, U.S. v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1382 n. 9 (8th Cir. 1989).

**a. Solid or hazardous wastes were handled, stored, treated, transported or dispose of at the Sparton facility**

There is no question that hazardous wastes were handled, stored, treated, transported, and/or disposed of at the Sparton facility from 1961 through at least 1983. EPA has promulgated regulations defining hazardous wastes. 40 C.F.R. Part 261.<sup>10</sup> Under these regulations, hazardous wastes include all solid wastes listed in 40 C.F.R. Part 261, Subpart D ("listed hazardous wastes").

Sparton admits that it generated and stored solid and hazardous wastes at its facility. Malott Decl. ¶¶ 9-14 (Exh. 1); Answer in action No. CIV-97-0210-M ¶ 18. Among the numerous hazardous wastes which Sparton notified EPA it handled were: F002 (spent halogenated solvents) and F005 (spent non-halogenated solvents).<sup>11</sup> Malott Decl. ¶¶ 10-14

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<sup>10</sup>Hazardous wastes under 40 C.F.R. Part 261 are hazardous wastes for puposes of RCRA Sections 7002 and 7003. U.S. v. Valentine, 856 F. Supp. 621, 627 (D. Wyo. 1994).

<sup>11</sup>These waste codes describe listed hazardous wastes that can contain constituents including tetrachloroethylene, trichloroethylene (TCE), methylene chloride, and 1,1,1-trichloroethane.

(Exh. 1). Sparton also admits in its Answer that the hazardous wastes stored at its facility have been released to the environment. Answer in No. CIV-97-0210-M ¶ 19.

The hazardous wastes identified by Sparton as being handled at the Sparton facility can contain exactly the same substances, including TCE, as those detected in the plume of contamination emanating from its facility. Malott Decl. ¶ 9 & 12 (Exh. 1). This is consistent with Sparton's submissions to EPA which state that Sparton placed spent solvents into an on-site sump and that the sump is the source of contamination. Malott Decl. ¶ 27 (Exh. 1). Thus, there can be no question that solid and hazardous wastes handled by Sparton contributed to the contamination emanating from the Sparton facility.

**b. There is an imminent and substantial endangerment to health or the environment at the Sparton facility**

Originally enacted in 1976, Section 7003 allowed EPA to seek injunctive relief based on evidence that the handling of waste "is presenting" an imminent and substantial endangerment. In order to "enhance[] the ability of the Administrator to take precautionary measures," the 1980 amendments to RCRA permitted the EPA to act upon evidence that the handling of waste "may present" an endangerment. 126 Cong. Rec. 3345 (1980) (statement of Rep. Florio). Congress adopted similar language in Section 7002.

Congress intended Sections 7002 and 7003 to be interpreted broadly. The report of the Senate Committee on the 1984 amendments to RCRA stated that when evaluating a claim of endangerment, "risk may be assessed from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections, from

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40 C.F.R. § 261.31.

imperfect data, or from probative preliminary data not yet certifiable as 'fact.'" S. Rep. No. 284, 98th Cong., 1st Sess. at 59 (1984), reprinted in 2 A Legislative History Of The Solid Waste Disposal Act as Amended at 2082-83 (1991).

Judicial interpretations of the RCRA endangerment standard have been consistent with the legislative history. For example, in U.S. v. Valentine, 856 F. Supp. 621 (D. Wyo. 1994), a district court in the Tenth Circuit held that EPA need only find that there "may" be an endangerment. Id. at 626 (emphasis in original). The same court held that "[a]n endangerment is not actual harm, but a threatened or potential harm." Id.<sup>12</sup>

Congress also intended that courts construed the term "imminent" broadly. As noted by the Senate Report for the Hazardous and Solid Waste Amendments:

[An] endangerment is "imminent" and actionable when it is shown that it presents a threat to human health or the environment, even if it may not eventuate or be fully manifest for a period of years--as may be the case with drinking water contamination, cancer, and many other effects.

S. Rep. No. 284, 98th Cong., 1st Sess. at 59 (1984), reprinted in 2 Legislative History of the Solid Waste Disposal Act as Amended 2085 (emphasis added)).

In Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996), the Supreme Court recently addressed the meaning of "imminent" under RCRA noting that "imminent" can refer to the risk of future harm. Specifically, the Court held that "§ 6972(a) was designed to provide a remedy

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<sup>12</sup>See also Price v. U.S. Navy, 39 F.3d 1011, 1019 (9th Cir. 1994) ("'endangerment' means a threatened or potential harm and does not require proof of actual harm"); U.S. v. Waste Indus., Inc., 734 F.2d 159, 164 (4th Cir. 1984); Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991); U.S. v. Waste Indus. Inc., 734 F.2d 159, 165 (4th Cir. 1984); U.S. v. Conservation Chem. Co., 619 F. Supp. 162, 193-195 (D.C. Mo. 1985); Lincoln Properties, Ltd v. Higgins, 1993 WL 217429, \*12 (E.D. Cal. 1993).

that ameliorates present or obviates the risk of future 'imminent' harms . . . ." Id. at 1255.<sup>13</sup>

The Valentine court held that "[a]n endangerment need be neither immediate nor tantamount to an emergency to be imminent and warrant relief." and that an endangerment is "imminent" if "factors giving rise to it are present, even though the harm may not be realized for years."

Valentine, 856 F. Supp. 627. See also U.S. v. Conservation Chem. Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985).

Courts have also construed the term "substantial" broadly in the context of RCRA. For example, the Valentine court held that:

The United States need not quantify the endangerment to prove that it is substantial. It is sufficient to demonstrate that there exists reasonable cause for concern for the integrity of the public health or the environment.

U.S. v. Valentine, 856 F. Supp. at 626; see also Lincoln Properties, Ltd. v. Higgins, 1993 WL 217429, \*12 (E.D. Cal. 1993); U.S. v. Conservation Chem., 619 F. Supp. at 194.

Both EPA and the State have determined that the presence of solid or hazardous wastes in the soil and groundwater at the Sparton facility "may present an imminent and substantial endangerment to health or the environment" within the meaning of RCRA Sections 7002 and 7003, 42 U.S.C. § 6972 and 6973. (Exh 1, Attachment \_\_ & Exh. 4) Sparton's own studies

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<sup>13</sup>Unlike the instant case, Mehrig involved a claim by a private party for recovery of costs related to a successful, completed cleanup action. Noting that the contamination at issue in the Mehrig case had already been cleaned up, the Court held that the endangerment at issue could not be imminent. Id. See also Price v. U.S. Navy, 39 F.3d 1011, 1019 (9th Cir. 1994) (holding that "[a] finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present . . . ."); Ottati & Goss, 630 F. Supp. 1361, 1394 and 1400 (D.N.H. 1985) (defining "imminence" as "any point in a chain of events which may ultimately result in harm to the public. It is not necessary that the final anticipated injury actually have occurred prior to the determination that an 'imminent hazard' exists."); Environmental Defense Fund v. EPA, 465 F.2d 528, 535 (D.C. Cir. 1972)).

show that hazardous wastes, including TCE, are present in Albuquerque's drinking water aquifer at levels significantly above federal and state water standards. Malott Decl. ¶¶ 27 and 34 (Exh. 1). For example, the groundwater contains concentrations of 7,600 parts per billion ("ppb") TCE beneath the facility and 3,200 ppb TCE near the center of the plume compared to a federal MCLG of zero.<sup>14</sup> In addition, significant concentrations of 1,1,1-trichloroethane, 1,1-dichloroethane and tetrachloroethylene are present in the groundwater. Malott Decl. ¶ 36 (Exh. 1).

Many courts have found that contamination of groundwater may present an imminent and substantial endangerment to public health and the environment. See U.S. v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726, 730 and 745 (8th Cir. 1986) (holding defendants liable under RCRA Section 7003 at site where groundwater was contaminated; groundwater contamination more fully described in the district court opinion at 579 F. Supp. 823, 832-33 (D. Mo. 1984)); U.S. v. Waste Indus., Inc., 734 F.2d 159, 167 (4th Cir. 1984) (reversing dismissal under FRCP 12(b)(6) of claim under Clean Water Act of endangerment from groundwater contamination); Morris v. Primetime Stores of Kansas, Inc., 1996 WL 563845, \*4 (D. Kan. 1996) (gasoline seepage contaminated groundwater creating an imminent and substantial endangerment); Lincoln Properties, Ltd. v. Higgins, 1993 WL 217429, \*13-14 (granting relief under RCRA Section 7002 based on finding harm to groundwater); U.S. v. Conservation Chem. Co., 619 F. Supp. at 197-202 (granting relief under Section 7003 where

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<sup>14</sup>The federal drinking water standards known as "MCLGs" represent the level at which the EPA has determined that "no known or anticipated adverse effects on the health of persons occur and which allow an adequate margin of safety." 42 U.S.C.A. § 300g-1(b)(4)(A) (1996).

groundwater was contaminated).

The contamination from the Sparton facility clearly endangers public health and the environment. Groundwater is an important resource nationally, and it is particularly precious in the arid region of New Mexico. Indeed, the Groundwater Protection Policy and Action Plan for the City of Albuquerque has proposed placing wells in the vicinity of the Sparton facility. New Mexico Utilities, a private utility that supplies water in the area of the Sparton facility, has been issued a permit to install a well in the area of the Sparton plume. But for the contamination, this groundwater would be suitable for drinking. Gaume Aff. ¶ 2-7 (Exh. 2). As hazardous wastes continue to spread from the Sparton facility, more and more of this precious groundwater will be contaminated. According to the best estimate based on available data, each hour up to an additional 4,000 gallons of previously clean groundwater may become contaminated. Morrison Affidavit ¶ 4 (Exh. 3).

This imminent threat to the City of Albuquerque's drinking water aquifer clearly presents "an imminent and substantial endangerment to public health or the environment" within the meaning of RCRA Sections 7002 and 7003.

- c. **Sparton is a person who has contributed to the handling, storage, treatment, transportation, or disposal of hazardous wastes at the Sparton facility.**

Under Sections 7002 and 7003, the scope of liability is broad. Where past or present disposal of hazardous wastes may present an endangerment, EPA or a citizen may bring an action to abate the endangerment against "any person (including any past or present generator . . . or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed . . . to such . . . disposal." RCRA Section 7003(a), 42 U.S.C. § 6973(a). RCRA

Section 7002 contains virtually identical language. 42 U.S.C. § 6972(a). In U.S. v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989), the court found that “[t]he relevant legislative history supports a broad, rather than a narrow, construction of the phrase ‘contributed to.’” Id. at 1384. The Aceto court then held that “[a]lthough the phrase ‘contributing to’ is not defined by the statute, its plain meaning is ‘to have a share in any act or effect.’” Id., at 1384. See also U.S. v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1393 (D.N.H. 1985).

A showing that a party owned or operated a facility where hazardous waste was disposed is equivalent to showing that the party “contributed to” disposal of the hazardous waste. As a practical matter, any party owning or operating a facility where hazardous waste was disposed will necessarily “have a share in” that disposal.<sup>15</sup> Sparton is both the past and present owner and past operator of the Sparton facility. Answer in No. CIV-97-0210-M ¶ 18; Malott Decl. ¶15 & 29 (Exh. 1). In its submissions to EPA, Sparton unequivocally states that its operations involved the generation of aqueous plating wastes and spent solvents. Sparton also states that it placed these wastes in sumps, ponds, and drums. Malott Decl. ¶¶ 10-14, & 27, 29 (Exh. 1). Thus, Sparton is a person<sup>16</sup> who has contributed to disposal of hazardous wastes

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<sup>15</sup>The legislative history reveals that Congress equated owner/operator status with contributing to disposal. Discussing the 1984 amendments to RCRA Section 7003, the Report of the House Energy and Commerce Committee states:

The amendments clearly provide that anyone who has contributed or is contributing to the creation, existence, or maintenance of an imminent and substantial endangerment is subject to the equitable authority of Section 7003, without regard to fault or negligence. Such persons include . . . past and present owners and operators or [sic] waste treatment, storage, or disposal facilities . . . .

H.R. Rep. No. 198, 98th Cong. 48, reprinted in 1984 U.S.C.C.A.N. 5576, 5606.

<sup>16</sup>Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), includes corporations in its definition

at the Sparton facility, and, therefore, falls squarely within the category of persons who are expressly liable under RCRA Sections 7002 and 7003.

2. **The United States Is Substantially Likely To Prevail Upon Its Claim Under The Safe Drinking Water Act**

For the same reasons set forth above, the United States is substantially likely to prevail upon its claim under the SDWA Section 1431, 42 U.S.C. § 300i. SDWA Section 1431 is similar to RCRA Section 7003 in that both sections authorize the EPA to seek injunctive relief to abate an imminent and substantial endangerment to the public health. Section 1431 of the SDWA, 42 U.S.C. § 300i, provides, in pertinent part:

[T]he Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water may present an imminent and substantial endangerment to the health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons . . . . The actions which the Administrator may take include (but shall not be limited to) (1) issuing such orders as may be necessary...and (2) commencing a civil action for appropriate relief including a restraining order or permanent or temporary injunctions.

42 U.S.C. § 300i(a).

As explained above, contaminants from the Sparton facility are present in the Santa Fe Group aquifer system which supplies drinking water to the City of Albuquerque, and may present an imminent and substantial endangerment to the health of persons. The substances identified in Malott Declaration Table E are "contaminants" present in the groundwater at the

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of "person." The Defendant is a corporation organized under the laws of the State of New Mexico. Answer in CIV-97-0210-M ¶4 As such, it is a "person" within the meaning of RCRA.

Sparton facility.<sup>17</sup>

Although there is no case law interpreting the meaning of “imminent and substantial endangerment” under the SDWA alone, courts have looked to interpretations of RCRA and other endangerment provisions of federal environmental statutes when interpreting the SDWA. In a case involving allegations of imminent and substantial endangerment, the Second Circuit held that “[t]he similarity between the CWA [Clean Water Act] and the later enacted SDWA and RCRA leads us to read all three acts in a similar manner.” U.S. v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 981-82 (2d Cir. 1984). See also U.S. v. Price, 688 F.2d 688, 211 (3d Cir. 1982) (noting the similarity in Congressional intent underlying RCRA Section 7003 and SDWA Section 1431). Applying the broad judicial interpretations of the “imminent and substantial endangerment” provisions of RCRA Sections 7002 and 7003 discussed above, it is apparent that the “endangerment” to public health presented by the Sparton contamination is “imminent and substantial.” The public water supply already is impacted and more and more of that supply is being lost, perhaps irretrievably, each day. If not contained, the plume of contamination will continue to spread and could become a direct threat to the health of anyone who may use the groundwater in this area.

In the “Determination of Imminent and Substantial Endangerment,” EPA specifically

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<sup>17</sup>The term contaminants is broadly defined by the SDWA to mean “any physical, chemical, biological, or radiological substance or matter in water.” 42 U.S.C. § 300g. The term “underground source of drinking water” is defined as “an aquifer or its portion . . . (a)(1) which supplies any public water system; or (2) which contains a sufficient quantity of groundwater to supply a public water system and (i) currently supplies drinking water for human consumption; or (ii) contains fewer than 10,000 mg/l total dissolved solids. 40 C.F.R. § 144.3. The aquifer contaminated by the Sparton plume qualifies under this definition. Malott Affidavit (Exh. 1) at ¶ 35.

found that the contamination present at the Sparton facility presents an imminent and substantial endangerment to the health of persons within the meaning of SDWA Section 1431. Malott Decl., Attachment AA ¶ 57 (Exh 1). In that same document, EPA found that in response to the 1988 AOC issued by EPA under RCRA Section 3008(h), state and local agencies had taken no governmental action to protect the health of persons from contaminants emanating from the Sparton site. *Id.* at ¶ 45. Together, these findings satisfy the prerequisites to filing an action for injunctive relief under SDWA Section 1431.

### **B. Preliminary Injunction Is Necessary to Prevent Irreparable Harm**

For the same reasons that the Plaintiffs believe that there is an “imminent and substantial endangerment” to health and the environment from the Sparton contaminant plume, we believe that the public will suffer irreparable injury unless this Court issues the requested preliminary injunction. The environmental harm described in Section I(A)(1)(b) above is precisely the type of harm that courts have found to be irreparable. In Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 544–45 (1987), the Court held that “[e]nvironmental injury by its nature can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Id.* at 545. See also Sierra Club v. Hodel, 848 F.2d 1068, 1097 (10th Cir. 1988) (holding that continuation of construction activities prior to completion of environmental studies required by federal law would constitute irreparable harm); Provo River Coalition v. Pena, 925 F. Supp. 1518, 1524 (D. Utah 1996) (holding that construction activities which would permanently alter Provo Canyon constitute irreparable injury).

The continued expansion of the Sparton contaminant plume presents a particular threat

of irreparable harm because clean-up of contaminated groundwater is difficult and uncertain. Although it is a goal of EPA's selected remedy to restore the groundwater to comply with drinking water standards, the success of restoration is not guaranteed. At a minimum, aquifer restoration is a time-consuming process. Morrison Aff. ¶ 5 (Exh. 3); Malott Decl. ¶ 32 (Exh. 1). Given the difficulties and length of time involved in groundwater cleanup, there clearly is a threat of irreparable harm if the Sparton contaminant plume is permitted to continue to expand.

**C. The Threatened Injury To Public Health and The Environment Outweighs The Burden On Sparton Should The Preliminary Injunction Issue**

The "balancing of equities" test is intertwined with the nature of the injury and with the public interest. In cases involving environmental harm, the balance of harms generally favors the environment: "If . . . [environmental] injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco, 480 U.S. at 545.<sup>18</sup> In Sharp v. 251st. Street Landfill, Inc., 810 P.2d 1270, 1280-81 (Okla. 1991), which involved potential groundwater contamination from a landfill, the Supreme Court of Oklahoma found that "groundwater contamination is a type of environmental damage" which is difficult to remediate. Id. The court then held that the balance of equities favored the movants "due to the potential long-term effects contamination may have to their water sources and granting the

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<sup>18</sup>Where the public interest is at stake, that interest generally outweighs other interests. U.S. v. San Francisco, 310 U.S. 16, 30-31 (1940) (where United States sought injunctive relief to enforce the Raker Act [1913 federal statute granting certain public rights of way], the Court upheld relief without balancing the equities); Associated Sec. Corp. v. S.E.C., 283 F.2d 773, 775 (10th Cir. 1960) ("[T]he necessity of protection of the public far outweighs any personal detriment resulting from the impact of applicable laws.").

injunction was not adverse to the public interest." *Id.* The court upheld a preliminary injunction enjoining construction and operation of a solid waste landfill.

In this case, the public interest in protecting a precious drinking water aquifer far outweighs the potential harm to the defendant of performing the limited testing and monitoring actions that are requested in the Plaintiffs' Motion. Moreover, in this case there is no potential harm to the defendant. Since Sparton is required by law to take corrective action for the hazardous wastes released from its facility (42 U.S.C. § 3008(h)), there is little question that Sparton is ultimately going to be required, at a minimum, to take the investigatory actions requested by the Plaintiffs in this motion. This motion merely seeks to compel Sparton to take those actions sooner. The only possible detriment to Sparton is having to expend these funds sooner rather than later.<sup>19</sup> It is estimated that the cost of the actions which the United States seeks to compel Sparton to take is \$300,000 to \$350,000. Morrison Aff. ¶ 8 (Exh. 3).

#### **D. The Public Interest Favors Granting The Preliminary Injunction**

As held by the Supreme court in Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982), "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." The Supreme Court has recognized that preventing further environmental harm is within the public interest. Keystone Bituminous

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<sup>19</sup> A private interest in avoiding--or, in this case, delaying--expense is far outweighed by the public interest in protecting its drinking water supply. See U.S. v. Price, 688 F.2d 204, 212-13 (3rd Cir. 1982) ("even though funding a diagnostic study would require payments of money, it may still be an appropriate form of preliminary relief if the traditional balancing process tips decidedly in favor of plaintiff. . . . The mere fact "that an injunction may require the payment or expenditure of money does not necessarily foreclose the possibility of equitable relief. . . . [I]t is not unusual for a defendant in equity to expend money in order to obey or perform the act mandated by an injunction.")

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Ass'n v. DeBenedictis, 480 U.S. 470, 505 (1987) (upholding a Pennsylvania law that imposed liability on coal companies in order to deter certain mining practices determined to damage surface lands). Similarly, in Nat'l Indian Youth Council v. Andrus, 623 F.2d 694, 696 (10th Cir. 1980), the court considered "the public interest in protecting the environment" when upholding a district court's denial of a preliminary injunction. See also, Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1250 (10th Cir. 1973) (declaring that the "public interest in preserving the character of the environment is one that [a movant] may seek to protect by obtaining equitable relief. ").

In this case, the public has a strong interest in protecting its precious drinking water aquifer. Unlike Romero-Barcelo, no public interest would be adversely affected in this action.<sup>20</sup> In this case, the public interest falls only on one side--supporting issuance of the preliminary injunction to protect the aquifer.

## II. THE RELIEF REQUESTED BY THE PLAINTIFFS

The Supreme Court has held that a district court has the discretion to "order that relief it considers necessary to secure prompt compliance with the [law]." Weinberber v. Romero-Barcelo, 456 U.S. 305, 320 (1982) (interpreting the injunctive relief provisions of the Clean Water Act).<sup>21</sup> The injunctive relief requested by the Plaintiffs will protect the public health and

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<sup>20</sup>The two public interests at stake in Romero-Barcelo were the Navy's interest in continuing weapons training and the Clean Water Act's stated objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Romero-Barcelo, 456 U.S. at 307 and 314. Unlike the Navy, Sparton has no ongoing operations with which the requested injunction would interfere.

<sup>21</sup> As held in Virginian R. Co. v. Railway Employees, 300 U.S. 515, 552 (1937) "Courts of equity may, and frequently do, go much farther both to give and withhold relief in

the groundwater of the citizens of Albuquerque. The actions which the Plaintiffs ask this Court to order Sparton to take are needed to abate the endangerment to public health and the environment created by the plume of contaminants emanating from the Sparton facility. These actions are the essential, first steps towards stopping the further spread of contaminants from the Sparton facility. Until Sparton takes these actions, it will not be possible to install an effective containment system to stop the spread of contamination from the Sparton facility.

In his attached affidavit, Dr. Robert Morrison, an experienced hydrogeologist and soil physicist, states that the groundwater contaminant plume will continue to expand unless it is contained. Dr. Morrison explains that a standard method to prevent the further spread of contamination is to construct a system to hydraulically contain the plume — known as a “containment system.” A containment system generally includes one or more extraction wells designed to capture contaminated groundwater — known as the “capture zone” — before it can migrate further. Before one can accurately design a containment system to capture the leading edge of the contaminant plume, data which is currently lacking in this case is needed in order to more clearly define the contours of the capture zone as well as the size and location of the leading edge of the plume. To obtain this critical information, Dr. Morrison has determined that Sparton needs to perform two actions immediately: 1) conduct an aquifer pump test, and 2) install additional monitoring wells. These two actions are the steps that the Plaintiffs ask the

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furtherance of the public interest than they are accustomed to go when only private interests are involved.” Accord S.E.C. v. Crofter’s Inc., 351 F. Supp. 236, 263 (S.D. Ohio 1972) (“in actions brought by a government agency to enforce by injunction compliance with a statute administered by the agency, courts go much further to give relief than they are accustomed to go when only private interests are involved.”) (quoting Fed’l Trade Comm’n v. Rhodes Pharmacal Co., 161 F.2d 744 (7th Cir. 1951)).

Court in this motion to order Sparton to undertake without delay.

**A. The Aquifer Pump Test**

As explained in Dr. Morrison's affidavit, an aquifer pump test, standard in the environmental and water well industry, is the most reliable method for obtaining data needed to correctly calculate the capture zone of the contaminated groundwater for a given extraction well. Specifically, an aquifer pump test will provide information on certain hydraulic parameters of the aquifer (see Morrison Aff., Attach B, p. 2) which can be used to estimate the size and location of the capture zone. Once the capture zone for a given extraction well is determined, the well can be installed for the purpose of capturing the leading edge of the plume, and the spread of the contaminant plume can be contained. Dr. Morrison proposes that Sparton install one pumping well and three observation wells in locations described in the Proposed Well Locations map accompanying the Workplan (Attachment B to Morrison Aff. (Exh. 3)), in order to conduct the necessary pump tests.

**B. Monitoring Wells**

As explained in Dr. Morrison's affidavit and the attached Workplan, some information is already known about the size and location of the contaminant plume. Current data shows that the plume extends approximately 2,600 feet northwest of the Sparton facility, is about 1,500 feet wide, and extends up to 265 feet below ground level. More information about the size and location of the plume, however, needs to be obtained in order to design a proper containment system to stop the spread of the contamination.

In this regard, Dr. Morrison has determined that five monitoring wells, in addition to the existing wells at the site, are needed to determine the vertical and horizontal extent (depth

and width) of the contaminant plume near the leading edge. This critical information, which is currently lacking, will help to better identify the size and location of the plume's leading edge and therefore to define the volume of the contaminated groundwater to be extracted as part of the containment system. As described in the Workplan, and the accompanying Proposed Well Locations map of the area, the five additional monitoring wells will be located in strategic locations downgradient from the Sparton facility close to what we presently believe to be the leading edge of the plume.

The information expected to be derived from the monitoring wells and aquifer pump test described above, will provide the data needed to properly design a containment system to capture the leading edge of the groundwater plume. Installation of the wells and performance of the pump test should take no more than 60 days, at a cost of approximately \$300,000 to \$350,000. By requiring Sparton to immediately install the additional monitoring wells and perform the aquifer pump test, this Court will go a long way to help stop the spread of the contaminant plume that threatens public health and the environment.

### **CONCLUSION**

For all of the reasons set forth herein, Plaintiffs respectfully request that this Court issue a preliminary injunction against the Defendant requiring Sparton to take the actions specified in the Plaintiffs' proposed Order.

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### **CONCLUSION**

For all of the reasons set forth herein, Plaintiffs respectfully request that this Court issue a preliminary injunction against the Defendant requiring Sparton to take the actions specified in the Plaintiffs' proposed Order.

Respectfully submitted,

**FOR THE UNITED STATES OF AMERICA**

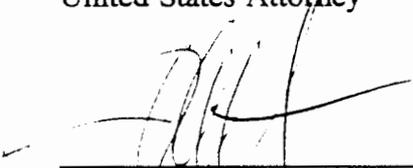
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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused copies of the foregoing "Plaintiffs' Joint Opposed Motion for Preliminary Injunction And Memorandum in Support" and Plaintiff's "Opposed Motion For Leave Exceed Page Limit For Exhibits" by the indicated method this 1<sup>st</sup> day of ~~March~~<sup>April</sup> 1997 to counsel for defendant at the following addresses:

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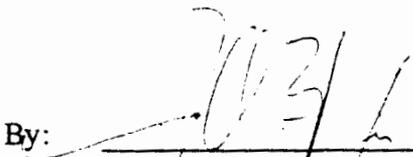
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FOR THE NEW MEXICO OFFICE OF THE NATURAL RESOURCES TRUSTEE

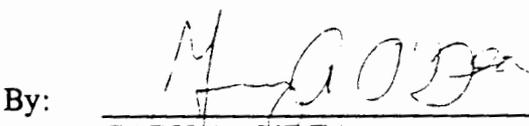
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