

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF:)
THE PETITION FOR A HEARING ON)
ORDER OF THE SECRETARY)
REMANDING FOR CONSIDERATION OF)
FINANCIAL ASSURANCE FOR GROUND)
WATER DISCHARGE PERMIT (DP-1132))
FOR THE RADIOACTIVE LIQUID WASTE)
TREATMENT FACILITY)
)
THE UNITED STATES DEPARTMENT)
OF ENERGY, TRIAD NATIONAL)
SECURITY, LLC,)
)
Petitioners.)
_____)

Docket No. WQCC _____

**UNITED STATES DEPARTMENT OF ENERGY
AND TRIAD NATIONAL SECURITY, LLC’S JOINT
PETITION FOR REVIEW AND NOTICE OF APPEAL OF
THE ENVIRONMENT DEPARTMENT SECRETARY’S ORDER
REMANDING FOR CONSIDERTION OF FINANCIAL ASSURANCE**

Pursuant to the New Mexico Water Quality Act (“WQA”), NMSA 1978, §74-6-5(O), and the Water Quality Control Commission’s Adjudicatory Procedures, 20.1.3.15.A NMAC, the United States Department of Energy (“DOE”) and Triad National Security, LLC (“Triad”) (collectively “DOE/Triad” or “Petitioners”) hereby submit their Petition for Review and Notice of Appeal of the Secretary of the New Mexico Environment Department’s (“Secretary”) June 24, 2020 Order of the Secretary Remanding for Consideration of Financial Assurance (“Order”) for the Water Quality Control Commission’s (“Commission”) review.¹

¹ The Secretary issued an Order of the Secretary Remanding for Consideration of Financial Assurance on June 23, 2020, then reissued the order to correct errors identified therein on June 24, 2020.

I. Introduction²

DOE and Triad are the proposed permittees of draft discharge permit 1132 (“Draft DP-1132”). Draft DP-1132, supported in proceedings below by witnesses for the Department, DOE and Triad, would permit groundwater discharges from the Radioactive Liquid Waste Treatment Facility (“RLWTF”), which is a fully operational wastewater treatment facility that supports Los Alamos National Laboratory’s (“LANL”) mission-critical programs by treating radioactive liquid waste wastewaters received from technical areas throughout the laboratory. Draft DP-1132 resulted from decades-long discussions, negotiations and deliberations.

NMED’s public notice associated with Draft DP-1132 occurred at three stages of the permitting process: the notification of NMED’s receipt of the 2012 discharge permit application (public notice 1, or PN-1), the notification of availability of a draft discharge permit for public comment and for request for public hearing (public notice 2, or PN-2), and the notification that a hearing is to occur (hearing notice). The permit application that is the subject of the Order was submitted to the Department on February 16, 2012. The Department found it to be administratively complete on March 2, 2012. NMED issued the first public notice in association with the 2012 DOE/LANS application in March of 2012. As a result of public participation in the permitting process, which included numerous comments on the draft discharge permits, a number of changes were made to Draft DP-1132. The numerous comments received on the draft discharge permit did not include any mention of, or concerns related to, financial assurance.

Following issuance of proper public notice, the Department held a public hearing on the issuance of DP-1132 on April 19, 2018. At that hearing, the Department, DOE and Los Alamos

² The administrative record has not yet been submitted in this proceeding. DOE/Triad are willing to supplement this Petition for Review and the factual statements made herein with record citations subsequent to submission of the administrative record.

National Security (“LANS”), Triad’s predecessor in interest, participated and presented evidence to support the issuance of Draft DP-1132. Communities for Clean Water (“CCW”) did not present technical testimony at the hearing but submitted a pre-hearing motion and post-hearing findings and conclusions based on its flawed argument that the RLWTF should not be permitted under the WQA, but rather the New Mexico Hazardous Waste Act. On July 19, 2018 the Hearing Officer entered a Hearing Officer’s Report, and on August 29, 2018, the Hearing Officer entered a Revised Hearing Officer’s Report. Neither the Hearing Officer’s Report nor the Hearing Officer’s Revised Report mentioned or considered the issue of financial assurance. Both recommended the Secretary approve the issuance of Draft DP-1132. Following the hearing, the Secretary approved a final discharge permit on August 29, 2018. Soon thereafter, the Commission vacated the Secretary’s Order approving DP-1132 and remanded the matter to the Department for a new hearing with a newly appointed Hearing Officer.

In accordance with the Commission’s Order, the Department assigned a newly appointed Hearing Officer who conducted a second hearing on Draft DP-1132 on November 14, 2019. At the public hearing, DOE/Triad, NMED, and Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, New Mexico Acequia Association and Tewa Women United (“Citizens”) offered technical testimony. Once again, at the second hearing, DOE/Triad and NMED offered testimony and evidence to support the issuance of the discharge permit. Citizens presented technical testimony and various members of the public presented non-technical testimony at the hearing to again advance its argument that the RLWTF should not be permitted under the WQA, but rather the New Mexico Hazardous Waste Act.

On February 11, 2020, the Hearing Officer, after deliberating on the hearing and the administrative record, which contained over 17,000 pages, issued the Hearing Officer’s Report

and Proposed Findings of Fact and Conclusions of Law. On February 25, 2020, DOE/Triad, NMED and Citizens filed comments on the Hearing Officer's Report. On March 4, 2020, the Hearing Officer entered a detailed, thirty-two page Hearing Officer's Revised Report and Proposed Findings of Fact and Conclusions of Law ("Hearing Officer's Revised Report"). The Hearing Officer's Revised Report concluded that DOE/Triad and NMED met their burdens of proving that the permit conditions of DP-1132 as proposed should be adopted. The Hearing Officer's Revised Report further concluded that the Citizens failed to meet their burden of proving that the conditions contained in Draft DP-1132 are inadequate, improper or invalid. The Hearing Officer's Revised Report notes all the public notice, comment and hearing opportunities that were granted in the proceeding. The Hearing Officer's Revised Report does not mention or consider the issue of financial assurance. The Hearing Officer's Revised Report concludes that the Secretary should grant DP-1132.

Following nearly eight years of permit proceedings and two public permit hearings in which DOE, Triad and the Department supported Draft DP-1132 with expert witnesses, on June 24, 2020, the Secretary issued the Order. The Order did not follow the Hearing Officer's recommendation to issue DP-1132. Instead, acknowledging that the testimony and the non-technical testimony presented at the hearing "contain no evidence related to financial assurance," the Secretary ordered a remand of the proceeding to the Ground Water Quality Bureau ("GWQB") for "the purpose of considering the types and levels of financial assurance that should be applied to DP-1132 . . . including corrective action, closure and post-closure care of the facilities that are the subject of DP-1132." Order at 3-4, Finding 10, Conclusion 3. The Order fails to acknowledge the fact that at no time during the extensive public comment process or during the two hearings associated with Draft DP-1132 did a person or party raise an issue or concern related to financial

assurance. The Secretary's only justification for the actions required thereunder are certain "equitable" concerns raised—in the context of Hazardous Waste Act-related arguments—by Citizens and the public which "may potentially be addressed by requiring adequate financial assurance for corrective action, closure, and post-closure care in DP-1132." Order at 3, Finding 11.

II. Bases for Petition for Review

In accordance with the Commission's Adjudicatory Procedures, 20.1.3.16 NMAC, Petitioners state as follows:

A. Timeliness of the Petition

Under the WQA, a petition for review must be made in writing to the Commission within thirty days from the date notice is given of the permitting action. NMSA 1978, §74-6-5(O)(1). The Order is dated June 24, 2020, twenty-two days prior to today's date. Therefore, this Petition for Review is timely filed.

B. Identification of Petitioners and Statement of Standing

The Petitioners are the United States Department of Energy and Triad National Security. Under the WQA, a person who participated in a permitting action before the Department, and who is adversely affected by the permitting action, has standing to seek review before the Commission. NMSA 1978, §74-6-5(O)(2009). Petitioners are the applicants for the groundwater discharge permit, DP-1132, that is the subject of the Order. Petitioners, as the applicants for DP-1132, submitted technical testimony and participated as parties in support of issuance of Draft DP-1132 at the hearing on DP-1132, conducted November 14, 2019. Petitioners are adversely affected by the issuance of the Order that fails to adopt the Hearing Examiner's Report and Recommendation to issue DP-1132.

C. Permitting Actions to Be Reviewed

Petitioners seek review of the June 24, 2020 Order of the Secretary Remanding for Consideration of Financial Assurance.

D. Portions of the Permitting Action to Which Petitioners Object

Petitioners object to the following six portions of the Order:

- i) Petitioners object to Findings 6 and 11 of the Order, which state that.

[t]he Hearing Record and the public record reveal a longstanding legacy of contamination of soil, surface water and groundwater caused by operations of the Applicants, as evidenced by, among other public documents, the Federal Facility Compliance Order between the Department and the United States Department of Energy dated May 20, 1997, the Compliance Orders on Consent issued by the Department under the HWA and entered into among the Department, the Applicants and predecessor operators of LANL on March 1, 2005 and in June, 2016.

Order at 2-3, Finding 6, and

[t]he concerns raised by [Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, New Mexico Acequia Association and Tewa Women United] and other members of the public in this proceeding may potentially be addressed by requiring adequate financial assurance for corrective action, closure, and post-closure care in DP-1132).

Order at 3, Finding 11.

Petitioners object to Findings 6 and 11 in the Order because they are arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law. *See* NMSA 1978, §74-6-7(B); *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005–NMCA–139, ¶ 16, 138 N.M. 625, 124 P.3d 1164 (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.”) (internal quotation marks and citation omitted); *McDaniel v. N.M. Bd. of Med. Exam'rs*, 1974–NMSC–062, ¶ 11, 86 N.M. 447, 525 P.2d 374 (describing agency action as arbitrary and capricious when it is “willful and unreasonable . . . , without consideration and in

disregard of facts or circumstances”) (internal quotation marks and citation omitted); *Atlixco Coal. v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 793, 965 P.2d 370, 377 (finding that the Secretary was required to provide a reasoned explanation for why he departed from the recommendations of the hearing officer who presided at the formal adjudicatory hearing and heard testimony from witnesses, stating “an agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand”); 20.6.2.3109(B) NMAC (requiring the Secretary’s Order “be based upon the administrative record.”).

Finding 6 of the Order suggests that the RLWTF and the operation of the RLWTF is responsible for legacy soil, surface water and groundwater contamination. Finding 6 of the Order makes this assertion without including a sufficient citation to or demonstration of evidence in the administrative record necessary to support the finding. Petitioners object to this finding as it is arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law.

Finding 11 of the Order suggests that the Secretary *sua sponte* determined to raise the issue of financial assurance without any evidence or reasoned basis to do so in an effort to address concerns raised by parties to the proceeding that were entirely unrelated to the issue of financial assurance. The Secretary’s Order properly recognizes that the hearing record did not include testimony or non-technical evidence or comments related to financial assurance. *See* Order, Finding 10 (“The technical testimony submitted at the public hearing and the non-technical public testimony and comments submitted at and after the public hearing contain no evidence related to financial assurance.”). Indeed, the issue of financial assurance was never properly before the Hearing Officer in this proceeding because it was neither the subject of any condition in Draft DP-

1132 nor raised by any person or party in any public comment period, including on the draft permit or at either of the two hearings on the draft permit. In addition, as reflected in the Hearing Officer's Revised Report recommending that DP-1132 be granted, the Hearing Officer concluded that DOE, Triad and the Department met their burdens for the issuance of DP-1132, and no party opposing the permit met a burden of proof on any condition, much less a condition relating to financial assurance that neither existed nor was offered. The Secretary offers no reasoned basis to depart from the Hearing Officer's Revised Report, and, mirroring the facts in *Atlixco Coal*, the Order significantly departs from the Hearing Officer's Revised Report without *any* reasonable or rational explanation.

There is good reason why financial assurance was not made a part of the draft discharge permit or addressed in hearings related to issuance of the permit. In negotiations on the terms of Draft DP-1132, the Department specifically decided not to require financial assurance in the draft permit. This is evidenced by an exchange of emails in the record. *See* the email exchanges between and among the Department and Petitioners in November 2014, true and correct copies of which are attached hereto as Exhibit 2. As the email exchange reflects, the Department's earlier decision not to require financial assurance was informed by the rationale of the federal facilities exemption from financial assurance discussed more fully later in this Petition. The Secretary's Order—which plainly and without sufficient justification departs from the previous financial assurance decision of the Department in negotiations on the terms of Draft DP-1132— is arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law.

Finding 11 of the Order is arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law because it is wholly unsupported

anywhere in the extensive administrative record and substantially departs from the Hearing Officer's recommendations without reasoned explanation.

ii) Petitioners object to Conclusions 1-4 of the Order, which state as follows:

1. Given the longstanding legacy of contamination of soil, surface water and groundwater caused by the Applicant's operations, the public interest is served by requiring financial assurance provisions to be included in DP-1132, if the permit is issued as a result of this proceeding.
2. This proceeding should be remanded to the Ground Water Quality Bureau ("GWQB") for the purpose of considering the types and levels of financial assurance that should be applied to DP-1132, if issued as a result of this proceeding, including corrective action, closure and post-closure care of the facilities at the RLWTF that are the subject of DP-1132.
3. The GWQB is directed to publish notice(s) of its financial assurance proposal related to DP-1132 in accordance with 20.6.2 NMAC and 20.1.4 NMAC ("Permit Rules") of the Water Quality Control Commission and the Department and provide for public participation and a hearing, if requested pursuant to the Permit Rules.
4. The Hearing Officer is authorized and directed to rule on any procedural or other matters related to financial assurance for DP1132 and conduct any additional hearings that may be required on remand to the GWQB.

Order at 4, Conclusions 1-4.

DOE/Triad incorporate their objections to Findings 6 and 11 in their objections to Conclusions 1-4 of the Order. Conclusions 1-4 of the Order are arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law as they exceed the scope of the over 17,000 page administrative record.

The WQA provides that following receipt of a Hearing Officer's report, the Department shall "either grant the permit, grant the permit subject to conditions, or deny the permit," NMSA 1978, §74-6-5, and the corresponding requirement of the WQCC regulations state that the Secretary must "approve, approve with conditions or disapprove the proposed discharge permit" 20.6.2.3109(B) NMAC. Conclusions 1-4 of the Order do not grant, grant subject to conditions

or deny the permit. Instead, these conclusions remand the proceedings to consider entirely new matters that were outside the scope of the permit proceeding. For these reasons, DOE/Triad further object to Conclusions 1-4 of the Order as arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law because the Secretary exceeded the scope of his statutory and regulatory authority in issuing Conclusions 1-4 of the Order.

Petitioners further object to the Secretary's Order and Conditions 1-4 of the Order as an *ultra vires* act. Neither the WQA nor the Commission's regulations authorize the Secretary to condition the issuance of a groundwater discharge permit, particularly one for which an applicant has met its evidentiary burden supporting issuance, upon providing financial assurance, as the Secretary has effectively done through Conclusions 1-4.

Conclusions 1-4 of the Order also conflict with the June 30, 2016 Compliance Order on Consent ("Consent Order") entered into by the Department and DOE. The Consent Order sets forth specific requirements for characterization, cleanup and corrective action for all of the Solid Waste Management Units ("SWMUs") or areas of concern ("AOCs") identified therein, including specifically the RLWTF and its units. The Consent Order also sets forth the requirements to fund the requirements of the Order, which include corrective action, and specifies that corrective action requirements under other permits cannot conflict with or duplicate the Consent Order. The Department recognized these provisions and addressed this in Condition 46, *Integration with the Consent Order*, in Draft DP-1132 which specifies that all cleanup and corrective action requirements for the RLWTF are contained in the Consent Order and that requirements of DP-1132 shall not conflict with or duplicate the requirements identified in that Order. No party or member of the public presented technical testimony, non-technical testimony or general public comment to change any term of Condition 46. Conclusions 1-4 of the Order set in motion a process

on remand to include financial assurance requirements for DP-1132 which would both duplicate and conflict with the Consent Order.

Finally, DOE/Triad object to Conclusions 1-4 of the Order as arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law because the conclusions fail to recognize that financial assurance requirements do not apply to public entities. The sound reason for the specific exemption of financial assurance for public entities is that “State and Federally-owned facilities will always have adequate resources to conduct closure and post-closure care activities properly.” 45 Fed. Reg. 33198 (1980), Monday, May 19, 1980, pages 32655 – 33588. Imposition of financial assurance on DOE and Triad would undermine the rationale supporting the exemption from financial assurance requirements for state and federally-owned facilities.

LANL is a federal facility, has a federal mission, and is located on federal property. The DOE owns LANL, while the National Nuclear Security Administration (“NNSA”), a semi-autonomous agency within DOE, oversees the management and operation of LANL by its contractors, Triad. Triad does not own title to any property at LANL, and its sole role is to operate LANL in accordance with its Management and Operating contract, which directs the work to be done at the laboratory and provides federal funds to accomplish that work. In previous proceedings before NMED, the agency has recognized that any financial assurance requirements imposed on NNSA’s management and operating contractor will be paid by the federal government and therefore qualifies for exemption from financial assurance requirements. *See* Hearing Officer’s Report and Final Order, *In the Matters of the Application of the United States Department of Energy and Los Alamos National Security LLC for a Hazardous Waste Facility Permit for Los Alamos National Laboratory and the Notice of Intent to Deny a Permit for Open Burn Unites TA-*

388 and TA-16-399 For Los Alamos National Laboratory, HBW 09-37(P) and 10-04(P) (October 7, 2010), Findings 366-368.

Recognizing the rationale for exempting a manager of LANL from financial assurance requirements, the Hearing Officer in that proceeding noted:

It is undisputed that, because [Triad's processor] is a management and operating contractor any financial assurance requirements imposed on [Triad's predecessor]³ will be paid by the Federal Government and ultimately the United States taxpayer. The Bureau recognizes that the federal government is exempt from these requirements...because federally-owned facilities will always have adequate resources to conduct closure and post-closure care.

Id., Finding 336. Petitioners object to Conclusion 1-4 of the Order because DOE/NNSA and Triad are all government entities that are exempted from financial assurance requirements.

E. Issues to be Raised and Relief Sought

DOE/Triad raise the following issues in this Petition for Review:

- 1) Whether the Secretary's Order is arbitrary, capricious, an abuse of discretion, not based on substantial evidence and not in accordance with law because it is not based on the hearing record, or the underlying administrative record.
- 2) Whether the Secretary's Order is arbitrary, capricious, an abuse of discretion, not based on substantial evidence and not in accordance with law because it exceeds the authority granted to the Director in the WQA, NMSA 1978, §74-6-5, and the corresponding requirements of the WQCC regulations at 20.6.2.3109(B) NMAC.
- 3) Whether the Secretary's Order is arbitrary, capricious, an abuse of discretion, not based on substantial evidence and not in accordance with law because it disregards and substantially departs from the Hearing Officer's Report.

³ Triad is the successor of the former O&M contractor, Los Alamos National Security, LLC.

- 4) Whether the Order conflicts with the corrective actions set forth in the June 30, 2016 Compliance Order on Consent entered into by the Department and DOE.
- 5) Whether the United States and its contractors are lawfully subject to financial assurance requirements given that the Los Alamos National Laboratory, as a federal facility, is owned by the federal government and co-operated by Triad pursuant to a federal contract specifying that all work done under this contract is directly funded by the federal government.

DOE/Triad seek relief from the Commission in the form of a ruling from the Commission that the Order is arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law; that the Order conflicts with the Compliance Order; and that the Petitioners are exempt from financial assurance requirements. DOE/Triad further seek relief from the Commission in the form of an order from the Commission vacating the Order and remanding to the Department with instructions for the Secretary to approve the proposed discharge permit.

F. Permitting Actions Attached

The June 24, 2020 Order of the Secretary Remanding for Consideration of Financial Assurance is attached hereto as Exhibit 1.

G. Affirmation

The affirmation of the truth of the information in this Petition for Review, by DOE and Triad, are attached hereto as Exhibits 3 and 4.

III. Conclusion

Petitioners seek review of the June 24, 2020 Order of the Secretary Remanding for Consideration of Financial Assurance. Petitioners request that the Commission find that the Order

is arbitrary, capricious, an abuse of discretion, against the weight of substantial evidence and not in accordance with the law; that the Order conflicts with the Compliance Order; and that the Petitioners, being government entities, are exempt from financial assurance requirements. Petitioners further request that the Commission vacate the Order and remand the matter to the Department with instructions for the Secretary to approve, approve with conditions or disapprove the proposed discharge permit.

Respectfully submitted,

/s/ Stuart R. Butzier

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2020, a copy of the foregoing the United States Department of Energy and Triad National Security, LLC's Petition for Review of Order of the Secretary Remanding for Consideration of Financial Assurance was filed with the Hearing Clerk and sent by first class mail and electronic mail to:

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**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-1132) FOR THE
RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY**

GWB 19-24 (P)

**ORDER OF THE SECRETARY
REMANDING FOR CONSIDERATION OF FINANCIAL ASSURANCE**

The Secretary of the Environment Department (“Secretary”), having considered the Hearing Record (as defined in 20.1.4.7(A)(14) NMAC), all post-hearing submittals, the Hearing Officer’s Report and the comments on the Hearing Officer’s Report, and being otherwise fully advised, **FINDS:**

1. The urgent duties of the Secretary related to the Executive Order concerning COVID-19 issued by the Governor of the State on March 11, 2020, as revised through June 12, 2020, have delayed the Secretary’s review and consideration of the Hearing Officer’s Report and the Hearing Record in this case.

2. The Application in this proceeding is for a ground water discharge permit (“DP-1132”) under the State Water Quality Act (“WQA”), NMSA 1978, Section 74-6-1 et seq., applicable to certain wastewater discharges that may be made from the radioactive liquid waste treatment facility (“RLWTF”) located at Los Alamos National Laboratory (“LANL”) and may move directly or indirectly into ground water.

3. The technical testimony submitted on behalf of Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, New Mexico Acequia Association and Tewa Women United (collectively, “Citizens”) addresses the history of the RLWTF and includes the opinion of

Citizens' technical witness that the State Hazardous Waste Act ("HWA"), NMSA 1978, Section 74-4-1 et seq., should be applied to the RLWTF. In the opinion of the witness, regulation of the RLWTF under the HWA is more stringent than regulation under the WQA and is thus more protective of the environment. Tr. 11-14-19, pp. 167-173. The technical testimony of the Citizens witness does not address in specific detail how regulation of the RLWTF under the HWA would be more protective of the environment.

4. Numerous persons expressed views similar to those expressed by the Citizens' witness in oral comments made at the public hearing and in written comments submitted for the Hearing Record, including comments made by representatives of Native American communities located in the vicinity of LANL. Tr. 11-14-19, pp. 92-105, 227; AR. 14894-15188.

5. The interplay between the HWA and the WQA is not a relevant consideration in this matter as the construct of the wastewater treatment unit exemption is a construct of the implementing regulations of the Resource Conservation and Recovery Act ("RCRA") and the HWA with relevance to Clean Water Act discharge permits – not WQA groundwater discharge permits. However, the Citizens raise an equitable argument as to whether the RCRA and HWA wastewater treatment unit exemption is practicably enforceable by the Department in the State. The Department cannot issue permits nor assure compliance with either section 402 or 307(b) of the Clean Water Act. The WQA applies to the Application in this case for the purpose of protecting groundwater in the State.

6. The Hearing Record and the public record reveal a longstanding legacy of contamination of soil, surface water and groundwater caused by operations of the Applicants, as evidenced by, among other public documents, the Federal Facility Compliance Order between the Department and the United States Department of Energy dated May 20,1997, the Compliance

Orders on Consent issued by the Department under the HWA and entered into among the Department, the Applicants and predecessor operators of LANL on March 1, 2005 and in June, 2016.

7. The WQA makes the Applicants responsible for protecting the health of the citizens of New Mexico and the environment in part by eliminating contamination of the State's groundwater in connection with their operations, and the issuance of ground water discharge permits is the primary mechanism authorized under State law for protecting the State's groundwater.

8. The regulations of the Water Quality Control Commission ("WQCC") issued pursuant to the WQA to protect ground water state at 20.6.2.3107(A)(11) NMAC that each ground water discharge permit shall provide, "as the secretary may require", for a closure plan which includes closure measures, maintenance and monitoring plans, post-closure maintenance and monitoring plans and financial assurance.

9. The contingency plans and closure plan contained in the proposed DP-1132 do not include requirements that the Applicants provide financial assurance in connection with corrective action required under contingency plans, in connection with closure of the RLWTF or in connection with post-closure care of the RLWTF.

10. The technical testimony submitted at the public hearing and the non-technical public testimony and comments submitted at and after the public hearing contain no evidence related to financial assurance.

11. The concerns raised by Citizens and other members of the public in this proceeding may potentially be addressed by requiring adequate financial assurance for corrective action, closure, and post-closure care in DP-1132.

THEREFORE, THE SECRETARY CONCLUDES:

1. Given the longstanding legacy of contamination of soil, surface water and groundwater caused by the Applicant's operations, the public interest is served by requiring financial assurance provisions to be included in DP-1132, if the permit is issued as a result of this proceeding.

2. This proceeding should be remanded to the Ground Water Quality Bureau ("GWQB") for the purpose of considering the types and levels of financial assurance that should be applied to DP-1132, if issued as a result of this proceeding, including corrective action, closure and post-closure care of the facilities at the RLWTF that are the subject of DP-1132.

3. The GWQB is directed to publish notice(s) of its financial assurance proposal related to DP-1132 in accordance with 20.6.2 NMAC and 20.1.4 NMAC ("Permit Rules") of the Water Quality Control Commission and the Department and provide for public participation and a hearing, if requested pursuant to the Permit Rules.

4. The Hearing Officer is authorized and directed to rule on any procedural or other matters related to financial assurance for DP1132 and conduct any additional hearings that may be required on remand to the GWQB.

5. Matters related to the appropriate regulatory treatment of the RLWTF under the HWA, including the practicality of enforcement of the applicable HWA permit conditions, are properly raised before the HWB and not in this proceeding.

IT IS THEREFORE ORDERED that this proceeding is remanded to the GWQB for further proceedings consistent with this order and the Hearing Officer is directed to file a revised Hearing Officer's Report after the conduct of the proceedings on remand.

DATED: June 24, 2020.



Digitally signed by James Kenney
Date: 2020.06.24 09:55:57 -06'00'

JAMES C. KENNEY, Secretary
New Mexico Department of Environment

From: [Huddleson, Steven, NMENV](mailto:Huddleson.Steven.NMENV)
To: [Turner, Gene E.](mailto:Turner.Gene.E)
Cc: [Pruett, Jennifer, NMENV](mailto:Pruett.Jennifer.NMENV); [Cummings, Lisa](mailto:Cummings.Lisa); [Saladen, Michael Thomas](mailto:Saladen.Michael.Thomas)
Subject: RE: Financial Assurance Question
Date: Thursday, October 30, 2014 4:31:32 PM

Thanks Gene, the earlier the better so I can get this last version out to all the various groups.

From: Turner, Gene E. [<mailto:Gene.Turner@nnsa.doe.gov>]
Sent: Thursday, October 30, 2014 4:20 PM
To: Huddleson, Steven, NMENV
Cc: Pruet, Jennifer, NMENV; Cummings, Lisa; Saladen, Michael Thomas
Subject: RE: Financial Assurance Question

Steve-

I'd like to work with our legal staff on this; I'll try to get you a response early next week.

Regards,

GT

From: Huddleson, Steven, NMENV [<mailto:Steven.Huddleson@state.nm.us>]
Sent: Thursday, October 30, 2014 4:04 PM
To: Turner, Gene E.
Cc: Pruet, Jennifer, NMENV
Subject: Financial Assurance Question

Gene, in our last meeting with the respective groups, during the discussion of the applicability of Financial Assurance you spoke quite definitively that the attorneys had decided that it could/should not be applied to Federal agencies and LANL in particular. Could you provide a citation, reference, letter, memo or some kind of confirmation of that so we can resolve that issue satisfactorily? It would be most helpful... we hope to get the last Draft of the permit out to all tomorrow or early next week once I resolve a couple of issues (like this one).

Steve Huddleson, P.G., C.P.G.
Environmental Scientist
Groundwater Protection Bureau
New Mexico Environment Department
(505) 827-2936

From: [Turner, Gene E.](#)
To: [Huddleson, Steven, NMENV](#); [Pruett, Jennifer, NMENV](#)
Cc: [Saladen, Michael Thomas](#); "Beers, Bob"; [Cummings, Lisa](#)
Subject: Financial Assurance Issue
Date: Wednesday, November 12, 2014 2:52:42 PM
Attachments: [Hearing Officer's Report and draft Final Order.pdf](#)

Steve/Jennifer-

As I indicated earlier, I consulted my legal staff regarding the Financial Assurance issue; see response below. The referenced Hearing Officer's report is attached, the Financial Assurance discussion begins on page 72.

Keep in mind that the facility will ultimately be closed under the RCRA Consent Order.

Regards,

GT

From: Cummings, Lisa
Sent: Wednesday, November 12, 2014 2:24 PM
To: Turner, Gene E.; 'McMichael, Susan Lynn'
Cc: 'Beers, Bob'; Saladen, Michael Thomas
Subject: FW: Preparation for Next Meetin

Gene –

Here is the rationale re: why a requirement for financial assurance should not be included in the RLWTF DP currently being negotiated:

The Water Quality Control Commission Regulations, at section 20.6.2.3107.A.II NMAC, *authorizes* the Department to require financial assurance as a condition in a discharge permit – but it is *not* a requirement that all groundwater discharge permits include financial assurance requirements. Not all groundwater discharge permit contain such requirements, and, to my knowledge, none have been included in discharge permits issued at LANL. The purpose of requiring financial assurance is to ensure that sufficient funds will be available to implement closure plans or to conduct actions required by an abatement plan.

There is no need to impose financial assurance requirements on DOE/NNSA or LANS for the reasons that were discussed during the hearings on the recently-issued RCRA Permit. NMED included financial assurance requirements in the draft Permit, and we protested the requirement because there was no need to do so, and because there was an exemption for State and Federally-owned facilities. In the preamble to the promulgation of the financial assurance requirements, EPA stated that it provided the exemption because "government institutions are permanent and stable, and have as their reason for being the health and welfare of their people. Therefore ...publicly-owned

facilities would be more likely and more able financially to carry out their closure and post-closure. " The Hearing Officer in the RCRA Permit decided that no financial assurance requirements should be imposed on LANS because "It is undisputed that, because LANS is a management and operating contractor, any financial assurance requirements imposed on LANS will be paid by the Federal Government and ultimately the United States taxpayer."

HWB regulations at 20.4.1.500 (adopting 40 CFR Part 264) provide that "States and the Federal government are exempt from the requirements of (financial assurance)," as do those of the Petroleum Storage Tank Bureau – its regulation provides that " federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of this part." (20.5.9.900) The WQCCC has not adopted regulations detailing when and on whom financial assurance should be imposed, therefore there is no similar specific exemption in this case.

Lisa Cummings
Staff Attorney, DOE/NNSA, Los Alamos Site Office
(505)665-9172(work)
(505)699-1590 (personal cell)

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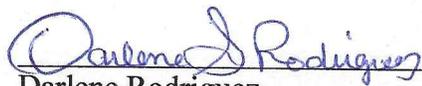
**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF:)
THE PETITION FOR A HEARING ON)
ORDER OF THE SECRETARY)
REMANDING FOR CONSIDERATION OF)
FINANCIAL ASSURANCE FOR GROUND)
WATER DISCHARGE PERMIT (DP-1132))
FOR THE RADIOACTIVE LIQUID WASTE)
TREATMENT FACILITY)
THE UNITED STATES DEPARTMENT)
OF ENERGY, TRIAD NATIONAL)
SECURITY, LLC,)
Petitioners.)

WQCC No.

AFFIRMATION BY THE UNITED STATES DEPARTMENT OF ENERGY

In accordance with the regulations at 20.1.3.16.A(1)(g) NMAC, I hereby affirm under penalty of perjury that the information contained in the forgoing Petition for Review of Order of the Secretary Remanding for Consideration of Financial Assurance, dated July 16, 2020, to which this document is appended, is true and correct to the best of my knowledge.

 7/15/20
Darlene Rodriguez
Landlord and Stewardship Program Team Team Lead
United States Department of Energy

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF:)	
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TREATMENT FACILITY)	
)	
THE UNITED STATES DEPARTMENT)	
OF ENERGY, TRIAD NATIONAL)	
SECURITY, LLC,)	
)	
Petitioners.)	
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AFFIRMATION BY TRIAD NATIONAL SECURITY, LLC

In accordance with the regulations at 20.1.3.16.A(1)(g) NMAC, I hereby affirm under penalty of perjury that the information contained in the forgoing Petition for Review of Order of the Secretary Remanding for Consideration of Financial Assurance, dated July 16, 2020, to which this document is appended, is true and correct to the best of my knowledge.

ENRIQUE TORRES Digitally signed by ENRIQUE
(Affiliate) TORRES (Affiliate)
Date: 2020.07.15 12:14:24
-06'00'

Enrique Torres
Triad National Security, LLC
Senior Director, Environmental and Waste Program Office