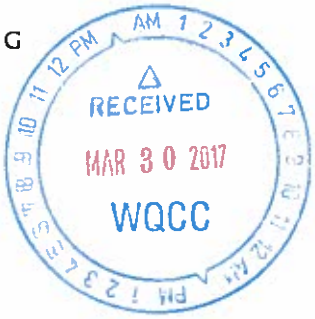
MODRALL SPERLING

LAWYERS



Christina C. Sheehan
505.848.1868
Fax: 505.848.1891
ccs@modrall.com

March 30, 2017

Via Hand Delivery

Pam Castaneda
Administrator for Boards & Commissions
New Mexico Environment Department
Harold Runnels Building
Office of the Secretary – 4th Floor
1190 St. Frances Drive
Santa Fe, NM 87505

Dear Ms. Castaneda,

Enclosed please find the original and 11 copies of Waste Control Specialists LLC's Response to NMED's Motion for Partial Summary Judgment.

Please contact me should you have any questions.

Sincerely,

Christina C. Sheehan

CCS/sjh
Enclosure
Cc: Stuart R. Butzier
Y:\dox\client\87117\0001\CORRES\W2906199.DOC

Modrall Sperling
Roehl Harris & Sisk P.A.

500 Fourth Street NW
Suite 1000
Albuquerque,
New Mexico 87102

PO Box 2168
Albuquerque,
New Mexico 87103-2168

Tel: 505.848.1800
www.modrall.com

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	)	**Docket No. WQCC 17-01(A)**
WASTE CONTROL SPECIALISTS LLC,	)	
Petitioner.	)	

WASTE CONTROL SPECIALISTS LLC'S RESPONSE TO NMED'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Waste Control Specialists LLC ("WCS"), pursuant to 20.1.3.15 NMAC, hereby submits its response in opposition to the New Mexico Environment Department's ("NMED") Motion for Partial Summary Judgment ("Motion").

For the past several years, representatives of WCS and NMED have worked in good faith in an attempt to arrive at a mutual understanding of the appropriate extent of regulatory oversight by NMED in relation to discharges of stormwater from WCS' operational facilities located in Texas and already regulated by federal and Texas laws. At times the considerable efforts focused on various difficult questions, including: whether any regulatory oversight by NMED should fall within the purview of the Surface Water Quality Bureau or the Groundwater Quality Bureau; whether imposing *groundwater* quality standards makes sense as effluent limitations for

surface stormwater; whether imposing *groundwater* quality standards makes sense in a *stormwater* discharge permit issued by Texas under the federal Clean Water Act; what kind of permit conditions might be lawful, reasonable and achievable in a groundwater discharge permit under New Mexico's Water Quality Act ("WQA"); and whether a discharge permit is required by the WQA given the increasingly refined understandings of WCS and NMED over time as to the legal as well as physical landscape, including surface and subsurface geology and hydrology in the area in question. The issues considered by WCS and NMED have not been easy and have involved a learning process on both sides, with both sides approaching the questions out of a genuine desire to ensure environmental protections and compliance and to do what is legally appropriate.

Although the issues have been approached and vetted cooperatively by WCS and NMED, after much in the way of sharing of information and meeting in person, unfortunately the two have been unable to agree on the fundamentally important question of whether a discharge permit is appropriately required under all of the circumstances as they have come to be understood over time. When this impasse became apparent, WCS understood that both sides were favorably disposed to figuring out how to put the fundamental question to the New Mexico Water Quality Control Commission ("WQCC" or "Commission") for decision before proceeding further. Ultimately, however, NMED decided it would rather proceed all the way through an additional public notice round before allowing the Commission to be presented with the issue in an appeal by WCS. Because WCS felt that a more orderly and efficient way of proceeding made sense, particularly after so many years of back-and-forth, it opted to withdraw its permit application (which was an option WCS and NMED had previously discussed) in hopes that it would trigger an appealable response from NMED so that the Commission could grapple with

the fundamental question of whether a discharge permit is required before expending further time and resources on processing a permit that may ultimately be shown to have been unnecessary and improper.

II. NMED's MOTION

A. The Summary Judgment Procedure NMED Proposes Undermines the WQCC Appeals Process

NMED's Motion seeks to interpose a procedural device courts sometimes employ to summarily decide claims in advance of a trial. WCS respectfully submits that NMED's Motion is wholly out of step with the Commission's appeal standard of reviewing the whole record that was before NMED when it made its February 2017 determination that a permit is required. NMED's Motion requests the WQCC to dismiss all or a portion of the appeal prior to a review of the entire administrative record, which "whole-record" review is the very purpose of the appeal process and its established rules and procedures. Also, the Motion interrupts the WQCC's rules establishing an orderly briefing schedule for appeals, prejudicially re-orders arguments for the parties, and creates additional rounds of briefing opportunities benefitting NMED on only portions of the administrative record when the purpose of the established WQCC schedule is to ensure that the WQCC reviews the entire administrative record supporting NMED's determination. The Commission should deny NMED's request to introduce a procedure that is outside of the established appeal procedures and the whole-record standard of review governing this appeal.

The basic argument NMED uses to urge the Commission into a position WCS submits would be in error, is that NMED could find nothing explicitly preventing it from pursuing summary judgment. Motion at 11. This is the same logic NMED used to conclude that it could reject WCS' withdrawal of its permit application; NMED could find nothing that explicitly

prevented it from rejecting WCS' withdrawal and forcing a continuation of the permitting process. The logic advanced in both NMED positions is faulty. It is clear that summary judgment is antithetical to the Commission's appeal process, just as it should have been readily apparent that NMED cannot properly force an unwilling party through a permitting process initiated by and later withdrawn by that party just because NMED disagrees with the reasons for the withdrawal—in this case jurisdictional reasons.

NMED concedes that WCS' appeal of NMED's rejections of WCS' withdrawal of its permit application was timely and proper. Motion, p. 12. NMED's "partial" Motion instead asks the Commission to dismiss the jurisdictional issue that served as WCS' basis for the withdrawal, arguing that an appeal of that issue is not timely. But divorcing the reason for the withdrawal from the question of whether NMED could ignore the withdrawal makes little sense, because the two issues are inextricably related and both are expressly addressed in NMED's February 2017 determination letter. As a result, it would be inappropriate to decide WCS' jurisdictional challenge separately from the withdrawal question.

WCS' appeal is timely for both the withdrawal and jurisdiction issues. As explained more fully below, the notion that WCS' jurisdictional challenge is time-barred as a result of a letter from four years ago belies and purports to ignore the intervening exchanges of information that NMED in fact considered and rejected as part of the agency's February 2017 explicit determinations to refuse to accept the withdrawal and that a permit is required. ("[T]he Department declines to accept withdrawal of the Application....the Department believes a permit is required pursuant to the New Mexico Water Quality Act..." AR 135, 02787).[1]

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

Moreover, according to NMED, the merits of WCS' jurisdictional challenge should be summarily avoided by the Commission because it either was raised *too late* or, alternatively, because it is *premature.* These incongruous positions cannot be squared and reflect NMED's understandable reluctance over having this Commission review whether NMED truly has jurisdiction to regulate stormwater that is already regulated by permit under Texas and federal laws. A fundamental admission in NMED's Motion is that if the Commission denies this Motion and proceeds to review the question of jurisdiction, then NMED needs and requests more time, and the cover that it hopes for from a public hearing, to shore up the administrative record so that it might hereafter be able to show that it has jurisdiction. In essence, the WQCC is being asked to decide the withdrawal question in a vacuum, while either turning a blind eye to whether NMED had the requisite jurisdiction to compel a permit at the time of its February 2017 determination, or else allowing NMED an opportunity to hereafter create a record in hopes of establishing jurisdiction. This remarkably novel, two-alternative, and diametrically opposed, form of summary judgment request, even if it were procedurally proper, lacks merit.

The law requires proof of jurisdiction to appear on the record of an administrative agency. According to the United States Supreme Court, "[w]here jurisdiction is denied and squarely challenged, jurisdiction cannot be assumed to exist 'sub silentio' but must be proven." *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5 (1974). Although it is certainly true that WCS did not initially question NMED's jurisdiction under one assumed set of factual circumstances as understood in 2013, once WCS did challenge NMED's jurisdiction more recently after updating NMED with corrected information and substantial technical data, NMED was required by law to decide the issue based on actual evidence contained in the administrative record existing at the time, and not on the basis of conjecture or some future gathering of evidence. As the Tenth

Circuit has noted, "jurisdiction can be challenged at any time [and,] once challenged, cannot be assumed and must be decided." *Cf. Basso v. Utah Power & Light Co.*, 495 F 2d 906, 910 (1974). The reason is not difficult to comprehend: without such jurisdiction all acts of the agency are null and void.

B. NMED's Statement of Facts Are Disputed and Cannot Serve as the Basis for Summary Judgment

NMED's lengthy recitation of facts contains many errors and incorrect inferences, as will be explained in detail below. Noticeably missing is the key fact in this dispute; the discharges that occasionally cross from Texas into New Mexico are fully permitted and are comprised of non-contact stormwater only. Moreover, NMED fails to set forth any facts that establish that WCS' discharges reach usable groundwater in New Mexico. As will be presented and supported upon full briefing of WCS' position, multiple independent investigations have concluded that 1) there is no usable groundwater in the shallow alluvium in the area of the discharges; and 2) it is not possible for surface discharges to reach deeper groundwater (approximately 225 feet below ground surface) due to a naturally impermeable red clay geological feature underlying the area.

The legal standard, discussed in greater detail below, is that summary judgment is inappropriate if there are disputed facts. WCS disputes most of the facts as set forth in the Motion either because there are errors in the statements or information is taken out of context. The facts are complex and many of the errors are likely honest misunderstandings of the complex information. This is precisely why the whole administrative record should be reviewed and explained by both sides before the Commission decides the critical jurisdiction issue.

WCS notes that much of the information offered by NMED is focused more on emphasizing that WCS stores or disposes of various kinds of materials and wastes at its Texas facility and portraying WCS in a bad light than on offering actual jurisdictional evidence. WCS

does not hide from the fact that it is a unique facility that processes, stores and disposes of hazardous and low level radioactive wastes. It is also the most robust landfill ever built to receive such wastes. WCS is highly regulated and has 2 radioactive material licenses, 2 hazardous waste permits, 2 waste water permits, an air permit and multiple other regulatory authorizations issued under Texas and federal laws that heavily regulate all activities at the WCS facility. The WCS facility is one of the most heavily sampled and studied sites in the United States, both to qualify WCS for such myriad of permits and licenses and also to comply with hundreds of requirements in those authorizations to continually monitor all aspects of its operations and constantly ensure that its operations are conducted in a safe and lawful manner with no impacts to the environment, health and safety. This extensive WCS data in addition to data from third party experts, prepared for other purposes, forms the basis upon which WCS decided to withdraw its permit application and seek appeal on the issues of withdrawal and jurisdiction.

The full set of facts and factual disputes should be addressed during the normal course of the WQCC appeal process pursuant to the Commission's rules. However, to ensure the WQCC has all the appropriate information to decide NMED's Motion, WCS feels compelled to set forth in detail in the following sections the specific factual disputes.

The Facility

Fact 1: WCS clarifies that it is a limited liability company which controls and operates a licensed waste disposal facility for the processing, treatment, storage and disposal of a broad range of radioactive, hazardous, toxic and other wastes. *See* Administrative Record ("AR") 127, 03474.

Fact 2: WCS disputes the statement that it "is the only facility in the United States that can accept Class A, B, and C low-level waste from generators across the United States." There are other facilities that accept Class A. B, and C waste.

Fact 3: NMED mischaracterizes the discharges into New Mexico and other facts regarding WCS' operations. All of WCS' operating facilities are located in the State of Texas. *See* AR 71 at 01531; AR 128 at 02809-02818; 02820-02852; AR 60 at 01390-01432. WCS owns approximately 500 acres of land in New Mexico, adjacent to its facilities in the State of Texas. WCS' New Mexico property is vacant pasture land, a portion of which is used for the stockpiling of soils. AR 71, 01532. All discharges of water from the operating facilities occur in the State of Texas. *See* AR 71 at 01531; AR 128 at 02809-02818; 02820-02852; AR 60 at 01390-01432. While stormwater has the ability to cross state lines, any stormwater discharged in the State of Texas that crosses into New Mexico is already regulated pursuant to the Clean Water Act ("CWA") by the State of Texas pursuant a Texas Pollutant Discharge Elimination System ("TPDES") permit, issued pursuant to Texas' delegated authority from the Environmental Protection Agency ("EPA"). NMED's reference to AR 128, 02944 "report by WCS consultant discussing discharge into New Mexico" is misplaced. That page of WCS' consultant's report does not refer to any discharges of water into New Mexico.

The Facility's Existing Permits

Fact 4: NMED incorrectly summarizes WCS' TPDES permits. WCS is not authorized to discharge up to 170,500,000 gallons per day ("gpd") of stormwater and industrial wastewater via Outfall 001 and Outfall 002, as stated by NMED. Rather, TPDES Permit No. WQ000403800 ("TPDES Permit 4038") authorizes WCS to discharge effluent not to exceed the daily average of 20,000 gpd and the maximum of 60,000 gpd from internal Outfall 101. *See* AR 128, 02820-

02852. This effluent, which is previously treated and tested prior to discharge at Outfall 101, then flows toward but does not reach Outfall 001 due to the volume restrictions explained above and the long distance from Outfall 101 to Outfall 001. *Id.* The discharge that could theoretically reach Outfall 001 contains only non-contaminated stormwater and non-contact water. *Id.* In fact, Outfall 001 has not had any discharge, even stormwater, since 2007. WCS further disputes NMED's characterization of the discharges regulated by TPDES Permit No. WQ0004857000 ("TPDES Permit 4857"). Permit 4857 does not regulate Outfall 002. That outfall is regulated by permit 4038 and is comprised solely of non-contaminated stormwater. Pursuant to TPDES Permit 4857, WCS is authorized to discharge up to 440,000 gpd of previously monitored effluent during dry weather from Outfall 005. This effluent is previously tested prior to discharge from Outfall 103. Outfall 005 is an outfall that only discharges in Texas, it does not discharge to Outfall 002 or to New Mexico. *See* AR 60, 01390-01432. NMED's citation to WCS' NOI, AR 71, at 01531-01533 does not support this description.

Fact 5: NMED wrongly describes Outfall 002 and the location and purpose of rock berms. Outfall 002 is located in the State of Texas. Additionally, the berms are positioned in the drainage ditch prior to the outfall in Texas, with the exception of one berm that was built on WCS land in New Mexico. The berms were constructed as part of WCS' best management practices set forth in its Storm Water Pollution Prevention Plan and are designed to slow down the flow of stormwater, prevent erosion and filter naturally occurring dirt, clay and rocks.

Fact 6: WCS does not dispute that TCEQ was required to consider impacts from WCS' discharge to water quality of the downstream state.

Fact 7: WCS does not dispute that NMED submitted comments on the draft of TPDES Permit 4857. Those comments specifically requested a change to only the arsenic limits.

Subsequently, TCEQ incorporated "Other Requirement 16" into TPDES Permit 4857, which added more than 60 other effluent limitations for constituents in addition to arsenic. WCS affirmatively states, however, that it agreed to have TCEQ include NMED's suggested standards as "Other Requirement 16" in TPDES Permit 4857 because it was under time pressure to obtain a TPDES permit in order to receive and dispose of by-product waste from the Department of Energy, which itself was under an order with a deadline for disposal. AR 56, 01271.

Fact 8: NMED wrongly states that it was denied the opportunity to comment on the renewal of TPDES Permit 4038. To the contrary, on May 16, 2011 and May 14, 2015, TCEQ sent notice of the renewal to the Surface Water Quality Bureau of NMED. Furthermore, EPA contacted Bruce Yurdin at the Surface Water Quality Bureau directly on two occasions to inquire as to whether New Mexico would be submitting comments to the Texas permit. Mr. Yurdin stated in an email to EPA that he would review the notice and application and contact the Texas permit writer if needed. For NMED to now claim that it was not aware of the permit renewal is patently false. *See* AR 129 at 03438-03439; 03445-03446; AR 128 at 02928. NMED's failure to comment on TPDES Permit 4038 was not a result of TCEQ failing to send the notice to NMED.

The Discharge Permit Application

Fact 9: WCS does not dispute that the TCEQ issued a compliance violation as a result of failure to comply with TPDES Permit 4857's "Other Requirement 16," which were the standards TCEQ agreed to include at NMED's suggestion. The exceedances were caused by naturally-occurring background conditions.

Fact 10: WCS disputes that TCEQ's sole basis for removing "Other Requirement 16" from TPDES Permit 4857 was NMED's representation that WCS would apply for and obtain a New Mexico groundwater discharge permit. In fact, the Cook-Joyce report submitted as part of the

major amendment of the permit set forth two additional reasons why Other Requirement No. 16 should have been removed from the permit: first, because some of the effluent limits in Other Requirement No. 16 were incorrectly calculated; and second, because of the presence of new information consisting of analytical data gathered since the time of permit issuance. AR 56, 01274-01289. WCS does not dispute that it agreed to apply for a discharge permit; however, WCS never believed that a discharge permit was required, as stated in its Notice of Intent to Discharge ("NOI"). AR 71, 01531.

Fact 11: WCS disputes that TCEQ removed "Other Requirement 16" solely based on WCS' representation that it would obtain a groundwater discharge permit from the State of New Mexico. As stated above, the Cook-Joyce report submitted as part of WCS' Application for a Major Amendment to TPDES Permit 4857 showed that Other Requirement No. 16 was based on incorrect facts and no longer appropriate based on new analytical data. AR 56, 01274-01289.

Fact 12: WCS does not dispute that the quoted text portions of its NOI to are accurate quotations from the NOI. WCS does dispute NMED's suggested definition of "dissipates to overland flow" means that the flow infiltrates to subsurface. This is not defined in the NOI, and, in fact, the opposite is suggested as stated in the NOI:

> Low precipitation rates, along with high evapotranspiration/infiltration values and nominal terrain slopes, prevent significant surface accumulation of stormwater. GEI prepared the design and NMED regulatory compliance documents for the Lea County Landfill, immediately south of the WCS tract in NM. These same conditions have historically provided a "zero discharge" configuration for the facility.

Furthermore, WCS has provided more accurate descriptions of its discharges in Fact 4, above. *See* AR 128 at 02809-02818; 02820-02852; AR 60 at 01390-01432. The NOI does not contain the most accurate summary of the source of discharges that have the potential to cross the state line into New Mexico.

Fact 13: WCS does not dispute that the quoted text portions of its NOI are accurate quotations from the NOI; however the third discharge point described in the NOI contains non-contact stormwater only.

Fact 14: WCS does not dispute Fact 14.

Fact 15: WCS does not dispute Fact 15.

Fact 16: WCS does not dispute Fact 16.

Fact 17: WCS does not dispute that it communicated with NMED about the terms and conditions of the draft discharge permit that NMED issued for comment on August 1, 2013. WCS worked in good faith to discuss terms of the draft permit with NMED and shared new evidence with NMED as it became available.

Fact 18: WCS disputes that NMED did not receive notice of the renewal of TPDES Permit 4038 as set forth above in Fact 8. *See* AR 129, 03438-03439; 03445-03446; AR 128, 02928. NMED's failure to comment on TPDES Permit 4038 was not a result of TCEQ failing to notice to NMED. WCS does not dispute that it was working with NMED to address New Mexico's water quality concerns. The language quoted from the TCEQ response to the Sierra Club comments is misleading; it does not state that WCS obtained a discharge permit or was required to do so. In fact, TCEQ clarified in response to the Sierra Club's comments that:

> The discharges authorized from this facility are PME (landfill leachate and contaminated stormwater via internal Outfall 101), non-contaminated stormwater, and non-contact cooling water via Outfall 001; non-contaminated stormater via Outfalls 002 and 003; and stormwater associated with construction activity via Outfall 004. These discharges are stormwater-driven and intermittent in nature. Therefore, the discharge into New Mexico is predominately stormwater.....During dry weather conditions previously monitored effluent (PME) may be discharged from internal Outfall 101 and does not reach Outfall 001 due to imposed volume restrictions.... The discharges via Outfalls 001 and 002 are primarily stormwater-driven and are intermittent and flow-variable. Therefore, any discharge into New Mexico is predominately stormwater.

AR 128, 02927-02928.

WCS disputes NMED's statement that "TCEQ relied on WCS' 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." NMED provides no support for such assertion. NMED's failed to comment on the draft TPDES Permit 4038 and EPA approved the draft TPDES Permit.

Fact 19: WCS does not dispute that it met with NMED on August 26, 2016 to discuss whether a discharge permit was required. WCS disputes that this was the first time it believed it should not be required to obtain a discharge permit for discharges in Texas. Moreover, at the meeting NMED staff present also indicated their agreement that a groundwater permit was not the correct permit for stormwater discharges.

Fact 20: WCS does not dispute that it submitted information to NMED in November and December of 2016 in an effort to share with NMED what it had learned and to supply NMED with information related to whether or not it had the jurisdiction to require a discharge permit. WCS disputes that these were new legal and factual arguments.

Fact 21: WCS does not dispute this fact.

Fact 22: WCS does not dispute this fact.

III. ADDITIONAL HELPFUL BACKGROUND ON THE CLEAN WATER ACT

Under the federal Clean Water Act ("CWA") there are different approaches to and requirements for the treatment of downstream states in permits issued by state agencies and permits issued by the EPA. The CWA mandates that point sources may discharge pollution into navigable water only pursuant to a permit. *See* 33 U.S.C. § 1342. The EPA may delegate its permitting authority to individual states, as it has to Texas (New Mexico does not have such delegation). Regardless of which body issues the permit, a state that believes, correctly or

incorrectly, that it will be affected by water discharged in another state has little voice in the permitting decision. Where a point source in one state applies for a permit from EPA to discharge effluent in a manner that degrades the water quality of another state, the affected other state may file an objection with EPA before the permit is issued. *See* 33 U.S.C. § 1341(a)(2). If the source state is the permitting authority, that state must also consult the affected state and consider any objections before issuing the permit. *See* 33 U.S.C. § 1342(b)(3) & (b)(5). The affected state has no authority, however, to block the issuance of the permit. If the source state issues a permit despite the affected state's objections, the affected state's only recourse under the CWA is to ask the EPA Administrator to use the Administrator's discretion to refuse the permit because effluent discharges have an undue impact on interstate waters. *See* 33 U.S.C. § 1342(c)(3) (1988). The record will show that NMED received all such notices and opportunities concerning the WCS' TPDES permit at issue.

IV. ARGUMENT

A. Standard of Decision for Summary Judgment

WCS readily acknowledges that 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 motion for summary judgements, and for good reason: motions for summary judgment directly conflict with the procedures for permit review set forth in the regulations. The Commission's adjudicatory procedures clearly set forth the procedure for a permit review in 20.1.3.16 NMAC. Pursuant to 20.1.3.16.B(1) NMAC, the permit review is to begin no later than 90 days after the date the permit review petition is received. That regulation ensures compliance with the 90 day review deadline by establishing a briefing schedule that takes 60 days. 20.1.3.16.A(4) NMAC. Specifically, the regulation allows the petitioner to file an

opening brief within 25 days of the department filing the administrative record, allows the department to file a response brief within 25 days of the petitioner filing and opening brief, and the petitioner to file a reply brief within 10 days of the department filing a response brief. *Id.* The Commission is limited to reviewing the existing administrative record in determining whether to sustain, modify or reverse NMED's actions on appeal in a permit review. 20.1.3.16.F(3) ("The commission shall consider and weigh *only the evidence contained in the record before the department* and the recommended decision of the hearing officer..." (Emphasis added)).

NMED's decision to file its Motion for Partial Summary Judgment defies the Commission's permit review process. By filing the Motion, NMED has in essence preempted the opening brief and has given itself additional opportunities to argue its case, and do so out of order so that it can present its case to the WQCC before the appellant, which is contrary to the permit review rules and schedule. WCS objects to NMED's circumvention of the permit review regulations by filing the Motion, which risks leading to a repetitive and confusing course of arguments and briefing materials. WCS requests the Commission disregard or deny the Motion. Should the Commission decide to entertain NMED's Motion for Partial Summary Judgement, however, in accordance with 20.1.3.8 NMAC, the Commission should look to the New Mexico Rules of Civil Procedure[2] and case law interpreting the rules for guidance. Summary judgment

[2] NMED wants this Commission to borrow from summary judgment procedures used by courts, but then largely ignores requirements of the New Mexico Rules of Civil Procedure on summary judgment motions. Most notably, Rule 1-056(D)(1) provides: "Motions for summary judgment will not be considered unless filed within a reasonable period of time prior to the date of trial to allow sufficient time for the opposing party to file a response . . . and to permit the court reasonable time to dispose of the motion." Because of the time limitations and pace of appeals before the Commission, including the requirement that WCS file its opening brief one week from this filing, and the requirement for the Commission itself to decide the entire appeal within 90 days, NMED's motion violates the spirit of the civil procedure rule, places WCS at a briefing disadvantage herein, and as a practical matter renders it infeasible for the Commission to consider the Motion at any time prior to the time in which it will need to consider the merits of the entire appeal. For that further reason, WCS requests that the motion for partial summary judgment by NMED be set aside and not considered or, at a minimum, consolidated with the review hearing on the merits of

is appropriate only where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 970 P.2d 582. New Mexico courts hold that in reviewing a motion for summary judgment, a court "view[s] the facts in a light most favorable to the party opposing summary judgment and draw[s] all reasonable inferences in support of a trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 242 P.3d 280 (internal quotation marks and citation omitted). By NMED's own admission, in the context of summary judgment motions, "[a]ll reasonable inferences are to be construed in favor of the non-moving party," which in this case is WCS. Motion at 12, quoting *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 127 P.3d 971. Courts in New Mexico "view summary judgment with disfavor," *id.* ¶ 8, and consider it "a drastic remedy to be used with great caution." *Pharmaseal Labs., Inc. v. Goffe*, 1977-NMSC-071, ¶ 9, 568 P.2d 589; *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶6, 310 P.3d 611. There are significant and substantial genuine issues of fact as demonstrated in detail above, which consist of incorrect statements, statements taken out of context in order to give the inference of different meanings, and substantially incomplete information. Until these factual issues are resolved, NMED is not entitled to summary judgment as a matter of law. Accordingly, WCS submits that the Commission should deny NMED's Motion.

B. <u>WCS' Appeal Challenging NMED's Jurisdiction Is Not Time-Barred</u>

The only legal issue actually pursued in NMED's Motion as the basis for summary judgment and dismissal of WCS' appeal is whether WCS properly and timely filed its notice of appeal and petition for review. Based on the clear language of the WQA, WCS' notice of appeal and petition for review was based on the February 9, 2017 NMED determination that a discharge

---

WCS' appeal, rather than considered separately. NMED's Motion has been interjected into WCS' appeal on an untimely basis to the prejudice of WCS, to the inconvenience of this Commission, and in clear violation of Rule 1-056(D)(1), and so should be dealt with by the Commission accordingly.

permit is required. AR 135 at 02787-02789. WCS brought its appeal pursuant to NMSA §74-6-5(O) and 20.6.2.3112 NMAC. Both the WQA and its implementing regulations do not offer a definition of "permitting action," but 20.6.2.3112.B NMAC provides:

> [i]f the secretary determines that a discharger is not exempt from obtaining a discharge permit...then the discharger may appeal such determination by filing with the commission's secretary a notice of appeal to the commission within thirty days after receiving the secretary's written determination, and the appeal therefrom and any action of the commission thereon shall be in accordance with the provisions of Sections 74-6-5(O), (P), (Q), (R) and (S) NMSA 1978.

The regulations do not state that an appeal is only available at the time of an initial determination by the secretary. Rather, the regulation allows an individual to appeal a determination that a discharger is not exempt from obtaining a discharge permit after receiving the written determination. In this instance, WCS initially received a written determination that a discharge permit was required on February 19, 2013. Following years of discourse and new information and evidence, however, and prior to the issuance of any discharge permit, WCS made NMED aware of a jurisdictional defect, cooperatively explored alternatives for resolving the issue, and ultimately decided to withdraw its application by letter dated February 1, 2017. This withdrawal resulted in the issuance of another determination of the secretary dated February 9, 2017 that a discharge permit was required, which WCS timely appealed pursuant to 20.6.2.3112.B.[3]

C. NMED's Reliance on References to an Agreement by WCS is Misplaced

In the Motion, NMED expends considerable effort foreshadowing the existence of an agreement with WCS to pursue a discharge permit, but without actually producing such an agreement. Although WCS does not deny that it said it would apply for a discharge permit, and acknowledges statements to that effect in the record, there is no basis for the Commission to

[3] Specifically, NMED's correspondence dated February 9, 2017 states "This letter is to inform you that the Department declines to accept withdrawal of the Application...the Department believes a permit is required pursuant to the New Mexico Water Quality Act..." AR 135, 02787.

infer that WCS' intention to apply for a permit meant that WCS agreed for all time to be bound by an undefined set of permit terms and requirements, regardless of new information and a greater understanding of the facts and the law. WCS in fact did submit an application for such a permit just as it said it would and in good faith worked with NMED for four years to attempt to reach agreement about the need for such a permit and the terms of such a permit. At the end of the day, WCS' understanding of the law and the facts led it to the honest belief that such a permit is not required. WCS acknowledges that NMED disagrees and that the two parties were unable after considerable time and effort to reach a resolution. For these reasons, WCS seeks to exercise its rights under New Mexico law to have this dispute heard by the WQCC. As acknowledged by NMED, the summary judgement standard is that all inferences in the context of its partial summary judgment motion must be construed favorably to WCS, not NMED. The issue raised by NMED in its partial motion for summary judgment is whether WCS is time barred from bringing this appeal. The undisputed facts show that WCS brought this appeal timely after the secretary's February 9, 2017 determination that a permit was required. NMED's inflammatory characterization of WCS' jurisdictional challenge as a "bait and switch" is merely an unfair attempt to prejudice this Commission against WCS for asserting its rights.

Even more to the point, however, NMED's incorrect and unwarranted inference to prejudice the Commission against WCS is not relevant to the legal question of whether NMED can establish its jurisdiction from the administrative record herein. An agreement by a third party to be regulated does not confer authority on NMED to so regulate that entity. Thus, even if WCS had made a clear and unequivocal agreement to do more than apply for a permit, NMED is still left with the authority it has under state law. The sources of NMED's authority to administer New Mexico's discharge permit program, as well as the contours of that authority, are entirely

defined by New Mexico's Water Quality Act and this Commission's regulations adopted pursuant to that Act. *Kilmer v. Goodwin,* 2004-NMCA-122, ¶ 24, 136 N.M. 440, 99 P.3d 690; *Piedra, Inc. v. State Transp. Comm'n,* 2008-NMCA-089, ¶ 17, 144 N.M. 382, 387, 188 P.3d 106, 111 (an administrative agency may not exercise authority beyond the powers that have been granted to it."); *Rivas v. Bd. of Cosmetologists*, 1984-NMSC-076, ¶ 3, 101 N.M. 592, 593, 686 P.2d 934 ("An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority. The Legislature can delegate legislative powers to administrative agencies but in so doing, boundaries of authority must be defined and followed. In New Mexico, action taken by a governmental agency must conform to some statutory standard or intelligible principle.") (Internal citations omitted.)

A private understanding or agreement, whether supported by consideration or not, and whether arrived at through arms-length negotiations between co-equal parties or not, simply cannot confer or expand jurisdiction upon an agency where none exists. By the same token, where an agreement derives from mistaken understandings as to the parties' rights and responsibilities, as was the case here, any attempt to enforce something that the statutes and regulations do not allow would be fruitless and contrary to law.

If NMED contends, as it appears it will, that it voluntarily forestalled an opportunity it believes it otherwise would have had to convince Texas to impose New Mexico's *groundwater* standards as effluent limitations on *stormwater* discharges in TPDES No. 4038, WCS submits that it did so at its own peril and could have taken steps to avoid putting itself at risk. Moreover, this Commission is not the proper audience for NMED to assert that it missed its opportunity with Texas; the proper audience would be TCEQ and/or EPA, which retains oversight authority over TCEQ pursuant to the Clean Water Act's Section 402 program. Finally, TPDES permits

are only issued for five year periods, so nothing prevents NMED from trying to make its case for including *groundwater* standards for *surface* discharges, if it can, at such time in the future as WCS TPDES permit comes up for renewal.

D. NMED's Request to Develop the Record is Both Unwarranted and Revealing

Perhaps the most compelling reason that this Commission should deny NMED's Motion for Partial Summary Judgment and instead move forward to review the question of jurisdiction is NMED's alternative request that the Commission hold this appeal in abeyance while it attempts to marshal evidence to support its jurisdiction. How could NMED have made proper determinations that WCS is subject to WQA jurisdiction (either at the time of its February 2013 determination letter to WCS or its February 9, 2017 determination letter to WCS) unless it already had adequate support for such determinations? This admission is a strong indication that NMED does not in fact have foundational support for such determinations.

WCS acknowledges that it has provided NMED additional technical and factual information over the last four years, and concedes that much of it was concentrated during the last eighteen months. However, most of that information has been available to NMED and in some cases reviewed by NMED for other purposes (like permitting decisions for other facilities in the region).[4] Rather than withdrawing its permit application months ago, WCS took the approach of scheduling detailed meetings with technical and legal experts at NMED to lay out this data and information in a manner that would foster collaboration and understanding of the parties. Unfortunately, the parties ultimately were not able to agree. For these reasons, WCS

[4] The administrative record herein reflects that WCS made substantial efforts to prove to NMED that its basis for asserting jurisdiction is groundless due to the extensive controls and management practices in place at WCS' facility, and the ample technical studies and drilling results some of which was prepared by WCS, but to a much greater extent by unaffiliated third parties overwhelmingly reflect an absence of any potential for the permitted stormwater to intersect groundwater in New Mexico, much less cause an exceedance of any groundwater standards. NMED's alternative request to allow further development of the administrative record after deciding against WCS, ignoring its properly withdrawn application, and then proceeding with publishing a notice of a more onerous permit draft than had heretofore been discussed, is unwarranted.

respectfully requests that this Commission deny NMED's request for additional time and that WCS' appeal be allowed to proceed in an orderly manner.

V. CONCLUSION

NMED's request for a partial summary judgment should be denied. The summary judgment procedure conflicts with the appeal standards and procedures of this Commission, and is an attempt by NMED to deny WCS its right to a fair review of an agency determination in accordance with the WQA. Moreover, WCS submits to this Commission that NMED's inflammatory characterizations of WCS' conduct is unfounded and would be an inappropriate basis for decisions on the merits of the actual legal question raised in NMED's motion—whether WCS timely filed its appeal. NMED provided a written determination that a permit was required on February 9, 2017 and WCS appealed that determination within the time required by the rule. Most of the facts in the Motion are in dispute. Also, the legal standard requires that this Motion be decided with all inferences in favor of WCS.

WCS submits that during the course of this appeal the Commission will find that both parties have attempted to act in good faith and have both devoted significant time and resources to determine if a permit is indeed required to protect human health and the environmental in New Mexico and if so, what would be the reasonable, lawful and achievable conditions of such a permit. As the record demonstrates, the parties were ultimately unable to come to a resolution about whether a discharge permit is required and are now seeking a fair review of this issue by the WQCC.

For all of the above reasons, as well as common sense and prudent governance, NMED's Motion should be denied.

Respectfully Submitted,

MODRALL, SPERLING, ROEHL
HARRIS & SISK, P.A.

By: _____

Stuart R. Butzier
Christina C. Sheehan
Attorneys for Waste Control Specialists
Post Office Box 2168
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800

CERTIFICATE OF SERVICE

I hereby certify that Waste Control Specialists LLC's Response to NMED's Motion for Partial Summary Judgment was hand delivered to:

Pam Castaneda
Commission Administrator
Water Quality Control Commission
New Mexico Environment Department
1190 Saint Francis Drive
Santa Fe, NM 87502
Pam.Castaneda@state.nm.us

And emailed and mailed to all those listed below on March 30, 2017:

Bruce Yurdin, Director
Water Protection Division
New Mexico Environment Department
1190 Saint Francis Drive
Santa Fe, NM 87502
Bruce.Yurdin@state.nm.us

Michelle Hunter, Chief
Ground Water Quality Bureau
New Mexico Environment Department
1190 Saint Francis Drive
Santa Fe, NM 87502
Michelle.Hunter@state.nm.us

Lara Katz
Assistant General Counsel
New Mexico Environment Department
1190 Saint Francis Drive
Santa Fe, NM 87502
Lara.Katz@state.nm.us

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: _____
Stuart R. Butzier
Christina C. Sheehan
Attorneys for Attorneys for Waste Control Specialists LLC
Post Office Box 2168
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800

W2906578.DOCX