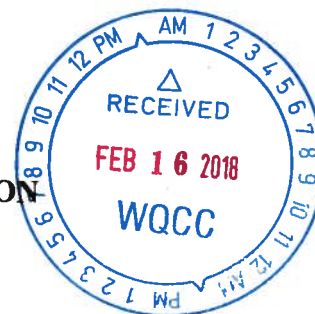


**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



**IN THE MATTER OF PROPOSED
AMENDMENTS TO GROUND AND
SURFACE WATER PROTECTION
REGULATIONS, 20.6.2 NMAC**

No. WQCC 17-03 (R)

**LOS ALAMOS NATIONAL SECURITY, LLC'S
CLOSING LEGAL ARGUMENT AND PROPOSED STATEMENT OF REASONS**

Los Alamos National Security, LLC ("LANS") hereby submits its proposed Statement of Reasons and Closing Legal Argument pursuant to 20.1.6.304 NMAC and the Procedural Order filed May 31, 2017, as amended by the Hearing Officer's Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline, filed December 11, 2017.

I. INTRODUCTION

This matter is before the Water Quality Control Commission ("WQCC" or "the Commission") upon a petition filed by the Ground Water Quality Bureau of the New Mexico Environment Department ("NMED" or "the Department") proposing amendments to the Ground and Surface Water Protection Regulations, 20.6.2 NMAC ("the Department's Petition"), as amended through November 9, 2017.¹ See Pleading Log No. 1, The New Mexico Environment Department's Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) and Request for Hearing; Pleading Log No. 81, New Mexico Environment Department's Notice of Intent to Present Rebuttal Technical Testimony; and Pleading Log No. 89, Amended Notice of Withdrawal of the New Mexico Environment Department's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC.

¹ The Department's petition was amended multiple times prior to the hearing. Unless otherwise noted, the "Department's Petition" refers to the version the Department submitted at hearing as Exhibit 36 available at Pleading Log No. 89.

The Department's initial Petition was filed with the WQCC on May 1, 2017. Pleading Log No. 1. The WQCC set the matter for hearing on November 14, 2017, and designated Erin Anderson as the Commission's Hearing Officer for that hearing. *See* Pleading Log No. 4, Order for Hearing and Appointment of Hearing Officer.

On May 31, 2017, Hearing Officer Anderson issued a Procedural Order and Scheduling Order directing non-petitioning parties to file (1) "a statement indicating their support of, opposition to, or no position taken on the amendments proposed by the Department;" and (2) "any proposed amendments to 20.6.2 NMAC not contained in NMED's Petition ... accompanied by a statement of reasons for the proposed regulatory change." Pleading Log No. 10, Procedural Order. Pursuant to that Order, LANS submitted a statement of its position on the amendments proposed by the Department and filed proposed changes to the regulations that were not contained in the Department's petition with a statement of reasons for its proposed changes. *See* Pleading Log No. 28, Los Alamos National Security, LLC's Statement of Position on the Amendments Proposed by the New Mexico Environment Department, as amended by Pleading Log No. 34, Los Alamos National Security, LLC's Corrected Statement of Position on the Amendments Proposed by the New Mexico Environment Department (collectively LANS' "Statement of Position"); Pleading Log No. 29, Los Alamos National Security, LLC's Proposed Changes to Regulations and Statement of Basis, as amended by Pleading Log No. 35, Los Alamos National Security, LLC's Corrected Proposed Changes to Regulations and Statement of Basis (Collectively LANS' "Proposed Changes").

LANS submitted technical direct and rebuttal testimony of Robert S. Beers in support of its position on the amendments proposed by the Department and the additional amendments proposed by LANS. *See* Pleading Log No. 52, Los Alamos National Security, LLC's Notice of

Intent to Present Technical Testimony; Pleading Log No. 80, Rebuttal Testimony of Robert S. Beers, Los Alamos National Security, LLC. LANS also called Mr. Beers as a witness during the hearing to testify in support of LANS' proposal, rebut testimony presented by the Department and other parties, and to answer questions posed by the Commission. *See generally* Tr. Vol 2 at 456-459; Vol 3 at 546-548, 551-565, 685-688. Mr. Beers is an environmental professional with LANS, and provides advice, analysis, and assistance in the preparation of LANL's ground water discharge permit applications, negotiation of permit conditions, and compliance with monitoring and reporting conditions in the permits. He currently manages four of LANL's ground water discharge permits and one pending permit application. Pleading Log No. 52 at 1.

In addition to LANS, fourteen other parties participated in this matter. *See* Pleading Log Nos. 18, 19, 21, 23, 24, 25, 36, 27, 30, 32 (statements of position and proposed changes to the regulations); 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 71, 72 (direct technical testimony); 74, 75, 76, 77, 78, 81, 82, 83, 84, 85 (rebuttal testimony). *See also* Tr. Vols. 1, 2, 3, and 4.

LANS submits this closing legal argument and statement of reasons to explain LANS' final proposed amendments to the Ground and Surface Water Protection Regulations, 20.6.2 NMAC, as revised after review of the record, the hearing transcript, and ongoing discussions with the Department. This submission first addresses LANS' final position on the Department's proposed amendments and then explains LANS' additional proposed amendments not included in the Department's petition. LANS also includes (1) LANS' final proposed amendments to 20.6.2 NMAC, attached as Exhibit A and (2) LANS' proposed statement of reasons, attached as Exhibit B. For the reasons stated herein, the Commission should accept LANS' proposed final changes to the Regulations and statement of reasons and amend the Ground and Surface Water Protection Regulations accordingly.

II. ARGUMENT AND PROPOSED STATEMENT OF REASONS

LANS submits the following in support of its proposed amendments to 20.6.2 NMAC.

A. LANS' POSITION ON THE DEPARTMENT'S PROPOSED AMENDMENTS TO 20.6.2 NMAC

1. Proposed Amendments to which LANS did not provide substantive comments

LANS takes no position on the following amendments proposed by the Department:

- 20.6.2.1201 NMAC (Notice of Intent to Discharge);
- 20.6.2.1210 NMAC (Variance Petitions);
- 20.6.2.3103 NMAC (proposal to add conditional requirement to test for both filtered and nonfiltered portions of inorganic compound; proposal to delete the introductory narrative language in subsection A; proposal to add single-sentence narrative standard for non-aqueous phase liquids in subsection (A)(3); and proposal to add language regarding amended numeric standards for particular contaminants);
- 20.6.2.3106.C NMAC (proposal to require that request for modification include all elements of discharge plan);
- 20.6.2.3108.A NMAC (proposal to change time for the Department to notify applicant of deficiencies from 15 days to 30 days);
- 20.6.2.3108.I NMAC (proposal to add email address to the list of provided contact information; proposal to add "draft permit and fact sheet or the notice of intent to deny" as information available to interested persons);
- 20.6.2.3108.J and K NMAC (proposal to delete "proposed approval or disapproval of an application..." and replace with "draft permit or notice of intent to deny");
- 20.6.2.4103 NMAC (abatement standards and requirements);
- 20.6.2.4104 NMAC (abatement plan required);
- 20.6.2.4105 NMAC (exemptions from abatement plan requirements);
- 20.6.2.4106 NMAC (abatement plan proposal);
- 20.6.2.4108 NMAC (public notice and participation);
- 20.6.2.4109 NMAC (Secretary approval or notice of deficiency of submittals);

- 20.6.2.4114 NMAC (appeals from Secretary's decisions);
- 20.6.2.5004 NMAC (prohibited underground injection control activities and wells);
- 20.6.2.5005 NMAC (addition of subsection A(17) regarding well plugging plans);
- 20.6.2.5006 NMAC (discharge permits for Class V injection wells).²

LANS generally supports the Department's non-substantive proposed amendments (i.e. changes to section identification, formatting, numbering, and headings) and the Department's proposed amendments to:

- 20.6.2.7.WW NMAC (proposal to restyle as 20.6.2.7(T)(2); delete narrative definition leaving only the list of pollutants; add several new pollutants to the list of toxic pollutants);
- 20.6.2.3103 NMAC (proposal to conform numerical standards to MCLs; proposal to move narrative standard for Toxic Pollutants from 20.6.2.7(WW) to 20.6.2.3103.A(2) NMAC);
- 20.6.2.3105.A NMAC (proposal to clarify that effluent treated or blended to achieve standards is not exempt);
- 20.6.2.3107.A(11) NMAC (proposal to delete "or the presence of a toxic pollutant");
- 20.6.2.3108.B(2) NMAC (proposal to add electronic mail to forms of written notification);
- 20.6.2.3109.C(2) NMAC (proposal to delete "or the presence of any toxic pollutant");
- 20.6.2.3109.E and (F) NMAC (proposal to delete "or a toxic pollutant as defined in 20.6.2.7 NMAC is present");
- 20.6.2.3109.E(4) NMAC (proposal to require secretary, if discharge permit is terminated, to notify permittee in writing of action and reasons action was taken);
- 20.6.2.3112.B NMAC (appeal of Secretary's decision).

Accordingly, these proposed amendments will not be further addressed here.

² The citation to 19.25.5 NMAC in NMED's proposed amendments to 20.6.2.5006 is incorrect; the correct citation to the underground storage and recovery regulations is 19.25.8 NMAC.

Finally, because the Department withdrew its proposed amendments to 20.6.2.3114 NMAC (Fees) and its proposed definition of discharge permit amendment and related proposed changes (i.e. proposed amendments to 20.6.2.7.D(4) and (5) NMAC; 20.6.2.3106.H NMAC; 20.6.2.3109.B, D, and I NMAC; 20.6.2.3112.A NMAC; 20.6.2.3114.E NMAC, LANS does not address its position on those proposals here. *See* Pleading Log 89, Amended Notice of Withdrawal filed November 9, 2017.

2. LANS' position on Department's proposed amendments to conform the regulatory exemptions to the New Mexico Water Quality Act

The current 20.6.2.3105 NMAC exempts certain discharges from the groundwater permit requirements in 20.6.2.3104 NMAC and 20.6.2.3106 NMAC. The Department's initial petition proposed adding a new exemption, 20.6.2.3105.O NMAC, for facilities or activities subject to the authority of the Environmental Improvement Board pursuant to the Hazardous Waste Act, Ground Water Protection Act, Solid Waste Act, or federal Resource Conservation and Recovery Act (RCRA), from the requirement of a discharge permit to minimize duplication of regulatory oversight and conform the regulations to the exemptions stated in the Water Quality Act, NMSA 1978, Section 74-6-12(B) (1999). *See* Pleading Index No. 1 at Attachment 3, ¶ 9.

LANS expressed general support of the Department's goal to conform the regulations to the exemptions provided for by law, but suggested that it would be better accomplished by moving the statutory exemptions to a new section, 20.6.2.10 NMAC, and deleting the current 20.6.2.3105.J and M NMAC. LANS also proposed revising the Department's proposed new exemption at 20.6.2.3105.O NMAC to (1) clarify that the exemptions for hazardous waste and solid waste extend to exempt activities and conditions already subject to federal authority under the federal Solid Waste Disposal Act and (2) add language exempting activities or conditions subject to the

federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). LANS position on each of these proposals is discussed in turn below.

a. Proposal to move exemptions to a new 20.6.2.10 NMAC and delete 20.6.2.3105.J NMAC

LANS proposed a new 20.6.2.10 NMAC to provide exemptions from the WQCC regulations for activities or conditions that are subject to the authority of the Environmental Improvement Board under the Hazardous Waste Act, the Ground Water Protection Act, or the Solid Waste Act, or the authority of the Oil Conservation Commission under the Oil and Gas Act. *See* Pleading Log No. 29 at ¶ 2. As LANS explained in its corrected proposed amendments and statement of reasons, Pleading Log No. 35 at 1, and the written testimony of Mr. Beers, Pleading Log No. 52 at 5:5-15, the Water Quality Act, specifically NMSA 1978, Section 74-6-12 (1999), expressly exempts certain activities and conditions subject to the authority of the Environmental Improvement Board, or subject to the authority of the Oil Conservation Commission from the Commission’s authority under the Water Quality Act. Thus, the proposed 20.6.2.10 NMAC, which incorporates these exemptions into the regulations, is necessary to bring the regulations into conformity with the Water Quality Act. Pleading Log No. 52 at 5:5-15. *Id.* LANS additionally explained that adoption of this proposal would render the current permit exemptions in 20.6.2.3105.J NMAC redundant, and therefore, unnecessary. Mr. Beers, therefore, requested that they be deleted. Pleading Log No. 52 at 5:17-6:2. *See also* Pleading Log No. 35 at 1-2.

The United States Department of Defense (“DoD”), through the corrected technical testimony of Scott Clark, similarly expressed the necessity of amending the regulations pertaining to exemptions to conform to statute, and similarly proposed adding a provision identical to that proposed by LANS. *See* Pleading Log No. 66 at 4:8-18. *See also* Pleading Log No. 76 at 2:20-3:6

(stating as part of rebuttal testimony that the DoD proposed 20.6.2.10 NMAC is identical to the proposal submitted by LANS).

William Olson submitted rebuttal testimony addressing this section, stating the concept was reasonable, but the language in the proposal did not conform to the language of the Water Quality Act in that “it omits portions of the statutory language.” *See* Pleading Log No. 85 at 2-3. Mr. Olson, therefore, proposed an amendment to 20.6.2.10 NMAC that (1) deleted “except as provided in Part 4” from LANS and the DoD proposal, and (2) added language at the end of subsection A stating “except to abate water pollution or to control the disposal or use of septage and sludge.” The Department amended its petition to include a new Section 20.6.2.10 adopting the language proposed by Mr. Olson. *See* Pleading Log No. 81 at 24.³

At hearing, Ms. Hunter testified that the Department had submitted an amended petition moving the exemptions previously provided for in Section 20.6.2.3105 for activities regulated under the Hazardous Waste Act, the Groundwater Protection And, and the Solid Waste Act into new Section 20.6.2.10 in response to the proposals submitted by LANS, the DoD, and Mr. Olson. Tr. Vol. 3 at 594:14-20, 595:16-25. The proposal adopted the amended language proposed by Mr. Olson. The Department also agreed with LANS’ proposal to delete the current discharge permit exemptions for leachate from solid waste facilities, 20.6.2.3105.J NMAC. *See* Pleading Log 87; Tr. Vol. 3 at 601:6-8, 686:7-687:2 (Ms. Hunter’s testimony that the exemption for leachate from solid waste facilities in 20.6.2.3105.J NMAC was no longer necessary). Mr. Olson also testified that subsection J was not necessary. Tr. Vol. 3 at 708:1-4.

LANS does not object to the Department’s amended language for 20.6.2.10 NMAC, which more closely tracks the Water Quality Act. *See* Tr. Vol 3 at 685:20-686:6. Accordingly, the

³ The Department’s rebuttal testimony does not list page numbers for exhibits. LANS provides the PDF page number for ease of reference.

Commission should adopt a new 20.6.2.10 NMAC with the language in the Department's revised petition. *See* Exh. A, ¶ 2. Additionally, the Commission should delete the current 20.6.2.3105.J NMAC.⁴

b. Proposal to exempt activities or conditions subject to RCRA and CERCLA

As stated above, the Department initially proposed a new exemption at 20.6.2.3105.O NMAC, which exempted discharges from facilities or conditions regulated under RCRA. *See* Pleading Log No. 1 at Attachment 2 pg. 24:54-56 (“or regulated under the Resource Conservation and Recovery Act, except to abate water pollution or to control the disposal or use of septage and sludge”). LANS proposed revising the exemption to instead exclude “Any activity or condition regulated under the federal Solid Waste Disposal Act, 42 U.S.C. §§6901 to 6992k, or any removal or remedial action under the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 to 9675” for purposes of clarifying that the exemptions for hazardous waste and solid waste extend to activities and conditions already subject to federal authority under the federal Solid Waste Disposal Act, which includes RCRA,⁵ and to add an exemption for activities or conditions subject to CERCLA to avoid duplication and acknowledge that federal law preempts the necessity to obtain state permits for removal or remedial actions. Pleading Log No. 35 at 2.

The written testimony of Mr. Beers in support of this proposal explains that LANS' revised language clarifies that activities regulated under the federal Solid Waste Disposal Act and activities regulated under CERCLA are exempt from the discharge permitting requirements because they

⁴ The Department's amended petition also includes EMNRD's proposed language in a revised subsection M relating to an exemption for discharges from activities regulated by that department under the Geothermal Resources Development Act. LANS' proposal to delete subsection M does not extend to EMNRD's GRDA proposal.

⁵ RCRA, Public Law 94-580 (October 21, 1976), is a 1976 amendment to the federal Solid Waste Disposal Act that added federal regulation of hazardous waste, solid waste, and underground storage tanks.

are already subject to federal authority. Pleading Log No. 52 at 3-7. With respect to CERCLA, Mr. Beers also pointed out that Section 121(e) of CERCLA (42 U.S.C. § 9621(e)(1)) provides that “[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with [Section 121],” demonstrating that duplicative regulation was not intended. *Id.* at 6:10-14.

i. The proposed exemption for CERCLA

The Department, through rebuttal testimony of Ms. Hunter, objected to LANS’ proposal to add an exemption for CERLA. Pleading Log No. 81, Exh. 26 (Hunter Rebuttal).

LANS, in an effort to reach a compromise, agreed at hearing to withdraw its request to include an exemption for facilities and activities subject to CERLA, but maintained its proposal to exempt facilities and activities subject to RCRA. Tr. Vol. 3 at 688:3-8.

ii. The proposed exemption for RCRA

As noted above, RCRA establishes programs for the regulation of hazardous waste, solid waste, and underground storage tanks, and covers the same areas as the New Mexico Hazardous Waste Act, Solid Waste Act, and Groundwater Protection Act. Generally, New Mexico regulates these activities under delegation/program approval from EPA under RCRA. Regulations adopted by EPA are enforceable by EPA under the federal acts until New Mexico adopts them under state law. Thus, in some circumstances, there may be a delay in state regulation of hazardous waste, solid waste, and underground storage tanks. It is this gap that LANS seeks to address by its proposed exemption. It would be inconsistent with the exclusions in Section 74-6-12 to only exempt regulation of hazardous waste, solid waste, and underground storage tanks upon formal

adoption of these regulations by the Environmental Improvement Board. LANS believes that the better approach is to exempt these activities once regulation has been initiated under RCRA.

Ms. Hunter testified on cross examination that the Department's amended petition removed the proposed Section 20.6.2.3105.O NMAC in its entirety, including the proposed exemption for RCRA. Tr. Vol. 3 at 601:23-24. Ms. Hunter characterized LANS' proposal as different from, and arguably broader than, the language of the Water Quality Act. Tr. Vol. 3 at 596:11-14. Ms. Hunter supported the Department's position to not include that proposal, stating that "[t]he Water Quality Act sets forth the regulatory authority of the commission and the Department and sets the limits on that authority. The Department believes that it would be inappropriate to include limitations on such authority in the regulations that go beyond the scope of the Water Quality Act." *Id.* at 596:15-20.

On cross examination by counsel for LANS, Ms. Hunter testified that the Department did not intend to subject "facilities that had certain discharges subject to [federal] permits...under [RCRA] to state jurisdiction. Tr. Vol. 3 at 601:18-602:10.

Mr. Beers testified on behalf of LANS in favor of including an exemption for RCRA, stating that inclusion of the proposed exemption was necessary to ensure that the exemption sections are comprehensive. Tr. Vol. 3 at 687:20-688:2. Mr. Beers expressed concern that the Department's proposal leaves the potential for residual federal permitting under RCRA and thus, potentially, dual permitting, for the same activity. Tr. Vol. 3 at 688:3-8. Mr. Clark, on behalf of the DoD, also testified regarding the proposed exemption for RCRA. Mr. Clark, in favor of the exemption, stated that the regulations should go beyond just reiterating the statute to "provide more detail and consider the real-life scenario where the rules need not apply because of the direct oversight in other environmental programs." Tr. Vol. 3 at 697:25-698:4.

Mr. Olson testified in support of the Department's position stating that the Water Quality Act agreeing that the exemption for RCRA should not be included where there is no statutory exemption in the Water Quality Act for these activities. Tr. Vol. 3 at 706:21-707:7. Mr. Olson also agreed with the Department's testimony that some RCRA sites have operational discharge permits issued under Commission rules. *Id.* at 707:7-9. Mr. Olson further stated that the Commission "needs...to protect public interests which may or may not be aligned through the federal statutes."

LANS' testimony explains why activities that are already subject to federal authority under RCRA should be exempted under the Regulations. Moreover, the Department's argument in opposition, that exemptions must be limited to the express language of the Water Quality Act, is inconsistent with the existing exemptions in 20.6.2.3105 NMAC and creates the potential for dual regulation. As such, the Commission should reject the Department's position and instead adopt an exemption for "any activity or condition regulated under the federal Solid Waste Disposal Act, including the federal Resource Conservation and Recovery Act, 42 U.S.C. §§6901 to 6992k." *See* Exh. A, ¶ 4.

Proposed Statement of Reasons

1) The Commission adopts LANS' proposal, as revised, to add a new 20.6.2.10 NMAC exempting activities or conditions that are subject to the authority of the Environmental Improvement Board under the Hazardous Waste Act, the Ground Water Protection Act, or the Solid Waste Act, except to abate water pollution or to control the disposal or use of septage and sludge and activities and conditions subject to the authority of the Oil Conservation Commission under the Oil and Gas Act to conform the regulations to the Water Quality Act.

2) The Commission finds that this provision will exempt activities expressly excluded from the Commission's authority under the Water Quality Act, NMSA 1978, Section 74-6-12 (1999), and will conform the regulations to the statute.

3) The Commission finds that the proposed 20.6.2.10 NMAC includes activities currently exempted in 20.6.2.3105.J NMAC, making this subsection redundant, and therefore, unnecessary.

4) The Commission finds that deletion of the exemption in the current 20.6.2.3105.J NMAC will provide clarity and eliminate confusion likely to result from having redundant provisions in the regulations

5) The Commission, therefore, also adopts LANS' proposal to delete the current discharge permit exemptions for leachate from solid waste facilities, 20.6.2.3105.J NMAC.

6) The Commission adopts LANS' proposal to add a new subsection to 20.6.2.3105 exempting "any activity or condition regulated under the federal Solid Waste Disposal Act, including the federal Resource Conservation and Recovery Act, 42 U.S.C. §§6901 to 6992k."

7) The Commission agrees that federal law obviates the necessity to obtain discharge permits under the Water Quality Act for these activities and conditions regulated under the federal Solid Waste Disposal Act, and that providing for this exemption will avoid duplicative regulation.

8) The Commission does not agree with the Department that exemptions provided for in regulation cannot go beyond "what is covered in the limitations section of the Water Quality Act." The Commission notes that many of the exemptions listed in 20.6.2.3105 NMAC have no counterpart in the limitations section of the Act.

9) The Commission finds that the no party to this proceeding advanced substantive reasons for not including an exemption for activities subject to RCRA.

B. LANS PROPOSED AMENDMENTS TO 20.6.2 NMAC NOT INCLUDED IN THE DEPARTMENT'S PETITION

1. **LANS' proposal to include CAS numbers for each pollutant currently listed at 20.6.2.7.WW NMAC and 20.6.2.3.3103 NMAC and each pollutant proposed by the Department to be listed at 20.6.2.7.T(2) NMAC.**

LANS proposed to add the Chemical Abstract Service Registry Number ("CAS Number") for each pollutant currently listed at 20.6.2.7.WW NMAC and 20.6.2.3.3103 NMAC, and proposed by the Department to be listed at 20.6.2.7.T(2) NMAC in order to unambiguously identify the

pollutants listed as toxic pollutants and to ensure consistency throughout the ground and surface water regulations. *See* Exh. A, ¶¶ 1, 3, tables 1, 2.

In support of its proposal, LANS submitted written technical testimony of Mr. Beers. *See* Pleading Log No. 52 at 1:8-12. Mr. Beers explained that each substance in the CAS Registry (the most comprehensive collection of disclosed chemical substance information in the world) is assigned a “unique, unmistakable, and, universally recognized identifier” which thus provides an “unambiguous way to identify a chemical substance or molecular structure when there are many possible alternative systematic, generic, proprietary or trivial names for that substance.” *Id.* at 3:17-4:17. Mr. Beers further stated that “reference to the CAS number, as opposed to the generic name, provides an unambiguous way to identify a chemical substance or molecular structure when there are many possible alternative systematic, generic, proprietary or trivial names for that substance.” *Id.* Mr. Beers thus concluded that “using the CAS number will ensure for the Department, as well as the regulated community, that regulated contaminants are properly and consistently identified and regulated.” *Id.* Mr. Beers further concluded that “inclusion of the unique CAS Number for each contaminant identified in the regulations will serve to standardize references throughout the regulations,” providing the example that the Commission already identifies contaminants by CAS Number in the surface water standards in 20.6.4.900.J NMAC. *Id.*

The proposal to include CAS numbers was uncontested by other parties to this proceeding. *See* Tr. Vol. 2 at 458:23-25. The Department, through the Rebuttal testimony of Mr. McQuillan, expressed support for inclusion of this proposed amendment. *See* Pleading Log No. 81, Exh. 28 at 4:1-2 (McQuillan Rebuttal Testimony). No other party to the proceeding addressed this proposal in pre-filed direct or rebuttal testimony or during the hearing, cross-examined Mr. Beers’ written

or oral testimony in support of this proposal, or otherwise expressed opposition to this proposal. Finally, the Commission did not question Mr. Beers regarding this proposal or otherwise raise any issues or concerns.⁶

For these reasons, the Commission should adopt LANS' proposal and include the Chemical Abstract Service (CAS) numbers for each pollutant listed in 20.6.2.3103, 20.6.2.7.WW, and the Department's proposed 20.6.2.7.T(2) NMAC. See Exh. A, ¶¶ 1, 3, tables 1, 2.

Proposed Statement of Reasons

10) The Commission adopts LANS' proposal to include the Chemical Abstract Service (CAS) numbers for each contaminant currently listed in 20.6.2.3103 NMAC and every toxic pollutant listed in 20.6.2.7 NMAC.

11) Reference to the CAS number, as opposed to the generic name, provides an unambiguous way to identify a chemical substance or molecular structure when there are many possible alternative systematic, generic, proprietary or trivial names for that substance.

12) Inclusion of the CAS number for each contaminant identified in the regulations will ensure that contaminants are properly and consistently identified and regulated. The CAS database is regularly updated and considered the most comprehensive collection of disclosed chemical substance information in the world, and the assigned CAS Number provides a unique, unmistakable and universally recognized identifier for every known chemical substance.

13) Inclusion of the CAS number will also serve to standardize references throughout the regulations. For example, the Commission identifies contaminants by CAS number in Standards for Interstate and Intrastate Surface Waters (20.6.4.900.J NMAC).

14) The proposed amendment to include CAS numbers is uncontested by the other parties to the proceeding.

⁶ The only question related to this proposal was from Commissioner DeRose-Bamman, clarifying that the proposed amendment to include CAS numbers applied to the definition of toxic pollutant at 20.6.2.7, in addition to 20.6.2.3103. Tr. Vol 2 at 459:10-13.

2. LANS' proposal to reduce the time period stated in 20.6.2.3106.B NMAC for making a decision on whether a discharge permit is required.

LANS proposed to amend 20.6.2.3106.B NMAC to reduce the time period from 60 days to 30 days in which the Department must make a decision on whether a discharge permit is required. In support of this proposal, LANS submitted written testimony of Mr. Beers, stating that the current time period is unnecessarily long for what is generally a very straightforward process. Mr. Beers further stated that the shorter period will "allow entities proposing a discharge for which no permit is required to commence work more quickly" and, where a permit is required, providing notice more quickly will expedite the process by allowing entities to begin preparation of an application right away. Pleading Log No. 52 at 7:10-18 (Beers Direct).

The Department, through the rebuttal testimony from Ms. Hunter, stated that it did not oppose LANS' proposed change to 20.6.2.3106(B), but asked that the time period be reduced by only 15 days- from 60 to 45. In support of this request, Ms. Hunter testified that the Ground Water Quality Bureau "reviewed the 2017 record of data regarding the length of time that it takes staff to respond to Notice of Intent to Discharge; [and] nearly half receive a determination within 30 days and 80% receive a determination within 45 days." Pleading Log No. 81 Exh. 26 at 5:6-10 (Hunter Rebuttal). No other party submitted direct or rebuttal testimony addressing this proposal.

At hearing, Ms. Hunter testified that "the Department does not necessarily oppose the shortening of the time frame [provided in 20.6.2.3106(B)], but because this affects the Oil Conservation Division at the Energy Minerals and Natural Resources Department, we cannot agree to this change." Tr. Vol. 3 at 544:1-8.

In his direct testimony, Mr. Beers stated that the Department's average response time on the sixteen (16) Notices of Intent submitted by LANS to the Department over the last four years

was approximately 38 days. Based on that, Mr. Beers stated that LANS' would prefer the 30 day period, but was willing to agree to 45 days by way of compromise.⁷ No other party to the proceeding addressed this proposal during the hearing, crossed Mr. Beers' written or oral testimony in support of this proposal, or otherwise expressed opposition to this proposal. Finally, the Commission did not question Mr. Beers regarding this proposal or otherwise raise any issues or concerns. Accordingly, the Commission should adopt LANS proposal to amend 20.6.2.3016 NMAC. *See* Exh. A, ¶ 5.

Proposed Statement of Reasons

15) The Commission adopts LANS' proposal, as revised during the hearing, to amend 20.6.2.3106.B NMAC to reduce the time period in which the Department must make a decision on whether a discharge permit is required from 60 days to 45 days.

16) The proposed amendment to reduce the time period is uncontested by the other parties to this proceeding.

3. LANS' proposal to amend 20.6.2.3108.H NMAC: Public Notice and Participation.

LANS' proposed changes to 20.6.2.3108 NMAC are summarized below. Prior to the hearing, the Department and LANS engaged in discussions about LANS' proposed changes. The Department and LANS were able to reach agreement on several proposed changes. However, three proposals remain unresolved. These three proposals are discussed in more detail below.

⁷ Mr. Beers' testimony at hearing as reflected in the transcript appears to have created confusion as to the reduction that LANS was proposing. LANS clarifies here that it proposed reducing the time period to 30 days, but stated at hearing it was to accept the Department's proposal to reduce it by 15 days.

a. LANS' proposal to include additional information in draft permits in 20.6.2.3108.H(1) NMAC.

i. Overview

LANS initially proposed the following amendment to 20.6.2.3108.H(1) NMAC in its

Proposed Amendments:

H. Within 60 days after the department makes its administrative completeness determination and all required technical information is available, the department shall make available a ~~proposed approval or disapproval of the application for a discharge permit, modification or renewal, including conditions for approval proposed by the department~~ draft permit or the reasons for disapproval notice of intent to deny an application for a discharge permit, modification or renewal.

(1) The draft permit shall include all proposed effluent limitations or other conditions on the proposed discharge, and all proposed monitoring, recordkeeping and reporting requirements. The proposed effluent limitations or conditions on the proposed discharge, and proposed monitoring conditions shall apply only to those pollutants that the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any standard of 20.6.2.3103 NMAC.

LANS' pre-filed direct testimony discussed the technical reasons in support of including a reasonable potential analysis requirement in the regulations. *See generally* Pleading Log No. 52 at 9 (Beers Direct). The Department's direct testimony did not address this proposed change, and it was not addressed by any of the other parties. The Department did not expressly oppose LANS' proposed amendments incorporating a reasonable potential analysis, but did not include it and did not propose any alternative language.

ii. Support for Proposed Change

The objective of LANS' proposed changes to 20.6.2.3108.H(1) NMAC is to specify when conditions, including monitoring and reporting requirements, are necessary and must be included in permits to assure that water quality standards are protected and what those conditions must

address. LANS proposed that these conditions address contaminants that have a reasonable potential of being in the permitted effluent and could cause or contribute to an excursion above any standard of 20.6.2.3103 NMAC, including narrative standards. *See generally* Pleading Log No. 52 at 9 (Beers Direct). This approach is consistent with EPA's approach to regulating surface water discharges under the NPDES program.

As Mr. Beers testified, the concept of reasonable potential was developed by the EPA in the context of NPDES industrial outfall permits. *See* Tr. Vol. 3 at 554:19-23. EPA's regulations for NPDES permits, 40 CFR §122.44(d)(1)(i), state that "[l]imitations [in permits] must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." The regulations further state "[w]hen the permitting authority determines . . . that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant." 40 CFR 122.44(d)(1)(iii). LANS' proposal takes a similar approach to the ground water discharge permits subject to these regulations.

EPA's "reasonable potential" language derives from its implementation of CWA §301(b)(1)(C), which requires water quality-based effluent limits, "including those necessary to meet water quality standards . . . established pursuant to any State law or regulations." *See discussion* 54 Fed. Reg. 23868, 23873 (June 2, 1989). Additionally, CWA §402(a)(1) authorizes the Administrator to issue an NPDES permit "upon condition that such discharge will meet either (A) all applicable requirements . . . or (B) . . . such conditions as the Administrator determines are

necessary to carry out the provisions of this Chapter.” Section 402(a)(2) requires the Administrator to “prescribe conditions for such permits to assure compliance with the requirements of [402(a)(1)], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.” The federal Environmental Appeals Board explained that the “reasonable potential” language is a “reasonable interpretation of the word ‘necessary’ in [CWA] Section 301(b)(1)(C).” *In the Matter of: Miami-Dade Water and Sewer Authority Department*, NPDES Appeal No. 91-14 (July 27, 1992).

The Water Quality Act has similar language on the issuance of discharge permits. NMSA 1978, § 74-6-5(D) (2009) authorizes a constituent agency, after receiving an administratively complete application, to “either grant the permit, grant the permit subject to conditions or deny the permit.” The section further provides that “[t]he constituent agency has the burden of showing that each applicable condition *is reasonable and necessary to ensure compliance* with the Water Quality Act and applicable regulations, considering site-specific conditions.” (Emphasis added.) The Act requires the constituent agency to deny a permit application if “the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard.” Section 74-6-5(E)(3).

Thus, NMED is required to deny any permit for a discharge that would cause or contribute to an exceedance of the water quality standard. In the alternative, NMED could grant the permit subject to conditions, including effluent limitations, to assure that the discharge would not cause or contribute to an exceedance. Requiring limits for discharges that have a “reasonable potential” to cause or contribute to an exceedance is an appropriate way to assure that an exceedance does not occur. At some point, NMED must determine when conditions on discharges, including

effluent limitations, are “reasonable and necessary” to ensure compliance with the standards. The reasonable potential approach, which seems to work for EPA, is a good approach.

In LANS’ experience, even after submission of detailed process information and data showing the type and quantity of constituents within a proposed discharge, the Department nevertheless includes conditions in the permit and requires sampling and analysis for all contaminants listed in 20.6.2.3103 and all toxic pollutants defined in 20.6.2.7.WW NMAC. For example, in Discharge Permit DP-1835, LANL identified 7 toxic pollutants that had reasonable potential to be present in the effluent, based on extensive sampling, modeling, and process knowledge. Despite extensive data supporting the fact that only 7 toxic pollutants had been identified, the Department still required annual sampling for all 48 contaminants listed in Section 3103 and all 93 toxic pollutants listed at Section 20.6.2.7.WW NMAC. Similar requirements have been imposed in other groundwater discharge permits issued to LANL, even though most of the contaminants and toxic pollutants that must be sampled for have never been, and never will be, used in any process at the Laboratory, nor was there any evidence that the discharge could cause, or contribute to an excursion above any ground water standard.⁸ *See id.*; Tr. Vol. 3 at 553-554.

LANS’ proposed approach to tailor requirements, including monitoring, recordkeeping, and reporting requirements, to contaminants that have been identified as having a reasonable potential of being present in the effluent and to cause, or contribute to an excursion above any standard of 20.6.2.3103 NMAC would increase efficiency for both the permittee and the Department. This approach would eliminate unnecessary sampling and analysis of results without any increased threat to the environment. The reasonable potential analysis provides the scientific

⁸ 20.6.2.3109.C(2) NMAC currently provides that the Secretary must approve a discharge permit if “the person proposing to discharge demonstrates that approval of the proposed discharge plan, modification or renewal will not result in either concentrations in excess of the standards of 20.6.2.3103 NMAC or the presence of any toxic pollutant at any place of withdrawal of water for present or reasonably foreseeable future use”

basis for concluding that without a reasonable potential for a given contaminant to be present in the effluent, it would not be present in the discharge. *See* Pleading Log No. 52 at 10 (Beers Direct).

Mr. Beers' testimony acknowledged that it may not be possible to limit the suite of analytes to be tested in every process or system using a reasonable potential analysis. For example, in systems with numerous inputs from diverse sources, such as septic systems or sanitary wastewater treatment facilities, there exists the possibility for unexpected contaminants or toxic pollutants to enter a waste stream. For such systems, requiring testing for a broad suite of analytes may be appropriate. However, Mr. Beers explained that the reasonable potential analysis should be undertaken and evaluated even in those situations where the analysis results in sampling requirements for numerous constituents. *See* Pleading Log No. 52 at 10 (Beers Direct).

At the hearing, the Department was the only party to cross-examine Mr. Beers on this issue. The Department's questioning centered around budgetary concerns about the ability of their staff to conduct a reasonable potential analysis on the permitted discharge. Mr. Beers explained that the Department must, as part of its current responsibilities, conduct an analysis in order to determine a monitoring plan and effluent limits. Tr. Vol. 3 at 561-562.

Proposed Statement of Reasons

17) The Commission adopts LANS' proposed changes to 20.6.2.3108.H(1) NMAC to require the Department to prepare a draft permit, which includes proposed effluent limitations and other conditions on the proposed discharge, and all proposed monitoring, recordkeeping and reporting requirements. These requirements apply to those pollutants that the Department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any standard of 20.6.2.3103 NMAC.

18) Tailoring requirements, including monitoring, recordkeeping, and reporting requirements, to contaminants that have been identified as having a reasonable potential of being present in the effluent and could cause or contribute to concentrations in excess of applicable standards would increase efficiency for both the permittee and the Department.

19) The reasonable potential approach would eliminate unnecessary sampling and analysis of results without any increased threat to the environment.

20) While the reasonable potential may not be successfully applied to limit monitoring requirements in every situation, the potential benefits of this approach should be evaluated in all situations nevertheless, to investigate whether it is a possibility.

Final proposed 20.6.2.3108.H(1) NMAC

(1) The draft permit shall include all proposed effluent limitations or other conditions on the proposed discharge, and all proposed monitoring, recordkeeping and reporting requirements. The proposed effluent limitations or conditions on the proposed discharge, and proposed monitoring conditions shall apply only to those pollutants that the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any standard of 20.6.2.3103 NMAC.

See Exh. A, ¶ 6.

b. LANS' proposed clarification to the Department's proposed language in 20.6.2.3108.H(2) NMAC.

i. Overview

LANS initially proposed amendments to 20.6.2.3108.H(1) and (2) NMAC in its Proposed Changes. See Pleading Log Nos. 29 (Proposed Changes), 35 (Corrected Proposed Changes).

In response to LANS' proposal, the Department proposed language in its rebuttal testimony requiring that fact sheets be required for draft discharge permits at federal facilities. The Department proposed, however, to carve out an exception to this requirement for domestic discharges, such as municipal wastewater treatment plants and septic tank/leachfield systems at federal facilities. Pleading Log No. 81, Exh. 26 at 12 (Hunter Rebuttal); Pleading Log No. 88, Exh. 36 at 26-28.

At the hearing, Mr. Beers testified that LANS agreed with the Department's proposed language with respect to 20.6.2.3108.H(2) NMAC, to require the preparation of fact sheets for permits for federal facilities. However, with respect to the Department's proposal to exclude

domestic liquid waste discharges from this requirement, LANS proposed to clarify that language to read that the exception would be for permits with *only* domestic discharge wastewater. Tr. Vol. 3 at 556: 9-18. The proposed amended language is:

(2) The department shall prepare a fact sheet for every draft permit for a discharge at a federal facility, except for *discharges comprised of only domestic liquid waste*, and for other draft permit as determined by the Secretary.

ii. *Support for proposed change*

In support of the excepting discharges comprised of *only* domestic liquid waste, as opposed to the language proposed by the Department, Mr. Beers testified that LANS has a discharge permit that contains both discharges of sanitary effluent and tertiary treatment from polishing of that effluent for reuse. With this type of complex facility, preparation of a fact sheet by the Department would assist with continuity, transparency, and clarity in the permitting and compliance process. Tr. Vol. 3 at 556-557. Neither the Department nor any other parties elected to cross-examine Mr. Beers with respect to this issue, and no other opposition to this proposed clarification was made.

Proposed Statement of Reasons

21) The Commission adopts LANS' proposed clarification to the Department's proposed language with respect to 20.6.2.3108.H(2) NMAC to require preparation of fact sheets for every draft permit for discharge at a federal facility, with the exception of discharges comprised only of domestic liquid waste.

22) Inclusion of this clarification ensures that complex permits in which the permitted discharge may include domestic liquid waste, as well as other types of discharge, will receive the benefit of a fact sheet.

23) This proposed clarification received no opposition from other parties at the hearing.

Final proposed 20.6.2.3108.H(2) NMAC

H.(2) The department shall prepare a fact sheet for every draft permit for a discharge at a federal facility, except for discharges comprised of only domestic liquid waste, and for other draft permit as determined by the Secretary. The fact sheet shall include: ...

See Exh. A, ¶ 6

c. LANS' proposed changes to the Department's proposed language in 20.6.2.3108.H(2)(d) NMAC.

i. Overview

LANS initially proposed amendments to 20.6.2.3108.H(1) and (2) NMAC, including the addition of 20.6.2.3108.H(2)(d), in its Proposed Changes. See Pleading Log Nos. 29, 35. LANS' proposed amended 3108.H(2)(d) provides that facts shall include:

(d) *Any calculations or other necessary explanation of the derivation of specific effluent limitations and other conditions, including a citation to the applicable regulations or standards and reasons why they are applicable.*

The Department's direct testimony did not include this proposed change, and it was not proposed or opposed by any of the other parties.

ii. Support for proposed change

The inclusion of the language of 20.6.2.3108.H(2)(d) NMAC into the requirements for the contents of a fact sheet is needed to increase transparency and help permittees understand the source or derivation of effluent limits set forth in a discharge permit. The proposed language derives from EPA's required content for NPDES permit fact sheets. 40 CFR §124.56(a). The regulations specify that NPDES fact sheets must contain "[a]ny calculations or other necessary explanation of the derivation of specific effluent limitations and conditions or standards for sewage sludge use or disposal" LANS believes this approach is appropriate for fact sheets under the groundwater discharge permit program.

By way of example, Mr. Beers testified that LANS has two permits, DP-1835 and DP-857, that contain specific numeric limits for toxic pollutants. Tr. Vol. 3 at 558-559. However, without any explanation or rationale regarding the source of these limits, and no opportunity for the

permittee and the public to offer comment on these numeric limits, the process lacks transparency. Tr. Vol. 3 at 559: 2-5. If the calculations and derivation of the numeric limits were provided, the permittee and the public would be in a more informed position to respond and potentially object to any limits related to those conditions. Tr. Vol. 3 at 559:12-21. Providing this information to the permittee in writing would also ensure transfer of knowledge during times such as permit renewals or enforcement issues, especially in the event of staff turnover at the Department and/or LANS (or other facilities). *See* Pleading Log No. 52 at 11 (Beers Direct); Tr. Vol. 3 at 560: 6-10. Finally, this level of transparency would also create a more complete and defensible administrative record in the event that a discharge permit is challenged. *See* Pleading Log No. 52 at 11 (Beers Direct).

At the hearing, there was no opposition to LANS' proposed language; cross-examination by the Department focused on resource limitations of the department. Tr. Vol. 3 at 561-563. However, requiring this information to be included in a fact sheet should not impose any additional burden on Department staff, as the Department cannot grant or deny any discharge permit application without considering the basis for approval or disapproval, the conditions included in the permit and the reasons for the conditions, or the quantity and quality of the effluent. *See* Pleading Log No. 52 at 12 (Beers Direct); Tr. Vol. 3 at 562: 5-7. The only additional requirement would be that the Department's decision-making process be set forth in the fact sheet, which would provide clarity in the permitting process and better inform all parties interested in a draft permit. *See* Pleading Log No. 52 at 12 (Beers Direct).

Proposed Statement of Reasons

24) The Commission adopts LANS' proposed changes to 20.6.2.3108(H)(2)(d), requiring fact sheets for draft permits to contain calculations or other information regarding derivation of effluent limitations and other conditions.

25) Inclusion of this information in fact sheets for draft permits would increase transparency and help permittees understand the source or derivation of effluent limits set forth in a discharge permit.

26) This requirement would also ensure knowledge transfer in the event of personnel turnover at the Department or permitted facility.

27) Inclusion of the information in fact sheets for draft permits would also create a more defensible administrative record in the event a discharge permit is challenged.

28) Because the Department is required to consider the basis for approval or disapproval, the conditions included in the permit and the reasons for the conditions, and/or the quantity and quality of the effluent before granting or denying any discharge permit application, requiring this information to be provided to the permittee and public would not impose an undue additional burden on the Department.

Final proposed 20.6.2.3108.H(2)(d) NMAC

H.(2)(d) Any calculations or other necessary explanation of the derivation of specific effluent limitations and other conditions, including a citation to the applicable regulations or standards and reasons why they are applicable.

See Exh. A, ¶ 27

4. LANS' proposal to amend 20.6.2.3109 NMAC.

LANS proposed to amend 20.6.2.3109.C NMAC to add a requirement that the Department issue a response to comments on a draft permit or proposed disapproval at the time it makes a final decision to approve, approve with conditions, or disapprove the permit. *See* Pleading Log Nos. 29 at 5 (Proposed Changes), 35 at 5 (Corrected Proposed Changes). The purpose of requiring a response to comments would be to ensure that those who submitted comments would know how the Department took their comments into consideration in reaching a final decision. Providing a response to comments would help commenters in deciding whether or not to pursue an appeal from the permitting decision. If an appeal is taken, the Department's response to comments would serve

to narrow the potential issues and areas of disagreement. *See* Pleading Log Nos. 29 at 5, 35 at 5. This proposed amendment is set forth in detail in paragraph 7 of Exhibit A.

Although this proposal was not included in the Department's initial proposed changes to the regulations, the Department agreed with LANS' proposal and decided to incorporate the change into its proposal as well. At the hearing, the Department expressed that it supports the reasoning of LANS' proposal to this section, and agreed that providing a response to comments would be worthwhile. Tr. Vol. 3 at 570: 13-23. Accordingly, the Department's proposed changes incorporate a requirement for the Department to provide responses to public comment on a draft permit. *See* Pleading Log No. 89, Amended Exh. 36 at 29 (20.6.2.3109(B)).

At the hearing, LANS accepted the changes to 20.6.2.3109 NMAC as stated by the Department in Amended Exhibit 36 and noted that LANS would offer no additional testimony on this section. Tr. Vol. 3 at 571: 10-14. William C. Olson also expressed his support of the Department's proposed language in this section. None of the other parties indicated disagreement with the proposed language. Tr. Vol. 3 at 572: 8-14.

The Department proposed one additional substantive change at 20.6.2.3109(E)(4), to require the Secretary give notice via certified mail of when a discharge permit is terminated and the reasons for doing so, as well as giving written notice of the action to all participating parties and those persons on the facility-specific list maintained by the Department. *See* Pleading Log No. 89, Amended Exh. 36 at 30. The Department explained at this hearing that the purpose of this change was to conform the language of the regulations more closely with that of the Water Quality Act. Tr. Vol. 3 at 570: 6-12. As noted in its Corrected Statement of Position, LANS supports this change and offered no further testimony on the matter. *See* Pleading Log No. 34 at 5. No parties indicated disagreement with this proposed change at the hearing.

For these reasons, LANS' proposal as reflected in the Department's proposed 20.6.3.3109.B NMAC should be accepted, and the regulations should be amended to require that the Department issue a response to comments on a draft permit at the time that a final permitting decision is made. *See* Exh. A, ¶ 7. Additionally, the Department's proposed changes to 20.6.2.3109.E(4) NMAC should be approved to bring notice requirements in the regulations into conformity with the language of the Water Quality Act.

Proposed Statement of Reasons

29) The Commission adopts LANS' proposal, as reflected in the Department's proposed 20.6.3.3109.B NMAC, to require the Department to issue a response to comments on a draft permit at the time that a final permitting decision is made.

30) A response to comments from the Department would ensure that those commenters would know how the Department considered their comments in reaching a final decision.

31) Requiring a response to comments by the Department would also assist commenters in deciding whether or not to pursue an appeal from the permitting decision, and if an appeal is taken, to narrow potential issues and areas of disagreement.

32) The Commission also adopts the Department's proposed changes to 20.6.2.3109.E(4) NMAC to bring notice requirements for termination of discharge permits in the regulations into conformity with the language of the Water Quality Act.

III. CONCLUSION

For the reasons stated herein, the Commission should accept LANS' proposed final changes to the Regulations and statement of reasons and amend the Ground and Surface Water Protection Regulations accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2018, a true and correct copy of the foregoing *Los Alamos National Security, LLL's Proposed Statement of Reasons and Closing Legal Argument* was served via electronic mail or hand-delivered to the following:

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**LOS ALAMOS NATIONAL SECURITY, LLC'S
FINAL PROPOSED AMENDMENTS TO 20.6.2 NMAC**

1. 20.6.2.7.T.2 NMAC (definition of Toxic Pollutant). Include the Chemical Abstract Service (CAS) numbers for each pollutant listed. *See* attached Table 1.

2. 20.6.2.10 NMAC

20.6.2.10 LIMITATIONS/EXEMPTIONS: These regulations do not apply to:

A. Any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, NMSA 1978, §§74-1-1 to -14, the Ground Water Protection Act, NMSA 1978, §§ 74-6B-1 to -14, or the Solid Waste Act, NMSA 1978, §§ 74-9-1 to -25, except to abate water pollution or to control the disposal or use of septage and sludge; or

B. Any activity or condition subject to the authority of the oil conservation commission pursuant to the provisions of the Oil and Gas Act, NMSA 1978, §§ 70-2-12, or other laws conferring power on the oil conservation commission to prevent or abate water pollution.

3. 20.6.2.3103 NMAC. Include the CAS numbers for each pollutant listed. *See* attached Table 2.

4. 20.6.2.3105 NMAC.

J. ~~Leachate from materials disposed of in accordance with the Solid Waste Management Regulations (20 NMAC 9.1) adopted by the New Mexico Environmental Improvement Board.~~

N. Any activity or condition regulated under the federal Solid Waste Disposal Act, including the federal Resource Conservation and Recovery Act, 42 U.S.C. §§6901 to 6992k.

5. 20.6.2.3106 NMAC.

B. Any person who intends to begin, after June 18, 1977, discharging any of the water contaminants listed in 20.6.2.3103 NMAC so that they may move directly or indirectly into ground water shall notify the secretary giving the information enumerated in Subsection B of 20.6.2.1201 NMAC; the secretary shall, within ~~60~~ 45 days, notify such person if a discharge permit is required

6. 20.6.2.3108 NMAC.

A. Within ~~15~~ 30 days of receipt of an application for a discharge permit, modification or renewal, the department shall review the application for administrative completeness. . . .

H. Within 60 days after the department makes its administrative completeness determination and all required technical information is available, the department shall make available a ~~proposed approval or disapproval of the application for a discharge permit, modification or renewal, including conditions for approval proposed by the department~~ draft permit or the reasons for disapproval notice of intent to deny an application for a discharge permit, modification or renewal.

(1) The draft permit shall include all proposed effluent limitations or other conditions on the proposed discharge, and all proposed monitoring, recordkeeping and reporting requirements. The proposed effluent limitations or conditions on the proposed discharge, and proposed monitoring conditions shall apply only to those pollutants that the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any standard of 20.6.2.3103 NMAC.

(2) The department shall prepare a fact sheet for every draft permit for a discharge at a federal facility, except for discharges comprised of only domestic liquid waste, and for other draft permit as determined by the Secretary. The fact sheet shall include:

(a) The information in Paragraphs 1 – 4 of Subsection F of 20.6.2.3108 NMAC;

(b) The information in Subsection I of 20.6.2.3108 NMAC;

(c) A brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record;

(d) Any calculations or other necessary explanation of the derivation of specific effluent limitations and other conditions, including a citation to the applicable regulations or standards and reasons why they are applicable.

(3) The department shall mail by certified mail a copy of the ~~proposed approval draft permit and fact sheet or disapproval~~ notice of intent to deny to the applicant and shall provide notice of the draft permit or the proposed approval or disapproval of the application for a discharge permit, modification or renewal notice of intent to deny by:

I. The public notice issued under Subsection H shall include the information in Subsection F of 20.6.2.3108 NMAC and the following information:

. . .

(3) the address and telephone number, and email address at which interested persons may obtain a copy of the draft permit, and any fact sheet prepared for the draft permit, or the notice of intent to deny proposed approval or disapproval of an application for a discharge permit, modification or renewal.

J. In the event that the ~~draft permit or proposed approval or disapproval of an application for a discharge permit, modification or renewal~~ notice of intent to deny is available for review within 30 days of deeming the application administratively complete, the department may combine the public notice procedures of Subsections E and H of 20.6.2.3108 NMAC.

K. Following the public notice of the ~~draft permit or proposed approval or disapproval of an application~~ notice of intent to deny Requests for a hearing

7. 20.6.2.3109 NMAC

B. The secretary shall, within 30 days after the administrative record is complete and all required information is available, approve, approve with conditions or disapprove the proposed discharge permit, modification or renewal based on the administrative record. The secretary shall issue a response to comments, which shall specify which provisions, if any, in the draft permit were changed and the reasons for the change, and which shall briefly describe and respond to all significant comments on the draft permit or the notice of intent to deny raised during the public comment period or at any hearing. The secretary . . . notify give written notice of the action taken to the applicant or permittee by certified mail of the action taken, and the reasons for such action, and shall include a copy of the response to comments. . . .

TABLE 1
20.6.2.7 NMAC--TOXIC POLLUTANTS

Toxic Pollutants (proposed)	CAS #
acrolein	107-02-8
acrylonitrile	107-13-1
benzene and alkylbenzenes	
benzene	71-43-2
toluene (methylbenzene)	108-88-3
ethylbenzene	100-41-4
xylene (dimethyl benzene isomers)	
o-xylene	95-47-6
m-xylene	108-38-3
p-xylene	106-42-3
styrene (ethenylbenzene)	100-42-5
chlorinated benzenes	
monochlorobenzene	108-90-7
1,2-dichlorobenzene (ortho-dichlorobenzene)	95-50-1
1,4-dichlorobenzene (para-dichlorobenzene)	106-46-7
1,2,4-trichlorobenzene	120-82-1
1,2,4,5-tetrachlorobenzene	95-94-3
pentachlorobenzene	608-93-5
hexachlorobenzene	118-74-1
chlorinated phenols	
2,4-dichlorophenol	120-83-2
2,4,5-trichlorophenol	95-95-4
2,4,6-trichlorophenol	88-06-2
pentachlorophenol (PCP)	87-86-5
chloroalkyl ethers	

bis (2-chloroethyl) ether	111-44-4
bis (2-chloroisopropyl) ether	108-60-1
bis (chloromethyl) ether	542-88-1
1,2-dichloropropane (propylene dichloride, PDC)	78-87-5
dichloropropenes	542-75-6
1,4-dioxane	123-91-1
halogenated ethanes	
1,2-dibromoethane (ethylene dibromide, EDB)	106-93-4
1,1-dichloroethane (1,2-DCA)	75-34-3
1,2-dichloroethane (ethylene dichloride, EDC)	107-06-2
1,1,1-trichloroethane (TCA)	71-55-6
1,1,2-trichloroethane (1,1,2-TCA)	79-00-5
1,1,2,2-tetrachloroethane	79-34-5
hexachloroethane	67-72-1
halogenated ethenes	
chlorinated ethene (vinyl chloride)	75-01-4
1,1-dichloroethene (1,1-DCE)	75-35-4
cis-1,2-dichloroethene (cis-1,2-DCE)	156-59-2
trans-1,2-dichloroethene (trans-1,2-DCE)	156-60-5
trichloroethene (trichloroethylene, TCE)	79-01-6
tetrachloroethene (perchloroethylene, PCE)	127-18-4
halogenated methanes	
bromodichloromethane	75-27-4
bromomethane	74-83-9
chloromethane	74-87-3
dichlorodifluoromethane (fluorocarbon-12)	75-71-8
dichloromethane (methylene chloride)	75-09-2
tribromomethane (bromoform)	75-25-2
trichloromethane (chloroform)	67-66-3
tetrachloromethane (carbon tetrachloride)	56-23-5
trichlorofluoromethane (fluorocarbon-11)	75-69-4
hexachlorobutadiene	87-68-3

EXHIBIT A

LANS Final Proposed Amendments to 20.6.2

isophorone	78-59-1
methyl tertiary butyl ether (MTBE)	1634-04-4
nitroaromatics and high explosives (HE)	
nitrobenzene	98-95-3
2,4-dinitrotoluene (2,4,DNT)	121-14-2
2,6-dinitrotoluene (2,6,DNT)	606-20-2
octahydro-1,3,5,7-tetranitro-1,3,5,7- tetrazocine (HMX)	2691-41-0
hexahydro-1,3,5-trinitro-s-triazine (RDX)	121-82-4
2,4,6-trinitrotoluene (TNT)	118-96-7
2,4-dinitro-o-cresol	534-52-1
dinitrophenols	51-28-5
nitrosamines	
N-nitrosodiethylamine	55-18-5
N-nitrosodimethylamine	62-75-9
N-nitrosodibutylamine	924-16-3
N-nitrosodiphenylamine	86-30-6
N-nitrosopyrrolidine	930-55-2
perchlorate	14797-73-0
perfluorinated chemicals (PFCs)	
perfluorohexane sulfonic acid (PFHxS)	355-46-4
perfluorooctane sulfonate (PFOS)	1763-23-1
perfluorooctanoic acid (PFOA)	335-67-1
pesticides	
aldrin	309-00-2
atrazine	1912-24-9
chlordane	57-74-9
DDT	50-29-3
dieldrin	60-57-1
endosulfan	115-29-7
endrin	72-20-8
heptachlor	76-44-8

hexachlorocyclohexane (HCH, lindane)	
alpha-HCH	319-84-6
beta-HCH	319-85-7
gamma-HCH	58-89-9
technical HCH	608-73-1
hexachlorocyclopentadiene	77-47-4
prometon	1610-18-0
toxaphene	8001-35-2
phenol	108-95-2
phthalate esters	
dibutyl phthalate	84-74-2
di-2-ethylhexyl phthalate (DEHP)	117-81-7
diethyl phthalate (DEP)	84-66-2
dimethyl phthalate (DMP)	131-11-3
polycyclic compounds	
benzidine	92-87-5
dichlorobenzidine	91-94-1
diphenylhydrazine	122-66-7
polychlorinated biphenyls (PCB's)	1336-36-3
polynuclear aromatic hydrocarbons (PAHs)	
anthracene	120-12-7
benzo-a-pyrene	50-32-8
3,4-benzofluoranthene	205-99-2
benzo (k) fluoranthene	207-08-9
fluoranthene	206-44-0
fluorene	86-73-7
naphthalene	91-20-3
1-methylnaphthalene	90-12-0
2-methylnaphthalene	91-57-6
phenanthrene	85-01-8
pyrene	129-00-0
thiolane-1,1-dioxide (sulfolane)	126-33-0

TABLE 2
20.6.2.3103 NMAC—GROUND WATER STANDARDS

Ground Water Contaminants (proposed)	CAS #
<u>A. Human Health Standards</u>	
Antimony (Sb)	7440-36-0
Arsenic (As)	7440-38-2
Barium (Ba)	7440-39-3
Beryllium (Be)	7440-41-7
Cadmium (Cd)	7440-43-9
Chromium (Cr)	7440-47-3
Cyanide (CN)	57-12-5
Fluoride (F)	16984-48-8
Lead (Pb)	7439-92-1
Total Mercury (Hg)	7439-97-6
Nitrate (NO ₃ as N)	NA
Nitrite (NO ₂ as N)	NA
Selenium (Se)	7782-49-2
Silver (Ag)	7440-22-4
Thallium (Tl)	7440-28-0
Uranium (U)	7440-61-1
Radioactivity: Combined Radium-226 & 228	NA
Benzene	71-43-2
Polychlorinated biphenyls (PCB's)	1336-36-3
Toluene	108-88-3
Carbon Tetrachloride	56-23-5
1,2-dichloroethane (EDC)	107-06-2
1,1-dichloroethylene (1,1-DCE)	75-35-4
1,1,2,2-tetrachloroethylene (PCE)	127-18-4
1,1,2-trichloroethylene (TCE)	79-01-6
ethylbenzene	100-41-4
total xylenes	1330-20-7
methylene chloride	75-09-2
chloroform	67-66-3
1,1-dichloroethane	75-34-3
ethylene dibromide (EDB)	106-93-4
1,1,1-trichloroethane (TCA)	71-55-6
1,1,2-trichloroethane	79-00-5
1,1,2,2-tetrachloroethane	79-34-5
vinyl chloride	75-01-4
PAHs: total naphthalene plus monomethylnaphthalenes	NA

benzo-a-pyrene	50-32-8
cis-1,2-dichloroethene	156-59-2
trans-1,2-dichloroethene	156-60-5
1,2-dichloropropane (PDC)	78-87-5
styrene	100-42-5
1,2-dichlorobenzene	95-50-1
1,4-dichlorobenzene	106-46-7
1,2,4-trichlorobenzene	120-82-1
pentachlorophenol	87-86-5
atrazine	1912-24-9
<u>B. Other Standards for Domestic Water Supply</u>	
Chloride (Cl)	16887-00-6
Copper (Cu)	7440-50-8
Iron (Fe)	7439-89-6
Manganese (Mn)	7439-96-5
Phenols	
Sulfate (SO ₄)	14808-79-8
Total Dissolved Solids (TDS)	TDS
Zinc (Zn)	7440-66-6
pH	
methyl tertiary-butyl ether (MTBE)	1634-04-4
<u>C. Standards for Irrigation Use</u>	
Aluminum (Al)	7429-90-5
Boron (B)	7440-42-8
Cobalt (Co)	7440-48-4
Molybdenum (Mo)	7439-98-7
Nickel (Ni)	7440-02-0

**LOS ALAMOS NATIONAL SECURITY, LLC'S
PROPOSED STATEMENT OF REASONS**

1) The Commission adopts LANS' proposal, as revised, to add a new 20.6.2.10 NMAC exempting activities or conditions that are subject to the authority of the Environmental Improvement Board under the Hazardous Waste Act, the Ground Water Protection Act, or the Solid Waste Act, except to abate water pollution or to control the disposal or use of septage and sludge and activities and conditions subject to the authority of the Oil Conservation Commission under the Oil and Gas Act to conform the regulations to the Water Quality Act.

2) The Commission finds that this provision will exempt activities expressly excluded from the Commission's authority under the Water Quality Act, NMSA 1978, Section 74-6-12 (1999), and will conform the regulations to the statute.

3) The Commission finds that the proposed 20.6.2.10 NMAC includes activities currently exempted in 20.6.2.3105.J NMAC, making that subsection redundant, and therefore, unnecessary.

4) The Commission finds that deletion of the exemptions in the current 20.6.2.3105.J will provide clarity and eliminate confusion likely to result from having redundant provisions in the regulations

5) The Commission, therefore, also adopts LANS' proposal to delete the current discharge permit exemptions for leachate from solid waste facilities, 20.6.2.3105.J NMAC.

6) The Commission adopts LANS' proposal to add a new subsection to 20.6.2.3105 exempting "any activity or condition regulated under the federal Solid Waste Disposal Act, including the federal Resource Conservation and Recovery Act, 42 U.S.C. §§6901 to 6992k."

7) The Commission agrees that federal law obviates the necessity to obtain discharge permits under the Water Quality Act for these activities and conditions regulated under the federal Solid Waste Disposal Act, and that providing for this exemption will avoid duplicative regulation.

8) The Commission does not agree with the Department that exemptions provided for in regulation cannot go beyond "what is covered in the limitations section of the Water Quality Act." The Commission notes that many of the exemptions listed in 20.6.2.3105 NMAC have no counterpart in the limitations section of the Act.

9) The Commission finds that the no party to this proceeding advanced substantive reasons for not including an exemption for activities subject to RCRA.

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LANS Proposed Statement of Reasons

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10) The Commission adopts LANS' proposal to include the Chemical Abstract Service (CAS) numbers for each contaminant currently listed in 20.6.2.3103 NMAC and every toxic pollutant listed in 20.6.2.7 NMAC.

11) Reference to the CAS number, as opposed to the generic name, provides an unambiguous way to identify a chemical substance or molecular structure when there are many possible alternative systematic, generic, proprietary or trivial names for that substance.

12) Inclusion of the CAS number for each contaminant identified in the regulations will ensure that contaminants are properly and consistently identified and regulated. The CAS database is regularly updated and considered the most comprehensive collection of disclosed chemical substance information in the world, and the assigned CAS Number provides a unique, unmistakable and universally recognized identifier for every known chemical substance.

13) Inclusion of the CAS number will also serve to standardize references throughout the regulations. For example, the Commission identifies contaminants by CAS number in Standards for Interstate and Intrastate Surface Waters (20.6.4.900.J NMAC).

14) The proposed amendment to include CAS numbers is uncontested by the other parties to the proceeding.

15) The Commission adopts LANS' proposal, as revised during the hearing, to amend 20.6.2.3106.B NMAC to reduce the time period in which the Department must make a decision on whether a discharge permit is required from 60 days to 45 days.

16) The proposed amendment to reduce the time period is uncontested by the other parties to this proceeding.

17) The Commission adopts LANS' proposed changes to 20.6.2.3108.H(1) NMAC to require the Department to prepare a draft permit, which includes proposed effluent limitations and other conditions on the proposed discharge, and all proposed monitoring, recordkeeping and reporting requirements. These requirements apply to those pollutants that the Department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any standard of 20.6.2.3103 NMAC.

18) Tailoring requirements, including monitoring, recordkeeping, and reporting requirements, to contaminants that have been identified as having a reasonable potential of being present in the effluent and could cause or contribute to concentrations in excess of applicable standards would increase efficiency for both the permittee and the Department.

19) The reasonable potential approach would eliminate unnecessary sampling and analysis of results without any increased threat to the environment.

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LANS Proposed Statement of Reasons

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20) While the reasonable potential may not be successfully applied to limit monitoring requirements in every situation, the potential benefits of this approach should be evaluated in all situations nevertheless, to investigate whether it is a possibility.

21) The Commission adopts LANS' proposed clarification to the Department's proposed language with respect to 20.6.2.3108.H(2) NMAC to require preparation of fact sheets for every draft permit for discharge at a federal facility, with the exception of discharges comprised only of domestic liquid waste.

22) Inclusion of this clarification ensures that complex permits in which the permitted discharge may include domestic liquid waste, as well as other types of discharge, will receive the benefit of a fact sheet.

23) This proposed clarification received no opposition from other parties at the hearing.

24) The Commission adopts LANS' proposed changes to 20.6.2.3108(H)(2)(d), requiring fact sheets for draft permits to contain calculations or other information regarding derivation of effluent limitations and other conditions.

25) Inclusion of this information in fact sheets for draft permits would increase transparency and help permittees understand the source or derivation of effluent limits set forth in a discharge permit.

26) This requirement would also ensure knowledge transfer in the event of personnel turnover at the Department or permitted facility.

27) Inclusion of the information in fact sheets for draft permits would also create a more defensible administrative record in the event a discharge permit is challenged.

28) Because the Department is required to consider the basis for approval or disapproval, the conditions included in the permit and the reasons for the conditions, and/or the quantity and quality of the effluent before granting or denying any discharge permit application, requiring this information to be provided to the permittee and public would not impose an undue additional burden on the Department.

29) The Commission adopts LANS' proposal, as reflected in the Department's proposed 20.6.3.3109.B NMAC, to require the Department to issue a response to comments on a draft permit at the time that a final permitting decision is made.

30) A response to comments from the Department would ensure that those commenters would know how the Department considered their comments in reaching a final decision.

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LANS Proposed Statement of Reasons

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31) Requiring a response to comments by the Department would also assist commenters in deciding whether or not to pursue an appeal from the permitting decision, and if an appeal is taken, to narrow potential issues and areas of disagreement.

32) The Commission also adopts the Department's proposed changes to 20.6.2.3109.E(4) NMAC to bring notice requirements for termination of discharge permits in the regulations into conformity with the language of the Water Quality Act.