STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF:
WASTE CONTROL SPECIALISTS LLC'S PETITION FOR REVIEW AND NOTICE OF APPEAL OF THE GROUND WATER QUALITY BUREAU OF THE NEW MEXICO ENVIRONMENT DEPARTMENT'S REJECTION OF WASTE CONTROL SPECIALISTS LLC'S WITHDRAWAL OF ITS APPLICATION FOR DISCHARGE PERMIT AND DETERMINATION THAT A DISCHARGE PERMIT IS REQUIRED

WQCC 17-01 (A)

WASTE CONTROL SPECIALISTS LLC,

Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE IN OPPOSITION TO WASTE CONTROL SPECIALISTS LLC'S MOTION TO STAY

Pursuant to the New Mexico Water Quality Control Commission's ("WQCC" or "Commission") regulations at 20.1.3.15 NMAC, the New Mexico Environment Department (the "Department" or "NMED") submits this response in opposition to Waste Control Specialist LLC's ("WCS") Motion to Stay NMED's Proceedings on its Withdrawn Discharge Permit Application (the "Motion"). The Commission's regulations at 20.6.2.3112.A NMAC expressly state that an appeal of a permitting action does not automatically stay those permit proceedings, and WCS has failed to demonstrate that it meets each of the four substantive elements to justify a stay of the permit proceedings in this matter. Therefore, the Motion is without merit and should be denied for the reasons set forth below.

BACKGROUND

I. The Facility

1. WCS is a treatment, storage, and disposal company dealing in radioactive, hazardous, and other wastes. *See* Administrative Record ("AR") 127, 03474-03636,[1] at 03474 (description of WCS in WCS's Application to the U.S. Nuclear Regulatory Commission ("NRC") for a License for a Consolidated Interim Spent Fuel Storage Facility, Docket No. 72-1050).

2. WCS operates a waste management facility (the "Facility") in Andrews County, Texas, for the processing, treatment, storage, and disposal of a broad range of radioactive, hazardous, toxic, and other wastes. WCS holds permits and licenses for the Facility from the Texas Commission on Environmental Quality ("TCEQ") and the U.S. Environmental Protection Agency ("EPA") to accept hazardous and toxic wastes, low level radioactive waste, and byproduct waste material governed by various laws and regulations, including the federal Atomic Energy Act, the federal Resource Conservation and Recovery Act, and the federal Toxic Substances Control Act. WCS is currently the only facility in the United States that can accept Class A, B, and C low level radioactive waste from generators across the United States. WCS also provides waste management services to the commercial sector and Federal government waste generators. WCS has also recently submitted an application to NRC for a license to store high-level spent nuclear fuel from commercial nuclear power reactors at the Facility. *See id.*

3. While all of the WCS operational and storage facilities are located on lands within the State of Texas, the Facility encompasses 800 acres within New Mexico on which

[1] Citations to the Administrative Record in this Motion will take the following form: "AR [Index Number], [Bates Number Range]."

WCS stockpiles soils and discharges storm water and industrial wastewater from the Facility. *See* AR 71, at 01531-01533 (describing discharges onto WCS property in New Mexico); *See also* AR 128, at 02944 (report by WCS consultant discussing discharge into New Mexico).

II. The Facility's Existing Permits

4. The Facility is authorized by TCEQ to discharge up to 170,500,000 gallons per day ("gpd") of storm water and industrial wastewater via outfalls (Outfall 001 and Outfall 002) regulated by Texas Pollutant Discharge Elimination System ("TPDES") permits, issued pursuant to Texas' delegated authority under the federal Clean Water Act ("CWA"). This amount includes up to a permitted maximum of 60,000 gpd of industrial wastewater and storm water that has come into contact with waste, is tested pursuant to TPDES permit requirements, and may be treated prior to discharge to New Mexico via Outfall 001 pursuant to TPDES Permit WQ0004038000 ("TPDES Permit 4038"). *See* AR 128, at 02820-02852. Up to 440,000 gpd of landfill leachate from the by-product facility is not treated, but stored in a 500,000-gallon above ground storage tank prior to analysis, and is then discharged to New Mexico through Outfall 005, and then to Outfall 002, in accordance with TPDES Permit No. WQ0004857000 ("TPDES Permit 4857"). *See* AR 25, 00455-00500. *See also* AR 71, at 01531-01533 (description of discharge in NOI); AR 80, at 01801 (description of discharge in discharge permit application); AR 128, at 02944 (description of discharge in WCS consultant report).

5. Outfall 002 is channelized from the end of the pipe across WCS-owned property into New Mexico. A series of rock berms are set within the channelized outfall, with the final berm located in New Mexico. The berms are designed to slow down surface flow

and facilitate infiltration to the subsurface. *See* AR 71, at 01536 (photos showing discharge points into New Mexico, including berms).

6. When WCS applied for TPDES Permit 4857 for the Facility in 2008, EPA required TCEQ to consider New Mexico water quality standards, given New Mexico's status as a downstream state, in accordance with the CWA and corresponding regulations. Specifically, the CWA grants EPA, or state permitting agencies authorized to administer the CWA permitting program (such as TCEQ), authority to require conditions in surface water permits that ensure compliance with the water quality requirements of downstream states. *See* 33 U.S.C. § 1341(a)(2) ("[The permitting agency] shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit."); 40 C.F.R. 122.4(d) ("No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States . . . ").

7. Accordingly, the Department submitted comments to TCEQ on the draft of TPDES Permit 4857. *See* AR 12, 00371-00373; AR 13, 00389-00392; AR 15, 00374-388. In these comments, the Department identified applicable ground water quality standards as compared to the daily maximum effluent limitations in the proposed TPDES permit, explaining as follows:

> Given the relatively high permitted daily flow from this facility, it is likely that discharges from this facility will flow regularly into the State of New Mexico and contain pollutants that may exceed New Mexico ground water standards described above. Therefore, the discharge as described in the proposed TPDES permit will be required to have a New Mexico ground water discharge permit pursuant to Section 20.6.2.3104 NMAC of the Water Quality Control Commission Regulations.

See AR 13, at 00392. In email exchanges with WCS's counsel regarding the Department's comments on the draft TPDES Permit, the Department explained that it could "only withdraw its requirement for a state ground water discharge permit if the TPDES permit addresse[d] New Mexico water quality through enforceable effluent limits that are at or below New Mexico's ground water standards or goes to zero discharge through evaporation ponds or other methods." *See* AR 15, at 00376-00377.

8. Following discussions between the Department, WCS and TCEQ, *see* AR 15, 00374-00388, it was agreed that the TPDES permit would include "New Mexico ground and surface water quality-based effluent limits and monitoring requirements. *See* AR 22, 00448-0049, Letter withdrawing NMED comments on TPDES Permit 4857. Accordingly, the version of TPDES Permit No. 4857 issued on July 24, 2009, included conditions (identified in the permit as "Other Requirement 16") to protect both New Mexico surface and ground water quality standards, enabling WCS to avoid having to obtain a New Mexico ground water discharge permit. *See* AR 25, at 00475-00477.

9. TPDES Permit 4038, which also covers outfalls that discharge to New Mexico, was originally issued in December of 1999, and did not include protections for New Mexico water quality standards. That permit was renewed in 2005, which renewal expired in 2010, and was then administratively continued until the new permit was finally issued in August of 2016. *See* AR 01, 00001-00046; AR 128, at 02820-02852. The Department never received the Notice of Application and Preliminary Decision for a Water Quality Permit issued by TCEQ in May of 2015, and was not aware of the issuance of the final permit until November of 2016. *See* AR 129, 03433-03454 (correspondence between EPA Region 6 and NMED discussing notice issues with TPDES Permit 4038). Therefore, the Department did not submit

comments during the comment period on TPDES Permit 4038 regarding inclusion of provisions to protect New Mexico water quality standards.

III. The Discharge Permit Application

10. Following issuance of TPDES Permit 4857 in 2009, the discharge failed to meet New Mexico water quality standards included in that permit, and WCS was issued at least one compliance violation by TCEQ. *See* AR 29, 00697, AR 30, 00698 (Texas Register Notices re notice of violation of "Other Requirement 16"); AR 35, 00804 (Texas Register Notice re Notice of Agreed Order on compliance violation, assessing penalties against WCS for violation of "Other Requirement 16").

11. In July of 2012, WCS submitted an application to TCEQ requesting a major amendment to TPDES Permit 4857 to remove the New Mexico water quality standards requirements from that permit. *See* AR 44, 00956-01025 (Application for major amendment of TPDES Permit 4857); AR 47, 01059-01060 (TCEQ Notice of Receipt of Application and Intent to Obtain Water Quality Permit Amendment); AR 56, 01221-01288 (submittal of revisions to Application for Major Amendment to TPDES Permit 4857). As the basis for this amendment, WCS represented that: "NMED has verbally advised WCS that NMED agrees that Other Requirement 16 can be removed from TPDES Permit WQ0004857000 ***because WCS will apply for and obtain a New Mexico groundwater discharge permit from NMED.*** The groundwater discharge permit issued by NMED will ensure protection of New Mexico water quality." *See* AR 56, 01258-01289, Attachment B Wastewater and Storm Water Management Summary, Industrial Wastewater Permit Amendment Application Waste Control Specialists LLC Byproduct Material Disposal Facility (July 2012 Revision) ("Cook-Joyce Report"), at 01274 (emphasis added). The Cook-Joyce Report that formed the basis for

removal of "Other Requirement 16" from TPDES Permit 4857 contains numerous references and discussions regarding WCS's intent to obtain a groundwater discharge permit from New Mexico. *See* AR 56 at 01283 ("Since WCS has agreed with NMED to apply for a ground water discharge permit from NMED, iron can be eliminated from Other Requirement 16); *Id.* ("Manganese can be eliminated from Other Requirement 16 because discharges do not have the potential to exceed surface water quality standards for manganese and because WCS is applying for a New Mexico ground water discharge permit."); *Id.* ("TDS can be eliminated from Other Requirement 16 because WCS is applying for a New Mexico ground water discharge permit.").

12. Pursuant to WCS's amendment application, and based on WCS's representation that it would obtain a groundwater discharge permit from the State of New Mexico, TCEQ amended TPDES Permit 4857 to remove the New Mexico water quality standards in "Other Requirement 16." *See* AR 60, 01390-01432 (TPDES Permit No. 4857 Renewal with "Other Requirement 16" removed).

13. On October 17, 2012, in accordance with 20.6.2.1201 NMAC, WCS submitted a Notice of Intent to Discharge ("NOI") to NMED, identifying three discharge points at which surface water from the Facility enters New Mexico. *See* AR 71, 01530-01732. Two of these three points are Outfall 001 and Outfall 002 identified in TPDES Permit No. 4857. The NOI describes the discharges from Outfalls 001 and 002 as follows:

a. "Outfall 001 captures non-contact stormwater that falls within the areas outside the north, east and south path of the Facility railroad loop; ***and treated water from the leachate treatment facility*** confirmed compliant with discharge standards." *See* AR 71, at 01532 (emphasis added).

b. "Outfall 002 captures non-contact operational runoff from a small portion of the facility ***and contact runoff*** from the regulated By-Products Material Management Area. ***Stormwater from this Area is tested to document that it meets the surface discharge parameters of the State of Texas.*** This clean contact runoff is discharged through two Outfalls (004 and 005), identified in the TCEQ TPDES Permit WQ0004857000, into a meandering surface water management channel that runs along the Texas side of the state line within the WCS Facility . . .This channel crosses under the facility access road and discharges to a short pilot channel that enters New Mexico and dissipates to overland flow[2] approximately five hundred feet after entering WCS property in New Mexico . . ." *Id.* (emphasis added).

14. The third discharge point is described in the NOI as "situated at the intersection of the northern portion of the Facility railroad track and the State Line (see Figure 2). This discharge point captures flows from vacant pastures north and upgradient of the operational areas in Texas, and allow stormwater to flow through culverts under the railroad to vacant pastures in New Mexico within the Facility railroad track loop." *Id.* at 01532.

15. On February 19, 2013, NMED sent a response to the NOI ("DP Required Letter") via certified mail return receipt requested. *See* AR 70, 01527-01528. In the letter, NMED stated as follows: "NMED has reviewed the information provided [in the NOI] in accordance with Subsection D of 20.6.2.1201 NMAC. **You are hereby notified that a Discharge Permit is required for the proposed discharge.**" (Emphasis in original). The DP Required Letter further notified WCS that "Any appeal of this determination that a

[2] "Dissipates to overland flow" with respect to this surface discharge means that the flow infiltrates to the subsurface.

Discharge Permit is required must be made to the New Mexico WQCC within 30 days of receipt of this letter, in accordance with Subsection B of 20.6.2.3112 NMAC." *Id.* at 01528.

16. WCS did not appeal NMED's discharge permit required determination to the Commission. Instead, WCS submitted a Discharge Permit Application (the "Application"), which was received by the Department on July 17, 2013. *See* AR 80, 01791-02040. Accordingly, the Department moved forward with the permitting process, including working with WCS to draft the terms and conditions of draft DP-1817. *See, e.g.*, *See* AR 91, 02107-02128; AR 92, 02129-02211; AR 93, 02212-02230; AR 94, 02231-02241; AR 95, 02242-02241; AR 122, 02584-02659.

17. On August 1, 2013, the Department issued a public notice in accordance with 20.6.2.3108.E and F NMAC. *See* AR 75, 01782. The Department then prepared draft permit DP-1817 in consultation with WCS, and issued the draft permit for public comment on October 2, 2015, pursuant to 20.6.2.3108.H and I. *See* AR 120, 02576-02581. The comment period closed on November 20, 2015. *See* AR 87, 02077. The Department received comments on the draft permit, and a number of commenters requested a public hearing on the permit. *See* AR 115, 02468-02520.

18. Following the public notice of the issuance of the draft permit on October 2, 2015, WCS indicated that it wanted additional changes to the draft permit. *See* AR 81, 02046-02048, 02051-02052; AR 89, 02102-02103. Over the next year and a half, the Department went back and forth with WCS, attempting to resolve WCS's issues with the draft permit. *See, e.g.*, AR 99, 02351-02355; AR 101, 02359; AR 103, 02363-02365; AR 105, 02369-02419; AR 111, 02424-02456; AR 114, 02472; AR 116, 02526-02538; AR 118, 02555-02556; AR 124, 02675-02751.

19. On August 18, 2016, TCEQ issued the renewal of TPDES Permit 4038, of which, as noted previously, the Department did not receive notice, and regarding which the Department did not submit comments. However, the Sierra Club submitted comments on the application, noting that the permitted discharge would flow into New Mexico and therefore required demonstration of compliance with New Mexico water quality standards. In the Response to Comments filed by the Executive Director of TCEQ on June 24, 2016, AR 128, at 02924-02940, TCEQ responded to the Sierra Club's comment in pertinent part as follows:

> [WCS] is also working with the New Mexico Environment Department (NMED) to address New Mexico water quality concerns. NMED prepared a draft of Discharge Permit, DP-1817, to Waste Control Specialists LLC (WCS) (permittee) pursuant to the New Mexico Water Quality Act (WQA), New Mexico Statutes Annotated (NMSA) 1978 §§ 74-6-1 through 74-6-17, and the New Mexico Water Quality Control Commission (WQCC) Regulations, § 20.6.2 New Mexico Administrative Code (NMAC).

See AR 128, at 02928.The response then includes a footnote citing "NMED Draft Ground Water Discharge Permit, DP-1817, NMED Ground Water Quality Bureau Public Notice 2, October 2, 2015." *Id.* Thus, as late as June of 2016, and shortly before WCS began to assert that it should not have to obtain a discharge permit from NMED, TCEQ relied on WCS's application for a groundwater discharge permit from NMED as justification for not including protections for New Mexico water quality standards in a TPDES Permit for the Facility.

20. On August 26, 2016, at WCS's request, the Department met with representatives of WCS to discuss DP-1817. *See* AR 128, at 02809-02818 (WCS PowerPoint presentation for August 26, 2016 meeting). At that meeting, WCS for the first time indicated that it no longer believed that it should be required to obtain a discharge permit for the discharges entering New Mexico from the Facility.

21. Over the next several months, WCS submitted information and documents to the Department that WCS claimed supported its contention that no discharge permit was required because there was no "groundwater," as defined in the Commission's regulations, in New Mexico that could be affected by the discharge. *See* AR 128, 02802-02977; AR 130, 02981-03430; AR 131, 02794-02797; AR 133, 02791-02792. In the course of these submissions, WCS also began to advance new legal and factual arguments regarding the Department's lack of authority and jurisdiction to require a discharge permit for a discharge that "occurs" in Texas, and indicated its intent to "withdraw" its permit application. *See* AR 130, at 02802-02807 (November 23, 2016 letter from Stuart Butzier, counsel for WCS, to Lara Katz, counsel for the Department).

22. On January 11, 2017, again at the request of WCS, the Department met with WCS representatives. *See* AR 132, 02793. At that meeting, WCS continued to advance its legal arguments that the Department is without jurisdiction to require a permit. The Department stated its continuing disagreement with that position, and advised WCS that the length of time that had elapsed since the previous draft permit was issued, along with the changes that had been made at WCS's request, required an additional public notice and comment period for the new draft permit. The Department informed WCS that it was planning to issue the second draft permit for public notice around the end of February.

23. In a letter to the Department dated February 1, 2017, ("Withdrawal Letter"), WCS purported to "withdraw" the Application on the basis that the Department "has no reason or jurisdictional basis to continue with New Mexico's groundwater discharge permitting process" for discharges from the Facility that flow into New Mexico. *See* AR 134, 02790.

24. On February 9, 2017, the Department sent a letter ("Withdrawal Response Letter") responding to the Withdrawal Letter. *See* AR 135, 02787-02789. In that letter, the Department declined to accept WCS's purported withdrawal of the Application, explaining that "[t]here is no law or regulation that compels the Department to accept the withdrawal of a discharge permit application where there has been no change in process resulting in elimination of the discharge for which the application was originally submitted, and where the Department believes a permit is required pursuant to the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 through -17, and the New Mexico Water Quality Control Commission's regulations at 20.6.2 NMAC." *Id.* at 02787. Referring to the previous discussions between NMED and WCS, the Department further stated its intent to "move forward with the additional public notice process" on the draft permit, including plans to release the draft for public comment "before the end of February." *Id.*at 2788.

25. On February 22, 2017, WCS filed its Petition for Review and Notice of Appeal of the Ground Water Quality Bureau of the New Mexico Environment Department's Rejection of Waste Control Specialists LLC's Withdrawal of its Application for Discharge Permit and Determination that a Discharge is Permit is Required ("Petition"), challenging the Department's authority to reject WCS's attempt to withdraw its Application, as well as the Department's jurisdiction and authority to require a discharge permit.

26. On March 3, 2017, the Department issued the second draft of DP-1817 for public comment pursuant to 20.6.2.3108.H NMAC.

STANDARD OF DECISION

As WCS points out, there is no provision in either the Water Quality Act ("WQA"), NMSA 1978, §§ 74-6-1 to -17, or the Commission's adjudicatory procedures, 20.1.3 NMAC,

that addresses the requirements or standards necessary to obtain a stay of discharge permit proceedings pending WQCC review under NMSA 1978, § 74-6-5(O) and 20.6.2.3112 NMAC. The Department agrees that the standard articulated by WCS in its Motion is applicable in this instance to determine whether proceedings on DP-1817 should be stayed pending the Commission's consideration of the issues raised in WCS's Petition. That standard mirrors both the standard used by appellate courts in determining whether to grant a stay from an order of an administrative agency, *see Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708, and the standard required for injunctive relief under rule 1-066 of the New Mexico Rules of Civil Procedure. *See* 20.1.3.8 NMAC (the Commission may look to the New Mexico Rules of Civil Procedure for guidance in the absence of a specific provision in Part 20.1.3 NMAC that governs a particular action).

The applicable standard requires that WCS demonstrate the existence of the following four conditions: (1) there is a likelihood that WCS will prevail on the merits of its Petition; (2) WCS will be irreparably harmed unless a stay is granted; (3) no substantial harm will result to other interested parties if a stay is granted; and (4) no harm will result to the public interest if a stay is granted. *See Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10. As the petitioner, WCS bears the burden of establishing each and every one of these elements. *See id.* As discussed below, WCS cannot satisfy its burden, and therefore the requested stay should be denied.

ARGUMENT

I. The Filing of an Appeal Under 20.6.2.3112 NMAC Did Not Entitle WCS to a Stay

In its Motion, WCS makes several statements suggesting that the Department should have voluntarily halted all actions with respect to DP-1817 upon WCS's filing of its Petition. Nothing in the WQA or the Commission's regulations requires such an action. Indeed, the regulations at 20.6.2.3112 NMAC expressly provide that "[t]he filing of an appeal [under that section] ***does not act as a stay*** of any provision of the Act, the regulations, or any permit issued pursuant to the Act, unless otherwise ordered by the secretary or the commission." (Emphasis added). A stay of a permitting action thus requires a valid order of the Commission, which, in turn, must be obtained through a procedure requiring a substantive showing that the petitioner is entitled to such a stay, along with an opportunity for the Department to respond. The only mechanism by which this can be accomplished is through the filing of a motion pursuant to 20.1.3.15 NMAC; simply including a few sentences requesting a stay in a petition for review, as WCS initially did, does not entitle the petitioner to any action on the part of either the Department or the Commission. Thus, unless and until the Commission issues an order staying further proceedings on DP-1817 following a valid motions process under 20.1.3.15 NMAC, the Department is fully within its authority and discretion to continue moving forward with the process, as it repeatedly informed WCS it intended to do.

II. WCS Is Not Likely to Prevail on the Merits of its Petition

In its Petition, WCS identifies two primary issues on appeal: (1) "[W]hether NMED has the authority to deny WCS's notice of withdrawal of its discharge permit application and proceed to issuance of a permit based on the withdrawn application;" and (2) "[W]hether

NMED has the authority and jurisdiction to require WCS to apply for and obtain a discharge permit." Petition at 2. As demonstrated below, WCS is not likely to prevail on either of these issues.

A. The Department Acted Within Its Discretion in Declining to Accept WCS's Purported Withdrawal of its Permit Application

WCS cites to 20.6.2.3114.B NMAC in support of its argument that the Department has no authority to reject WCS's withdrawal of its permit application. That regulation provides that "[f]acilities applying for discharge permits which are subsequently withdrawn or denied shall pay one-half of the permit fee at the time of denial or withdrawal." Clearly the regulations contemplate the withdrawal of a permit application. WCS, however, ignores the unusual circumstances under which it is attempting to withdraw its Application here. In most cases, an application for a discharge permit is made ***prior to*** the initiation of a discharge. The Department acknowledges that it likely would not have the discretion or authority to reject the withdrawal of a discharge permit application where circumstances arise following the submission of the application such that the requested discharge will no longer take place. In such a situation, it would certainly be arbitrary and capricious to proceed through a public process regarding a permit for a discharge that will never occur. Another example where withdrawal of an application may be appropriate is where the nature of the requested discharge changes so drastically following submission of the application that an entirely new application must be submitted. This case, however, presents an entirely different set of circumstances, one for which withdrawal is not appropriate. Indeed, nothing in the WQA or the regulations provides an applicant the unfettered right to withdraw a discharge permit application once a discharge is already taking place.

Before the Facility became operational, WCS applied to TCEQ for surface water permits for its discharges. At that time, the Department informed WCS and TCEQ that such discharges had to comply with New Mexico surface water standards, given New Mexico's status as a downstream state, as well as with New Mexico groundwater standards to the extent that the discharge contained contaminants that "may move directly or indirectly into groundwater," 20.6.2.3104 NMAC, and that were not regulated under the surface water permit. The Department explained that WCS would either have to obtain a separate ground water discharge permit from New Mexico, or have TCEQ include the New Mexico ground water standards included in the TPDES Permit as effluent limits. WCS chose the latter option. Thus, at the time the Facility began operations, the discharges were considered by New Mexico to be "fully permitted." However, when WCS realized it would have difficulty complying with the effluent limits in its TPDES permit, it applied to have the protections for New Mexico water quality standards removed on the condition that it would obtain a ground water discharge permit from New Mexico.

WCS then submitted a notice of intent to discharge pursuant to 20.6.2.3106.B NMAC, and what has become a four-year process began. However, WCS did not stop discharging pending issuance of the permit from New Mexico, and the Department, believing that WCS was acting in good faith in pursuing a permit, did not order WCS to do so. Now, just as the Department was getting close to issuing the second draft permit for public comment, WCS has done an about-face, seeking to simply "withdraw" its Application – an application that has taken up significant staff time and Department resources, including development of a draft permit that has gone through one round of public notice and comment, along with numerous subsequent negotiations over the conditions of the permit – and continue to discharge despite

there being no change in the circumstances under which WCS originally applied for the permit. Given these facts, and the Department's longstanding position that it has the authority and jurisdiction to require a permit for this discharge, the Department is fully within its discretion to reject WCS's attempt at withdrawal. As discussed below, WCS's challenge to the Department's authority and jurisdiction to require a permit is time-barred. To the extent WCS objects to the conditions in the draft permit, WCS is free to comment on those conditions during the public comment period, request a hearing under the Department's permit procedures, and appeal to the Commission for review of any final permit.

Finally, it is useful to consider what the Department's options are in this situation. If WCS is correct that it is entitled to withdraw its Application four years after the Department determined that a discharge permit is required, and continue to discharge without such a permit, then the Department will be compelled to bring an enforcement action against WCS. Under the WQA, Section 74-6-10, the Department has two options: (1) it can issue a compliance order requiring compliance immediately or within a specified time period or issue a compliance order assessing a civil penalty, or both; or (2) commence a civil action in district court for appropriate relief, including injunctive relief. Penalties for operating without a permit – which in this case would be considered by the Department to be willful and possibly even in bad faith – can be assessed up to $15,000 per day of noncompliance. Injunctive relief could include ordering WCS to cease discharging, which could impact WCS's operations. Given that the standard for a preliminary injunction mirrors that for a stay, and that the Department has a high likelihood of success on the merits as discussed below, the route the Department has chosen here would seem preferable to WCS. Should the Commission determine that the Department is required to accept WCS's withdrawal of its Application

under the circumstances of this case – which would create a problematic and unworkable precedent for other permitting actions[3] – the Department will be compelled to initiate enforcement proceedings against WCS and will consider the full range of options provided by the WQA, including seeking civil penalties and injunctive relief in district court.

B. WCS's Challenge to the Department's Jurisdiction and Authority to Require a Discharge Permit Is Time Barred

WCS brings this appeal under Section 74-6-5(O) of the WQA, and 20.6.2.3112 NMAC of the Commission's regulations. *See* Petition at 2. Section 74-6-5(O) provides that a person who has been adversely affected by a permitting action must file a petition for review before the Commission within thirty days from the date notice is given of the action. Likewise, 20.6.2.3112.B NMAC provides that an appeal from a determination that a discharge permit is required must be filed with the Commission within thirty days after receiving the Department's written determination.

WCS points to the Department's Withdrawal Response Letter of February 9, 2017, in which the Department rejected WCS's attempt to withdraw its Application, as constituting NMED's written notice to WCS of the determination that a discharge permit was required. However, notice of that determination was given four years prior, in NMED's DP Required Letter dated February 19, 2013, wherein NMED stated: "You are hereby notified that a Discharge Permit is required for the proposed discharge." That letter also apprised WCS of its right to appeal that determination under 20.6.2.3112.B NMAC. The Department's Withdrawal Response Letter of February 9, 2017, on the other hand, constituted notice of the

[3] The problematic and unworkable nature of WCS's position is plain: the premise is that WCS and WCS alone is the arbiter of when and under what circumstances a permit is required. This results in a situation where the potentially polluting and responsible party simply opts out of the permit process whenever they so choose – such as when the conditions of the permit fail to meet their expectations, when the process becomes expensive or divisive in the public eye, or when they find, as WCS did, that they cannot meet standards under the current discharge regulatory scheme.

Department's rejection of WCS's withdrawal of its permit application. While it is true that the Department stated in its Withdrawal Response Letter that it believes a discharge permit is required, that statement did not constitute notice of such determination, but was rather a reiteration of the Department's long-standing position set forth in its DP Required Letter sent four years earlier.

WCS secured the removal of protections for New Mexico water quality standards from its Texas surface water permit on the representation that it would obtain a groundwater discharge permit from the State of New Mexico. Now, after four years of going back and forth with the Department over the conditions of that discharge permit – all the while tying up the Department's staff time and limited resources, and continuing to discharge without a permit that protects New Mexico water quality standards – WCS has decided that it does not want to be regulated under a New Mexico permit. From the Department's perspective, this conduct is a classic example of a "bait and switch." The nature of the discharge and the circumstances that formed the basis for both WCS's notice of intent to discharge and the Department's determination that a discharge permit was required have not changed; the only thing that has changed is WCS's mind.

In sum, it is undisputed that the Department's determination that a discharge permit was required for the discharges at issue in this appeal was contained in the DP Required Letter dated February 19, 2013. The deadline for WCS to appeal the determination that a permit was required for the discharge from its Facility expired thirty days from its receipt of that letter, and WCS is now barred from raising that issue on appeal. *See Citizen Action N.M. v. N.M. Env't Dept.*, 2015-NMCA-058, ¶ 25 (where the applicable statute required an appeal from a final agency action to be taken within 30 days of the action, the New Mexico Court of

Appeals held that an appeal from a final agency action was time barred where the letter containing the agency's determination was issued over two years prior to the filing of the appeal). The Commission should reject WCS's attempt to sidestep regulatory protections for New Mexico with respect to discharges flowing into the State from WCS's radioactive and hazardous waste processing, treatment, and storage facility in Texas.

C. New Mexico has Jurisdiction to Regulate the Subject Discharges

If the Commission were to decide that WCS's challenge to the Department's authority and jurisdiction is not time barred, WCS is still unlikely to prevail on the merits of that challenge. WCS argues that there is "no precedent for the Commission to assert that stormwater passing into New Mexico serves as a basis to afford extraterritorial jurisdiction to impose a ground water permit requirement on a party like WCS who plays by the rules applicable in the state where it operates and discharges stormwater pursuant to a stormwater permit under the Clean Water Act." Motion at 10. As an initial matter, the Department disputes that the discharges flowing into New Mexico from the Facility are in compliance with the Clean Water Act, particularly given WCS's actions in securing removal of protections for New Mexico water quality standards from TPDES Permit 4857, and the fact that the Department never received notice of the most recent TPDES Permit 4038 issued by TCEQ in August of 2016, and was therefore unable to submit comments regarding that permit's lack of protections for New Mexico as a downstream State.

The Department further disputes that the discharges from the Facility are entirely constituted of non-contact stormwater, as WCS repeatedly represents in its Motion. In Section B-1 of its Application, WCS describes the source of the discharge as follows:

> Rainwater perculating [sic] through Land Disposal Restrictions compliant waste in the WCS facility landfills is collected and pumped

> into storage tanks, along with landfill leachate, laboratory derived wastewater, contact industrial storm water, and washwater from the washing of trucks and equipment that has come into contact with waste will be treated, analyzed and verified to meet applicable standards identified in the various RCRA hazardous waste permits and Radioactive Materials Licenses (RML). The water will then be discharged in accordance with applicable [TPDES Permits]. Contact water from the By-product disposal cell will not be treated, but is analyzed and discharged in accordance with [TPDES Permit No. 4857]. Non-contact storm water from the facility is also discharged during rain events.

See AR 80, at 01801. *See also* Application at Attachment 1, AR 80 (identifying discharge as "Treated Industrial Wastewater and Stormwater"); Application Section A-8, AR 80 at 01795 (referring to "contact water from the WCS RCRA landfill ... discharged from Outfall 101," which further discharges to Outfall 001); *Id.* (referring to "Contact water for the By-product landfill...discharged from Outfall 003,' which further discharges to Outfall 002; Application Section B-12, AR 80, at 01803; Application Attachment 7, AR 80, at 01821.

Nor do those discharges come within the permit exemption under 20.6.2.3150.F NMAC. That exemption does not apply to ***discharges*** regulated by a surface water permit under the CWA, but rather to ***constituents*** included in such a permit. WCS had TCEQ remove those constituents from TPDES Permit 4857 based on a representation that WCS would obtain a groundwater discharge permit from the State of New Mexico. Therefore, WCS cannot claim the exemption from permitting under 20.6.2.3150.F NMAC.[4]

Contrary to WCS's claims, the Department is not asserting "extraterritorial jurisdiction" here. It is undisputed that the discharges covered in the Application ***flow into***

[4] The Department notes that many facilities in New Mexico have both surface water and groundwater permits. To the extent that a facility discharges to water bodies considered "Waters of the United States" under the federal Clean Water Act, that facility is required to have a surface water permit (in New Mexico, these are issued by EPA because New Mexico has not been delegated authority for its own surface water permitting program). To the extent that the same discharge "may move directly or indirectly into groundwater" and contains constituents that are not regulated by a surface water permit, the facility also must obtain a ground water discharge permit.

New Mexico from a facility that straddles the border and encompasses land ***in New Mexico***. WCS appears to assume that because the points at which the discharges flow out of the Facility's operational areas are located on the Texas side of the border, the discharges do not "occur" in New Mexico. An examination of the logical extension of such a position demonstrate its absurdity: WCS could simply route all of its discharges such that they flowed into New Mexico, and, so long as the points at which those discharges flowed out of the Facility were on the Texas side of the border, New Mexico would have no regulatory authority over the discharges, regardless of whether they may impact New Mexico ground water. The WQA allows for no such limitation. The WQA provides that the Commission shall adopt "regulations to prevent or abate water pollution," Section 74-6-4(E), and "may require persons to obtain . . . a permit for the discharge of ***any water contaminant***," Section 74-6-5(A) (emphasis added). The WQA defines "water" in pertinent part as "all water, including water situated wholly or ***partly within or bordering upon the state***, whether surface ***or subsurface*** . . ." (emphasis added). Nowhere is there any indication that the Legislature intended that New Mexico's regulatory jurisdiction over discharges of water contaminants should be limited only to discharges whose sources are located entirely within New Mexico, regardless of a discharge's potential impact on New Mexico waters.

D. WCS's Arguments Regarding the Department's Authority Are Premised on Disputed Issues of Fact that Require Further Development of the Record

WCS's arguments based on the "technical data and evidence" that it has submitted to the Department are also unavailing for two interrelated reasons. First, the Commission cannot make a determination based on such data until there has been a hearing on the record at which the Department's technical experts can demonstrate through their own testimony and evidence

that groundwater, as defined under the Commission's regulations at 20.6.2.7.G NMAC, exists in the area and may be directly or indirectly impacted by discharges from the Facility. Thus, the technical arguments advanced by WCS in its appeal are premature and require further development of the record.

Second, these arguments assume that the standard for requiring a discharge permit is whether or not groundwater ***will*** be infiltrated. That is not the standard reflected in the WQA, or in the Commission's regulations promulgated pursuant to that statute, which provide that a permit is required where effluent or leachate is discharged such that it "***may*** move directly or indirectly into groundwater." 20.6.2.3104 NMAC (emphasis added). NMED strongly disputes WCS's claim that the evidence shows that discharges from the Facility are "incapable" of reaching groundwater, or that a one-time sampling of the well recently drilled by WCS (in the exact spot that the Department proposed for the monitoring well in the permit which WCS now claims it should not have to obtain) is somehow indicative that there is ***no possibility*** of groundwater being impacted by the discharge over time, or in unusual events such as extreme weather, geologic disturbances, or failure of operational controls at this Facility which engages in activities involving hazardous and radioactive materials. By WCS's logic, none of the facilities in the vicinity of WCS's Facility – which include a uranium enrichment facility and the Lea County Landfill – would be required to have a permit protecting New Mexico water quality standards.

Section 74-6-5(E) of the WQA lists the circumstances where the Department is required to deny a discharge permit application, including when "the effluent would not meet applicable state or federal effluent regulations, standards of performance or limitation," and where "the discharge would cause or contribute to water contaminant levels in excess of any

state or federal standard." Similarly, under Commission's regulations at 20.6.2.3109.C NMAC, the Department shall approve a proposed discharge plan if the following requirements are met:

> (1) groundwater that has a TDS concentration of 10,000 mg/l or less will not be affected by the discharge; or
>
> (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 20.6.2.3109 NMAC or the presence of any toxic pollutant at any place of withdrawal of water for present or reasonably foreseeable future use [except as provided in 20.6.2.3109.D NMAC]; or
>
> (3) the proposed discharge plan conforms to [the requirements set forth in 20.2.6.2.3109.C(3)(a) or (b), and (c)].

Thus, evidence showing that geologic features are such that groundwater in the vicinity is unlikely to be impacted by a proposed discharge, and that a facility has excellent operational controls to prevent contaminated water from infiltrating to groundwater, goes to whether the Department must grant a facility's permit application, allowing the facility to discharge without being subject to an enforcement action. *See* NMSA 1978, § 74-6-5(E) (listing circumstances under which the Department shall deny an application for a permit); such evidence does not go to whether the Department has the authority to require a permit in the first place. The position that a facility engaging in these types of activities and handling these types of materials should be allowed to discharge hundreds of millions of gallons of industrial wastewater and stormwater into New Mexico with no permitted protections for New Mexico water quality standards and no regulatory monitoring or oversight by the State of New Mexico is, simply put, absurd.

If the Commission determines that the issue is not time-barred, the questions regarding whether there is groundwater in the area that may be impacted directly or indirectly by this

discharge require development through presentation of evidence and expert testimony at a public hearing on the record. At this point, the administrative record contains only the communications between WCS and the Department regarding WCS's discharge permit application, and the correspondence and materials submitted by WCS beginning in August of 2016 in support of its recently-adopted position that no permit is required.[5] In order for the Commission to have before it a record that allows for full and fair consideration of the issues raised, the Department must have the opportunity to put on its own evidence, including expert testimony explaining the Department's long-standing determination that a permit protective of New Mexico water quality standards is required for this Facility.

III. WCS Will Not Suffer Irreparable Harm in the Absence of a Stay

Having failed to demonstrate a likelihood of success on the merits, WCS's request for a stay fails and the Commission need not inquire further as to the other factors. The Department will nonetheless address those factors in the event the Commission determines that the first factor has been met.

WCS argues that it has suffered and will continue to suffer irreparable harm by virtue of public notice of the draft permit being issued because such notice "exacerbat[es] public opposition to WCS and its lawful activities both in this proceeding and in future proceedings in other permits it may seek to obtain or renew." Motion at 12. Of course, such "harm" – and the Department objects to the notion that transparency and notice to the public can be considered a harm – occurred in October of 2015 when the first draft permit was issued for public comment. The public is already involved, and indeed has been inquiring of the

[5] Importantly, these materials largely consist of data, information, and case law from or relating to permits for other facilities in the same area as WCS's hazardous and radioactive waste facility. *See* AR 130, 02981-03430. Contrary to WCS's assertions, what these materials primarily demonstrate is that all the surrounding facilities were required to apply for and obtain ***permits*** that protect New Mexico water quality standards.

Department regarding what is happening with this draft permit. *See* AR 115, 02468-02520; AR 125, 02726; AR 126, 02712. Further, WCS fails to specify how public knowledge of WCS's operations and activities as set forth in the draft permit, and public participation in this and other permitting actions, is harmful to WCS. *See Tenneco Oil Co.*, 1986-NMCA-033, ¶ 1 (court denied application for stay where companies failed to "allege specifically in what manner the proposed amendments to the regulations" in that case would result in irreparable harm). Public notice and participation are integral and required components of any permitting action, and WCS must be prepared to address the public's concerns regardless of this or any other proceeding.

WCS next claims it will be irreparably harmed by virtue of having to divide its attention between prosecuting this appeal, and developing its comments on the draft permit issued March 3, 2017.[6] Of course, that situation is one of WCS's own making, since it chose to file its appeal during an ongoing permitting action. Regardless, any harm from having to comment on the draft permit will only arise if WCS prevails on its challenge to the Department's authority to require a permit, which, as demonstrated above, is highly unlikely.

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[6] WCS repeatedly complains that the second draft permit contains new conditions that the Department did not discuss or share with WCS prior to issuing the permit. *See* Motion at 4, n. 4; The Department spent four years in extensive negotiations with WCS attempting to come up with a very minimal, workable permit for WCS, requiring only a single, shallow well located such that it would serve as a "sentinel" by indicating impacts that could reach the deeper aquifers. However, when WCS decided to backtrack on its agreement to obtain a discharge permit, it began to advance legal arguments that the permit did not monitor for impacts in any "place of withdrawal for present or reasonably foreseeable use" under Section 74-6-5(E)(3) of the WQA. *See* AR 128, at 02802-02807 (November 23, 2016 letter from WCS Counsel, Stuart Butzier to NMED Counsel). While the Department disagrees with WCS that the water in the shallow zone is not protectible groundwater in itself, the new conditions in the second draft permit were included to fortify the permit against such legal arguments, making clear that there most certainly are "places of withdrawal" in the vicinity of the discharge that may be impacted. The Department further notes that neither the WQA nor the Commission's rules require that the Department provide draft permits to applicants prior to public notice. While it is certainly the Department's practice to do so, in this case the Department determined that such discussions would not prove fruitful given WCS's recently-adopted position that it is not subject to regulation by New Mexico and its belated challenge to the Department's authority to require a permit. The Department's permitting procedures provide ample opportunity for WCS to address these proposed conditions, including submission of comments to the Department regarding those conditions, and requesting a public hearing at which WCS can present evidence and testimony showing that such conditions are not appropriate. *See* 20.6.2.3108 NMAC; 20.6.2.3110 NMAC.

The last argument WCS makes in support of its claim that it will suffer irreparable harm without a stay is that the Department's actions in continuing the permitting process while WCS appeals the Department's authority to require a permit will be a waste of time and resources for the Department, the public, and the Commission. The Department appreciates WCS's new-found concern for the Department's resources in this permitting action after liberally availing itself of such resources for the past four years, during which time the Department went out of its way to accommodate WCS's concerns and requests, including numerous meetings and conference calls; review of documents and data submitted by WCS; an on-site visit to the Facility by NMED staff; and multiple rounds of revisions both before and after a full-blown public notice and comment process, at the end of which WCS decided to walk away and file a belated challenge to the Department's jurisdiction and authority. However, harm to the Department, the Commission, or the public is not appropriately raised with respect to the third factor, which looks only to whether the person seeking the stay will be harmed. The Department further notes that it is up to the Secretary, not WCS, to determine how best to allocate the Department's staff time and resources.

Finally, there is nothing unusual or expedited in how the Department has proceeded with regards to DP-1817; the Department is simply following the normal process for issuance of a discharge permit. WCS complains that the Department's issuance of public notice of a draft permit – a routine part of the permitting process – was "seemingly punitive." Motion at 2, n. 1. The Department worked with WCS for four years to come up with a very simple, straightforward permit for the Facility, bending over backwards to accommodate WCS's requested changes even after the close of the first public comment period, all the while allowing WCS to continue to discharge without a permit protecting New Mexico water

quality standards. At a certain point, when WCS indicated its intention to attempt to withdraw the permit application, it became clear to the Department that it was wasting its time, that WCS would continue to stall and quibble over the permit conditions, and that WCS in fact had no intention to follow through on the representations it had made to TCEQ and the Department that it would obtain a New Mexico ground water discharge permit. Upon realizing that WCS had no intention to obtain a permit, and that in fact it desired to create further delay by withdrawing its application and forcing the Department into an enforcement action, the Department determined that it was not in New Mexico's interest to continue the back and forth with WCS. Instead, it was time to move forward and re-issue the draft permit for public comment, and if WCS was not satisfied with the conditions, it could submit comments and request a public hearing before the Secretary pursuant to 20.6.2.3108.K NMAC. And that is what the Department has done, in the time frame communicated to WCS, consistent with the permitting procedures set forth in the Commission's regulations.

IV. The Department Will Be Harmed if a Stay is Granted

NMED recognizes that, viewing the third element in isolation, the agency itself will not be harmed by a stay of the permit proceedings. However, given that a stay requires a finding of likelihood of success on the merits, if the Commission grants a stay in this proceeding, it would immediately call into question the regulatory authority of the Department and other constituent agencies over numerous activities and facilities in the surrounding area – facilities that include a uranium enrichment facility, the Lea County Landfill, and an oil and gas field services waste facility. If WCS is correct that the existence of a geologic feature that, at least based on known data, renders it unlikely that contaminants discharged at the surface will reach protectible groundwater in a lower aquifer under normal

conditions renders the Department and the Commission without any authority to require that WCS obtain a permit protecting New Mexico groundwater standards, then the same could potentially be true for all of the facilities in the same vicinity. To have such authority called into question based on a time-barred appeal grounded in disputed facts and an insufficiently developed record would certainly be problematic for the Department.

V. The Public Interest Will Be Harmed If a Stay is Granted

WCS has been discharging without a permit for over four years now, much of which time has been taken up by what in retrospect appear to have been delay tactics on the part of WCS. Until recently, the Department was willing to allow this situation, based on a belief that WCS had a good faith intention to fulfill its obligation to obtain a discharge permit from the Department, as it represented to TCEQ in securing the removal of protections for New Mexico from the TPDES Permit. During that time, the Department worked cooperatively and diligently with WCS to come up with a straightforward, manageable permit for the Facility. Now, however, it is clear that the public interest lies in the issuance of a permit that will allow the Department to monitor the discharges flowing into New Mexico from this hazardous and radioactive waste facility to ensure compliance with the water quality standards that New Mexico – not Texas – deems protective for New Mexico ground water. The granting of a stay, allowing WCS to further delay the permitting of its discharges into New Mexico, is in the interest of no one but WCS.

CONCLUSION

WCS has failed to establish each and every factor required to obtain a stay of proceedings on its discharge permit application. Therefore, WCS's Motion to Stay the Department's proceedings on DP-1817 should be denied.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Administrator of Boards and Commissions, and was served on the following on March 28, 2017:

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