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L A W Y E R S

March 13, 2017

**Via Hand Delivery**

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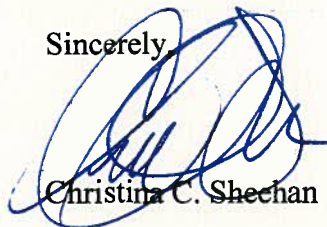
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Dear Ms. Castaneda,

Enclosed please find the original and 11 copies of *Waste Control Specialists Motion to Stay NMED's Proceedings on it Withdrawn Discharge Permit Application*.

Please contact me should you have any questions.

Sincerely,



Christina C. Sheehan

CCS/sjh  
Enclosure  
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**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 )**  
**)**  
**WASTE CONTROL SPECIALISTS LLC, )**  
**)**  
**Petitioner. )**  
**)**

**Docket No.**  
**WQCC 17-01(A)**



**WASTE CONTROL SPECIALISTS LLC'S MOTION TO STAY NMED'S  
PROCEEDINGS ON ITS WITHDRAWN DISCHARGE PERMIT APPLICATION**

Waste Control Specialists LLC ("WCS"), pursuant to 20.1.3.15 NMAC, moves to stay the Ground Water Quality Bureau of the New Mexico Environment Department's ("NMED") discharge permitting proceedings on an application that WCS previously submitted, but then withdrew on the basis that NMED lacks the necessary permitting jurisdiction. The stormwater discharges in question occur in the State of Texas and are appropriately permitted by the Texas Commission on Environmental Quality ("TCEQ"). In this motion, WCS respectfully requests that the Water Quality Control Commission ("Commission") stay all proceedings related to Draft Discharge Permit 1817 while the Commission considers WCS's appeal, filed on February 22, 2017. NMED opposes this motion, and in fact has already taken steps to process the withdrawn

permit application despite knowing of WCS's explicit appeal petition pronouncements that a stay is being sought.<sup>1</sup>

## **BACKGROUND<sup>2</sup>**

1. WCS operates a fully permitted commercial waste management facility located on approximately 1,338 acres of land in Andrews County, Texas, surrounded by approximately 13,000 acres of undeveloped land under WCS control.
2. About 500 acres of that undeveloped land is located on the New Mexico side of the border.
3. All water discharges and outfalls from the WCS facility occur or are located in the State of Texas.
4. Discharges from the WCS facility are regulated pursuant to Texas Pollution Discharge Elimination System ("TPDES") permits, which EPA delegated authority to Texas to issue pursuant to Section 402 of the Clean Water Act.<sup>3</sup>
5. Discharges of stormwater from one outfall at WCS's Texas facility, referred to as "Outfall 002," which is situated on the Texas side of the border, are regulated under TPDES Permit No. 4038, which includes effective and enforceable effluent limitations.
6. All stormwater that has the ability to subsequently cross into New Mexico after discharges in Texas from Outfall 002 in large storm events, is non-contact stormwater,

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<sup>1</sup> Despite awareness of WCS's appeal petition and stay request, NMED took the deliberate—and seemingly punitive—step of issuing public notice of a draft permit which notably contains conditions never before revealed to WCS in earlier drafts that had been shared with WCS prior to WCS's withdrawal of its permit application.

<sup>2</sup> As of this motion, the administrative record has not been submitted. WCS is willing to supplement this motion and the factual statements made herein with record sites subsequent to submission of the administrative record.

<sup>3</sup> The United States Environmental Protection Agency ("EPA") has delegated Clean Water Act Section 402 permitting authority, including stormwater permitting, to the State of Texas, but as the Commission no doubt is aware, EPA has not made a corresponding delegation of authority over stormwater to the State of New Mexico.

meaning that the stormwater is water which neither falls on the top of waste units at WCS's facility, nor comes into contact with disposed of materials.

7. Stormwater that falls on top of WCS's disposal units is managed separately from non-contact stormwater at WCS's facility and does not cross the border into New Mexico.
8. Permitted stormwater discharged from Outfall 002 in Texas has the potential in large storm events to flow across the border into New Mexico, onto WCS's lands, as surface water that is in full compliance with the Clean Water Act.
9. The area of southwestern Texas where the discharges in question may occur from Outfall 002, and the area of southeastern New Mexico where compliant stormwater has the potential to flow onto WCS lands, is underlain by a well-delineated and well-understood red clay formation that is highly impermeable.
10. WCS has submitted extensive and unrefuted technical evidence to NMED to demonstrate that there is no groundwater that could be reached underneath the path of any stormwater that could potentially travel across the border into New Mexico after it discharges in Texas from Outfall 002 at WCS's facility.
11. Despite many months of recent discussions and exchanges of technical information between WCS and NMED representatives, NMED has yet to produce any credible concern that the stormwater in question could combine with groundwater on the New Mexico side of the border. Indeed, at one point NMED management and staff essentially conceded the point.
12. In addition to ample pre-existing studies and evidence presented to NMED, in January 2017, WCS had an independent contractor drill a well to confirm the absence of groundwater in the projected path of stormwater discharges from Outfall 002.

13. WCS located the new well in the location downgradient and southwest of Outfall 002, which had been agreed upon with NMED staff.
14. This new well extended part way into the upper layer of the highly impermeable red clay feature, determined by geologists as being from the Triassic Period, hundreds of feet thick, widespread throughout the area and highly impermeable.
15. The well came up dry throughout the vertical extent of its column, further confirming the absence of groundwater in the area.<sup>4</sup>
16. WCS first made application to NMED for a discharge permit because it was held out as a viable alternative to having NMED press TCEQ to impose and enforce New Mexico *groundwater* standards as *surface water* effluent limitations in TPDES Permit No. 4038.
17. Based on mistaken information and an incorrect understanding that a discharge permit from NMED was required, on October 17, 2012, WCS filed a notice of intent to discharge with NMED and subsequently filed its application for a discharge permit on July 12, 2013.<sup>5</sup>
18. NMED received public comment on an earlier draft permit in November 2015.
19. From October 17, 2016 to February 1, 2017, after WCS questioned NMED's authority to require a discharge permit, WCS and NMED exchanged technical information and data related to the permitted stormwater that could potentially cross into New Mexico. During

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<sup>4</sup> Rather than accept the dry results from the one location where NMED agreed the well should be placed, NMED instead apparently rushed to amend the draft to include provisions for three additional new monitoring wells and then, despite knowing of WCS's request for a stay herein, forged ahead to publish public notice of the amended draft without first sharing it with WCS (as it had previously done consistently over the course of years of proceedings on WCS's now withdrawn permit application). The new draft permit contains errors and inconsistent provisions, which could have been identified and resolved had NMED followed its usual practice of sharing the draft permit with WCS prior to its publication.

<sup>5</sup> Given WCS's discharge permit application was in process for nearly four years, the haste with which NMED issued public notice of a new, more onerous, draft permit than what had previously been vetted with WCS is perplexing, to say the least, particularly after WCS expressly signaled it was requesting a stay of proceedings in its appeal petition.

this time, both parties simultaneously negotiated potential terms of a discharge permit and discussed whether or not a discharge permit was required in good faith.

20. For its part, WCS recently shared with NMED numerous technical studies spanning decades, legal positions, and specific data, all in an effort to convince NMED that a discharge permit is not required or appropriate.
21. By letter dated February 1, 2017, WCS withdrew its application for a discharge permit. *See* Petition, Exhibit 1.
22. As of WCS's February 1, 2017 letter withdrawing its permit application, NMED had not taken action to either deny the application or issue a permit.
23. By letter dated February 9, 2017, NMED declined to accept WCS's withdrawal of its application for a groundwater discharge permit, disagreed with WCS's positions that no permit is necessary, and set forth its conclusion, after considering the further information presented by WCS, that a groundwater discharge permit is required for discharges of stormwater from Outfall 002. *See* Petition, Exhibit 2.
24. On February 22, 2017, WCS filed its Petition for Review and Notice of Appeal with the WQCC from NMED's purported denial of WCS's withdrawal, and from NMED's rejection of WCS's positions and renewed determination that a groundwater discharge permit is required; WCS included in its Petition a request that the Commission stay further permitting proceedings by NMED during the pendency of the appeal.
25. On March 3, 2017, NMED issued public notice of a new draft DP-1817, which includes erroneous factual information, substantially different conditions and inconsistent limitation standards from the previous draft.

## LEGAL STANDARD

Neither the Water Quality Act, NMSA 1978, § 74-6-1, *et seq.*, nor the regulations governing WQCC adjudicatory procedures, 20.1.3 NMAC, specifically address stays of agency action pending WQCC review pursuant to NMSA 1978, § 75-6-5(O) and 20.6.2.3112 NMAC. While the WQCC regulations do provide the Commission the discretionary authority to issue a stay, 20.6.2.3112.A NMAC, the regulations do not set forth in what form a stay request is to be made, nor do they spell out the requirements or standards necessary to obtain a stay.

The standards used by appellate courts in determining whether to grant a stay from an order or a regulation adopted by an administrative agency may be instructive in this instance in order to guide the Commission's considerations of requests for stays. There are four conditions that guide an appellate court in determining whether its discretion should be exercised in granting a stay from an order or regulation adopted by an administrative agency: (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to the applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest. *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708, 710 1986 (adopting the test articulated in *Associated Securities Corp. v. Securities & Exchange Commission*, 283 F.2d 773 (10th Cir.1960)). The stay considerations articulated by appellate courts echo the standard required for injunctive relief under Rule 1-066 of the New Mexico Rules of Civil Procedure and, in accordance with 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 regulatory provision that governs a particular action.

As demonstrated below, the Commission should grant WCS's requested stay because: (1) there is a likelihood that WCS will prevail on the merits of its Petition; (2) WCS will be irreparably harmed unless the stay is granted; (3) no substantial harm will result to other interested persons; and (4) no harm will to the public interest will result if a stay is granted. Accordingly the Commission should enter a stay of all NMED proceedings related to DP 1817 pending the Commission's final decision on WCS's Petition.

## **ARGUMENT**

### **A. WCS Is Likely to Prevail on the Merits of its Petition**

WCS's Petition for Review and Notice of Appeal requests that the Commission require NMED to accept WCS's lawful withdrawal of its discharge permit application and find NMED's determination that a discharge permit is required, as articulated in NMED's letter of February 9, 2017, to be contrary to law, arbitrary, capricious, and/or against the weight of substantial evidence.

#### **i. WCS is Likely to Prevail on Its Request for the Commission to Require NMED to Acknowledge WCS's Letter of Withdrawal**

As stated in WCS's Petition, NMED lacks any basis or authority to reject or deny WCS's withdrawal of its discharge permit application. In NMED's February 7, 2017 letter, the agency defends its decision to deny WCS's withdrawal based on a supposed absence of specific statutory or regulatory authority requiring it to accept the withdrawal. NMED is correct that there are no specific statutory or regulatory provisions that explicitly state the agency must accept an applicant's withdrawal of an application for a discharge permit; however, the Commission's regulations clearly contemplate an applicant's right to withdraw an application. Specifically, 20.6.2.3114.B NMAC 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.”

NMED’s reliance on the absence of a regulation expressly compelling it to *accept* an applicant’s withdrawal is misplaced. The issue is whether NMED has authority to *reject* a party’s withdrawal opportunity, in the absence of a regulation providing that authority, where an applicant’s opportunity to withdraw an application is clearly contemplated by 20.6.2.3114 NMAC. NMED has no such authority. It may not forge ahead and process a withdrawn application, thereby holding an unwilling party hostage to proceedings on an application that the party has withdrawn. It would make no sense whatsoever for the Commission to interpret supposed regulatory silence—which NMED incorrectly asserts to be the case, ignoring 20.6.2.3114.B NMAC—as affording NMED the power to proceed on a withdrawn application, against one’s wishes. Its jurisdiction to do so plainly has been divested by the withdrawal, and any further proceedings on a withdrawn application would be without authority, i.e. agency action *ultra vires*.

Moreover, the position of WCS, and the very basis for its appeal, is that NMED lacks the jurisdiction to expect WCS to obtain a discharge permit. Even though NMED may disagree with that position for various reasons it will attempt to advance to the Commission,<sup>6</sup> its remedy at this

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<sup>6</sup> In responding to this motion and WCS’s Petition, NMED likely will argue that WCS previously agreed to pursue a discharge permit from New Mexico for discharges from Outfall 002, and that it did so to avoid having NMED urge that its groundwater standards comprise part of the effluent limitations in TPDES 4038 issued by TCEQ. Although language to that effect is part of a fairly convoluted documentary history associated with WCS’s facility and the sometimes strained relations between NMED and TCEQ, the argument would be a complete red herring. The sources of NMED’s authority to administer New Mexico’s discharge permit program, as well as the contours of that authority, are 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

juncture is not to move ahead on a withdrawn application. Rather, its remedy is to respond to WCS's appeal and attempt to make its case to the Commission that NMED has jurisdiction to require a permit for an already regulated stormwater discharge that occurs outside of New Mexico. Moving ahead on WCS's withdrawn permit application—particularly after knowing of WCS's appeal and request for stay, as NMED has begun to do here by publishing a brand new public notice—is at best an attempt to undermine WCS's appeal; at worst, it may be a ploy to affirmatively rally public opposition to WCS's lawful and fully regulated activity, for whatever value NMED thinks that may have in attempting to unfairly prejudice the Commission and any other reviewing authority against WCS.

Finally, NMED has regulatory enforcement tools available to compel a party to obtain a permit, and to compel compliance with a permit once issued. The power to reject an applicant's withdrawal of its permit application before any permit is issued, however, is not one of them. If a permit had been issued to WCS and then WCS attempted to withdraw the permit, as opposed to withdrawing an application that was merely pending, that might present a different question for the Commission. Here, however, NMED has not issued a discharge permit for WCS and, as evidenced by its most recent public notice regarding the newly reconstituted draft discharge permit, is not close to issuing it. For NMED to deny the withdrawal of a discharge permit

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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 expanded jurisdiction upon an agency that does not otherwise exist. By the same token, where an agreement derives from mistaken understandings as to the parties' rights and responsibilities, as WCS submits 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 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's response is that NMED did so at its own peril. 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 applying *groundwater* standards to *surface* discharges, if it can, at such time in the future as TPDES comes up for renewal.

application, and solely justify its refusal to accept the withdrawal based on a lack of statutory or regulatory provision that compels it to accept a withdrawal, is contrary to law as agency action *ultra vires*, and is an arbitrary and capricious decision.

**ii. WCS is Likely to Prevail on Its Request for the Commission to Conclude that a Discharge Permit is Not Required**

WCS will successfully demonstrate that NMED does not have the authority or jurisdiction to require WCS to obtain a groundwater discharge permit. As stated in WCS's Petition, all stormwater discharges from WCS's facilities are located in Texas, beyond the border of New Mexico. WCS has obtained all of the required permits from the State of Texas for its facilities, including two TPDES permits. TPDES Permit 4038 specifically regulates discharges from Outfall 002. Discharges from this outfall are all in the form of non-contact stormwater. While stormwater from Outfall 002 in Texas may subsequently cross into New Mexico, this stormwater is already regulated stormwater that is compliant with TPDES Permit 4038. Moreover, stormwater from Outfall 002 only has the possibility during large storm events of crossing the border; if and when it does, it has the status of surface water that, in legal terms, is no different from any surface water that may and does pass from one state into another. There simply is no precedent for the Commission to assert that stormwater passing into New Mexico serves as a basis to afford NMED 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. The Commission should not create such a precedent here, where it is completely unnecessary and would be expensive and problematic to administer.

Moreover, the administrative record will reveal that WCS has provided NMED with ample technical data and evidence demonstrating that water discharged from Outfall 002 that could

travel into New Mexico in rare large storm events is incapable of reaching groundwater. Groundwater is defined as “interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply.” 20.6.2.7.Z NMAC. WCS has confirmed, by drilling a well in the stormwater’s projected path, that there is no groundwater in the path of the stormwater discharges from Outfall 002. The well results demonstrated an absence of groundwater in the area and confirmed that there is not a chance that any stormwater from Outfall 002 is capable of entering a well in sufficient amounts to be utilized as a water supply. These findings as well as decades of additional technical data showing the lack of regulated groundwater in this area disqualify the regulated stormwater from being subject to a groundwater discharge permit. WCS therefore expects to demonstrate that NMED’s determination that a groundwater discharge permit is required is arbitrary and capricious and not supported by substantial evidence in the record.

As set forth above, WCS has demonstrated that it is likely to prevail on the merits of its Petition before the Commission thereby warranting a stay in agency proceedings regarding draft DP 1817.

**B. WCS Will Suffer Irreparable Harm in the Absence of a Stay**

There is no question that WCS is already suffering, and will in the future suffer, irreparable harm if this Commission does not stay NMED’s further processing of WCS’s withdrawn permit application. It is already suffering irreparable harm by NMED’s issuance of a public notice on March 3, 2017, and issuing public notice on a permit draft that contains erroneous factual information and more onerous permit conditions than have surfaced since WCS mistakenly applied for the permit almost four years ago. The irreparable harm WCS will suffer without a stay is readily apparent.

First, WCS now is required to divide its attention between prosecuting this appeal, and developing its comments on the surprise draft permit that NMED noticed on March 3, 2017. Should this appeal be successful and a permit is not justified, then all the time and money spent by WCS, NMED and any members of the public who provide comments on the terms of the permit will be wasted. Second, part of the development of comments WCS will have to give immediate attention to, in the absence of a stay, includes expensive technical and legal input on, for example, whether NMED's proposal to require three new monitoring wells and then monitor for any exceedances of numeric groundwater standards, some of which should be supplanted by elevated constituent levels pursuant to this Commission's 3103 standards is appropriate. Third, the issuance of public notice, that likely will turn out to have been unnecessary, produces irreparable harm by exacerbating 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. Finally, although the dollar amount of some of the damages described in this paragraph may be determinable, the sovereign immunity enjoyed by the State would block recovery of them; further, no monetary value could be placed on some of the harms, such as those resulting from NMED's unwarranted incitement of additional comments from the public.

Additionally, it is not just the resources of WCS that stand to be wasted if the Commission denies a stay. NMED itself, in times of a limited tax base, as well as members of the public and even this Commission are placed at a considerable risk of wasting time, resources and money by NMED's proposal to run in parallel a permitting process and WCS's appeal challenging whether the permitting process is necessary in the first instance. There simply is no urgency for the Commission to allow that to happen, and any attempt by NMED to convey a sense of urgency in

its response will lack credibility inasmuch as the permitting process already had lasted almost four years when WCS withdrew its permit application.<sup>7</sup>

**C. NMED and Other Persons Interested in This Matter Will Not Suffer Substantial Harm if a Stay is Granted**

The New Mexico Environment Department, in earlier stay-related briefing concerning an unrelated proceeding, advanced the argument that NMED and a permit applicant technically are not “Interested Persons” in permit review proceedings such as that invoked by WCS’s appeal herein, as terms are defined in the Commission’s regulations. *See* New Mexico Environment Department’s Response to Motion to Stay (September 8, 2015) (citing 20.1.3.16.A(2)(b) NMAC and 20.6.2.3108.G NMAC), filed in *In the Matter of a Petition Appealing the Secretary of the Environment’s Denial of a Hearing on DP-1793*, WQCC No. 15-07(A), Communities for Clean Water, Petitioner. At least for purpose of this motion, WCS is not inclined to agree with that proposition. Accordingly, WCS explains here that NMED will not suffer substantial harm if the stay requested by WCS in this motion is granted. Likewise, general members of the public who offered comment in November 2015 and have expressed an interest in this matter will not suffer substantial harm if the stay is granted. If WCS’s appeal is ultimately unsuccessful, public commenters from the previous notice period and the current notice period will still have a full and complete opportunity to exercise their rights to comment and otherwise be part of the record for this matter. Commenting on a permit that could potentially be overturned, is tantamount to

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<sup>7</sup> Some of the irreparable harms WCS describes in this motion conceivably still could be minimized if NMED were to extend the deadline for public comment until a reasonable period of time after WCS exhausts its appeal rights. At the time of filing this motion, counsel for NMED agreed to confer with its client about whether it would do that, and the parties and Commission’s counsel are scheduled to have a call on March 15, 2017 to determine the outcome of that inquiry. Even if NMED were to agree to extend its comment period for such a duration (which seems unlikely in light of its rush to publish a newly strengthened draft permit), WCS still stands to irreparably suffer some of the harms. Accordingly, a stay by the Commission still would be justified.

providing the public incorrect or misleading information; the public is being told there is a potential risk calling for a need to permit, when this Commission may determine to the contrary.

Clearly NMED, which has been processing the now withdrawn application for years, will not be substantially harmed by a stay. If anything, a stay will likely avoid substantial harm to NMED and its limited resources. Currently NMED is already taxing its resources by forging ahead to process a permit despite the application for it having been withdrawn by WCS. Should WCS prevail in the merits of its Petition, as is likely, NMED's currently ongoing efforts to process the withdrawn permit application will have been wasted. NMED's recent invitation for public comment encourages and will foster more work for the agency should a stay not be granted. If the agency's proceedings are stayed pending the Commission's determination of WCS's Petition, NMED can preserve the time and expenses of processing the application until the Commission issues a final determination in late spring or early summer. To proceed with processing the application pending the outcome of WCS's Petition is premature and is a waste of NMED's time and resources. Even in the unlikely event NMED prevails in this appeal, the temporary nature of the stay will be only a limited interruption that could not even remotely be viewed as causing NMED substantial harm.

Almost four years have elapsed since WCS initially submitted its application for a groundwater discharge permit to NMED in July of 2013. The agency has not suffered harm in the intervening years as a result of not issuing a discharge permit to WCS, so the agency clearly would not be substantially harmed if were required to stay its processing of WCS's application a few more months until the Commission reaches a determination on WCS's Petition.

Likewise, the interested public will not suffer substantial harm if a stay is granted. First, just as in the case of NMED, if anything, a stay would avoid harm to interested members of the

public by saving them wasted time and effort on public comments. Second, the public has already had opportunities to provide input into the protracted permit proceedings, and it will continue to have opportunities if the Commission were to deny WCS's appeal, as evidenced by the invitation for public comment on the newly issued more onerous permit draft that NMED developed and made the subject of its March 3, 2017 public notice. Third, even in the event of a large storm event that causes a stormwater discharge in Texas to enter New Mexico, there would be no substantial harm to any interested member of the public, because the administrative record herein amply reveals that no groundwater in New Mexico is placed in any jeopardy by WCS's fully permitted discharges of non-contact water from Outfall 002.

**D. The Public Interest Will Not be Harmed if a Stay is Granted**

The public interest is not harmed by granting a stay. For the entire time WCS has had its application pending, WCS has operated without a groundwater discharge permit without inflicting harm on the public interest, as demonstrated in the record by the fact that the recent well WCS had an independent third party drill came up with no groundwater through the extent of its column. To stay the agency's proceedings related to the application for a discharge permit until the Commission reaches a determination on WCS's Petition, i.e., for three to four months, will hardly result in harm to the public interest.

**CONCLUSION**

WHEREFORE, the Commission should grant WCS's requested stay because WCS has successfully demonstrated that: (1) there is a likelihood that WCS will prevail on the merits of its Petition; (2) WCS will be irreparably harmed unless the stay is granted; (3) no

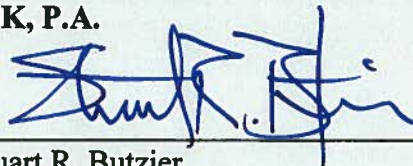


substantial harm will result to other interested persons; and (4) no harm will to the public interest will result if a stay is granted.

Respectfully Submitted,

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

By: \_\_\_\_\_



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**CERTIFICATE OF SERVICE**

I hereby certify that Waste Control Specialists LLC's Motion to Stay NMED's Proceedings on Its Withdrawn Discharge Permit Application was hand delivered to:

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And emailed and mailed to all those listed below on March 13, 2017:

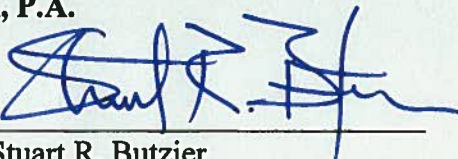
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**MODRALL, SPERLING, ROEHL, HARRIS  
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