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

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **Case No.: 1-19-cv-46** |
| **NEW MEXICO ENVIRONMENT DEPARTMENT, and JAMES KENNEY, Secretary (in his official capacity),** | ) | |
| | ) | |
| **Defendants.** | ) | |

**DEFENDANTS' MOTION TO DISMISS**
**OR IN THE ALTERNATIVE,**
**MOTION FOR A MORE DEFINITE STATEMENT**

COME NOW Defendants New Mexico Environment Department (NMED) and James Kenney, Secretary (in his official capacity), by the undersigned counsel, and hereby move pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the above-referenced Complaint, or in the alternative, for a more definite statement under Rule 12(e).

## INTRODUCTION

This litigation involves a challenge to a permit NMED issued to Cannon Air Force Base pursuant to the New Mexico Hazardous Waste Act (HWA), NMSA 1978, Sections 74-4-1 to -14, on December 19, 2018 (the Permit). In its single count, Plaintiff United States purports to challenge the definition of hazardous waste included in the Permit, asserting that the definition is inconsistent with both the HWA and the federal Resource Conservation and Recovery Act (RCRA) and, as a consequence, falls outside the waiver of sovereign immunity in RCRA.

Plaintiff's Complaint is inadequate as a matter of law and fact because it fails to allege any specific inconsistencies between the Permit, RCRA, and the HWA, and it should be dismissed. Moreover, because there is an ongoing state court proceeding which implicates important state interests and provides an adequate forum for Plaintiff's claim, this Court should abstain from exercising jurisdiction. Alternatively, NMED moves for a more definite statement of the alleged inconsistencies between the Permit, RCRA, and the HWA.

**BACKGROUND**

Congress enacted RCRA in 1976 in response to "a rising tide of scrap, discarded, and waste materials" that had become a matter of national concern. 42 U.S.C. § 6901(a)(2), (4) (1984). In enacting RCRA, Congress declared it a national policy "that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). Congress recognized, however, that "the collection of and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ." 42 U.S.C. § 6901(a)(4). Thus, RCRA allows any state to administer and enforce a hazardous waste program subject to authorization from the EPA. 42 U.S.C. § 6926(b) (1986).

RCRA includes a clear and unambiguous waiver of sovereign immunity:

> Each [federal entity] . . . engaged in [disposal or management of hazardous waste] shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (**including any requirement for permits** or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management **in the same manner, and to the same extent, as any person is subject to such requirements** . . . . The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or

> procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine) . . . .

42 U.S.C. § 6961 (emphasis added).

EPA authorized New Mexico's state program pursuant to RCRA in 1985, 40 C.F.R. § 272.1601(a) (2012), and delegated to New Mexico "primary responsibility for enforcing its hazardous waste management program." 40 C.F.R. § 272.1601(b). New Mexico's HWA and regulations promulgated pursuant to it are incorporated by reference into RCRA. 40 C.F.R. § 272.1601(c)(1).

The following prohibitions and procedural requirements of the HWA and its regulations are relevant to this case. Under the HWA, no person can knowingly transport, treat, store, or dispose of any hazardous waste without an HWA or RCRA permit, Section 74-4-11(A), and hazardous waste permits issued under the HWA "shall require corrective action for all releases of hazardous waste." Section 74-4-4.2(B). The NMED Secretary must give public notice when a draft permit has been prepared and allow 45 days for review and public comment, including requests for public hearing, 20.4.1.901(A)(3) NMAC. The Secretary must also respond to comments when a permit is issued. 20.4.1.901(A)(9) NMAC. Parties may petition the Secretary for permit modification, suspension, or revocation. 20.4.1.901(B)(3) NMAC. Any person affected by a final administrative action of NMED under the HWA may appeal to the New Mexico Court of Appeals within 30 days, and all appeals "shall be upon the record before the . . . secretary." Section 74-4-14.

The Permit that Plaintiff seeks to challenge in this case is simply a renewal and revision of one previously issued in 2003—one that Plaintiff did not challenge. Complaint ¶ 2. Plaintiff does not allege that NMED failed to comply with its own administrative procedures in issuing its permit, nor does it allege that those procedures failed to fall within the express waiver of

sovereign immunity. Rather it appears that Plaintiff simply disagrees with the outcome of those procedures and now seeks to collaterally attack the contents of a permit lawfully issued by NMED under its delegated authority. Plaintiff filed the instant Complaint, as well as a concurrent appeal with the New Mexico Court of Appeals, on January 17, 2019. *See* Notice of Appeal, *United States v. N.M. Env't Dep't*, Case No. A-1-CA-37887 (N.M. Ct. App. Jan. 17, 2019).

## ARGUMENT

### I. The Court Should Decline to Exercise Jurisdiction Over the Complaint

The challenged Permit in this case has been issued under the authority of NMED, a New Mexico administrative agency, and New Mexico law provides that appeals from administrative orders, including permits, are to be directed to the New Mexico Court of Appeals. Plaintiff plainly states that it has availed itself of that remedy. Complaint ¶ 19. This Court should abstain from considering Plaintiff's complaint so that the case may properly unfold in State court proceedings.

As this Court has explained:

> Under the abstention doctrine that the Supreme Court articulated in *Younger,* federal courts should not interfere with state court proceedings by granting equitable relief—such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings—when the state forum provides an adequate avenue for relief. *Weitzel v. Div. of Occupational & Prof'l Licensing*, 240 F.3d 871, 875 (10th Cir. 2001) (quoting *Rienhardt v. Kelly*, 164 F.3d 1296, 1302 (10th Cir.1999)).
>
> * * *
>
> For *Younger* abstention to be appropriate, the Tenth Circuit has ruled that three elements must be present: (i) interference with an ongoing state judicial proceeding; (ii) involvement of important state interests; and (iii) an adequate opportunity afforded in the state court proceedings to raise the federal claims.

*Gerhardt v. Mares*, 179 F.Supp.3d 1006, 1045-46 (D.N.M. 2016)(internal quotation marks omitted), *See also Hunter v. Hirsig*, 660 Fed.Appx. 711, 714 (10th Cir. 2016) (same).

A *Younger* abstention is appropriate in this case because: 1) there is an ongoing State judicial proceeding (also initiated by Plaintiff); 2) the State forum (namely the administrative process and resulting judicial review) is sufficient to provide an adequate opportunity to address the question contained in the complaint; and 3) the State proceedings involve important State interests, that is, "matters which traditionally look to state law for their resolution or implicate separately articulated state policies." *Crown Point I, LLC v. lntermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003) (quoting *Amanatullah v. Colo. Bd. Of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999)). Once these requirements have been met, the *Younger* abstention is mandatory. *Goings v. Sumner Cty. Dist. Atty's Office*, 571 Fed.Appx. 634, 638 (10th Cir. 2014) (citing *Amanatullah*, 187 F.3d at 1163).

**A. There is an Ongoing State Judicial Proceeding**

Plaintiff indicated in its Complaint its intent to appeal the permit in the New Mexico Court of Appeals and did so concurrently with the filing of its Complaint in this Court. Complaint ¶ 19; Notice of Appeal. Although Plaintiff also indicates it intends to move to stay that appeal pending the outcome of this case, no such request has of yet been filed. NMED will oppose such a request, and the appellant is not entitled to a stay as a matter of right. *See Wood v. Millers Nat'l. Ins. Co.*, 632 P.2d 1163, 1166 (1981) ("The power to stay proceedings pending the outcome of other litigation is within the discretion of the court . . . ."). The proceeding is therefore ongoing.

**B. The State Provides an Adequate Forum for Plaintiff's Federal Claims**

For *Younger* purposes, a federal litigant is deemed to have an "adequate opportunity" to raise its federal claims in the state forum if such claims "may be raised in state court judicial review of administrative proceedings." *Amanatullah*, 187 F.3d at 1164; *J.B. ex rel. Hart v.*

*Valdez*, 186 F.3d 1280, 1292 (10th Cir. 1999) (adequate opportunity exists unless "state law clearly bars the interposition of the [federal statutory] and constitutional claims") (quoting *Moore v. Sims*, 442 U.S. 415, 425-26 (1979)).

It appears Plaintiff's RCRA sovereign immunity claim is entirely dependent upon, and co-extensive with, its claim that the definition of hazardous waste for purposes of corrective action is inconsistent with New Mexico's HWA. *See* Complaint ¶¶ 21-22. Because the New Mexico Court of Appeals is expressly empowered to provide judicial review of final NMED permitting actions, Section 74-4-14, this is an issue squarely within that court's competence to decide. Moreover, to the extent the federal sovereign immunity claim implicates any issue of federal law outside of the HWA, nothing in New Mexico law bars consideration of such a claim. The New Mexico Court of Appeals has routinely considered and decided HWA cases. *See Sw. Research & Info. Ctr. v. N.M. Env't Dep't*, 2014-NMCA-098, ¶ 7, 336 P.3d 404, 407 (affirming NMED permit modification for the Waste Isolation Pilot Plant); *Citizen Action v. Sandia Corp.*, 2008-NMCA-031, ¶ 1, 179 P.3d 1228, 1230 (affirming NMED decision to grant permit modification request of Sandia National Laboratories); *Sw. Research & Info. Ctr. v. State*, 2003-NMCA-012, ¶ 1, 62 P.3d 270, 271 (affirming NMED Secretary's procedural decisions regarding permit for Waste Isolation Pilot Project); *Atlixco Coal. v. Maggiore*, 1998-NMCA-134, ¶ 2, 965 P.2d 370, 372-73 (affirming in part and vacating in part an NMED-issued HWA permit for a landfill).

**C. The State Proceeding Involves Important State Interests.**

The interests involved in the State proceeding are of the highest importance to New Mexico, as reflected in both constitutional and statutory provisions. The New Mexico Constitution provides that:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

N.M. Const. art. XX, § 21. The HWA is part of New Mexico's Environmental Improvement Act, the purpose of which is to provide for:

> [E]nvironmental management and consumer protection in this state in order to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment: and will maximize the economic and cultural benefits of a healthy people.

Section 74-1-2.

The purpose of the HWA itself "is to help ensure the maintenance of the quality of the state's environment; to confer optimum health, safety, comfort and economic and social well-being on its inhabitants; and to protect the proper utilization of its lands." Section 74-4-2. *See also V-1 Oil Co. v. Wyoming*, 902 F.2d 1482, 1486 n.l (10th Cir. 1990) (protection of environment and public from pollution is substantial governmental interest).

In addition to these broad policy concerns, the State proceeding implicates more specific interests in maintaining the integrity of the RCRA permitting process, including the parameters of judicial review. In particular, the State has a strong interest in preserving the requirement that permittees exhaust their administrative remedies before invoking the jurisdiction of the courts, and that they properly preserve issues for appeal.

New Mexico law provides several opportunities for permittees to be heard in the NMED permitting process. *See* HWA, Section 74-4-4.2 (H) (requiring an opportunity for a public hearing at which all interested persons may be given a reasonable chance to submit data, views,

or arguments orally or in writing); Hazardous Waste Management Rules, 20.4.1.901(A)(5) NMAC (same), 20.1.4.500(C)(2)-(3) NMAC) (providing for comment on a Hearing Officer's permitting report and oral argument before the NMED Secretary). Plaintiff therefore had the opportunity to raise its objection to the definition of hazardous waste to NMED.

In the normal course of RCRA permitting, a permittee's disagreement with an NMED permit would be adjudicated by the New Mexico Court of Appeals. Section 74-4-14. And, under RCRA's broad waiver of sovereign immunity, these procedural requirements are applicable to federal entities. *See* 42 U.S.C. § 6961(a). The Complaint, however, does not indicate whether Plaintiff ever raised its objections to the Permit condition to NMED in written or oral comments, or whether it requested a hearing at which it could have articulated its concerns.

By bringing this collateral attack on a permit condition without first allowing NMED's permitting process to conclude (including judicial review of such a permit in the New Mexico Court of Appeals), Plaintiff seeks to evade RCRA's mandate that it abide by New Mexico's procedural requirements. As recognized by the Supreme Court, exhaustion serves two important purposes. "First, exhaustion protects administrative agency authority" by giving an agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and . . . discourages disregard of the agency's procedures." *Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (citation omitted). Second, exhaustion promotes efficiency because "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in . . . federal court." *Id.*

The three elements for a *Younger* Abstention as articulated by the court have therefore been satisfied in this case. Judicial restraint is also warranted by principles underlying other abstention doctrines recognized by federal courts. *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496,

501 (1941) (coining the Pullman Abstention Doctrine, "a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary"); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 (1976) (recognizing the Colorado River Abstention Doctrine when "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").

Under Rule 12(b)(1) and applicable abstention doctrines, as a matter of law the federal court should abstain from exercising jurisdiction over this case. A motion to dismiss on the basis of abstention is similar to a motion to dismiss for lack of subject matter jurisdiction. *Stein v. Legal Advert. Comm.*, 272 F. Supp.2d 1260, 1276, n.3 (D.N.M. 2003). "Once a Court concludes that abstention is appropriate, it should not then adjudicate the case on the merits." *Id.* at n.4 (citing *Amanatullah*, 187 F.3d at 1163 n.4).

Therefore, because the "exercise of federal review of the question in [this case] . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern," *Colo. River*, 424 U.S. at 814, this Court should abstain from exercising its jurisdiction.

**II. Failure to State a Claim on Which Relief May Be Granted**

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Detailed factual allegations are not required, but the Rule does call for "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Instead, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679.

The sole claim alleged in Plaintiff's Complaint is, "[t]he definition of 'hazardous waste' for the purposes of corrective action in Permit Section 1.12 is inconsistent with the HWA and its implementing regulations," and consequently exceeds the scope of RCRA's waiver of sovereign immunity in 42 U.S.C. Section 6961(a). Complaint ¶¶ 21-22. These conclusions of law are not entitled to a presumption of validity. *Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). The Complaint is completely devoid of any facts on which such a conclusion could be based.

In the three paragraphs in which the Complaint sets forth facts, Plaintiff alleges that it owns Cannon Air Force Base, that "the challenged Permit replaces the existing permit, which, in most relevant part addresses corrective action at Cannon," and that Plaintiff intends to appeal the Permit in a New Mexico court and then move to stay that proceeding pending the resolution of this case. Complaint ¶¶ 17-19. None of these facts bear on the definition of hazardous waste or overcome the waiver of sovereign immunity subjecting Plaintiff to NMED's permitting processes.

The Complaint contains additional information in a "Statutory and Regulatory Background" section identifying certain federal and New Mexico statutory provisions. *See* Complaint ¶ 12 (EPA has authorized NMED to implement RCRA in lieu of a federal program); Complaint ¶ 15 (RCRA waives sovereign immunity "as to the application of RCRA and state hazardous waste laws such as the HWA to federal facilities like the Cannon Air Force Base");

Complaint ¶ 16 (permit is a final agency action subject to judicial review under "arbitrary and capricious standard"). While NMED does not dispute the accuracy of these statements, none shed any light on Plaintiff's contention that NMED's definition of hazardous waste for the purpose of corrective action falls outside the broad waiver of sovereign immunity provided in RCRA. In fact, the only paragraph that addresses the definition of hazardous waste simply states, "New Mexico has adopted the same definition of hazardous waste as in RCRA. *Compare* NMSA 1978, § 74-4-14(K), *with* 42 U.S.C. § 6961(a)." Complaint ¶ 15. Another paragraph merely notes that the HWA requires regulations "that are equivalent to but no more stringent than" federal RCRA regulations. Complaint ¶ 13. This provision applies to the New Mexico Environmental Improvement Board, not NMED. In any case, even viewing the facts in the light most favorable to the non-moving party (Plaintiff, here), as this Court must for this motion, the Complaint neither pleads sufficient facts to explain how this requirement is relevant to the Permit nor identifies any pertinent regulations. In sum, Plaintiff nowhere applies the statutory provisions it identifies to any facts relevant to the Permit in order to explain the alleged deficiency in the Permit.

Plaintiff's related assertion that the Permit definition of hazardous waste "exceeds the scope of RCRA's waiver of sovereign immunity," Complaint ¶ 22, is similarly unsupported. RCRA's waiver of sovereign immunity is both broad and clear. *See* 42 U.S.C. § 6961; *see also State of Colo. v. U.S. Dep't of the Army*, 707 F. Supp. 1562, 1571-2 (D. Colo. 1989) ("[I]t is difficult to imagine a clearer statement of legislative intent . . . ."). The Permit was duly issued under New Mexico's RCRA authority. Plaintiff acknowledged this authority when it entered into the previous permit that this Permit replaces. Plaintiff has failed to articulate any reason why it should now be exempted from the RCRA waiver of immunity.

Therefore, the Complaint fails to state a claim on which relief may be granted, Fed. R. Civ. P. 12(b)(6), and should be dismissed.

**III. Alternative Motion for More Definite Statement**

A Rule 12(e) motion is appropriate when a complaint "is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e). The Supreme Court of the United States has held that, "[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). Commentary to the federal rule adds that "the motion provided for is . . . to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question." Fed. R. Civ. P. 12 Commentary. "'Whether to grant or deny such a motion lies within the sound discretion of the court.'" *Graham v. Prudential Home Mortg. Co.*, 186 F.R.D. 651, 653 (D. Kan. 1999) (citation omitted). Federal district courts in New Mexico have granted 12(e) motions in the recent past. *See Tompkins v. LifeWay Christian Res. of S. Baptist Convention*, No. 17-CV-0460 RB/KRS, 2018 WL 6632070, at *7 (D.N.M. Dec. 19, 2018); *Serna v. Webster*, No. CV 17-0020 JB/WPL, 2017 WL 4386359, at *28 (D.N.M. Sept. 30, 2017), appeal dismissed, No. 17-2177, 2017 WL 8786138 (10th Cir. Nov. 27, 2017), reh'g denied (Dec. 5, 2017), and aff'd, No. 18-2049, 2018 WL 6574937 (10th Cir. Dec. 13, 2018).

In this case, it is impossible to ascertain from Plaintiff's Complaint which aspect of the hazardous waste definition in the Permit Plaintiff believes is problematic. In addition to its failures to meet the federal pleading standard, the Complaint as written provides no basis on which NMED may formulate a thoughtful and informed response. Therefore, if the court declines to dismiss the Complaint, NMED respectfully requests that the court order a more

definite statement from Plaintiff specifying the aspect of the Permit's hazardous waste definition that is allegedly flawed.

## CONCLUSION

Plaintiff has failed to show that this Court should assume jurisdiction over a State matter already properly before the New Mexico Court of Appeals, and the Complaint should therefore be dismissed under Rule 12(b)(1) according to abstention doctrines. Additionally, Plaintiff's Complaint is legally and factually insufficient and should be dismissed under Rule 12(b)(6). Alternatively, NMED requests that this court order a more definite statement under Rule 12(e).

Dated: February 18, 2019.

Respectfully submitted:

**NEW MEXICO ATTORNEY GENERAL**
**HECTOR H. BALDERAS**

*/s/William G. Grantham*
William G. Grantham
P. Cholla Khoury
Assistant Attorneys General
ckhoury@nmag.gov
wgrantham@nmag.gov
(505) 490-5042
Post Office Drawer 1508
Santa Fe, NM 87504

**NEW MEXICO ENVIRONMENT DEPARTMENT and JAMES KENNEY, Secretary (in his official capacity)**

*/s/Jennifer Hower*
Jennifer Hower
General Counsel
Christopher Atencio
Assistant General Counsel
Special Assistant Attorneys General
New Mexico Environment Department
121 Tijeras Ave. NE
Albuquerque, NM 87102
Phone: (505) 222-9554
Fax: (505) 383-2064

**CERTIFICATE OF SERVICE**

I CERTIFY that, on February 18, 2019, I filed the foregoing using CM/ECF which caused the parties of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

*/s/William G. Grantham*
William G. Grantham