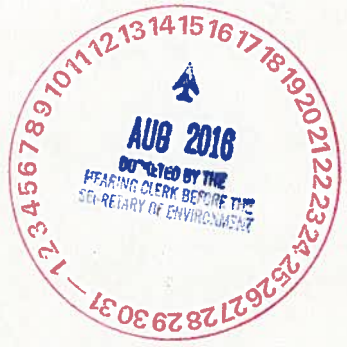

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES DEPARTMENT OF ENERGY AND LOS ALAMOS NATIONAL SECURITY, LLC FOR A GROUND WATER DISCHARGE PERMIT (DP-1835) FOR LOS ALAMOS NATIONAL LABORATORY

No. GWB 16-08 (P)

HEARING OFFICER'S REPORT PURSUANT TO 20.6.2.3110(K) NMAC

On June 7, 2016, the appointed Hearing Officer conducted a public hearing pursuant to 20.6.2.3110 NMAC at the University of New Mexico, Los Alamos in Los Alamos, New Mexico. Louis W. Rose and Timothy A. Dolan appeared on behalf of Los Alamos National Security, LLC ("LANS"), and Ben Underwood appeared on behalf of the United States Department of Energy ("DOE" and jointly "Applicants"). John Verheul, Office of General Counsel, appeared on behalf of the Ground Water Quality Bureau of the New Mexico Environment Department ("Department"). Kathy WanPovi Sanchez, Environmental Health and Justice Program Manager for Tewa Women United, appeared on behalf of Communities for Clean Water ("CCW").

Applicants seek approval of a ground water discharge permit ("DP-1835") for Los Alamos National Laboratory ("LANL"). Applicants presented the technical testimony of Gerald Fordham, Danny Katzman and Bob Beers in support of approval. The Department also supports approval of the ground water discharge permit with thirty-five (35) proposed conditions reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions. The Department presented the technical testimony of Steve Huddleson and Patrick Longmire in support of approval. CCW supports remediation of the regional drinking water aquifer, but "opposes issuance of the final permit at this time." CCW presented no technical testimony.

No other person entered an appearance to provide technical testimony in advance of the public hearing. District 46 State Representative Carl Trujillo presented a general oral statement and also read a general written statement from District 43 State Representative Stephanie Garcia Richard in support of approval. Stacey Loretto, Robert Chavez, Beata Tsosie-Pena, Aspen Vallo, Marian Naranjo, and Kathy WanPovi Sanchez also provided general oral statements. The Hearing Officer asked clarifying questions, admitted all exhibits offered by the parties (Applicants' Exhibits 1-4, Department's Exhibits 1-5, and CCW's Exhibit 1) into the record proper, and closed the evidentiary record at the conclusion of the public hearing. The record proper also contains the administrative record and all documents filed with the Hearing Clerk.

The public hearing lasted one day and the Hearing Officer conducted it in accordance with 20.6.2.3110 NMAC and the Department's Permit Procedures found in 20.1.4 NMAC, except to the extent any of these procedures conflicted with 20.6.2.3110 NMAC.[1] The parties submitted proposed findings of fact and conclusions of law, which the Hearing Officer considered and adopted in relevant part as set forth herein.

FINDINGS OF FACT

Background

1. Ground water sampling data from monitoring wells at LANL indicate the presence of chromium contamination at levels exceeding the New Mexico ground water standard of 0.05 mg/L (50 ppb). Subsequent investigations determined that the chromium originated as potassium dichromate, which had been used from approximately 1956 to 1972 as a corrosion inhibitor in power plant cooling towers. The chromium reached the environment through cooling tower water discharged during routine maintenance. These discharges resulted in a

[1] 20.1.4.2 NMAC provides that the Department's Permit Procedures apply except to the extent any provision is inconsistent with any rule promulgated by the Water Quality Control Commission. 20.6.2.3110 NMAC is a rule promulgated by the Commission.

plume of chromium contamination in the regional aquifer, primarily beneath Mortandad Canyon. Concentrations of chromium within the ground water plume exceed the New Mexico ground water standard of 50 ppb near the property boundary between LANL and the Pueblo de San Ildefonso and are as high as 1,000 ppb in the plume center. Recent ground water monitoring well sampling data show evidence of increasing chromium concentrations along the downgradient edge and on one side edge of the plume, which may be indicative of plume migration. **Applicants' Exhibit 4 at page 4, lines 3-16.**

2. This chromium discharge area is in a sacred place to the indigenous Tewa Pueblo Peoples inhabiting Mortandad Canyon. **Hearing Transcript ("Hrg. Trans.") 169:10-170:16.**

3. Since the discovery of chromium in 2005, Applicants have been obligated to conduct interim measures for chromium plume control in accordance with Section VII.B.1 of the March 1, 2005, Compliance Order on Consent ("Consent Order") with the Department. **Department's Exhibit 4 at page 2, line 22 to page 3, line 1.**

4. The interim measures proposed to control chromium migration in ground water during the evaluation of long-term corrective action remedies. Work proposed for interim measures involves pumping from an array of extraction wells in an effort to hydraulically control potential plume migration beyond the LANL boundary, and to achieve and maintain the 50 ppb (20.6.2.3103 NMAC standard) downgradient plume edge within the LANL boundary. **Department's Exhibit 4 at page 3, lines 3-8.**

5. Three (3) extraction wells located in the Mortandad Canyon area within the boundary of LANL will bring contaminated water to the surface, and then two (2) ion-exchange units will treat the contaminated water to reduce the chromium to less than 45 ppb. **Applicants' Exhibit 4 at page 5, lines 14-25.**

The Proposed Discharge

6. On April 10, 2015, Applicants submitted a Discharge Permit Application ("Application") to the Department for a permit to discharge up to 648,000 gallons per day of treated ground water from up to three (3) extraction wells. The Application stated that the ground water from the extraction wells will be contaminated with chromium and may contain perchlorate. The Application proposed to treat the contaminated water in two (2) ion-exchange units and discharge the treated water through a system of up to six (6) Underground Injection Control wells, or during maintenance of the injection wells, to lined impoundments and land application in accordance with the requirements of DP-1793. The Application included supporting information concerning the treatment proposal, the injection wells, and the impact of the proposed discharge on ground water. **Administrate Record ("AR") Nos. NMED-DP1835-C01, NMED-DP1835-C33, and NMED-DP1835-C34; Applicants' Exhibit 4 at page 6, lines 6-12; Department's Exhibit 4 at page 3, lines 10-16.** Applicants supplemented the Application, including the supporting information, on October 8, 2015, May 12, 2016, and May 25, 2016. **AR Nos. NMED-DP1835-C06, NMED-DP1835-C31, and NMED-DP1835-C35.**

7. The location of the proposed discharge is approximately three miles southeast of Los Alamos in sections 24 and 25, Township 19N, Range 06E, Los Alamos County, New Mexico. The most likely affected ground water lies in a regional aquifer from 900-1100 feet below ground surface and has a total dissolved solids (TDS) concentration of approximately 150 milligrams per liter (mg/L). **Department's Exhibit 4 at page 6, lines 11-14.**

8. Specific monitoring of the extraction, treatment, and injection systems will be completed to ensure proper system operation using a supervisory control and data acquisition ("SCADA") control system with a centrally located computer station. Applicants will monitor

incoming data, including flowrates, pressures, liquid levels, ground water levels, motor status, and alarms from the system sites, and flowrate of injected water will be managed by motor controlled valves, and pressure at each injection well will be maintained at a specified value using down-hole pneumatic flow control valves ("FCV"). **Department's Exhibit 4 at page 4, line 18 to page 5, line 2.**

9. The flow of treated water that is pumped into the injection wells will be controlled with the FCVs to maintain an appropriate pressure head in the down-hole injection pipe to prevent cascading of the water into the well. Once discharged from an FCV, the water will enter the injection well casing and gravity flow through the well screen into the formation. Pressure in the surface piping will be monitored by the control system, which will automatically adjust the FCV operation to maintain the pipeline pressure set point. **Department's Exhibit 4 at page 5, lines 4-9.**

10. The water level in the injection well casing will be monitored by the control system through a down-hole pressure transducer. Applicants anticipate that the water pressure in the injection well casing will rise 10-15 pounds per square inch ("psi") above that of the static ground water level during injection. Reduced injection capacity within the well is anticipated during on-going operation; thus, the control system will be programmed to alarm the operator and shut down one or more extraction wells in the event that water levels within the injection well casing reach the high-level set point. **Department's Exhibit 4 at page 5, lines 11-17.**

11. The injection pipe will be equipped with a check valve and a submersible pump. This pump will be used to maintain well performance by back-flushing the well as part of a regular maintenance program. Back-flushing is anticipated once the water pressure within the injection well increases 10-12 psi above the levels observed initially under static conditions. The

ground water generated from injection well back-flushing will be pumped into storage tanks, tested, transported to an IX treatment unit for treatment if necessary, and then land-applied under separate authorization. **Department's Exhibit 4 at page 5, line 19 to page 6, line 2.**

12. The ground water to be treated and discharged may contain water contaminants which may be elevated above the standards of 20.6.2.3103 NMAC and/or toxic pollutants as defined in 20.6.2.7.WW NMAC. Prior to discharge, all ground water will be treated to achieve standards less than 90% of the numeric standards of 20.6.2.3103 NMAC or of the numeric standards established for tap water in the Department's *Risk Assessment Guidance for Site Investigations and Remediation* for constituents not listed in 20.6.2.3103 NMAC. **Department's Exhibit 4 at page 6, lines 4-9.** Applicants proposed that concentrations of chromium in the discharge not exceed 0.045 mg/L (45 ppb) (less than 90% of the New Mexico numeric ground water human health standards of 0.05 mg/L) and that any perchlorate present in the extracted water not exceed 12.4 µg/L (less than 90% of the tap water screening level of 13.8 µg/L specified in Table A-1 of the Department's *Risk Assessment Guidance for Site Investigations and Remediation*). **Applicants' Exhibit 4 at page 5, lines 24-25, and page 6, lines 1-5.**

DP-1835 Requirements

13. The proposed discharge through injection into the regional aquifer is defined as a Class V Underground Injection Control well as defined in 20.6.2.5002(B)(5)(d)(i) NMAC. The Underground Injection Control Program of the Department has been granted primacy by the United States Environmental Protection Agency under the federal Safe Drinking Water Act. 42 U.S.C. §§ 300f *et seq*. **Department's Exhibit 4 at page 6, lines 16-19.**

14. The Department's purpose in issuing DP-1835, and in imposing the requirements and conditions specified therein, is to control the discharge of water contaminants from activities

related to ground water remediation projects into ground and surface water so as to protect ground and surface water for present and potential future use as domestic and agricultural water supply and other uses and to protect public health. In developing the discharge permit, the Department determined that the requirements of 20.6.2.3109(C) NMAC have been or will be met. **Department's Exhibit 4 at page 6, line 20 to page 7, line 3.**

15. DP-1835 requires that Applicants demonstrate within one year of the effective date of the permit the mechanical integrity of the distribution piping and the injection wells. This requirement ensures that the construction and maintenance of the proposed system is not subject to failures or leakage. This integrity testing shall be repeated at least once during each five-year permit term. In addition, conditions within the draft permit document response actions that Applicants must follow in the case of an unauthorized release or a system failure that results in a system alarm. All components of the pumping, treatment, and injection system are maintained by the SCADA system. Any system failure detected by the SCADA system triggers appropriate shut-down activities to minimize the potential for unintended discharge. **Department's Exhibit 4 at page 7, lines 5-14.**

16. Applicants must provide quarterly reports that document influent and discharge volumes, effluent sampling results, ground water quality sampling results, and any operations/maintenance activities conducted during the reporting period. Injection pressures, flow rates, and cumulative discharge quantities are also reported quarterly. **Department's Exhibit 4 at page 7, lines 16-20.**

17. Applicants must develop ground water potentiometric surface maps based on these monitoring data for quarterly submittal. Applicants must conduct ground water quality monitoring in accordance with the *Interim Facility-Wide Groundwater Monitoring Plan*

("IFGMP"), which is conducted under the oversight of the Department's Hazardous Waste Bureau ("HWB"). The Department may require additional analytes or well sampling in addition to those parameters specified in the IFGMP if deemed necessary. **Department's Exhibit 4 at page 8, lines 3-8.**

18. DP-1835 contains conditions regarding possible replacement of existing monitoring wells, and closure requirements following termination of the discharge. DP1835 also provides Additional general Terms and Conditions. **Department's Exhibit 4 at page 8, lines 10-13.**

Technical Comments and Requests for Hearing

19. On November 23, 2015, the New Mexico Department of Game and Fish submitted a letter to the Department in response to the public notice of the discharge permit, which stated that they did not anticipate any significant impacts to wildlife or sensitive habitats from the proposed discharge. Additionally, the Department received eight non-technical letters supporting the approval of DP-1835 from Los Alamos County, The City of Santa Fe, Northern New Mexico Protects, State Representatives Carl Trujillo and Stephanie Garcia Richard, and individual members of the local community. **Department's Exhibit 4 at page 9, lines 1-6. AR Nos. NMED-DP1835-C09 through NMED-DP1835-C12 and NMED-DP1835-C14 through NMED-DP1835-C18.**

20. On November 24, 2015, the Department received a request for hearing and technical comments on the initial draft permit from Applicants. CCW, which also represents Concerned Citizens for Nuclear Safety, Amigos Bravos, Tewa Women United, Honor our Pueblo Existence, Partnership for Earth Spirituality, and Communities for Clean Water Youth Council, submitted a request for hearing and technical comments on November 30, 2015. **Department's Exhibit 4 at page 8, lines 15-19; AR Nos. NMED-DP1835-C13, NMED-DP1835-C19.**

21. Steven Huddleson detailed his response to the technical comments from CCW in his written testimony. **Department's Exhibit 4, pages 10-18.**

Hearing Determination and Public Hearing

22. On March 15, 2016, the Secretary approved the request for hearing determination. Michelle Hunter, Bureau Chief, notified Applicants and CCW of the hearing determination by letter dated March 18, 2016. **AR Nos. NMED-DP1835-C25 through NMED-DP1835-C27.**

23. On March 23, 2016, the Hearing Clerk received the hearing determination granted by the Secretary on March 15, 2016. The Secretary thereafter appointed Jeffrey N. Holappa, Administrative Law Judge for the Department, to serve as Hearing Officer pursuant to 20.6.2.3110(A) NMAC and 20.1.4.100(E)(2) NMAC on March 24, 2016. **Record Proper, Pleading Log, Nos. 1 and 4.**

24. On May 26, 2016, the Department filed a Statement of Intent to Present Technical Testimony. The Department's statement included the pre-filed direct testimony of Steven Huddleson, the resumes of Mr. Huddleson and Patrick Longmire, and proposed changes to DP-1835, based on the pre-hearing public comment. Applicants filed a Statement of Intent to Present Technical Testimony on May 27, 2016. Applicants' statement included the pre-filed direct testimony of Gerald Fordham, and the resumes of Mr. Fordham, Danny Katzman, and Bob Beers. **Record Proper, Pleading Log, Nos. 11 and 12.**

25. On May 27, 2016, CCW filed an entry of appearance, but elected not to submit a Statement of Intent to Present Technical Testimony. **Record Proper, Pleading Log, No. 13.**

26. On June 7, 2016, the Hearing Officer conducted a public hearing pursuant to 20.6.2.3110 NMAC at the University of New Mexico, Los Alamos in Los Alamos, New Mexico. Applicants, the Department, and CCW entered appearances at the public hearing. Witnesses for

Applicants and the Department provided technical testimony. **AR No. NMED-DP1835-C30; Hrg. Trans. 1:18-22, 2:1-3:11, 25:18-34:1, 71:21-81:7.**

27. Steven Huddleson, Manager of the Pollution Prevention Section, oversaw the permitting process for DP-1835. **Department's Exhibit 4 at page 1, lines 2-7.** Mr. Huddleson has over 40 years of experience in the public and private sectors as a regulator and consultant. He is a Certified Professional Geologist as accredited by the American Institute of Professional Geologists. As a consultant he has been involved in the investigation and remediation of a wide variety of contaminants, including chromium. **Department's Exhibit 2; Hrg. Trans. 72:23-73:11.**

28. Mr. Huddleson explained the technical need for the discharge permit, how the proposed discharge permit is protective of ground water, and expressed his support of the issuance of the proposed discharge permit DP-1835. **Department's Exhibit 4; Hrg. Trans. 75:17-22, 76:1-77:19, 80:3-81:7.**

29. Patrick Longmire, Senior Aqueous Geochemist (Advanced Engineer), discussed the expected impact of the discharge on the ground water in the area of the discharge, and confirmed Applicants' analysis that the discharge is not expected to adversely impact ground water. **Department's Exhibit 3; Hrg. Trans. 147:2-13.**

30. Gerald Fordham, the project engineer for the planning, design, and implementation of the Chromium Plume Control Interim Measure and Chromium Plume-Center Characterization ("the Project"), explained the purpose and design of the Project, and opined that the proposed discharge plan met the approval criteria for a discharge permit under the Water Quality Control Commission regulations. **Applicants' Exhibit 1; Applicants' Exhibit 4 at page 6, line 18 to page 7, line 19.** Mr. Fordham recommended that the Application be approved and the draft

permit be issued, as modified by Applicants' proposed changes. **Applicants' Exhibit 4 at page 11, lines 4-7.**

31. CCW, as well as members of the public, cross-examined witnesses presented by Applicants and the Department. **Hrg. Trans. 34:24-65:15, 103:8-141:20.**

32. Danny Katzman and Bob Beers answered questions on cross-examination concerning the design of the Project and the expected impact of the discharge of treated water through the proposed injection wells. **Applicants' Exhibits 2 and 3; Hrg. Trans. 37-65.**

33. Mr. Huddleson on cross-examination explained how seriously he, as well as the Ground Water Quality Bureau and the Department, take the drafting and development of discharge permits to protect aquifer resources, and how much time was spent on this discharge permit in particular to ensure it is protective of ground water. **Hrg. Trans. 132:20-133:12.**

34. District 46 State Representative Carl Trujillo presented a general oral statement and also read a general written statement from District 43 State Representative Stephanie Garcia Richard in support of issuance of DP-1835. **Hrg. Trans. 97:9-102:10.**

35. Stacey Loretto, Robert Chavez, Beata Tsosie-Pena, Aspen Vallo, Marian Naranjo, and Kathy WanPovi Sanchez also provided general oral statements during the public hearing. These folks discussed the historical and spiritual significance of the subject water to their lives. They also expressed general concerns about the remediation of the chromium plume rather than specific objections to DP-1835. **Hrg. Trans. 153:1-182:23.**

36. The Department proposed changes to draft DP-1835 in response to comments and testimony at the hearing. Specifically, the Department's draft: (1) revised the Introduction to more clearly include the proposed discharges to the lined impoundments and land application approved under DP-1793; (2) revised Condition A.1 to reflect that the surface water standards

were moved from Part 1 to Part 4 of Title 20, Chapter 6; (3) revised Condition B.11 to more clearly delineate the content of the quarterly reports submitted under the permit; (4) revised Condition B.12 to more clearly identify those modifications for which an analysis of the treated effluent is required; and (5) revised Condition B.20 to eliminate the requirements concerning construction of SIMR-2 since the well has already been constructed. **Department's Proposed Findings of Fact and Conclusions of Law, Attachment 1.**

CONCLUSIONS OF LAW

1. The Water Quality Control Commission "may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant" pursuant to the New Mexico Water Quality Act ("Act"), NMSA 1978, § 74-6-5(A) (2009).

2. Section 74-6-5(D) provides that the constituent agency shall "grant the permit, grant the permit subject to conditions or deny the permit." Section 74-6-5(D) also provides that if the constituent agency grants the permit subject to conditions, "[t]he constituent agency has the burden of showing that each condition is reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions."

3. Section 74-6-5(E) provides that the constituent agency "shall deny any application for a permit . . . if: (1) the effluent would not meet applicable state or federal effluent regulations, standards of performance or limitations; (2) any provision of the Water Quality Act would be violated; (3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard . . . ; or (4) the applicant has, within the ten years immediately preceding the date of submission of the permit application . . . ."

4. The Ground and Surface Water Protection Regulations ("Regulations") found in 20.6.2 NMAC contain the implementing regulations of the Act.

5. 20.6.2.3104 NMAC provides that "no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary."

6. DOE is a department of the United States. LANS is a limited liability company. Applicants are both "persons" within the meaning of the Regulations. 20.6.2.7(JJ) NMAC.

7. The Department is an agency of the executive branch of the state of New Mexico, created by statute. NMSA 1978, § 9-7A-6(B)(3) (1991).

8. 20.6.2.3108 NMAC directs the Department to evaluate applications for discharge permits, and recommend approval or disapproval by the Secretary.

9. The activities described by Applicants in the Application require a discharge permit, to be evaluated by the Department. 20.6.2.3104 and 20.6.2.3108 NMAC. **AR Nos. NMED-DP1835-C1; NMED-DP1835-C13; and NMED-DP1835-C35.**

10. The Application for DP-1835 complied with the requirements of Section 74-6-5 and 20.6.2.3106 NMAC.

11. 20.6.2.5006 NMAC provides that "Class V injection wells must meet the requirements of Sections 20.6.2.3000 through 20.6.2.3999 and Sections 20.6.2.5000 through 20.6.2.5006 NMAC."

12. The Water Quality Control Commission regulations provide, in pertinent part, that the Secretary "shall approve the proposed discharge plan . . . if the following requirements are met: . . . (2) the person proposing to discharge demonstrates that approval of the proposed discharge plan . . . will not result in either concentrations in excess of the standards of

20.6.2.3103 or the presence of any toxic pollutant at any place of withdrawal of water for present or reasonably foreseeable future use, except for contaminants in the water diverted as provided in Subsection D of 20.6.2.3109 NMAC; or (3) the proposed discharge plan conforms to either Subparagraph (a) [applicable to municipal, other domestic discharges and discharges from sewerage systems handling only animal waste] or (b) [applicable to discharges from industrial, mining or manufacturing operations] below and Subparagraph (c) below: (b) . . . (i) the discharger has demonstrated that the amount of effluent that enters the subsurface from a surface impoundment will not exceed 0.5 acre-feet per acre per year . . . ; (c) all discharges: (i) the monitoring system proposed in the discharge plan includes adequate provision for sampling of effluent and adequate flow monitoring so that the amount being discharged onto or below the surface of the ground can be determined; (ii) the monitoring data is reported to the secretary at a frequency determined by the secretary." 20.6.2.3109(C) NMAC.

13. The Water Quality Control Commission regulations further provide that the Secretary "shall not approve a proposed discharge plan . . . for: (1) any discharge for which the discharger has not provided a site and method for flow measurement and sampling; (2) any discharge that will cause any stream standard [in 20.6.4 NMAC] to be violated; (3) the discharge of any water contaminant which may result in a hazard to public health; or (4) a period longer than five years . . . ." 20.6.2.3109(H) NMAC.

14. The proposed discharge to the injection wells meets the criteria of 20.6.2.3109(C) NMAC and is therefore approvable under the Act and Regulations.

15. The conditions proposed in the Department's revised draft DP-1835, with changes proposed by Applicants, are responsive to comments and "are reasonable and necessary to ensure

compliance with the Water Quality Act and applicable Regulations, considering site-specific conditions." Section 74-6-5(D).

16. The Department provided the public, including Applicants and CCW, with notice of the proposed discharge permit in accordance with 20.6.2.3108(H) NMAC.

17. The Department provided the public, including Applicants and CCW, an opportunity to comment on the proposed discharge permit in accordance with 20.6.2.3108(K) NMAC.

18. The Department provided the public, including Applicants and CCW, with notice of the public hearing in accordance with 20.6.2.3110 and 20.1.4.200(C)(2) NMAC.

19. The Hearing Officer held a public hearing on the proposed discharge permit in accordance with 20.6.2.3110 NMAC and with the Department's Permit Procedures found in 20.1.4 NMAC except to the extent any of these procedures conflicted with 20.6.2.3110 NMAC.

CCW'S REQUEST FOR SETTLEMENT CONFERENCE

CCW requested on page 1 of their post-hearing submission that the Hearing Officer recommend to the Secretary that the parties "return to the settlement table to resolve the matters raised in our November 30, 2015 comments to the October 2015 draft permit, at the June 7, 2016 public hearing, and in this filing." The Hearing Officer closed the record at the conclusion of the hearing and therefore it would be inappropriate to consider any new matters raised by CCW in its post-hearing filing pursuant to 20.6.2.3110(I) NMAC. **Hrg. Trans. 187:17-19**. Further, the Secretary provided CCW with the opportunity to address the matters raised in the November 30, 2015 comments to the October 2015 draft permit by granting the request for a public hearing. Nevertheless, CCW elected not to present any technical testimony and instead solely relied on cross-examination to address these substantive matters.

CCW had sufficient opportunity to request a settlement conference over the two months from the time the Secretary granted the request for public hearing, or over the one month from the time the Department published notice of the public hearing. CCW instead entered its appearance on the last possible day, and only eleven days before the scheduled public hearing. Accordingly, CCW's request for a recommendation for a settlement conference at this stage of the proceeding is untimely and without sufficient grounds.

CONCLUSION AND RECOMMENDED DECISION

The narrow issue here is whether Applicants established compliance with the Act and Regulations requiring the Acting Secretary to approve the ground water discharge permit.[2] The totality of the evidence demonstrates that the proposed discharge to the injection wells meets the criteria of 20.6.2.3109(C) NMAC and is therefore approvable under the Act and Regulations. CCW raised a variety of issues including a non-transparent, non-protective regulatory system, but they ultimately failed to present sufficient relevant evidence during the public hearing of a failure by Applicants to demonstrate compliance with the Act and Regulations.

Upon review of the entire record proper in this matter, the Hearing Officer recommends that the Acting Secretary approve the ground water discharge permit with the thirty-five (35) proposed conditions reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions. The Hearing Officer further recommends that the Acting Secretary approve the ground water discharge permit forthwith as the rule governing this proceeding does not include a provision for a comment period.[3]

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[2] Governor Susana Martinez appointed Deputy Secretary, Butch Tongate, to serve as Acting Secretary of the New Mexico Environment Department after Ryan Flynn stepped down as Secretary effective August 12, 2016.

[3] During the public hearing, the Hearing Officer referenced the possibility of a comment period in accordance with 20.1.4.500 NMAC. However, upon further review, 20.6.2.3110 NMAC does not afford the opportunity for a comment period and is therefore inconsistent with 20.1.4.500 NMAC. In such instances, 20.1.4.2 NMAC provides that the rule promulgated by the Water Quality Control Commission (20.6.2.3110 NMAC) overrides the Department's Permit Procedures.

Finally, the Hearing Officer recommends that the Acting Secretary approve the ground water discharge permit as submitted by the Department as Attachment 1 with the changes to Findings 1-4 as proposed by Applicants on page 7 of their post-hearing submission in order to accurately reflect the prospective status of the discharge.

Jeffrey N. Holappa, Administrative Law Judge
New Mexico Environment Department
Hearing Officer for GWB 16-08 (P)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Hearing Officer's Report Pursuant to 20.6.2.3110(K)** was served on the following parties of record via the stated methods below on August 17, 2016:

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