

**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. 20-39(A)

**UNITED STATES DEPARTMENT OF ENERGY
AND TRIAD NATIONAL SECURITY, LLC'S
MOTION TO STRIKE RESPONSE TO MOTION FOR A STAY,
AND REQUEST FOR EXPEDITED HEARING OFFICER APPOINTMENT**

Pursuant to the Water Quality Control Commission’s (“Commission”) 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”) respectfully move the Commission for two forms of relief. First, Petitioners move to strike the Response on Behalf of Citizens¹ to Motion by DOE, Triad, and NMED for a Stay of Proceedings (“Response”), filed in this matter on August 7, 2020. As set forth fully herein, the Commission should strike the Response because the Citizens are not a party to this proceeding and therefore are not permitted to submit a response to the Joint Motion of the United States Department of Energy, Triad National Security, LLC and the New Mexico Environment Department for Stay of the Proceedings. Second, pursuant to the Water Quality Act, NMSA §74-6-5(Q), and the Commission’s adjudicatory

¹ The Response does not identify the party submitting the response, except by reference to “Citizens.” Petitioners believe the party to be the Concerned Citizens for Nuclear Safety, which Petitioners hereinafter refer to as “Citizens.”

procedures, 20.1.3.10.B NMAC, Petitioners respectfully request the Commission promptly appoint a hearing officer for this proceeding. In accordance with 20.1.3.15.A NMAC, Petitioners state that NMED, currently the only party herein other than Petitioners, concurs with this Motion and Request. As grounds for their Motion and Request, Petitioners state as follows:

Basis for Striking Response

1. On July 16, 2020, DOE and Triad initiated this proceeding by filing the Petition for Review and Notice of Appeal, which seeks the Commission’s review of a permitting action.
2. On July 23, 2020 DOE, Triad, and NMED filed the Joint Motion of the United States Department of Energy, Triad National Security, LLC and the New Mexico Environment Department for Stay of the Proceedings (“Joint Motion”) in this matter.
3. On August 7, 2020, Citizens filed its Response to the Joint Motion.
4. As set forth in 20.1.3.15.D NMAC “[a]ny *party* upon whom an opposed motion is served shall have (15) days after service of the motion to file a response. A non-moving party failing to file a timely response shall be deemed to have waived any objection to the granting of the motion.” (Emphasis added).
5. 20.1.3.7(A)(12)(a) NMAC defines “party” for the purposes of a permit review as “the petitioner, the applicant if different from the petitioner, the department, and, upon motion to the commission, any person who [sic] permitted to intervene in the review pursuant to NMRA 1-024.”
6. In this proceeding, the Citizens are not the petitioner, the applicant or the Department. The Citizens have not sought to intervene, much less obtained the Commission’s permission to intervene, in this proceeding.

7. The Citizens cannot be a party to this proceeding unless and until they have moved to intervene, and have been granted intervention, in accordance with Rule 1-024 NMRA.
8. As the Citizens are not a party to this proceeding, and are not permitted to file a response to the Joint Motion, the Commission should strike and not consider the Citizens' Response.

Need for Prompt Appointment of a Hearing Officer

9. 20.1.3.10(B) NMAC authorizes the Commission to appoint a hearing officer to perform all functions identified in 20.1.3.10(B)(2) NMAC, which includes "ruling upon motions and procedural requests that do not seek final resolution of the proceeding and issue all necessary orders." 20.1.3.10(B)(2)(b) NMAC.
10. In this proceeding there is a need to promptly appoint a hearing officer to decide the Joint Motion. As discussed in the Joint Motion, procedural and briefing deadlines in this case that would normally arise without a stay, considerable uncertainties regarding the time that may be required to resolve this matter, and the parties' desire to avoid having to invoke the Commission's attention to future extension motions, all justify holding all of the deadlines in this appeal in abeyance. No party will be prejudiced by a stay of the proceedings, and entering a stay will conserve the attention and resources of the parties and Commission in the short term, and may as well in the long term.
11. The reason to expedite appointment of the hearing officer is that the parties are already on the cusp of having to unnecessarily incur briefing expenses. Specifically, the Petitioners opening brief is due to be filed with the Commission as soon as August 25, 2020, with subsequent briefing by NMED coming due soon thereafter. Neither the resources of the parties nor the attention of the Commission need to be expended on

these matters or on serial extension motions, as the parties discussed in the Joint Motion.

12. An appointed hearing officer could efficiently consider and decide the Joint Motion currently pending before the Commission because: (a) the Joint Motion is a procedural motion under 20.1.3.10(B)(2)(b) NMAC; (b) no timely response has been made by any party as defined in 20.1.3.7(A)(12)(a) NMAC; and (c) the Joint Motion does not seek final resolution of this proceeding.

WHEREFORE, for the reasons stated herein, Petitioners respectfully request the Commission strike the Response on Behalf of Citizens to Motion by DOE, Triad, and NMED for a Stay of Proceedings and appoint a hearing officer to this appeal on an expedited basis.

Respectfully submitted,

/s/ Stuart R. Butzier

Stuart R. Butzier
Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, P.A.
Post Office Box 9318
Santa Fe, New Mexico 87504-9318
Telephone: 505.983.2020
stuart.butzier@modrall.com
christina.sheehan@modrall.com

and

Susan L. McMichael
Office of Laboratory Counsel
Los Alamos National Laboratory
Post Office Box 1663, MS A187
Los Alamos, NM 87545-0001
Telephone: 505.667.2073
smcmichael@lanl.gov

Attorneys for Triad National Security, LLC

/s/ Silas R. DeRoma

Silas R. DeRoma

Site Counsel

U.S. Department of Energy

National Nuclear Security Administration

Los Alamos Site Office

3747 W. Jemez Rd.

Los Alamos, NM 87544

Telephone: 505.667.4668

Silas.DeRoma@nnsa.doe.gov

Attorney for the U.S. Department of Energy

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2020, a copy of the foregoing the United States Department of Energy and Triad National Security, LLC's Motion to Strike the Response on Behalf of Citizens to Motion by DOE, Triad, and NMED for a Stay of Proceedings and Request for Appointment of a Hearing Officer was filed with the Hearing Clerk and sent by first class mail and electronic mail to:

Hearing Clerk
Water Quality Control Commission
1190 Saint Francis Drive, Suite S-2103
Santa Fe, NM 87502
public.facilitation@state.nm.us
alan.peura@state.nm.us

John Verheul
New Mexico Environment Department
Office of General Counsel
1190 St. Francis Drive, Suite N-4050
Santa Fe, NM 87505
john.verheul@state.nm.us

*Attorney for New Mexico Environment
Department, Ground Water Quality Bureau*

Lindsay A. Lovejoy Jr., Attorney
3600 Cerrillos Rd., Unit 1001 A
Santa Fe, NM 87507
lindsay@lindsaylovejoy.com

and

Charles de Saillan
Eric D. Jantz
Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
cdesaillan@nmelc.com
ejantz@nmelc.org
dmeiklejohn@nmelc.com
(505) 989-9022

*Attorneys for non-parties Concerned Citizens
for Nuclear Safety, et al.*