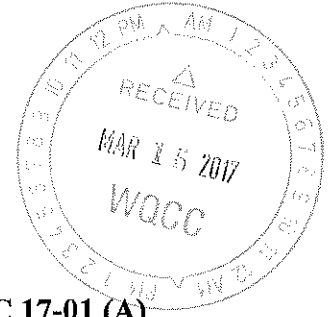


**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

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



WQCC 17-01 (A)

WASTE CONTROL SPECIALISTS LLC,

Petitioner.

**NEW MEXICO ENVIRONMENT DEPARTMENT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to the New Mexico Water Quality Control Commission's ("WQCC" or "Commission") regulations at 20.1.3.15 NMAC, the New Mexico Environment Department (the "Department" or "NMED") hereby moves the Commission to grant summary judgment on the second issue raised by Waste Control Specialists LLC ("WCS" or "Petitioner") in its Petition for Review and Notice of Appeal of the Ground Water Quality Bureau of the New Mexico Environment Department's Rejection of Waste Control Specialists LLC's Withdrawal of Its Application for Discharge Permit and Determination that a Discharge Permit is Required ("Petition"). As explained more fully below, any challenge to the Department's authority and jurisdiction to require WCS to apply for and obtain a discharge permit for its facility in Andrews, Texas, was required to be raised within 30 days of WCS's receipt of the Department's letter dated February 19, 2013, notifying WCS that a discharge permit was required. The current appeal is therefore untimely.

Alternatively, if the Commission determines that WCS's challenge to the Department's authority and jurisdiction is not time barred, the Commission should hold the appeal on that issue in abeyance to allow further development of the record on disputed factual issues.

Due to the nature of this Motion, Petitioner's opposition is presumed.

STATEMENT OF MATERIAL FACTS

The following facts are undisputed for purposes of this Motion:

I. The Facility

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

2. Petitioner operates a waste management facility (the "Facility") in Andrews, Texas, for the processing, treatment, storage, and disposal of a broad range of radioactive, hazardous, toxic, and other wastes. The Facility holds permits and licenses from the Texas Commission on Environmental Quality ("TCEQ") and the U.S. Environmental Protection Agency ("EPA") to accept hazardous and toxic wastes, low level radioactive waste, and byproduct waste material governed by various laws and regulations, including the Atomic Energy Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act. WCS is currently the only facility in the United States that can accept Class A, B, and C low-level radioactive waste from generators across the United States. WCS also provides

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

waste management services to the commercial sector and Federal government waste generators. WCS has also recently submitted an application to the NRC for a license to store high-level spent nuclear fuel from commercial nuclear power reactors at the Facility. *Id.*

3. While all of the WCS operational and storage facilities are located on lands within the in the State of Texas, the Facility encompasses 800 acres within New Mexico on which WCS stockpiles soils, and discharges storm water and industrial wastewater from the Facility. AR 71, at 01531-01533 (describing discharges onto WCS property in New Mexico); AR 128, at 02944 (report by WCS consultant discussing discharge into New Mexico).

II. The Facility's Existing Permits

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

discharge permit application); AR 128, at 02944 (description of discharge in WCS consultant report).

5. Outfall 002 is channelized from the end of the pipe across WCS-owned property into New Mexico. A series of rock berms are set within the channelized outfall, with the final berm located in New Mexico. The berms are designed to slow down surface flow and facilitate infiltration to the subsurface. *See* AR 71, at 01536 (photos showing discharge points into New Mexico, including berms).

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

7. Accordingly, the Department submitted comments to TCEQ on the draft of TPDES Permit 4857, *see* AR and the version of TPDES Permit 4857 issued on July 24, 2009, which included conditions (identified in the permit as “Other Requirement 16”) to protect New Mexico water quality standards. *See* AR 25, at 00475-00477.

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

III. The Discharge Permit Application

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

10. In July of 2012, WCS submitted an application to TCEQ requesting a major amendment to TPDES Permit 4857 to remove the New Mexico water quality standards requirements from that permit. *See* AR 44, 00956-01025 (Application for major amendment of TPDES Permit 4857); AR 47, 01059-01060 (TCEQ Notice of Receipt of Application and Intent to Obtain Water Quality Permit Amendment); AR 56, 01221-01288 (submittal of

revisions to Application for Major Amendment to TPDES Permit 4857). As the basis for this amendment, WCS represented that: “NMED has verbally advised WCS that NMED agrees that Other Requirement 16 can be removed from TPDES Permit WQ0004857000 *because WCS will apply for and obtain a New Mexico groundwater discharge permit from NMED.* The groundwater discharge permit issued by NMED will ensure protection of New Mexico water quality.” AR 56, 01258-01289, Attachment B Wastewater and Storm Water Management Summary, Industrial Wastewater Permit Amendment Application Waste Control Specialists LLC Byproduct Material Disposal Facility (July 2012 Revision) (“Cook-Joyce Report”), at 01274 (emphasis added). The Cook-Joyce Report that formed the basis for removal of “Other Requirement 16” from TPDES Permit 4857 contains numerous references and discussions regarding WCS’s intent to obtain a groundwater discharge permit from New Mexico. *See* AR 56 at 01283 (“Since WCS has agreed with NMED to apply for a ground water discharge permit from NMED, iron can be eliminated from Other Requirement 16); *Id.* (“Manganese can be eliminated from Other Requirement 16 because discharges do not have the potential to exceed surface water quality standards for manganese and because WCS is applying for a New Mexico ground water discharge permit.”); *Id.* (“TDS can be eliminated from Other Requirement 16 because WCS is applying for a New Mexico ground water discharge permit.”).

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

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

- a. “Outfall 001 captures non-contact stormwater that falls within the areas outside the north, east and south path of the Facility railroad loop; ***and treated water from the leachate treatment facility*** confirmed compliant with discharge standards.” AR 71, at 01532 (emphasis added).
- b. “Outfall 002 captures non-contact operational runoff from a small portion of the facility ***and contact runoff*** from the regulated By-Products Material Management Area. Stormwater from this Area is tested to document that it meets the surface discharge parameters of the State of Texas. This clean contact runoff is discharged through two Outfalls (004 and 005), identified in the TCEQ TPDES Permit WQ0004857000, into a meandering surface water management channel that runs along the Texas side of the state line within the WCS Facility...This channel crosses under the facility access road and discharges to a short pilot channel that enters New Mexico and dissipates to overland flow² approximately five hundred feet after entering WCS property in New Mexico. . .” *Id.* (emphasis added).

13. The third discharge point is described the NOI as “situated at the intersection of the northern portion of the Facility railroad track and the State Line (see Figure 2). This

² “Dissipates to overland flow” with respect to this surface discharge means that the flow infiltrates to the subsurface.

discharge point captures flows from vacant pastures north and upgradient of the operational areas in Texas, and allow stormwater to flow through culverts under the railroad to vacant pastures in New Mexico within the Facility railroad track loop.” *Id.* at 01531.

14. On February 19, 2013, NMED sent a response to the NOI (“DP Required Letter”) via certified mail return receipt requested. AR 70, 01527-01528. A copy of the Response Letter is attached hereto as Exhibit 1. In the letter, NMED stated as follows: “NMED has reviewed the information provided [in the NOI] in accordance with Subsection D of 20.6.2.1201 NMAC. **You are hereby notified that a Discharge Permit is required for the proposed discharge.**” (Emphasis in original). The DP Required Letter further notified WCS that “[a]ny appeal of this determination that a Discharge Permit is required must be made to the New Mexico WQCC within 30 days of receipt of this letter, in accordance with Subsection B of 20.6.2.3112 NMAC.” *Id.* at 01528.

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

16. On August 1, 2013, the Department issued a public notice in accordance with 20.6.2.3108.E and F NMAC. *See* AR 75, 01782. The Department then prepared draft permit DP-1817 in consultation with WCS, and issued the draft permit for public comment on October 2, 2015, pursuant to 20.6.2.3108.H and I. *See* AR 120, 02576-02581. The comment

period closed on November 20, 2015. *See* AR 87, 02077. The Department received comments on the draft permit, and a number of commenters requested a public hearing on the permit. *See* AR 115, 02468-02520.

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

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

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

AR 128, at 02928.

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

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

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

21. In a letter to the Department dated February 1, 2017, (“Withdrawal Letter”), WCS purported to “withdraw” the Application on the basis that the Department “has no

reason or jurisdictional basis to continue with New Mexico's groundwater discharge permitting process" for discharges from the Facility that flow into New Mexico. AR 134, 02790.

22. On February 9, 2017, the Department sent a letter ("Withdrawal Response Letter") responding to the Withdrawal Letter. AR 135, 02787-02789. In that letter, the Department declined to accept WCS's purported withdrawal of the Application, explaining that "[t]here is no law or regulation that compels the Department to accept the withdrawal of a discharge permit application where there has been no change in process resulting in elimination of the discharge for which the application was originally submitted, and where the Department believes a permit is required pursuant to the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 through -17, and the New Mexico Water Quality Control Commission's regulations at 20.6.2 NMAC." *Id.* at 02787.

STANDARD OF DECISION

There is no provision in either the Water Quality Act ("WQA"), NMSA 1978, §§ 74-6-1 to -17, or the Commission's adjudicatory procedures, 20.1.3 NMAC, that addresses motions for summary judgment. Under such circumstances, the Commission's rules at 20.1.3.8 NMAC provide that the Commission may look to the New Mexico Rules of Civil Procedure for guidance. Under Rule 1-056 of the New Mexico Rules of Civil Procedure, summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 9, 335 P.2d 1243. Summary judgment may be properly granted "where reasonable minds will not differ as to an issue of material fact." *Montgomery v. Lomos Altos*,

Inc., 2007-NMSC-002, ¶16, 127 P.3d 971. “All reasonable inferences are construed in favor of the non-moving party.” *Id.*

ARGUMENT

I. The Second Issue Raised by WCS Is Time Barred

In its Petition, WCS identifies two primary issues on appeal: (1) “[W]hether NMED has the authority to deny WCS’s notice of withdrawal of its discharge permit application and proceed to issuance of a permit based on the withdrawn application;” and (2) “[W]hether NMED has the authority and jurisdiction to require WCS to apply for and obtain a discharge permit.” Petition at 2. Only the first of these issues is properly raised at this time.

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

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

Withdrawal Response Letter of February 9, 2017, on the other hand, constituted notice of the Department's rejection of WCS's withdrawal of its permit application. While it is true that the Department stated in its Withdrawal Response Letter that it believes a discharge permit is required, that statement did not constitute notice of such determination, but was rather a reiteration of the Department's long-standing position set forth in its DP Required Letter sent four years earlier.

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

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

from a final agency action to be taken within 30 days of the action, the New Mexico Court of Appeals held that an appeal from a final agency action was time barred where the letter containing the agency's determination was issued over two years prior to the filing of the appeal). The Commission should reject WCS's attempt to sidestep regulatory protections for New Mexico with respect to discharges flowing into the State from WCS's radioactive and hazardous waste processing, treatment, and storage facility in Texas.

II. In the Alternative, the Second Issue Raised by WCS is Premature and Should be Held in Abeyance to Allow Further Development of the Record

Alternatively, if the Commission decides that the second issue raised in the Petition is not time barred,³ the Commission should hold that issue in abeyance to allow further development of the record. The issues raised by WCS involve questions of fact that are disputed by the Department. Specifically, as to each sub-issue identified under Issue No. 2, the Department briefly responds as follows:

(1) The Department disputes that the surface water discharging to New Mexico from the Facility is in "full compliance with the Clean Water Act," Petition at 4-5, particularly given WCS's actions in securing removal of New Mexico water quality standards from TPDES Permit 4857, and the fact that the Department never received notice of the most recent TPDES Permit 4038 issued by TCEQ in August of 2016, and was therefore unable to submit comments regarding that permit's lack of protections for New Mexico as a downstream State.

(2) The Department disputes that the discharges from the Facility are entirely constituted of non-contact stormwater. In Section B-1 of its Application, WCS describes the source of the discharge as follows:

³ The Department strongly urges the Commission not to take the alternative believes that failure to dismiss the second issue as time barred

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

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

The Department further disputes that those discharges come within the permit exemption under 20.6.2.3150.F NMAC. That exemption does not apply to *discharges* regulated by a surface water permit under the CWA, but rather to *constituents* included in such a permit. WCS had TCEQ remove those constituents from TPDES Permit 4857 based on a representation that WCS would obtain a groundwater discharge permit from the State of New Mexico. Therefore, WCS cannot claim the exemption from permitting under 20.6.2.3150.F NMAC.

- (3) The standard for requiring a discharge permit is not whether groundwater *will* be infiltrated, but whether the discharge “*may* move directly or indirectly into

groundwater.” 20.6.2.3104 NMAC (emphasis added). NMED strongly disputes WCS’s claim that the evidence shows that discharges from the Facility are “incapable” of reaching groundwater, or that a one-time sampling of the well recently drilled by WCS (in the exact spot that the Department proposed for the monitoring well in the permit which WCS now claims it should not have to obtain) is somehow indicative that there is *no possibility* of groundwater being impacted by the discharge over time, or in unusual events such as extreme weather, geologic disturbances, or failure of operational controls at this Facility which engages in activities involving hazardous and radioactive materials. By WCS’s logic, none of the facilities in the vicinity of WCS’s Facility – which include a uranium enrichment facility and the Lea County Landfill – would be required to have a permit protecting New Mexico water quality standards. Evidence showing that geologic features are such that groundwater in the vicinity is unlikely to be impacted by a proposed discharge, and that a facility has excellent operational controls to prevent contaminated water from infiltrating to groundwater goes to whether the Department is required to grant a facility’s permit application, allowing it to discharge without being subject to an enforcement action; it does not go to the Department’s authority to require a permit in the first place. WCS’s position that a facility engaging in the types of activities and handling the types of materials that this Facility does should be allowed to discharge hundreds of millions of gallons of water from that Facility into New Mexico with no permitted protections for New Mexico water quality standards or regulatory monitoring and oversight by the State of New Mexico is, simply put, absurd. If the Commission determines that the issue is not time-barred, NMED’s technical experts will demonstrate through

testimony and evidence at a public hearing on the record that groundwater, as defined under the Commissions regulations at 20.6.2.7.G NMAC, exists in the area and may be directly or indirectly impacted by discharges from the Facility.

These issues require development through presentation of evidence and expert testimony at a public hearing on the record. At this point, the administrative record contains only the communications between WCS and the Department regarding WCS's discharge permit application, and the correspondence and materials submitted by WCS beginning in August of 2016 in support of its recently-adopted position that no permit is required.⁴ In order for the Commission to have before it a record that allows for full and fair consideration of the issues raised, the Department must have the opportunity to put on its own evidence, including expert testimony explaining the Department's long-standing determination that a permit that is protective of New Mexico water quality standards is required for this Facility.

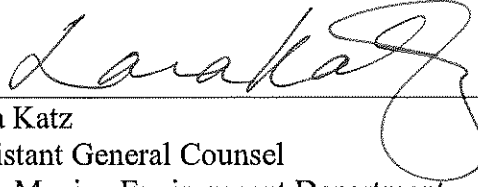
CONCLUSION

For the foregoing reasons, the Department requests that the Commission dismiss WCS's second issue on appeal as time-barred, or, in the alternative, remand that issue back to the Department for further proceedings, including a hearing on the record, regarding WCS's permit application.

⁴ Importantly, these materials largely consist of data, information, and case law from or relating to permits for other facilities in the same area as WCS's hazardous and radioactive waste facility. See AR 130, 02981-03430. Contrary to WCS's assertions, what these materials primarily demonstrate is that all the surrounding facilities were required to apply for and obtain *permits* that protect New Mexico water quality standards.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

A handwritten signature in black ink, appearing to read 'Lara Katz', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Administrator of Boards and Commissions and was served on the following on March 15, 2017:

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED

February 19, 2013

Sheila Parker, Environmental Director
Waste Control Specialists LLC
9998 Texas State Highway 176 West
Andrews, Texas 79714

RE: Response to Notice of Intent to Discharge and Discharge Permit Required for Waste Control Specialist, LLC; AI # 32292

Dear Ms. Parker:

The Ground Water Quality Bureau of the New Mexico Environment Department (NMED) received a Notice of Intent from you on October 17, 2012. The notice describes your intent to discharge from a treatment, storage and disposal facility. The notice satisfies the requirements of Subsection A of 20.6.2.1201 NMAC of the New Mexico Water Quality Control Commission (WQCC) Regulations, 20.6.2 NMAC. The proposed discharge is located at 9998 Texas Highway 176, approximately 6 miles east of Eunice, NM on the Texas/New Mexico stateline in both Lea County, NM and Andrews County, TX.

NMED has reviewed the information provided in accordance with Subsection D of 20.6.2.1201 NMAC. You are hereby notified that a Discharge Permit is required for the proposed discharge.

To apply for a Discharge Permit, you must complete and submit three copies of the enclosed Discharge Permit application, along with the \$100 filing fee. Please be advised that any discharge from this facility without prior written approval from NMED would be a violation of the WQCC Regulations.

EXHIBIT 1

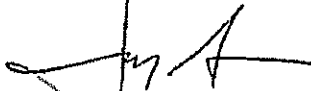
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Ms. Sheila Parker, Waste Control Specialists, LLC
February 19, 2013
Page 2

Any appeal of this determination that a Discharge Permit is required must be made to the New Mexico WQCC within 30 days of receipt of this letter, in accordance with Subsection B of 20.6.2.3112 NMAC. A copy of the WQCC Regulations, 20.6.2 NMAC, is available at <http://www.nmcpr.state.nm.us/nmac/title20/T20C006.htm>.

If you have any questions, please contact Clint Marshall, Program Manager of the Mining Environmental Compliance Section at 505-827-0027 .

Sincerely,



Jerry Schoeppner, Chief
Ground Water Quality Bureau

JS:CLM

Enc: Applying for a Discharge Permit: General Information
Discharge Permit Application, General Form

cc: Michael Kesler, Acting District Manager, NMED District III
NMED Hobbs Field Office
DP Required File
Ryan Flynn, OGC
I. Keith Gordon, P.E., Gordon Environmental, Inc., 213 S. Camino del Pueblo,
Bernalillo, NM 87004

: 01528