STATE OF NEW MEXICO
BEFORE THE
WATER QUALITY CONTROL COMMISSION

PETITION FOR REVIEW OF THE NEW MEXICO SECRETARY OF THE ENVIRONMENT'S DECISION GRANTING GROUNDWATER DISCHARGE PERMIT DP-1132 IN PROCEEDING GWB 17-20(P)

WQCC No. 18-05(A)

COMMUNITIES FOR CLEAN WATER BRIEF IN SUPPORT OF PETITION FOR REVIEW OF THE SECRETARY'S DECISION GRANTING DP-1132

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I. INTRODUCTION.

The Communities for Clean Water ("CCW") Petition and this supporting Brief concern an issue that the Water Quality Control Commission ("WQCC") should resolve. The issue is whether a non-discharging facility is required to obtain a discharge permit. CCW properly raised this issue at the beginning of the proceeding below by a *Motion to Dismiss* (March 16, 2018), which was provided with CCW's Petition for Review. Reviewing the Motion in light of the Hearing Officer's decision on the motion reveals that the substance of the Motion was ignored, and the Motion was denied without any statement of reasons. Following the denial of the Motion to Dismiss, a hearing took place in which CCW adduced evidence that further supported the contentions in the Motion to Dismiss. CCW presented this evidence to the Hearing Officer in the form of Closing Argument, Requested Findings of Fact, and Requested Conclusions of Law. CCW incorporates herein by reference its *Closing Argument, Requested Findings of Fact, and Requested Conclusions of Law*. **[AR 14249-14284].**

The Hearing Officer issued a Draft Report to the Secretary. Once again, comparison of the CCW filing with the Hearing Officer's Draft discloses that the Hearing Officer did not address the issues CCW raised. CCW then filed a response and comments on the Draft. After obtaining the comments of all parties, the Hearing Officer issued a Final Report to the Secretary. Comparison of the CCW response and comments to the Draft with the Final Report of the Hearing Officer once again demonstrates the absence of any substantive consideration of the issues CCW raised throughout this process. The Secretary's Decision and Order concerning the proceedings provide no substantive rationale for the decision to approve the permit.

Moreover, the Hearing Officer's Final Report and the Secretary's Decision fail to consider the substance of the public comments on the DP-1132 permit that CCW members and

other members of the public made before, during and after the public hearing, i.e., when the comment period was open. CCW contends herein that the hearing process was flawed because the process failed to address the key issue that CCW—the hearing requester—had raised, and the Hearing Officer failed to provide the process properly due to the noticed and participating public.

II. BACKGROUND FACTS AND EVIDENCE CONCERNING DP-1132.

A. Background Facts Concerning DP-1132.

1. The Radioactive Liquid Waste Treatment Facility ("RLWTF") was constructed in the early 1960's to treat, store, and dispose of radioactive and hazardous liquids generated by several Los Alamos National Laboratory ("LANL") facilities, the waste liquids of which are transported to the RLWTF by pipes and trucks. **[AR at 00117, 00123]**.

2. For decades, the RLWTF discharged treated water through Outfall 051 into Effluent Canyon, a tributary of Mortandad Canyon. Discharges from Outfall 051 have been regulated by LANL's permit under the federal National Pollutant Discharge Elimination System ("NPDES"). *See generally*, 33 U.S.C. § 1342.

3. LANL has operated the RLWTF on the premise that the RLWTF is exempt from HWA regulation under the Wastewater Treatment Unit exception to the RCRA. *See generally*, 42 U.S.C. § 6903(27) (NPDES permits); 40 C.F.R. § 260.10 (*Tank system, Wastewater treatment unit*), *see also* 40 C.F.R. § 264.1(g)(6)). *See, e.g.,* **[AR at 02323]**.

4. Since the RLWTF was considered exempt from hazardous waste regulation, it followed that it was eligible for regulation under the New Mexico Water Quality Act ("WQA"). The WQA does not apply to any activity that is regulated by the HWA. NMSA 1978, § 74-6-12.B. However, an exempt facility can receive a WQA permit without a conflict with the HWA.

5. Consequently, NMED started a proceeding to issue a ground water discharge permit, DP-1132. NMED recognized that a public hearing would be required but initially lacked the resources for a hearing and obtained LANL's agreement to make quarterly reports. **[AR at 01432, 01435]**.

6. Against this regulatory background, LANL announced[1] its commitment to eliminate liquid discharges from the RLWTF. [2]

7. The Zero Discharge Working Group made a presentation on April 8, 1998 to LANL officials, outlining problems raised by continued release of radioactive liquid effluent. **[AR at 00860]**. Therein, the Laboratory's Environmental Safety and Health ("ESH") and Environmental Management Divisions ("EM") initiated the "Radioactive Liquid Waste Zero Discharge Project." *Id.*

8. LANL told NMED that the project would include gas-fired evaporation units ("Mechanical Evaporation System" or "MES") and, later, evaporative basins ("Solar Evaporation System" or "SET"). **[AR at 01372, 03548]**. LANL's 2008 Site-Wide Environmental Impact Statement ("SWEIS"), Appx. G, discusses the prospective "upgrade" of the RLWTF.[3] In one Record of Decision ("ROD"), the United States Department of Energy ("DOE") determined to pursue design of a Zero Liquid Discharge RLWTF.[4] In a later ROD, DOE decided to construct

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[1] Moss, *et al., Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility*, (1998) (Ex. A to Request to Terminate NPDES Permit #NM0028355 to Outfall 051 for the Radioactive Liquid Waste Treatment Facility (June 17, 2016) (the "Request")). The Request with exhibits and the exhibits to the Motion to Dismiss **[AR 15255-15274]** were provided on CD-ROM to the parties when the Motion to Dismiss was filed. At hearing, the CD was provided to the Hearing Officer, the Hearing Clerk, and the Court Reporter, and, at the request of counsel for CCW, they were also made part of the record of the proceeding. Tr. at 12:5-13:3, **[AR 14339]**.

[2] *Id.* at v (Ex. A to Request).

[3] SWEIS at G-60, G-73, G-83, G-88 (Ex. JJ to Request).

[4] ROD, Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, 73 Fed. Reg. 55833, 55839 (Sept. 26, 2008) (Ex. LL to Request).

and operate a new RLWTF and operate the Zero Liquid Discharge facility.[5]

9. In the late 2000's, LANL rebuilt the RLWTF for "zero-liquid-discharge" operation. LANL intended to eliminate discharges through Outfall 051, except in an "emergency." **[AR at 03548]**.

10. LANL advised NMED in 2010 that it was evaluating a trailer-mounted evaporation system with sufficient capacity so that evaporation would exceed effluent production. **[AR at 04016]**, and a March 20, 2012 NMED inspection report states that LANL intended to evaporate all liquid output from the RLWTF. **[AR at 08122]**. LANL responded to the inspection report by stating: "The strategic plan for DOE/LANS [Department of Energy/Los Alamos National Security, LLC] is to maintain all three effluent management options, including the capability of treating radioactive liquid waste to meet all NPDES limitations." **[AR at 08223]**.

11. Yet, by the end of November 2010, discharges from Outfall 051 ended. That was affirmed in a 2014 report[6] and repeated in late 2014 in an NMED report to U.S. Environmental Protection Agency ("EPA") Region 6.[7] It is also consistent with the information on LANL's website.[8]

12. The LANL Quarterly Reports to NMED included in the Administrative Record show that there has been no discharge since November 2010. From August 25th, 2010, by letter informing the NMED of the "minor change" that discharges would be ceasing, there were only

[5] ROD, Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, 74 Fed. Reg. 33232, 33235 (July 10, 2009) (Ex. MM to Request).

[6] See Isotopic evidence for reduction of anthropogenic hexavalent chromium in Los Alamos National Laboratory groundwater, 373 Chemical Geology 1, 4 (May 12, 2014) (Ex. PP to Request) ("Discharges from Outfall 051 decreased significantly after the mid-1980s and effectively ended in late 2010")

[7] See Letter, Yurdin to Dories with Inspection Report, at 4th page (August 5, 2014) (Ex. QQ to Request) (Outfall 051 had not discharged since November 2010).

[8] At the pull down menus for Outfall 051 (reviewed on 11/16/2018): http://www.lanl.gov/environment/protection/compliance/industrial-permit/outfall-map.php

two discharges at the end of November, 2010, and all reports since that time state there was no discharge and the effluent was evaporated.[9] No discharges are planned. The facts are set forth in detail in the *Request to Terminate NPDES Permit #NM0028355 to Outfall 051 for the Radioactive Liquid Waste Treatment Facility* (June 17, 2016), which, as noted above, was made a part of the Record in this proceeding and is incorporated herein by reference.

13. The discontinuance of discharges determines which regulatory regime applies to the RLWTF. The discharges of contaminated water that required regulation under the WQA and under the NPDES program have stopped. Thus, there is no longer any need or any basis to regulate such discharges.

14. Nevertheless, LANL has proceeded with the pending WQA Discharge Permit Application, dated February 14, 2012, which is clearly marked "Application for a new Discharge Permit—existing (unpermitted) facility" and which refers to discharges through Outfall 051. See **[AR at 5348]** ("Discharge to the environment is via NPDES Outfall #051, solar evaporation at the TA-52 Zero Liquid Discharge Solar Evaporation Tanks, or mechanical evaporation at TA-50-257"). November 2018 marks the eight year anniversary of the cessation of discharges.

15. Still, LANL demands a discharge permit and insists that the RLWTF is exempt from HWA regulation. LANL argued that it was inappropriate for the draft permit to impose conditions from the Hazardous Waste regulations, because LANL claimed the RLWTF was exempt. See **[AR at 09794]** (General Comment No. 1, Permit Condition II.V at p. 6 (Dec. 12,

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[9] **[AR at 04045]** (1/31/2011) **[AR at 04579]** (4/19/2011); **[AR at 05210]** (7/25/2011); **[AR at 05238]** (10/21/2011); **[AR at 05305]** (01/24/2012); **[AR at 08216]** (4/26/2012); **[AR at 08216]** (07/17/2012); **[AR at 08324]** (10/29/2012); **[AR at 08330]** (01/20/2013); **[AR at 08681]** (04/30/2013); **[AR at 09271]** (07/25/2013); **[AR at 09578]** (10/17/2013); **[AR at 09922]** (01/21/2014); **[AR at 10254]** (07/22/2014); **[AR at 12839]** (10/27/2014); **[AR at 12922]** (01/13/2015) [LANL misdated this report as 2014]; **[AR at 12973]** (04/23/2015); **[AR at 13240]** (07/28/2015); **[AR at 13256]** (01/20/2016); **[AR at 13269]** (04/28/2016); **[AR at 13414]** (07/28/2016); **[AR at 13418]** (10/19/2016); **[AR at 13439]** (01/18/2017); **[AR at 13477]** (04/17/2017); **[AR at 13841]** (10/30/2017).

2013), stating: "RCRA contains very prescriptive requirements which NMED . . . is attempting to inject in the draft permit definition, to determine if tank or tank systems meet "secondary containment" requirements[.] Because it is an exempt wastewater treatment unit, the existing RLWTF was not constructed to meet the RCRA requirements."). LANL also commented that NMED could not lawfully use RCRA language concerning emergency plans. **[AR at 09799].**

16. CCW has consistently argued that conversion of the RLWTF to "zero-liquid-discharge" operation would change its regulatory status and would require that the RLWTF have a RCRA permit under the HWA. **[AR at 09663]**. In its comments on the draft permit, December 12, 2013, CCW stated that, "LANL should be forced to seek a RCRA permit for this facility as a hazardous waste treatment facility—and go to zero discharge within one year of issuance of the permit." **[AR at 09694]**.

17. In later comments, CCW urged that the "Authorization to Discharge" language in the draft DP-1132 was an error, since the RLWTF was a "zero-liquid-discharge" facility. **[AR at 13690]** (Nov. 23, 2015).

18. Again, in August of 2016, CCW argued that a groundwater discharge permit had improperly been used to avoid regulation under the HWA: "[W]e find that a discharge permit is only supportable where there is an actual discharge occurring or planned—a situation not present here." **[AR at 13698]**. In a January 2017 comment, CCW emphasized that the unsupported discharge permit would give the RLWTF an unfounded exemption from hazardous waste regulation. **[AR 13756-13758]**.

19. Despite the above facts, NMED Ground Water Quality Bureau ("GWQB") has persisted in issuing the draft DP-1132 WQA permit.

B. Evidence Presented At The Public Hearing.

20. Mr. Robert S. Beers of Los Alamos National Laboratory testified in support of the proposed permit, stating, "there would be three discharges regulated by DP-1132." These, he said, are to the solar evaporation tank system ("SET"); the mechanical evaporation system ("MES"), and the NPDES Outfall 051 in Mortandad Canyon. Transcript of Proceedings, *In the Matter of the Application of the United States Department of Energy and Los Alamos National Security, LLC, For a Groundwater Discharge Permit (DP-1132) for the Radioactive Liquid Waste Treatment Facility* ("Tr." or "Transcript") (April 19, 2018) at 70:25-71:14.

21. On cross-examination he conceded that there is no discharge at present from Outfall 051, Tr. at 71, and there has been no discharge from Outfall 051 since November of 2010. Tr. at 72-73; 80-81. He also agreed that being allowed or authorized to discharge is not the same thing as actually discharging. Tr. at 100-01.

22 Mr. Steven Pullen, who testified for NMED, agreed that the SET has not begun operation. Tr. at 205. He also agreed that during normal operation effluent would not touch the ground and that under normal operation of the MES evaporates water which escapes in a vapor phase. Tr. at 207-08.

23. He also testified that he is confident the MES will not send effluent to ground water, as the permit will ensure there are controls in place so it does not. Tr. at 209.

24. Neither LANL witnesses, nor Mr. Pullen of NMED, stated that there were any *actual* statutory discharges whereby water is released from containment in the RLWTF. *See generally*, Transcript (testimony only dealt with "potential" discharges).

25. LANL asserted to NMED in the permitting process that "a ground water discharge permit will not be required for this project [the SET] because there is no reasonable

probability or likelihood that liquid contained in the evaporation tanks will move toward ground water." Tr. at 88; *see also* CCW Cross Ex. 1 **[AR at 03654-03657]**. Similar language appears in CCW Cross Ex. 2 **[AR at 03704-03707]** and CCW Cross Ex. 3 **[AR at 05216-05223]**.

26. Mr. Beers testified that, "[U]nlike the treated effluent to the MES and SET, discharges of treated effluent from Outfall 051 reach surface waters and indirectly, have the potential to impact ground water." Tr. at 93. He testified that effluent directed to the MES or the SET does not normally reach surface water. Tr. at 94-95, 95-96.

27. Mr. Pullen, the NMED was asked about the basis for statements in his testimony and in the draft permit that the RLWTF is currently discharging in such a way that effluent may move into ground water, and at a place of ground water withdrawal for present or reasonably foreseeable future use. Tr. at 197-198. He admitted that the only "discharges" occurring were releases to the MES; discharges through Outfall 051 had only occurred in the past. *Id.* at 200.

28. He acknowledged that his belief there would be discharges to Outfall 051 were predicated on the notion that, "anything is possible" and that there have been no discharges from the RLWTF since November 2010. *See* Tr. at 201, 204-05 (recitation in DP-1132 that discharges are occurring only true if a discharge goes to Outfall 051, but there have been none since 2010).

29. Mr. Beers said that LANL plans to discharge from Outfall 051 as required by DP-1132 for "water tightness testing of the outfall line." Tr. at 71-72. When questioned as to whether such testing would be done with contaminated water, Mr. Pullen testified that he did not believe so. Tr. at 211:17-19.

30. Mr. Beers testified that the Lab only intends to discharge to Outfall 051 under certain conditions, namely: if the mechanical evaporator and the solar evaporation tank are both

out of service, or where the RLWTF is receiving larger than expected volumes of influent and needs to discharge, or to demonstrate operational readiness. Tr. at 74-75, 79, 101.

31. Mr. Beers stated that LANL's purpose in maintaining a federal NPDES permit for Outfall 051 is to maintain capacity to discharge if the MES or the SET become unavailable due to maintenance, malfunction, or there is an increase in treatment capacity. Tr. at 101.

32. Mr. Pullen testified that the Permittees viewed Outfall 051 as an "option" for use in certain conditions. Tr. at 211. He stated that Outfall 051 and "all of the discharge options are potential, and the permit will give the applicant the option to use any of them." Tr. at 212.

33. Mr. Beers testified that NMED's GWQB advised LANL that a discharge permit would be required for the SET. Tr. at 99. He explained that a WQA permit is needed because "it is the *potential* for a discharge to get to ground water that matters, regardless of intent." Tr. at 110 (*emphasis added*). Mr. Beers advocates for DP-1132 due to the *potential* for discharges *Id.*

34. Mr. Beers stated that when effluent is piped to the MES and/or the SET, it is a "discharge" as the regulations define it, namely, a discharge of effluent or leachate which *may* move directly or indirectly into ground water. *See* Tr. at 112. ("there is a potential for a failure of the containment system, in which case an unintended release could reach ground water"). He referred to a possible failure of the containment system in the MES or the SET. Tr. at 113.

35. When counsel for CCW inquired as to the *probability* of such event, counsel for LANL protested that it was *speculative*, and the Hearing Officer agreed. Tr. at 113-14

36. Mr. Beers agreed that other LANL facilities have tanks and pipes that contain substances controlled under the WQA, and each of them "just sitting there has a potential discharge," *but* they do not all have discharge plans. Tr. at 114.

37. Mr. Beers agreed that NMED proposes to issue DP-1132 for a *potential* discharge, a practice he views as a fundamental part of NMED's permitting program. Tr. at 119

38. Mr. Pullen testified that "[t]he *potential* for any of this [MES] effluent to move to ground water is the reason we permit the mechanical evaporator." *Id.* (emphasis added). The same is true of the SET. *Id.* He stated that pumping effluent to the MES and its evaporation is a "discharge that *may* move to ground water, has the *potential* to move to ground water. So it is a discharge." Tr. at 208-209 (emphasis added).

39. Mr. Pullen explained that the basis for permitting the MES is a transfer of water that, *possibly, might* cause effluent to move toward ground water. *Id.*

40. As to whether the MES releasing steam is a "discharge of effluent or leachate which may move directly or indirectly into ground water" (20.6.2.7.R NMAC), Mr. Pullen testified that the permit is needed due to the possibility of a failure of containment. Tr. at 215-16. Yet, he conceded the WQA does not allow NMED to permit a "potential" discharge. Tr. at 212.

41. Mr. Pullen testified that the permit, DP-1132, would come into effect "the moment my boss signs the permit." Tr. at 213. He then read NMSA 1978, § 74-6-5.I, which states that, for a new discharge, "the term of the permit shall commence on the date the discharge begins," and he said that the "discharge is occurring today" [to the MES]. Tr. at 214-15; *see also* Tr. at 215 ("Again, it's the *potential* for impact to ground water") (emphasis added); *and* ("[a] discharge permit would go into effect the moment it is signed, regardless of when the discharge actually occurs") Tr. at 218.

42. Since DP-1132 is a new NMED permit for a facility that has operated without a permit for its operational life, thus, the asserted "discharges" to the MES and the SET are new "discharges" never before made or permitted before, no water or contaminants will thereby be

released from the containment of the facility to the surface, and so water directed to the MES or the SET *cannot* "move directly or indirectly into ground water" (20.6.2.7.R. NMAC). Thus, they are *not* discharges under the Water Quality Act. A permit authorizing such alleged discharges will never come into effect under the requirements of NMSA 1978, § 74-6-5.I.

III. LEGAL ARGUMENT.

A. DP-1132 Is Not Legal Under the New Mexico Water Quality Act.

The Hearing Officer had the authority to determine issues of law and fact in resolving the issues presented in this hearing concerning DP-1132. 20.1.4.100.E(2) NMAC.

In determining issues of law concerning an agency action, a tribunal, such as the WQCC or a reviewing court, will determine, *inter alia*, whether the agency's decision is "not in accordance with law." *Earthworks Oil & Gas Accountability Project v. Oil Conservation Commission,* 2016-NMCA-055, ¶ 10, 374 P.3d 715-719; *Gila Resources Information Project v. Water Quality Control Commission,* 2005-NMCA-139, ¶ 15, 138 N.M. 625, 629. In examining the lawfulness of agency action, the reviewer looks first to the language of the governing statute. The question is "whether the [agency's] actions are consistent with the statute it is charged with implementing." As the Court stated in *Earthworks*:

> The standard of review normally applied by appellate courts to administrative decisions is found in Rule 1-074(R) NMRA. It provides that judicial review is limited to determining (1) whether the agency acted fraudulently, arbitrarily or capriciously; (2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence; (3) whether the action of the agency was outside the scope of authority of the agency; or (4) whether the action of the agency was otherwise not in accordance with law.

Id. at ¶ 25*; see also Johnson v. Sanchez,* 1960-NMSC-029, ¶ 22, 67 N.M. 41, 48-49; *Lion's Gate Water v. D'Antonio,* 2009-NMSC-057, ¶ 19, 147 N.M. 523, 529.

The "meaning of language used in a statute is a question of law that we review *de novo*." *Quynh Truong v. Allstate Insurance Co.,* 2010-NMSC-009, ¶ 22; 147 N.M. 583, 590. "However, we will not defer to the Commission's or the district court's statutory interpretation, as this is a matter of law that we review de novo". *Mutz v. Mun. Boundary Comm'n,* 1984-NMSC-070, ¶ 10, 101 N.M. 694, 697-98; *see also Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 17, 133 N.M. 97, 104. New Mexico courts are directed to follow the plain meaning of the statutory language:

> The first and most obvious guide to statutory interpretation is the wording of the statutes themselves. In the Uniform Statute and Rule Construction Act, the Legislature has mandated that "[t]he text of a statute or rule is the primary," essential source of its meaning." NMSA 1978, § 12-2A-19 (1997). New Mexico courts have long honored this statutory command through application of the plain meaning rule, recognizing that "[w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." In order to construe faithfully what the Legislature meant. . . . we consider the plain meaning of the words used in the context of the statutory text as a whole.

Quynh Truong v. Allstate Ins. Co., 2010-NMSC-009, ¶ 37, 147 N.M. 583, 593 [internal citations omitted].

"The primary indicator of the Legislature's intent is the plain language of the statute." *General Motors Acceptance Corp. v. Anaya,* 1985-NMSC-066, ¶ 15, 103 N.M. 72, 76. If the language is clear and unambiguous, it is to be given effect. *Draper v. Mountain States Mut. Casualty Co.,* 1994-NMSC-002, ¶ 4, 116 N.M. 775, 777. "When a statute is clear and unambiguous, we interpret it as written." *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 23, 147 N.M. 523, 532. NMED and the WQCC, as statutory creations, are limited in their powers by the authorizing statutes:

> Administrative bodies are the creatures of statutes. As such they have no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them.

Public Serv. Co. v. N.M. Envtl. Improvement Bd., 1976-NMCA-039, ¶ 7, 89 N.M. 223, 226 (*citing Maxwell Land Grant Co., et al., v. Jones*, 1923-NMSC-008, ¶ 4, 28 N.M. 427, 429-430). Furthermore, the subject matter jurisdiction of an administrative agency is defined by statute, and an agency is limited to exercising only the authority granted by statute. *Citizen Action v. Sandia Corp.*, 2008-NMCA-031, 143 N.M. 620.

When a Court reviews the actions of agencies, boards or commissions, little deference is given to an agency's interpretation of its own jurisdiction:

> The determination of whether an administrative agency has jurisdiction over the parties or subject matter in a given case is a question of law. As an administrative body created by statute, the agency's authority and jurisdiction are defined by statute. New Mexico courts will accord "little deference" to the agency's own interpretation of its jurisdiction.

Morningstar Water Users Association v. Public Utilities Commission, 1995-NMSC-062, ¶ 13, 120 N.M. 579, 583 [internal citations omitted] (*quoting El Vadito De Los Cerrillos Water Ass'n v. N.M. PSC,* 1993-NMSC-041, ¶ 11, 115 N.M. 784, 787).

The authority of NMED under the Water Quality Act is set forth in that Act. NMED is identified as a "constituent agency." NMSA 1978, § 74-6-2.K.1. Under that Act, the WQCC shall assign responsibility for administering its regulations to constituent agencies. NMSA 1978, § 74-6-4F. Moreover, "By regulation, the commission may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant[.]" NMSA 1978, § 74-6-5.A. Pursuant to statute, the WQCC has issued implementing regulations: 20.6.2.1 *et seq*. NMAC. Therein, in a part of the regulations that addresses ground water, it is stated that:

> Unless otherwise provided by this Part, no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary.

20.6.2.3104 NMAC. The "Secretary" is defined as the Secretary of NMED. 20.6.2.7.PP. NMAC. The regulations state that a "discharge permit" is an approved discharge plan, which is, in turn, defined as follows:

> "discharge plan" means a description of any operational, monitoring, contingency, and closure requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water.

20.6.2.7.R. NMAC. Further, "ground water" is defined as follows:

> "ground water" means interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply.

20.6.2.7.Z. NMAC

By virtue of these authorities defined by statutes and regulations, the Legislature has authorized the WQCC to designate state agencies, including NMED, to issue "a permit for the discharge of any water contaminant." NMSA 1978, § 74-6-5.A. The WQCC has made such designation under NMAC 20.6.2.3104, which authorizes the NMED Secretary to issue a discharge permit. Such a permit, in turn, shall consist of "requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water," which is defined as "interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply." 20.6.2.7. NMAC.

Such are the metes and bounds of the administrative agency authority that has been brought to bear in this case. Therefore, unless the proposed permit, DP-1132, is "a permit for the discharge of any water contaminant," as further defined, it is outside the NMED's statutory authority. NMED seeks to issue a discharge permit under the WQA for the RLWTF. For four principal reasons, this discharge permit may not issue:

First, the RLWTF does not and will not *discharge* any water or contaminants. Without a discharge, NMED has no basis to issue a discharge permit. NMSA 1978, §§ 74-6-5(A) *and* (I). From the records of the permitting proceeding and the testimony taken at the public hearing on April 19, 2018, it is clear that the proposed permit does not meet the statutory requirements. There is no discharge occurring at present or planned for the future. There are three locations proposed to be authorized for discharges from the RLWTF: The first is Outfall 051, which is a pipe from which water might be directed onto the surface at Effluent Canyon. There has been no discharge from Outfall 051 since November 2010. There is no plan to discharge from Outfall 051 in the future. At most, witnesses have testified that LANL *might* decide to discharge through Outfall 051 *if* both the Mechanical Evaporator System and the Solar Evaporation Tanks were out of operation for some reason *or* there were an increase in influent flow, requiring use of Outfall 051. It must be noted that significant new influent holding tanks have recently been added at the RLWTF, making it even less likely than otherwise that a discharge from Outfall 051 would ever be necessary. *See* Robert Beers pre-filed testimony, slide 8 (showing the tanks); Tr. at 191:19-24 (Hearing Officer questioning Mr. Pullen regarding options for discharging and discussing the very large tanks as one option other than the MES or Outfall 051); *and see* **[AR at 09552]** indicating the very large amount of "emergency" influent storage capacity for the RLWTF: 3 x 10^5 (300,000) gallons with 2 x 10^5 (200,000) specifically reserved for emergencies.[10]

[10] "Emergency Influent Storage - Building 50-250, the Waste Management and Risk Mitigation (WMRM) facility, is located about 50 meters southeast of Building 50-01 . WMRM houses six influent storage tanks with a capacity of 50,000 gallons each; four of these are held in reserve for use in emergency situations. WMRM is a steel frame structure designed to withstand seismic, wind, and snow load criteria. The concrete basement houses the two influent and six emergency storage tanks, and acts as secondary containment. Tanks would receive influent by gravity flow from WM-72."

The occurrence of any of the named circumstances, claimed to necessitate a discharge from Outfall 051, is entirely speculative. LANL offered no evidence of the likelihood of such circumstances, and the probability must be deemed unknown and unproven. The circumstances that supposedly might call for a discharge from Outfall 051 have not occurred since November 2010, or, if they did, it was not necessary to discharge via Outfall 051. Since such a discharge is not occurring at present, nor does LANL intend to discharge in the future from Outfall 051, the conditions for application for a discharge permit do not exist. *See generally*, 20.6.2.3106.A, B NMAC. No discharge permit should be issued for Outfall 051 or any other location connected to the RLWTF.

LANL has also pointed to what it termed intended discharges to the MES and to the SET. Both of these units process contaminated water by evaporation. The water, in other words, is vaporized either at elevated temperatures or by solar evaporation. It is established that, in normal operation, no water escapes either the MES or the SET and reaches the surface of the earth. Since no water escapes from containment, it cannot be said that any water is released that "may move directly or indirectly into ground water" (20.6.2.7.R. NMAC), much less into "interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply." 20.6.2.7.Z. NMAC. Indeed, Mr. Pullen of NMED was confident that the operation of the MES, in normal use, involves no discharge and that there has not been a discharge at the RLWTF for a long time. *See* Tr. at 209:7-11 (normal operation of the MES); *and* Tr. at 193:3-6 (no discharge for a long time)

The RLWTF is now a "zero-liquid-discharge" facility. No water at all, and no contaminants, are being released or will be released. Therefore, nothing will be released which may move toward any water, much less water occurring in saturated earth material which is

capable of entering a well in sufficient amounts to be utilized as a water supply. The WQA and its regulations only authorize NMED to regulate a facility that makes a discharge, as so defined. The RLWTF is not such a facility. An agency must follow its authorizing statute. *Albuquerque Cab Co. v. N.M. Public Regulation Commission,* 2014-NMSC-004, ¶ 11, 317 P.3d 837, 839. Likewise, an agency must follow its own regulations. *Hillman v. Health & Social Services Department,* 1979-NMCA-007, ¶ 5, 92 N.M. 480, 481-482; see also *La Mesa Racetrack v. State Racing Commission,* No. 31,884, mem. op. at 14 (N.M. Ct. App. Mar. 21, 2013) (non-precedential). Indeed, the draft permit now improperly defines "discharge" in expansive language that far exceeds the governing regulations, contrary to the cases cited above:

> G. Discharge- the intentional or unintentional release of an effluent or leachate which has the potential to move directly or indirectly into ground water or to be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property.

[AR at 12980] (May 5, 2017). In addition, NMED has improperly inserted language into DP-1132 to suggest that a statutory "discharge" is occurring or anticipated. These "Findings" regarding "discharges" are wholly without factual basis. **[AR at 12984]** (May 5, 2017). The recitals that assert that effluent or leachate is now being discharged are unsupported and refuted by, among other things, the consistent quarterly reports that show no discharges and the testimony of Mr. Beers and Mr. Pullen. (Beers, Tr. 72-73, 80-81; Pullen, Tr. 201, 204-05).

The Draft Permit also contains an "authorization to discharge," purportedly allowing LANL to "discharge" contaminated water from one tank to another within the RLWTF. **[AR at 12984].** These findings and authorizations are entirely bogus. It is known that discharges through Outfall 051 stopped in 2010 and are neither occurring nor planned. The purported "authorization" to make discharges through Outfall 051 is meaningless, because LANL has no plans to do so.

The other supposed "discharges" referred to in "Findings" and "Authorizations" are simply transfers among parts of the contained system of the RLWTF, transfers that leave the water and any contaminant isolated from the environment. Such so-called "discharges" involve no release to the environment or towards ground water, as the WQA requires. The idea that a transfer of water from one tank to another tank or back again, or to an evaporation unit in a contained facility constitutes a "discharge" cannot be squared with the language of the WQA and its implementing regulations. Such actions do not even incrementally increase the likelihood that there would be a release to the environment or towards ground water. LANL itself recognizes that a transfer to the evaporation tanks is no "discharge." LANL has repeatedly asserted that a groundwater discharge permit would not be required for the evaporation tanks, because "there is no reasonable probability that liquid contained in the evaporation tanks would move into groundwater." **[AR at 03655, 03704, 05217]**. Recitals about fantasy "discharges" are merely a fabricated predicate for a WQA permit that has no lawful basis.[11]

Second, NMED has no authority to issue a WQA permit for a "possible" or "potential" discharge, where there is no actual discharge. It was urged in testimony that a discharge permit should be issued, because of the possibility that some water connection, such as one between the treatment facility and a discharge location (*e.g.*, the MES) might fail, allowing a discharge to the surface and, therefore, potentially, to ground water. Tr. at 208-09, 215-16 (Mr. Pullen); Tr. at 112-13, 119 (Mr. Beers). However, such testimony refers at most to a *potential* discharge, and one whose likelihood must be regarded as speculative and unproven. Neither LANL nor NMED (or any other party) presented evidence concerning the likelihood of an unplanned release. Thus,

[11] The WQA makes it clear that management of water that is confined within a particular unit is not subject to the Water Quality Act. It denies application of the Act to water pollution that is "confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters." NMSA 1978, § 74-6-12.

the statutory basis for issuing a permit has not been established. Moreover, NMSA 1978, § 74-6-5 does not give the WQCC authority to designate a constituent agency to issue a permit for a potential discharge, nor does it attempt to describe how such a potential discharge might be identified or defined. Extension of regulatory authority beyond "the discharge of any water contaminant" to the much larger field of "potential discharges" is a step that the Legislature has not taken, and one that presents numerous problems, both legal and scientific, that no agency has been authorized to address.

The issuance of DP-1132 cannot be justified on the theory that an unplanned discharge through Outfall 051 is a mere possibility. The WQA does not authorize a permit when NMED finds that a facility might *possibly* discharge, *e.g.,* from an accidental leak. The WQA authorizes a permit *only* for an actual "discharge." NMED must stay within the bounds of the authority that the Legislature has given it—which does not include the regulation of hypothetical discharges. Such regulation would make little sense. If the *possibility* of equipment failure called for a discharge permit, then NMED would need to issue a discharge permit for any pipe that connects a water tank to a power plant boiler, or to cooling towers, or to another treatment system, or to any other building. It is always *possible* that a pipe might leak. But only a "discharge" may be regulated. 20.6.2.3104 NMAC. Under the WQA and its implementing regulations, NMED is not allowed to issue a discharge permit for a facility that does not actually discharge.

Third, a WQA permit for the RLWTF would be a nullity, because by law it would not become effective until there is a discharge, *i.e.*—never. The WQA, at NMSA 1978, § 74-6-5.I., provides that "for new discharges, the term of the permit shall commence on the date the discharge begins." *Id.* The parallel regulations contain the same terms. *See generally*, 20.6.2.3109.H NMAC. If a permit were authorized for a new discharge that is only a "potential

discharge," such a permit would never come into effect, as only an actual statutory "discharge" would cause it to do so. Since the permit term starts only with an *actual* statutory discharge, a permit to a non-discharging facility never comes into effect. Upon issuance, DP-1132 will be a nullity, and it will continue indefinitely as such. When a discharge permit is not in effect, it cannot be enforced; *i.e.*, there is no penalty for violation of its requirements. *State v. Villa*, 2003-NMCA-142, ¶¶ 7-10, 134 N.M. 679, 683-684, *aff'd in part, rev'd in part on other grounds,* 2004-NMSC-931, 136 N.M. 367. CCW respectfully submits that the New Mexico Legislature did not enact the WQA to assign NMED the task of promulgating such a nullity.

Fourth, the RLWTF is a *hazardous waste management facility,* and the WQA by its own terms cannot apply. Under NMSA 1978, § 74-6-12(B), "[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act[.]" *Id.* The proposed permit, DP-1132, would be issued under the WQA. Conflicts between the WQA and the HWA, which implements the federal RCRA, 42 U.S.C. § 6901 *et seq.*, in New Mexico, are mediated by a provision in the WQA, which states that a facility that is subject to the HWA cannot be regulated by the WQA:

> B. The Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978], the Ground Water Protection Act [Chapter 74, Article 6B NMSA 1978] or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge.

NMSA 1978, § 74-6-12.B. Thus, "The Water Quality Act is a separate regulatory scheme and does not overlap the Hazardous Waste Act." *Schwartzman, Inc. v. Atchison, T. & S.F. Ry.*, 857 F. Supp. 838, 847 n. 4 (D.N.M. 1994).

LANL expressly acknowledges that the RLWTF manages hazardous waste, as defined in regulations under the HWA.[12] Normally, such a facility is required to have a permit issued under RCRA or the parallel state law, here, the HWA: Since it receives, stores, and treats wastes which contain hazardous constituents and constitute "solid waste" and "hazardous waste" under RCRA, 42 U.S.C. § 6903(5) and (27), the RLWTF must have a permit under RCRA or an authorized state program. 42 U.S.C. § 6925; 40 C.F.R. § 270.1(c). However, the RLWTF has no RCRA permit. LANL relies upon a statutory RCRA exemption, 42 U.S.C. § 6903(27), for discharges from facilities regulated under the NPDES and a regulatory exemption for a "wastewater treatment unit." *See generally*, 40 C.F.R. § 260.10 (*Tank system, Wastewater treatment unit*); *see also* § 264.1(g)(6). LANL claims that the RLWTF constitutes a Wastewater Treatment Unit, exempt from regulation under RCRA and the HWA.

NMED has stated that the availability of the Wastewater Treatment Unit exemption depends upon the RLWTF discharging through a Clean Water Act outfall.[13] Yet, the Clean Water Act applies only to a "discharge of any pollutant, or combination of pollutants." 33 U.S.C. § 1342(a)(1). A discharge is "[a]ny addition of a 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source'." 40 C.F.R. § 122.2. The discharges

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[12] LANL concedes that the RLWTF will "receive and treat or store an influent wastewater which is hazardous waste as defined in 40 C.F.R. § 261.3[.]" LANL has expressly stated that, "The RLWTF satisfies each of these conditions[.]" The RLWTF "[r]eceives and treats a small amount of hazardous wastewater[.]" Comments, Dec. 12, 2013, Encl. 3 at 1. Moreover, LANL has told NMED that, "[A]ll units at the TA-50 RLWTF . . . have been characterized as a SWMU [solid waste management unit] or AOC [area of concern] and are therefore subject to regulation under the [HWA Consent Order]." LANL letter to [Jerry] Schoeppner, Head, Groundwater Quality Bureau (September 11, 2014).

[13] *See* 2010 LANL HWA permit at 86 section 4.6 ((LANL "shall discharge all treated wastewater from the TA-50 Radioactive Liquid Waste Treatment Facility (RLWTF) through the outfall permitted under Section 402 of the federal Clean Water Act, or as otherwise authorized by the terms of an applicable Clean Water Act permit that regulates the treatment and use of wastewater. If the Permittees intentionally discharge through a location other than the permitted outfall or as otherwise authorized, they will fail to comply with this requirement, and as a consequence the wastewater treatment unit exemption under 40 CFR § 264.1(g)(6) will no longer apply to the RLWTF. The Permittees shall not accept listed hazardous wastes as specified at 40 CFR Part 261 Subpart D at the RLWTF").

stopped years ago. Where there is no discharge, there is no basis for an NPDES permit. *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency,* 399 F.3d 486, 505 (2d Cir. 2005); *see also National Pork Producers Council v. U.S. Environmental Protection Agency,* 635 F.3d 738, 750 (5th Cir. 2011). Without a NPDES permit, there is no waste water treatment unit exemption from RCRA. Here, there is no discharge; thus, there can be no RCRA exemption. Without an exemption, RCRA (*i.e.*, HWA) regulation is required.

It is not within NMED's authority to exempt the RLWTF from the HWA by, *e.g.*, issuing a WQA permit. Regulation of hazardous wastes is governed by federal law. RCRA is the supreme law of the land. U.S. Const., Art. VI, Cl. 2. Further, NMED has represented to the EPA that New Mexico's HWA program is "equivalent to, consistent with, and no less stringent than the federal program" under RCRA. On that basis, EPA authorized New Mexico under 42 U.S.C. § 6926(b) to operate the state's HWA program in lieu of RCRA. *See generally*, New Mexico: Final Authorization of State Hazardous Waste Management Program Revision, 72 Fed. Reg. 46165 (Aug. 17, 2007). In addition, the WQA states that, if a facility is an "activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act," it cannot be regulated by the WQA. NMSA 1978, § 74-6-12.B.

LANL has long known that the RLWTF's transition to zero-liquid-discharge operation would spell the end of a NPDES discharge permit and, consequently, of the Wastewater Treatment Unit exemption from the HWA.[14] LANL has noted that loss of the RCRA exemption was an "important consideration" in its planning, and that "Loss of this exemption would mean

[14] *Id.* 12 (Ex. A to Request) (June 1998) ("Under RCRA, wastewater treatment facilities that are subject to NPDES permit limits may qualify for exemption from certain RCRA requirements, including engineering design standards. When the RLWTF implements zero liquid discharge, if the NPDES permit for Mortandad Canyon is deleted, current exemptions would not apply. RCRA-listed wastes are already administratively prohibited from the RLW waste stream. However, the potential for exposure to increased RCRA regulatory coverage with zero discharge underscores the need for better administration and documentation of compliance with WAC [waste acceptance criteria] requirements").

that the RLWTF would be required to meet additional RCRA regulatory guidelines regarding waste treatment practices."[15] LANL was well aware of the consequences: "[T]he loss of the NPDES permit at the RLWTF will cause the loss of the RCRA exemption for the RLWTF. RCRA regulatory oversight will increase at the RLWTF. NPDES regulatory oversight will decrease."[16] With its eyes open, LANL established zero liquid discharge from the RLWTF as its "ultimate goal."[17] LANL repeatedly so stated.[18] NMED has stated publicly that elimination of Outfall 051 is a desirable goal.[19]

When RCRA regulation is required, the WQA does not apply. NMSA 1978, § 74-6-12(B). As no WQA permit may be issued, the Secretary's Decision on the DP-1132 permit must be overturned. In this case, where the applicant does not plan to discharge from the RLWTF and has stated there is no likelihood of a discharge from the facility, neither the facts nor the law support the issuance of a ground water discharge permit. Thus, the key question that needed to be answered at the outset was (and remains) whether NMED has the authority under the Water Quality Act to issue a ground water discharge permit for a non-discharging facility such as the RLWTF merely because a would-be permittee requests a permit, which, in this case, avoids state regulation under the HWA and the RCRA.

CCW raised this question in its *Motion to Dismiss*. It also raised the issue after the

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[15] *Id.* 32 (("RCRA guidelines regarding waste treatment at the RLWTF would focus on concentrations of metals and organics in the RO [reverse osmosis] concentrate stream and sludges produced at the RLWTF. The RLWTF would need to manage the constituents in the waste stream and so have much better knowledge of, and control over, wastes discharged to it for treatment").

[16] *Id.* Table 6.

[17] Moss, *et al.*, *Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility*, LANL publication LA-13452-MS at 1 (June 1998) (Ex. A to Request); Letter from S. Hanson and S. Rae, LANL, to Phyllis Bustamante, NMED GWQB at 2 (Sept. 3, 1998) (Ex. B to Request).

[18] Letter, Erikson and Baca to Coleman (March 18, 1999) (Ex. C to Request); Letter, Rae to Coleman (Dec. 22, 1999) (Ex. D to Request); Letter, Rae to Coleman (June 13, 2000) (Ex. E to Request).

[19] Letter from Yanicak (NMED) to Coghlan at 2 (May 12, 1999) (Ex. F to Request).

hearing in its *Requested Findings of Fact and Conclusions of Law,* based upon the evidence at hearing and in the Administrative Record revealing the Applicant/Permittee's admission to NMED that the requested permit was not for an intended or even anticipated discharge. The Applicant/Permittee told NMED, as reproduced below, that there is no "reasonable probability or likelihood" there would be a discharge. However, there is absolutely no indication in the *Hearing Officer's Report* or the *Secretary's Final Decision* that the Hearing Officer and the Secretary even considered this rather significant party admission and the evidence confirming it.

At hearing, in the cross examination of witnesses for LANL and NMED, CCW introduced exhibits from the Administrative Record in which LANL stated to NMED in two separate letters that it did not intend any discharges from the facility due to installation of the evaporation system.[20] The same language appeared in in a subsequent letter. [21] Again. four years later, LANL explained the delay in the RLWTF zero-liquid-discharge project on the basis of funding issues, and made a similar statement concerning the lack of need for a permit based upon a description of the proposed changes to the facility.[22]

CCW pressed the issue again in its Closing Argument (June 4, 2018). The Hearing Officer ruled once on this issue *Order* (April 18, 2018) and ruled again in the *Hearing Officer's*

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[20] *See* CC[W] Exhibit 1, Letter from Anthony Griggs, Group Leader, Water Quality & RCRA, LANL, to William C. Olson, Bureau Chief, Ground Water Quality Bureau, NMED (August 15, 2007) (emphasis supplied); the same language appeared in CC[W] Exhibit 2, Letter from Anthony Griggs, Group Leader, Water Quality & RCRA, LANL, to William C. Olson, Chief, Ground Water Quality Bureau, and James Bearzi, Hazardous Waste Bureau, NMED (November 1, 2007) (LANL states a groundwater discharge permit will not be required because there is no reasonable probability or likelihood that liquid contained in the evaporation tanks will move into groundwater, either through a leak or by overflow).

[21] CC[W] Exhibit 2, Letter from Anthony Griggs, Group Leader, Water Quality & RCRA, LANL, to William C. Olson, Chief, Ground Water Quality Bureau, and James Bearzi, Hazardous Waste Bureau, NMED (November 1, 2007).

[22] *See* Exhibit CC[W] 3, Letter from Anthony Griggs, Group Leader, Water Quality & RCRA, and Gene E. Turner, Environmental Permitting Manager, Environmental Projects Office, LANL, to Jerry Schoeppner, Acting Chief, Ground Water Quality Bureau, NMED (August 11, 2011) (LANL asked for quick review and approval of its plans and a determination no discharge permit is required.)

Report. Neither ruling contains *any* reasoning about the factual and legal issue that CCW raised. Rather, they only convey that the Hearing Officer *decided* to deny the motion to dismiss, without stated reasons or reasoning, and, then, decided that a permit would be lawful, without explaining that conclusion in light of the facts in evidence and the relevant law. The *Report* merely lists findings of fact and conclusions of law without making any logical connection between the facts and law. This is decision by fiat, not the rational administrative process that the cases require.

CCW respectfully submits that the Hearing Officer's Report was insufficient to support the Secretary's decision and insufficient to support judicial review of this matter. A reviewing court may only affirm an agency's decision on the grounds the agency relied upon. *Gila Res. Info. Project, supra,* ¶ 34. Where, as here, the agency's grounds are not articulated, the court must vacate the ruling and remand. *Gila Res. Info. Project, supra,* ¶ 38. Plainly, the Secretary's reliance on the *Hearing Officer's Report* cannot stand, as the Report lacks adequate findings of fact and conclusions of law, and the Secretary's statement amounts to an unexplained endorsement of the *Report*.

Fundamentally, the Water Quality Act is limited to the regulation of actual discharges. *See* NMSA 1978, § 74-6-5(A) ("By regulation, the commission may require persons to obtain from a constituent agency designated by the commission a permit *for the discharge* of any water contaminant") (*emphasis supplied*). An applicant for a ground water discharge permit must *intend* to make an actual discharge. The burden is on the applicant. *See*, *generally*, 20.6.2.1202 *and* 20.6.2.3106 NMAC. Moreover, the regulatory definitions of "discharge plan" and "ground water" specify the water flows that are subject to regulation. *See* 20.6.2.3104 NMAC ("Unless otherwise provided by this Part, no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly in

At the hearing, representatives of LANL and NMED claimed that a discharge permit for the RLWTF was needed for use in hypothetical circumstances, *e.g.*, if the RLWTF's two existing evaporation systems are both inoperative. Thus, the witnesses described only *potential* future discharges, under possible conditions whose occurrence was "speculative," as opposed to planned discharges, which are part of the facility's actual operation and are required under the regulations to be permitted by NMED.[23] Neither Mr. Beers nor Mr. Pullen could identify the likelihood of a failure resulting in release to ground water and agreed such an occurrence is "speculative." Tr. at 112-14 (Beers); Tr. at 208-09, 215-16 (Pullen).

CCW presented the facts and made these and other well documented and cogent arguments in its *Motion to Dismiss* and again in CCW's *Requested Findings of Fact and Conclusions of Law* and CCW's comments on the *draft Hearing Officer's Report.* As stated above, neither the Hearing Officer nor the Secretary addressed this legal objection or even showed that it was considered. In fact, neither the final Report nor the Secretary's decision demonstrates that this issue was even understood. Thus, there is no basis for the WQCC to support the Secretary's decision to accept the *Hearing Officer's Report* and recommendations and grant DP-1132. *See Fasken v. Oil Conservation Comm'n*, 1975-NMSC-009, ¶ 8, 87 N.M. 292, 294 ("We do not have the vaguest notion of how the [agency] reasoned its way to its ultimate findings"); *Atlixco Coalition*, 1998 NMCA 134, ¶ 17, 125 N.M. 786 ("one of the purposes of requiring a statement of reasons is to allow for meaningful judicial review"); *Akel v. N.M. Human Servs. Dep't,* 1987-NMCA-154, ¶ 11, 106 N.M. 741, 743 (a hearing officer's

[23] Tr. at 74-75, 79, 101, 112-13, 119 (Beers); Tr. at 208-209, 211-212, 215-16 (Pullen); *see* (Pullen) Tr. at 208, 209: 7-11 (treated water directed to the MES is not released to flow to ground water, as the regulations require); Tr. at 93 (Beers concurring); Tr. at 207-208 (SET not yet in operation and designed to contain and evaporate treated water not release it to ground water). Moreover, LANL told NMED that there is no reasonable probability water directed to the SET will move toward ground water. Tr. at 88, **[AR 03654-57]**.

decision must adequately reflect the basis for the determination, the reasoning relied upon to formulate that determination, and the reason for the determination that more or less weight was to be given certain testimony or other evidence in arriving at a decision).

The Secretary's decision is, in turn, reviewable by the WQCC and, thereafter, in the Court of Appeals. NMSA 1978, § 74-6-7. Judicial or any other review cannot proceed without a clear statement of the reasons for the agency's decision. In the absence of such a statement, courts will vacate the agency's action. *Gila Res. Info. Project v. WQCC,* 2005-NMCA-139 at ¶ 33, 138 N.M. 625, 633-634. In a similar case, the permitting action was vacated and remanded. *Atlixco Coalition v. Maggiore, supra,* ¶ 2. ("because the Secretary has failed to adequately state the reasons for rejecting the proposed permit conditions. . . we set aside the provisions of the final order which concern those proposed permit conditions and remand for more reasoned decisionmaking"). A reviewing tribunal or court may only affirm an agency's decision on the grounds the agency relied upon. *Gila Res. Info. Project, supra,* ¶ 34. Where the agency's grounds are not articulated, the court must vacate the ruling and remand. *Gila Res. Info. Project, supra,* ¶ 38 (there must be a reasoned basis provided for conclusions and a reviewing court will not provide them when they are absent).

The Secretary's reliance on the Hearing Officer's Report cannot stand, as the Report lacks adequate findings of fact and conclusions of law. Thus, the Secretary's statement is no more than an unexplained endorsement of the Report and is completely lacking in a statement of facts and law to support the Secretary's decision to grant the permit.

B. The Public Did Not Receive The Statutory Process Due To Them.

On December 15, 2017, the New Mexico Environment Department published a public notice in English and Spanish announcing the hearing on DP-1132 ("the Notice") online and in

three large circulation newspapers. **[AR 14037-14042].** The Notice invited the public to participate in the hearing process, stating, "The Secretary of NMED will make a final determination approving, conditionally approving, or disapproving DP-1132 based on the administrative record for the permit application, public comment and the public hearing." *Id.* **[AR 14038]** (emphasis added). The WQA makes it clear that the Legislature intended public participation in the hearing processes of the Commission and its constituent agencies. NMSA 1978, § 74-6-5. The "views" of the public and its "arguments" are part of the *record* of proceedings. *Id.* at subsection F. The statute also requires an opportunity for a public hearing and that the views of the public be part of the record. *Id.* at subsection G. When a person aggrieved by a decision of the Secretary files a Petition, such as the instant case, that person must serve all persons who participated in any manner in the hearing process. *Id* at subsection O; see also *id.* at subsection N (members of the public who participated are to receive notice of the decision).

In stark contrast to the statutory requirements that NMED conduct a permit hearing as described above, the Secretary arrived at a final decision without any indication that the substance of the public "views" and "arguments" was taken into account in that decision. This is not the "robust" public participation the Legislature intended. *See Communities for Clean Water v. N.M. Water Quality Control Comm'n,* 2018-NMCA-024, ¶ 15, 413 P.3d 877, 882-83 (Court found "legislative intent to provide for robust public participation throughout the permitting process").

The notice for this proceeding stated, "Any member of the public may attend the hearing and present relevant non-technical testimony, orally or in writing, and to examine witnesses testifying at the hearing." **[AR 14037-38].** Under the circumstances set forth above, the notice

was defective in that it led members of the public to believe that they would have a meaningful opportunity to participate and that their views would have some effect on the outcome of the proceeding. "If the notice is 'ambiguous, misleading or unintelligible to the average citizen, it is inadequate to fulfill the statutory purpose of informing interested persons of the hearing so that they may attend and state their views'." *Freed v. City of Albuquerque* (*In re Hearing on the Merits Regarding Air Quality Permit No. 3135*), 2017-NMCA-011, ¶ 17, 388 P.3d 287, 292 (quoting *Nesbit v. City of Albuquerqu*e, 1977-NMSC-107, ¶ 9, 91 N.M. 455).

Given that the public—including CCW and its members—was led to believe that their participation would be part of the decision-making process in this matter, the notice was misleading. A careful review of the notice, transcript, pleadings, final report and the Secretary's decision documents reveal that, contrary to the statutory requirement, there is no evidence that the final decision was based upon the participation of CCW and its members or other public participants in the proceeding. This defective notice and statutory violation should void the proceeding and the decision.

IV. CONCLUSION

Based upon review of its Petition, the documents incorporated by reference into this Brief, and CCW's comments on the Hearing Officer's draft report, as well as the record of this proceeding, CCW respectfully requests that the WQCC find that: (1) the Radioactive Liquid Waste treatment Facility (the subject of DP-1132) is a non-discharging facility; (2) LANL has stated that there is no likelihood that the facility will discharge to ground water; (3) therefore, the facility should be subject to the New Mexico Hazardous Waste Act ("HWA") and the federal Resource Conservation and Recovery Act ("RCRA") instead of the Water Quality Act ("WQA"); and (4) CCW and the public did not have a fair, properly noticed hearing in this issue.

CCW's requested relief is that the WQCC overturn the decision of the Secretary on the ground that a permit is not required for a non-discharging facility and send the matter back to the Secretary for reconsideration of the issuance of DP-1132 in the light of the WQCC's decision.

DATED in Santa Fe, New Mexico, this 16th day of November, 2018.

Respectfully submitted:

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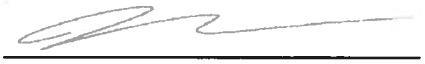
CERTIFICATE OF SERVICE

I, Jonathan M. Block., hereby certify that on this 19th day of November, 2018, a copy of the foregoing *Brief In Support of Petition for Review* was served upon the Water Quality Control Commission as an original and twelve copies by hand delivery to the Administrator of Boards and Commissions, and sent to counsel for the parties and the listed participants by email and/or U.S. Postal Service First Class Mail, prepaid.



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