

**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.)

**RESPONSE ON BEHALF OF CITIZENS
TO MOTION BY DOE, TRIAD, AND NMED
FOR A STAY OF PROCEEDINGS**

This memorandum is submitted on behalf of Citizens in response to the Motion for Stay filed on July 23, 2020 by the Petitioners, U.S. Department of Energy (“DOE”) and Triad National Security, LLC (“Triad”), which are Applicants for Groundwater Discharge Permit DP-1132, and Appellants in this matter, along with the Environment Department (“NMED”), Appellee herein.

DOE, Triad, and NMED have jointly moved to stay all proceedings indefinitely, so that neither this appeal pending before this Commission nor the hearing called for by the Order of the Secretary dated June 24, 2020 can go

forward. Moving parties propose that the Commission stop everything and only resume upon the application of DOE, Triad, and NMED.

The moving parties do not disclose their strategic reasons for asking to stay all proceedings, beyond suggesting that they wish to negotiate an agreement affecting this case and, in the process to avoid the participation of the Citizens, who are participating in the NMED proceedings, and the issuance of any judicial or agency rulings that might conflict with the arrangements that they intend to put in place.

Regardless of their undisclosed strategies, the moving parties are not entitled to a stay of proceedings from the Commission. For the Commission has no jurisdiction here, because the Petitioners have sought to appeal a nonfinal, thus non-appealable, order.

By statute, the Commission has jurisdiction over appeals of permit actions under the Water Quality Act. The Commission's jurisdiction is limited by law. Specifically, the statute says that if a constituent agency (*e.g.*, NMED) "denies, terminates, or modifies a permit or grants a permit subject to condition," any person who participated in a "permitting action" before NMED may "file a petition for review before the commission. . . . The petition shall (1) be made in writing to the commission within thirty days from the date notice is given of the constituent agency's action" § 74-6-5.N, O NMSA 1978.

Thus, by statute the appealable actions are denial, termination, modification, or granting (subject to conditions) of a permit. An interlocutory secretarial order directing the hearing officer to conduct additional hearings, like the June 24, 2020 secretarial order, is not an appealable order.

Agency rules confirm these principles. Commission and NMED rules direct that the NMED Secretary shall act on a permit application within 30 days after the hearing officer submits a report, or the completion of the administrative record, or the like. Section 20.6.2.3109 NMAC states that the Secretary is to approve, disapprove or approve with modifications a proposed discharge permit within 30 days of administrative record being complete. And under § 20.6.2.3110.L NMAC, the Secretary is to issue a “decision in the matter” no later than 30 days after receipt of the hearing officer’s report. Section 20.6.2.3112.A NMAC then states that an appeal to the Commission is available pursuant to § 74-6-5, subsections N, O, and P, NMSA 1978, if the Secretary approves, approves subject to conditions, or disapproves a discharge permit, a renewal, or modification, or modifies or terminates a discharge permit.

Consequently, an appeal is available only when the Secretary has taken action on a proposed permit, to approve, disapprove, or modify the permit. None of those permitting actions has taken place, and the Commission does not have

jurisdiction of this appeal. Consequently, the Commission, lacking jurisdiction, is not authorized to issue a stay of proceedings.

Moreover, no credible reason is offered for staying proceedings. We are told only that DOE, Triad, and NMED wish to avoid the distractions of deadlines while they seek “to achieve a resolution of the dispute arising from the Secretary’s Order,” referring to the Secretary’s June 24, 2020 order, directing consideration of financial assurance. But parties are constantly discussing resolutions while litigating. Arguably, ongoing litigation may spur efforts to resolve a matter. No reason has been offered justifying an indefinite suspension of this case, which, if it proceeds, potentially can resolve important issues about the ground water discharge permit through agency or judicial decisions.

CONCLUSION

For the reasons set forth herein, the Motion for a Stay should be denied and this appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2020 I caused the foregoing *Citizens' Response to Motion for Stay* to be electronically served on the parties listed below by email and filed with the Administrator of Boards and Commissions.

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