STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

IN RE: 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)

ANSWER BRIEF OF U.S. DEPARTMENT OF ENERGY AND TRIAD NATIONAL SECURITY, LLC

INTRODUCTION

The United States Department of Energy (DOE) and Triad National Security, LLC (Triad) (collectively DOE/Triad), as co-permittees under Discharge Permit No. 1132 (DP-1132),[1] respectfully submit this answer brief (Answer Brief) in response to the Communities for Clean Water Brief in Support of Petition for Review of the Secretary's Decision Granting DP-1132 (Opening Brief). DP-1132 controls certain specified discharges from the Radioactive Liquid Wasted Treatment Facility (RLWTF) at Los Alamos National Laboratory (LANL). As fully explained herein, the arguments of Communities for Clean Water (Petitioner) are premised on incorrect and unsupported facts, and in performing its permit review under the appropriate standards applicable to this proceeding, taking into account an evaluation of the whole record established before the Environment Department (Department), the Water Quality Control Commission (Commission) will easily recognize that the Petitioner's Petition (Petition) should be denied, thus affirming the appropriateness of the Department's issuance of DP-1132.

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[1] An Unopposed Motion to Substitute Party was filed with the Commission on December 28, 2018, and is pending herein to substitute Triad for Los Alamos National Security, LLC (LANS). At the time Petitioner initiated this permit review, the manager of Los Alamos National Laboratory (LANL) was LANS. As of the date of this filing, however, LANL is under new management by a successor-in-interest to LANS, Triad. When issued, DP-1132 was issued to DOE and LANS (sometimes referred to herein as DOE/LANS) as co-permittees. As a result of a subsequent permit transfer, however, the co-permittees under DP-1132—and hence the real parties in interest in this proceeding—are now DOE and Triad.

As discussed herein, in its pursuit of avoiding regulation of the RLWTF under the Water Quality Act (WQA) (and associated Commission regulations) in favor of regulation of the RLWTF exclusively under hazardous waste permitting regimes, Petitioner advances arguments that are premised upon: (1) incorrect and unsupported fact recitations that take undue liberties with the evidence adduced at the hearing on DP-1132; (2) demonstrably incorrect representations that the Hearing Officer in the hearing before the Department supposedly "ignored" or "did not consider" the legal postures of Petitioner; (3) misstatements of the permit review standards to be applied and the interrelated roles of the Commission and the Department in fulfilling the groundwater protection program mandates of the WQA, and (4) misinterpretations of key provisions of the Water Quality Act (WQA) and Commission regulations thereunder that would dramatically narrow the scope of—if not cripple—the WQA's groundwater discharge program as it has been understood and applied on a longstanding basis by the Department, the Commission, and the Courts of New Mexico. Petitioner's central protestation that the "hearing process was flawed" is without merit and simply reflects Petitioner's dissatisfaction with the substantive outcome of the hearing, with which it disagrees. Similarly, Petitioner's position that a WQA permit may not be granted to control discharges to the evaporators (the MES and SET) and through Outfall 051 is legally unsupportable.

In Part I of this Answer Brief, DOE/Triad refutes Petitioner's factual predicates on which its arguments rest. Part II discusses the Commission's permit review process and standards, and corrects certain misimpressions left by Petitioner's misguided offerings about New Mexico law. Part III refutes Petitioner's central argument—which was appropriately rejected by the Hearing Officer—that issuance of DP-1132 in connection with the RLWTF was unlawful under the WQA. DOE/Triad concludes that the Commission should reject the Petition and affirm DP-1132.

I. PETITIONER'S PETITION NECESSARILY FAILS BECAUSE IT IS PREMISED ON INCORRECT AND UNFOUNDED FACTUAL RECITATIONS

Petitioner makes four arguments that are premised on misstatements of what is established in the record. First, it asserts that the Hearing Officer ignored its legal arguments, so the process was flawed. Second, it asserts there are no planned discharges from the RLWTF, so permitting under the WQA was inappropriate. Third, it asserts that there will never be any discharges from the RLWTF, so any permit issued under the WQA is a nullity. Fourth, it asserts public notice was defective because public input was not considered, so due process was violated. Each of these arguments, and the asserted facts upon which they are based, are refuted here.

A. The Record Reflects that the Hearing Officer Did Not Ignore Petitioner's Legal Arguments; Rather, She Considered them and Decided Them Against Petitioner

Petitioner asserts that its March 16, 2018 pre-hearing Motion to Dismiss in which it advanced legal arguments "was ignored" by the Hearing Officer, and that the record "demonstrates the absence of any substantive consideration of the issues CCW raised throughout this process." Opening Brief, p. 1.[2] In conducting its permit review, this Commission will readily see otherwise. Specifically, in Section F entitled "Motion to Dismiss" in both the July 19, 2018 Hearing Officer's Report (Report), AR 14214-14229, (including Findings 29-34) and the August 29, 2018 Revised

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[2] Petitioner made these unsupported assertions while ignoring its obligations under New Mexico law to fairly summarize the proceedings below and support its assertions with citations to the Department's administrative record. According to this Commission's adjudicatory rules for "permit reviews" such as this one:

> [O]pening briefs . . . shall contain a summary of the proceedings before the department and an argument with respect to each issue presented by the petitioner. The opening brief may include proposed findings of fact and conclusions of law. All statements of fact shall contain citations to the administrative record before the department.

20.1.3.16(A)(4)(a) NMAC. *See also Stanton v. Bokum*, 1959-NMSC-091, ¶ 7, 66 N.M. 256, 346 P.2d 1039 (1959) (appellants have a duty to include all pertinent facts, and not just the evidence that is most favorable to its client); *Sedillo v. N.M. Dept. of Public Safety*, 2007-NMCA-002, ¶ 20, 140 N.M. 858, 149 P.3d 955 (appellant's contentions in its appeal brief that are not supported by references to the record need not be considered). Petitioner in its Opening Brief completely disregarded these requirements by failing to provide a summary of proceedings, and by failing to provide record citations to support its key factual premises while ignoring or disregarding contrary evidence.

Hearing Officer's Report (Rev. Report), AR 14179-14196, (including Findings 30-35), the Hearing Officer made it clear that:

- Full briefing occurred on the Motion to Dismiss, including briefs in support, in response, and in reply (*see* Report, Findings 29, 31 and 33; Rev. Report, Findings 30, 32 and 34);
- The Hearing Officer understood the grounds offered in support of the Motion to Dismiss, which she summarized in her reports, including but not limited to noting that Petitioner argued "the WQA does not reach the RLWTF" due to the asserted absence of existing or planned discharges, and the supposed preclusion of the RLWTF from the WQA "because the RLWTF is subject to regulation under the HWA" (*see* Report, Finding 29; Rev. Report, Finding 30);
- The Hearing Officer likewise understood and summarized the positions of the Department and DOE/LANS that "the discharges to the SET, MES and Outfall 51 are discharges under the [WQA], and therefore the Secretary has authority to issue a discharge permit." (*see* Report, Finding 31; Rev. Report, Finding 32);
- The Hearing Officer took note of the fact that NMED had supplemented the record to include other examples of permits issued by NMED, which NMED referred to in its Response Brief, reflecting permit issuances under circumstances she found were similar to the circumstances involving the RLWTF (*see* Report, Finding 33; Rev. Report, Finding 34);
- The Hearing Officer's reports expressly state that she denied the Motion to Dismiss "after reviewing all the pre-hearing briefing." (*See* Report, Finding 34; Rev. Report, Finding 35.)

These and other findings and conclusions in the Hearing Officer's reports completely dispel Petitioner's assertions that its legal arguments were ignored and not substantively considered. *See*

also Report, p. 2 (Hearing Officer conducted a hearing and "considered and adopted in relevant part" the parties' proposed findings of fact and conclusions of law); Findings of Fact 1 through 10 (discussing the existing and proposed conveyances and discharges associated with the RLWTF and the purpose of, and need for, DP-1132 "to control the discharge of water contaminants from activities related to treatment of Low Level RLW and Transuranic waste into ground and surface water so as to protect ground and surface water for potential future use as domestic and agricultural supply and other uses and to protect public health."); Conclusions of Law 7 ("The activities described by the Applicants in their application require a discharge permit, to be evaluated by the Department. 20.6.2.3104 and 20.6.2.3108 NMAC."), 8 ("The discharge permit application for DP-1132 complied with the requirements of 74-6-5 and 20.6.2.3106 NMAC.") and 15 ("CCW's Motion to dismiss was fully briefed and was properly decided pursuant to 20.1.4.200.D NMAC").

B. The Record Also Reflects that Discharges Are Occurring from the RLWTF and are Planned to Occur Hereafter, Contrary to Petitioner's Unsupported Assertions

In paragraph 12 of the section of Petitioner's Opening Brief entitled "Background Facts and Evidence Concerning DP-1132," Petitioner makes a blanket assertion that "[n]o discharges are planned." Opening Brief, p. 5. Petitioner makes this assertion without any citation whatsoever to record support, in violation of the Commission's adjudicatory procedure requirement that "[a]ll statements of fact shall contain citations to the administrative record before the department." *See* 20.1.3.16(A)(4)(a) NMAC. Petitioner's assertion that "[no] discharges are planned" is the factual predicate for its legal argument that no permit may be issued under the WQA to control discharges from the RLWTF. The assertion is amply refuted and shown to be incorrect, however, by Petitioner's own admissions that Mr. Robert S. Beers of LANL testified "there would be three discharges regulated by DP-1132," including "plans" and discharges LANL "intends," and that

Mr. Steven Pullen of the Department testified that "discharges already are ongoing from the RLWTF." Opening Brief, pp. 7-8 and 10.

Moreover, the record reflects further compelling evidence that Petitioner completely ignores. As set forth in the Affidavit of Robert C. Mason, LANL's Facility Operations Director for nuclear and support facilities at LANL:

> RLWTF is a mission-critical LANL facility that treats low-level and transuranic liquid wastewater from processes at various generator facilities throughout the Laboratory. Outfall 051 is an integral component of RLWTF, and the Laboratory intends to discharge from this outfall. Discharge through the outfall is necessary for operational flexibility so that the RLWTF can maintain the capability to discharge should the Mechanical Evaporator System (MES) and/or Solar Evaporation Tanks (SET) become unavailable due to maintenance or malfunction and/or should there be an increase in treatment capacity caused by changes in LANL scope/mission. RLWTF must maintain operational flexibility and readiness to meet the Laboratory's mission demands.

Mason Affid., par. 7 (the Mason Affidavit appears at AR 15238-15239). This expression of intent from LANL's Operations Director establishes, in no uncertain terms, that CCW's supposition that LANL intends no discharges is wrong, and on that basis alone, Petitioner's Petition may be rejected. The basis of Petitioner's "zero discharge" notion centers in part on the lack of discharges from Outfall 051 in recent years, although even apart from Operations Director Mason's statement, Petitioner's own Opening Brief acknowledges that Outfall 051 may be used in an emergency. Opening Brief, p. 4.

C. Petitioner's Argument that DP-1132 Would Be a "Nullity," Based on Petitioner's Asserted Fact that there will "Never" Be a Discharge from RLWTF, Is Frivolous

The express terms of DP-1132, in Section V.C, Authorization to Discharge, allows wastewater to be discharged to three different systems: the MES, the SET and Outfall 051. AR 12984. The MES is a natural gas-fired mechanical evaporator, and is already receiving ongoing

discharges from the RLWTF according to testimony of Mr. Pullen that Petitioner acknowledges. Opening Brief, p. 8. The SET—a two-cell, synthetically lined tank constructed in 2012—is sometimes referred to in record documents as a Zero Liquid Discharge (ZLD) solar evaporation tank. Outfall 051 is an outfall from a pipe system directly to Effluent Canyon. Petitioner's reliance on the fact that one of the three authorized discharge points has at various times been called a ZLD, and its extrapolation from that and an assemblage of dated references in the record to asserting without basis that the RLWTF is a "zero discharge" facility, is false and misleading.[3]

Petitioner bases its argument that the DP-1132 will be a "nullity" on the incorrect assertion—again, without record support—that there will "never" be a discharge under the WQA from the RLWTF. Opening Brief, pp. 10 and 19. Petitioner offered no technical evidence to support this assertion.[4] Further, although Petitioner emphasized evidence in the record that, at various times in the distant past, LANL pursued positions either that portions of their facilities would not have or have not had discharges, or that its zero discharge goals might eliminate the need for discharge permitting, those dated communications do not reflect the plans of LANL as reflected in the extensive testimony of expert witnesses—in particular, Messrs. Beers and Pullen—cited in Petitioner's own brief. *See* Opening Brief, pp. 7. 8 and 10.

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[3] The intention of both DOE/Triad and the Department that discharges are contemplated is underscored by Condition VI.C.8 in DP-1132, which would require water tightness testing within 180 days of the effective date of the permit for the conveyance to Outfall 051. *See* AR 12990-12991. As Petitioner admits, Mr. Beers testified that these will be planned discharges. Opening Brief, p. 8. Petitioner fails to explain how using uncontaminated water to test the pipeline that historically discharged RLWTF effluent to Effluent Canyon in any way undermined Mr. Beers' testimony that these are planned discharges.

[4] Further, Petitioner offered no technical evidence whatsoever to refute the ample technical evidence from DOE/LANS' and NMED's expert witnesses of ongoing, planned and potential discharges from the RLWTF. In fact, Petitioner specifically stated an intent that it would *not* offer technical evidence at the hearing, AR 15101-15105, nor did it offer a single witness. The Commission's rules are clear that only "non-technical" statements may be offered by one who does not file a statement of intent to present technical testimony. 20.6.2.3110.C NMAC. Accordingly, by stating its intent not to offer technical testimony, Petitioner waived any right to offer technical evidence that there would "never" be a discharge, nor did it offer any such evidence, so the absence of citation to any record support for that bold assertion by Petitioner is not at all surprising.

D. Petitioner's Due Process Theory Lacks a Basis in the Administrative Record

Another example of the liberties Petitioner took in the course of violating this Commission's requirements to summarize the proceedings and include citations to record support, is the unsupported premise of Petitioner's due process claim that the public notice was "defective" since the public responding to the notice supposedly was effectively denied participation in the proceeding. Opening Brief, pp. 27-29. This highly unusual argument, which amounts to little more than Petitioner's apparent belief that public input is only meaningful or robust if the public's positions prevail and are adopted, is completely undermined by the record, ignores reality. *See, e.g.*, Report, p. 2 (identifying by name numerous public commenters who participated in the hearing and indicating that additional public comments were received electronically); pp. 3-4 (identifying public notices that occurred at three stages of the permitting process); Findings 17 and 18 (identifying and discussing the content of public comments made orally at the hearing and in writing); Conclusions 10-13 (discussing public participation opportunities). At the end of the hearing, moreover, the Hearing Officer left the record open to receive, and did receive, additional comments from members of the public. Petitioner's novel due process claim that the notice was defective and the Department did not sufficiently regard input from members of the public, is utterly without basis in law or fact, and should be soundly rejected. *See N.M. Petroleum Marketers Ass'n v. N.M. Env. Improvement Bd.*, 2007-NMCA-060, ¶ 19, 141 N.M. 678, 160 P.3d 587 (an agency giving due process notice need not specially benefit deliberately unsympathetic or willfully obtuse members of the public). The record shows due process was amply afforded via notices and public input.

In sum, because the factual premises of Petitioner's various arguments are unsupported in the record, and in fact are amply refuted in the record, on this basis alone the Commission can and

should deny the Petition. DOE/Triad respectfully submits that because the factual predicates for Petitioner's arguments are unsupported, the Commission my easily affirm the Hearing Officer's clear rejection of Petitioner's legal arguments based on the full briefings of the parties below, and the Department's acceptance of the Hearing Officer's ruling on Petitioner's Motion to Dismiss.

II. PETITIONER MISSTATES THE REVIEW STANDARDS AND LEGAL PRINCIPLES THAT APPLY IN PERMIT REVIEWS SUCH AS THIS ONE

As discussed in Part III below, in its attempt to avoid groundwater discharge permitting under the WQA, Petitioner posits a remarkably narrow interpretation of what constitutes a "discharge" under the WQA and the Commission's regulations. If Petitioner's interpretation were to be adopted, it would turn back a longstanding liberal reading of the WQA that is entirely consistent with New Mexico law. *See Colonias Dev. Council v. Rhino Envtl. Servs.*, 2005-NMSC-024, ¶ 34, 138 N.M. 133, 142, 117 P.3d 939, 948 ("Department has a duty to interpret regulations liberally in order to realize the purpose of the [WQA]."). Before getting to the substance of Petitioner's legal argument about scope and meaning of the groundwater permitting program, however, it is necessary in this Part II to correct Petitioner's statements about, and amplify, the standards that apply to the Commission's review of the Department's permitting action.

This Commission has a central role in New Mexico's water pollution control regimes, including but not limited to the groundwater pollution protection function of the groundwater discharge permitting program established under the WQA, which is given form through the Commission's regulations and administered in the first instance by the Department, one of the Commission's constituent agencies. The Commission's substantial powers include, among other things, adopting and maintaining a comprehensive water quality management program, establishing surface and groundwater quality standards, promulgating regulations to prevent or

abate water pollution in the state, and serving as the state water pollution control agency for purposes of federal water quality protection programs. *See* 1978 NMSA, §§74-6-3(E) and 74-6-4. In a nutshell, the Commission sets the state's water quality policy agenda. *Id.*

Perhaps most importantly for these purposes, however, the Commission serves the function of assigning responsibility for administering its regulations to constituent agencies (such as the Department); vesting those agencies with, or specifying for them, certain responsibilities; and, ultimately, serving in an administrative review capacity in review proceedings that may be brought to the Commission from actions taken by a constituent agency, including but not limited to, permitting actions such as the Department's issuance of DP-1132. *See* 1978 NMSA, §§74-6-4 and 74-6-5. In this manner, the Legislature in the WQA took convenient advantage of the Commission's integral role for the State of New Mexico in all things relating to the important public policy matter of water quality protection.

The administrative review capacity of the Commission over permitting actions, and the basic permit review processes, are spelled out in 1978 NMSA, §75-6-5(O) through (S). The core of the Commission's function as reviewer of permitting decisions by its constituent agencies such as the Department are stated in the WQA as follows:

> The commission shall review the record compiled before the constituent agency, including the transcript of any public hearing held on the application or draft permit, and shall allow any party to submit arguments. The commission may designate a hearing officer to review the record and the arguments of the parties and recommend a decision to the commission. The commission shall consider and weigh only the evidence contained in the record before the constituent agency and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the constituent agency. Based on the review of the evidence, the arguments of the parties and recommendations of the hearing officer, the commission shall sustain, modify or reverse the action of the constituent agency. The commission shall enter ultimate findings of fact and conclusions of law and keep a record of the review.

1978 NMSA, §74-6-5(Q).

Several things are notable about this statutory underpinning of the Commission's review capacity over permitting decisions such as the Department's issuance of DP-1132. First, the Commission is charged with conducting a record review based on the record created before the Department. Second, the Department's use of a hearing officer was optional, and the Commission in any event "shall not be bound by the factual findings or legal conclusions of the Department." Third, the Commission not only may sustain or reverse the action of the Department; it also may "modify" the Department's action. Fourth, the Commission *itself* "shall enter ultimate findings of fact and conclusions of law" in recording the outcome of the review. In essence, then, quite unlike a court engaged in a judicial review, the administrative permit review function of the Commission in its structural oversight role as the agency ultimately responsible for the actions of its constituent agencies, is to make sure that the constituent agency got it right, and to fix things if it did not. These same administrative review principles are embodied in this Commission's "permit review" provisions of its adjudicatory procedures that the Petitioner ignored altogether in its opening brief. *See* 20.1.3.16 NMAC; Opening Brief, Table of Authorities.

Rather than provide guidance to the Commission on its integrally significant permit review function under the WQA and this Commission's adjudicatory procedures, Petitioner instead cites case law and standards pursuant to which *courts* will review *the Commission's* fulfillment of its own responsibility, asserting incorrectly (though somewhat usefully in an indirect sense), that those are the standards this Commission must apply when reviewing the Department's permitting action. Opening Brief, p. 11 (citing four cases, only one of which involved the Commission) (citations omitted).

Petitioner then goes on to discuss unremarkable cases, none of which involve the Commission, standing for the general propositions that: (1) courts typically give effect to the plain meaning of unambiguous statutes and will often review such statutory interpretations *de novo*; (2) administrative bodies are creatures of statutes and their authority derives from delegations in those statutes; (3) courts usually give little deference to an agency's interpretation of its own jurisdiction; and (4) courts sometimes decline to proceed with appellate reviews of agency action when they cannot discern from statements of reason or other indications the basis for the action. Opening Brief, pp. 12-13 and 26-27. What is most notable about Petitioner's exposition of these principles and cases, however, is Petitioner's failure to discuss or acknowledge much more germane legal principles and authorities that have direct significance for in this case.

Petitioner's assumption that the WQA somehow unambiguously supports its positions, for example, is just wrong. In this case, it is undisputed that a key question posed by Petitioner's attempt to undermine the Department's issuance of DP-1132, is what is covered by the term "discharge" as that term is used in the WQA. Notably, that term is left undefined by the WQA. As a result, the notion that the meaning of "discharge" can be determined from plain, unambiguous language in the statute is hard to swallow. The New Mexico Supreme Court earlier this year thoroughly addressed this topic in a unanimously decided case nowhere cited or acknowledged in Petitioner's Opening Brief:

> It is a settled principle of administrative law that the Legislature, when "through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determination is limited." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). This is because
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> > [w]hen [the Legislature] drafts a statute that does not resolve a policy dispute that later arises under the statute, some institution must resolve that dispute. The institution called upon to perform this task is not engaged in

> statutory interpretation. It is engaged in statutory construction. It is not resolving an issue of 'law.' Rather, it is resolving an issue of policy.
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> I Richard J. Pierce, Jr., Administrative Law Treatise Section 3.3, at 160-61 (5th ed. 2010). Our case law acknowledges and embraces these principles.
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> We "defer to an agency interpretation if the relevant statute is unclear or ambiguous." *Dona Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n,* 2006-NMSC-032, ¶10, 140 N.M. 6, 139 P.3d 166, and "will confer a heightened degree of deference to . . . special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶25, 133 N.M. 97, 61 P.3d 806 (internal quotation marks and citation omitted). We will overturn the administrative construction "of statutes by appropriate agencies *only if they are clearly incorrect*." *Bokum*, 1979-NMSC-090, ¶58 (internal quotation marks and citation omitted).
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> The Commission is the appropriate policy-making entity in this context.

Gila Res. Info. Project, et al. v. N.M. Water Quality Control Comm'n, 2018-NMSC-025, ¶¶ 34, 35, 417 P.3d 369. In the very recent Supreme Court case making these instructive pronouncements, the statutory language being reviewed by the court was not the undefined WQA term "discharge," but was the highly analogous WQA language in 74-6-5(E)(3) requiring that the effect of discharges shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use. *See* NMSA 1978, §74-6-5(E)(3). They are analogous not only because both provisions specifically relate to discharges under the WQA, but also because in both cases the policy-based constructions of the terms directly implicate the scope of agency jurisdiction, and not just any agency, but the scope of the Department's and the Commission's jurisdiction under the WQA.

A further line of cases Petitioner nowhere cites or acknowledges, is the well-established authority whereby courts take comfort that long-standing agency interpretations of a statute without amendment by the Legislature—sometimes referred to as an "administrative gloss"—deserve to be given persuasive weight and probably accurately reflect the Legislature's intent

behind the statute. *See, e.g., Molycorp, Inc. v. State Corp. Comm'n,* 1981-NMSC-033, ¶ 5, 95 N.M. 613, 624 P.2d 1010; *Montgomery v. N.M. State Engineer,* 2005-NMCA-071, ¶ 17, 137 N.M. 659, 114 P.3d 339, *rev'd in part on other grounds*, 2007-NMSC-002, 141 N.M. 21, 150 P.3d 971. This line of New Mexico cases have direct bearing here for two reasons. First, since this Commission adopted the groundwater program regulations in 1977, it has effectively placed a very broad administrative gloss, unimpeded by intervening legislation, on the meaning of "discharge," and in the process broadly construed its own foundational authority under the WQA by this regulation:

> [N]o 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.

20.6.2.7.R NMAC (emphases added). Second, consistent with this broad construction of the undefined term "discharge," and as the Hearing Officer and Department found persuasive, the Department has construed the key language as authorizing the issuance of groundwater permits even in cases where there is no intention on the part of the permittee to actually discharge, two of which such permits were added to the administrative record by the Department to underscore the point. *See* Report, Finding 33 (which was part of the Hearing Officer's stated rationale for denying the Motion to Dismiss that Petitioner's inexplicably asserted was "ignored" by the Hearing Officer).

Finally, as mentioned above, Petitioner has cited cases where courts have declined to proceed with appellate reviews of agency action when they cannot discern from statements of reason or other indications the basis for the action. *But see Miller v. SF Cty BCC*, 2008-NMCA-124, ¶ 33, 144 N.M. 841, 192 P.3d 1218 (a reviewing court may uphold an agency decision of less than ideal clarity if the agency's path may be reasonably discerned). Here, as already discussed,

the administrative record, including the full briefing of the parties and the Hearing Officer's report findings, unquestionably allow the Commission to reasonably discern why Petitioner's unpersuasive Motion to Dismiss was denied. Even more to the point, however, this Commission, when performing a permit review in its capacity as overseer of its constituent agency under the WQA and this Commission's adjudicatory procedures discussed above, is in a much different position than a court performing a judicial review. On that basis alone, the cases cited by the Petitioner are easily distinguishable. *See, e.g., Atlixco Coalition v. Maggiore,* 1998-NMCA-134, 125 N.M. 768, 965 P.2d 370 (judicial challenge taken directly from the Department Secretary's landfill permit, under a statute that expressly requires the Secretary to state reasons for a permitting decision, but that makes no provision for a Commission to conduct a permit review and state its own findings and conclusions as required by the WQA). None of the other cases cited by Petitioner for the point even involve the Department or this Commission, and they therefore likewise have no bearing whatsoever on how this Commission should conduct its permit review under its adjudicatory procedures and the permit review provisions of the WQA.

III. PETITIONER'S ARGUMENT THAT DP-1132 IS NOT AUTHORIZED BY THE WQA, IN ADDITION TO RESTING ON UNSUPPORTED FACTS, RELIES ON A RESTRICTIVE INTERPRETATION THAT WOULD ERODE LONGSTANDING AGENCY POLICIES AND PRACTICE UNDER THE WQA

A. Petitioner's Legal Argument Is Premised on Incorrect or Unsupported Facts

As discussed in Part I above, Petitioner's legal positions are premised on unsupported and misstated facts that inappropriately ignore the evidence adduced and the record herein. DOE/Triad need not repeat that independently compelling basis for rejecting the Petition. *See infra*, pp. 3-9.

B. The WQA and Commission Regulations Authorize the Issuance of DP-1132

Petitioner takes the position that the Department has no authority to issue a groundwater discharge permit for discharges to the MES, SET and through Outfall 051 based on the erroneous

assumption that the WQA triggers permitting only based on an actual and intentional release to groundwater. As an initial matter, this narrow interpretation is not one that is typically made by an environmental organization. It reflects that Petitioner's request for a hearing on DP-1132 was not so much to offer helpful public comments on DP-1132, but instead was a means for Petitioner to advance a policy position it is already advancing in other fora: namely, that permitting for the disposition of treated water from the RLWTF should occur exclusively pursuant to hazardous waste regimes rather than through applicable ground and surface water protection regimes under the WQA and the federal Clean Water Act.[5]

Petitioner's extraordinarily narrow interpretation of the Department's permitting authority under the WQA and implementing regulations to the effect that there needs to be an intention to discharge, is legally unsupportable. The WQA fundamentally defines a "source" to mean "a building, structure, facility or installation from which there is *or may be*, a discharge of water contaminants directly *or indirectly* into water." 1978 NMSA, §74-6-2(L) (emphases added). In turn, the WQA defines a "water contaminant" to mean "any substance that could alter *if discharged or spilled* the physical, chemical, biological or radiological qualities of water." 1978 NMSA, §74-6-2(B) (emphasis added). These central building blocks of the WQA are worded in a way that clearly reflects a deliberate legislative choice not to construe the concept of regulated discharges under the Act as narrowly as Petitioner proposes.

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[5] *See* AR 15240-15252. Discharges of treated water at the RLWTF are governed appropriately by DP-1132 under the WQA and the federal Clean Water Act as necessary to protect surface and groundwater; however, these regulations do not preclude applicability of other federal laws. *See* 42 U.S.C. § 6903(27) (establishing an exemption from the Resource Conservation and Recovery Act for discharges from facilities regulated under the Clean Water Act's Section 402 National Pollutant Discharge Elimination System (NPDES) program); *See also* 40 C.F.R. §§ 260.10 and 40 C.F.R 264.1(g)(6) (regulatory exemption for NPDES-permitted wastewater treatment units from the requirement to also obtain a treatment permit under the Resource Conservation and Recovery Act).

Based on the express terms of the WQA, the Department justifiably defines "discharge" in Section II.F of DP-1132 to include the "intentional *or unintentional* release of an effluent or leachate which has the *potential* to move directly or indirectly into ground water." AR 12980 (Emphases added.). Mr. Pullen from the Department testified that DP-1132 is needed to give LANL the "option" to discharge from Outfall 051under certain conditions, and to control "potential" releases from the MES and SET. *See* Opening Brief, p. 9. Accordingly, even if the intended discharges authorized by DP-1132 "through Outfall 051" to Effluent Canyon as amply supported in the record were disregarded, and only the discharges to the MES and SET evaporator systems were to be considered, CCW's position is still flawed, because the Department correctly concluded it is the "potential" for a discharge to move directly or indirectly to groundwater that matters, regardless of intent. The WQA and the Commission's regulations clearly support such a construction, as does the New Mexico judiciary's admonition to liberally construe the WQA to achieve its groundwater protection and pollution prevention purposes. *See Colonias Dev. Council, supra,* ¶34.

The notion that the Department's regulatory permitting authority under the groundwater protection program only arises if and when there is an *actual* release, as CCW argues, is fundamentally contrary to the central objective of the WQA to *prevent*—and not just *abate*—after-the-fact groundwater degradation. *See Bokum Res. Corp. v. New Mexico Water Quality Control Comm'n*, 1979-NMSC-090, ¶59, 93 N.M. 546, 555, 603 P.2d 285, 294. If the Legislature, and the Commission when it adopted regulations under the WQA beginning in 1977, intended only to permit facilities once those potential sources *actually* release water contaminants, then New Mexico's discharge permitting program to protect groundwater from becoming contaminated would be rendered ineffective, and the after-the-fact abatement program adopted by the WQCC

would be all that is needed. Petitioner's unduly narrow reading of the WQA and its regulations is not shared by the Department, and the Commission in this case is presented with the opportunity to reject it given its important policymaking role recognized by the unanimous decision of the New Mexico Supreme Court in *Gila Resources Information Project, supra,* ¶ 34.

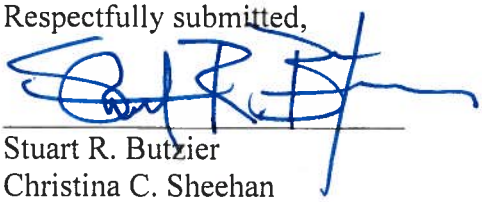
The Department has understood the fundamental groundwater protection and prevention mandate of the WQA for decades, and has pursued its groundwater protection program under the WQA accordingly. The Department's Ground Water Quality Bureau permitting files are replete with examples of groundwater discharge permits issued by the Department under the WQA where the coverage of the permit includes, in whole or part, facilities involving water that is conveyed or stored in man-made systems such as pipelines, tanks or lined ponds and other structures, facilities or installations. In a very many of these examples, the company to which the permit has been issued may believe and/or intend that no groundwater will ever actually receive or otherwise be impacted by its facilities as a result of water and contaminant control practices. A conclusion by the Commission that the Department has no authority to issue a discharge permit for the RLWTF would undermine a substantial portion of the groundwater permitting program established by the Commission and administered by the Department, and would place in doubt many long-standing permits issued or renewed to manufacturing, mining and other important potential sources for the preventative protection of New Mexico's groundwater resources. Such a conclusion would be particularly troubling in a state with limited water resources. Petitioner's offered interpretations of the WQA to suit its regulatory agenda in connection with LANL's RLWTF should be rejected.

CONCLUSION

When the Commission conducts its permit review under the WQA and related adjudicatory procedures, it will easily find that Petitioner's arguments are not supported by the administrative

record and are contrary to the WQA, the Commission's regulations and the Department's long-standing groundwater protection policies and practices. For all the reasons stated above, the Department has reasonably and appropriately issued DP-1132 as necessary to ensure protection of groundwater against existing, planned and potential "discharges" within the meaning of that term under the WQA as it has been broadly and appropriately construed by New Mexico courts, the Commission and the Department over time. DOE/Triad respectfully requests that the Commission deny Petitioner's requested relief, and affirm the appropriateness of DP-1132 in its findings of fact and conclusions of law required under NMSA 1978, §79-6-5(Q). A road map for the Commission's finding and conclusions in this permit review are the Hearing Officer's findings and conclusions below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2018, a copy of the foregoing "Answer Brief of U.S. Department of Energy and Triad National Security, LLC" was hand-delivered to the Hearing Clerk and served via electronic mail to the following:

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