

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



IN THE MATTER OF THE PETITION FOR REVIEW
OF THE NEW MEXICO SECRETARY OF THE
ENVIRONMENT'S DECISION GRANTING
GROUNDWATER DISCHARGE PERMIT DP-1132

WQCC 18-05(A)

COMMUNITIES FOR CLEAN WATER,
Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S ANSWER BRIEF

Pursuant to 20.1.3.16.A(4)(b) NMAC, Respondent the New Mexico Environment Department ("NMED" or "the Department") respectfully submits this answer brief to Petitioner Communities for Clean Water ("CCW" or "Petitioner") Brief in Support of its Petition for Review of the Secretary's Decision Granting DP-1132 ("CCW Brief"), which was filed with the Water Quality Control Commission ("WQCC" or "the Commission") on November 19, 2018.

As fully discussed below, Petitioner's challenge to the issuance of DP-1132 is premised on misrepresentations of the facts, the role of the Commission with respect to this Permit Review, how the Water Quality Act authorizes the issuance of discharge permits, and the substance of the Hearing Officer's Report and the Secretary's Final Order. For the reasons discussed below, the Commission should reject Petitioner's challenge and find that the Secretary of Environment properly ordered the issuance of DP-1132.

I. SUMMARY OF THE PROCEEDINGS

1. The focus of the proceeding under which Petitioner's brief was filed is the discharge permit (DP-1132) associated with an application submitted by the United States Department of Energy

and Los Alamos National Security, LLC¹ (the “Applicants”) to discharge treated wastewater from the Applicants’ Radioactive Liquid Waste Treatment Facility (“RLWTF”) located at Los Alamos National Laboratory (“LANL”). [AR 12975-13035].

2. Construction of the RLWTF began in 1961, and the processing of liquid waste began in 1963. On April 3, 1996, the Department notified the Applicants that a discharge permit was required. [AR 00013-00015].

3. The Application consists of the materials submitted by the Applicants on August 16, 1996 [AR 00112-00532], an updated application submitted to NMED on February 14, 2012 [AR 05336-08003], an amendment to the application submitted to NMED on August 10, 2012 [AR 08268-08313], supplemental information submitted on June 3, 2016 [AR 13272-13355], and materials contained in the administrative record prior to issuance of DP-1132.

4. NMED advised the Applicants in January 2000 that there was significant public interest in DP-1132, and that a public hearing would be held. However, due to staff constraints and time requirements for a full review of all materials submitted, no hearing was scheduled at that time, and subsequently the discharge permit was never issued. [AR 01437-01441].

5. DP-1132 was first public noticed in draft form on August 4, 2003 [AR 02159-02161]. A revised draft DP-1132 was public noticed on April 18, 2005 [AR 02881-02902], then another draft on June 10, 2005. [AR 02911-02919].

6. In January 2016, the Applicants submitted a draft Closure Plan for inclusion into DP-1132. [AR 13255-13258].

7. On May 5, 2017, the Department issued a public notice for the draft DP-1132 that was the subject of the hearing held on April 19, 2018. [AR 13481-13796].

¹ In the time since the hearing on DP-1132, operational responsibilities at Los Alamos National Laboratory have been taken over from Los Alamos National Security, LLC by Triad National Security, LLC.

8. On December 11, 2017, the Department published notice of the public hearing on DP-1132. **[AR 14043-14044]**.
9. On March 2, 2018, the Department re-noticed the draft Discharge Permit, and included the correct, September 2016 version of the closure plan contained therein (the May 5, 2017 notice inadvertently and mistakenly included a prior version of the closure plan). **[AR 14045]**.
10. On March 12, 2018, the Department re-published notice, in English and Spanish, of the public hearing on DP-1132 to be held on April 19, 2018 at the Fuller Lodge in Los Alamos. **[AR 14146-14151]**.
11. On March 12, 2018, Petitioner filed their Motion to Dismiss DP-1132 Proceeding, alleging that issuance of a discharge permit for this facility under the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (“WQA”), was not lawful. **[AR 15255-15274]**. This is a position CCW has taken since at least 2013. **[AR 09663, 09694]**.
12. On April 2, 2018, NMED and the Applicants filed Responses to Petitioner’s motion. **[AR 15164-15252]**.
13. On April 6, 2018, Petitioners filed their Reply to the Responses to their Motion. **[15154-15163]**.
14. On April 9, 2018, NMED filed its Notice of Supplemental Exhibits. **[15048-15100]**.
15. On April 9, 2018, NMED and the Applicants filed Statements of Intent to Present Technical Testimony, which included names and written testimony of witnesses. **[AR 14701-15047]**.
16. On April 9, 2018, Petitioners filed their Statement of Intent to Present Technical Testimony, which identified their witness, and included a summary of her anticipated testimony. **[AR 14701-15047]**.

17. On April 18, 2018, Petitioner's Motion to Dismiss was denied by the Hearing Officer, stating that the motion "was decided on its merits based on the briefing submitted." [AR 15101-15105].

18. A public hearing on DP-1132 was held on April 19, 2018, beginning at 9:25 AM at the Fuller Lodge, Pajarito Room, 2132 Central Avenue, Los Alamos, New Mexico. [4-9-18 1 Tr. 13-17]; [AR 14339-14617].

19. At the public hearing, public comment was heard from ten people: Scott Kovac, Rachel Conn, Beata Tsosie, Kathy Sanchez, Marlene Perrotte, Joan Brown, Joe Zupan, Michael Collins, Corinna Bethke, and Anna Hansen. Five of the commenters stated they believed the RLWTF should properly be regulated under the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA") or the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 ("HWA"), rather than via a groundwater discharge permit. [4-9-18 1 Tr. 17:11-44:8]; [AR 14299-14335].

20. At the public hearing, as part of her public comment, Ms. Conn submitted 28 identical comment letters signed by individuals (including Ms. Conn), also expressing that the RLWTF should be regulated under the New Mexico Hazardous Waste Act. [4-9-18 1 Tr. 20:7-22:19]; [AR 14299-14326].

21. At the public hearing the Department's witness, Steve Pullen, testified as to the technical need for the discharge permit, how the proposed discharge permit is protective of groundwater, how the department had gone about providing public notice of the hearing and the draft permit, and expressed his support of the issuance of the proposed discharge permit DP-1132. [4-9-18 1 Tr. 182:18-184:14, 187:4-189:17]; [AR 14520-14527].

22. At the public hearing, Mr. Pullen was cross examined at length by counsel for Petitioners as to the likelihood of a discharge from the RLWTF, and Mr. Pullen's understanding of the regulatory basis for issuance of a discharge permit under the Water Quality Act. **[4-9-18 1 Tr. 193:22-218:21]; [AR 14531-14556].**

23. At the public hearing the Applicants' witness, Robert Beers, provided an introduction to the RLWTF and discussed the relevant operations at that facility, including the three discharge pathways identified in Draft DP-1132. Mr. Beers discussed the permit application for DP-1132 and the regulatory background for issuance of the permit. He provided an overview of the requirements of Draft DP-1132, including the discharges authorized by Draft DP-1132 and the standards applicable to the RLWTF's treated effluent. Mr. Beers testified regarding certain requirements of Draft DP-1132, including requirements for the operational plan, monitoring requirements, reporting requirements, contingency plan provisions and the closure plan for the RLWTF. Mr. Beers also provided testimony and an exhibit responding to public comments submitted by CCW in a letter dated June 5, 2017. **[4-9-18 1 Tr. 48:19-58:16]; [AR 14386-14396].**

24. At the public hearing, Mr. Beers was cross examined at length by counsel for Petitioners, unsuccessfully attempting to elicit a statement from the witness that there would *never* be a discharge under the meaning of the Water Quality Act from the RLWTF. **[4-9-18 1 Tr. 65:5-102:7, 109:6-128:24]; [AR 14403-14466].**

25. On July 19, 2018, the Hearing Officer issued her Hearing Officer's Report, recommending issuance of DP-1132. **[AR 14214-14229].**

26. On August 3, 2018, all parties filed Comments on the Hearing Officer's Report. **[AR 14197-14213].**

27. On August 29, 2018, the Hearing Officer issued her Revised Hearing Officer's Report, again recommending issuance of DP-1132, and the Secretary of NMED issued his Final Order, issuing DP-1132. [AR 14179-14196].

II. STANDARD OF REVIEW

Permit Reviews before the Commission, are guided by NMSA 1978, Section 74-6-5(Q) (“...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.”) and 20.1.3.16.F(3) NMAC (“The commission shall consider and weigh only the evidence contained in the record before the department and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the department. The commission shall sustain, modify or reverse the action of the department based on a review of the evidence, the arguments of the parties and recommendations of the hearing officer. The commission shall set forth in the final order the reasons for its actions.”).

The CCW Brief does not include a Standard of Review, but does cite case law in support of their position that the Commission should overturn the Secretary's decision. CCW Brief at 26-27. However, any future judicial review will be of the Commission's Permit Review, not of the Secretary's issuance of DP-1132. CCW's cited caselaw is therefore inapposite, the Commission should focus on performing the present Permit Review in accordance with Section 74-6-5(Q) of the WQA and 20.1.3.16.F(3) NMAC. That the Commission “shall not be bound by the factual

findings or legal conclusions of the constituent agency” [Section 74-6-5(Q)] means the Commission may correct any deficiencies they find in the Secretary’s Final Order and the Hearing Officer’s Report in order to arrive at a final order of their own that comports with the WQA, so long as such a final order is based upon evidence contained in the Administrative Record for this Permit Review. The Commission’s ultimate findings of fact and conclusions of law and final order are what will be judged by any future judicial review, not the Secretary’s Final Order, nor the Hearing Officer’s Reports that are part of the Administrative Record for this Permit Review.

III. ARGUMENT

A. DP-1132 Was Issued Properly Pursuant to the Water Quality Act and the WQCC Regulations

1. The Secretary Has the Authority to Require and Issue Discharge Permits to Prevent Water Pollution Where There Exists the Possibility of a Discharge

a. The Purpose of the WQA is to Prevent Water Pollution

The WQA is the primary statutory mechanism by which groundwater in New Mexico is protected. The objective of the WQA is “to abate and *prevent* water pollution.” *Bokum Res. Corp. v. New Mexico Water Quality Control Comm’n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546, 555 (emphasis added). The WQA directs the WQCC to “adopt, promulgate and publish regulations to *prevent* or abate water pollution in the state.” NMSA 1978, § 74-6-4(E) (emphasis added). Pursuant to this statutory directive, the WQCC has adopted such regulations. *See* 20.6.2 NMAC.

b. The Secretary Has the Authority to Require and Issue Discharge Permits

The WQA provides the WQCC with the authority “to adopt regulations requiring that permits for discharge of a water contaminant be obtained from a constituent agency.” NMSA 1978, § 74-6-5(A); *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm’n*, 2006-NMCA-115, ¶ 16, 140 N.M. 464, 469, 143. “With regard to a permit, however, the Act grants

authority directly to constituent agencies.” *Phelps Dodge*, 2006-NMCA-115, ¶ 16. NMED is a constituent agency of the WQCC. NMSA 1978, § 74-6-2(K)(1). The WQA expressly authorizes NMED, as a constituent agency, to issue a permit, issue a permit with conditions, deny a permit, or modify a permit. NMSA 1978, § 74-6-5(M), (N). Permitting actions by NMED are reviewable by the WQCC in response to a petition filed by “any person who participated in the permitting action.” NMSA 1978, § 74-6-5(O).

The implementing regulations of the WQA, as adopted and promulgated by the WQCC pursuant to its authority under the WQA, state that “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 phrase “may move directly or indirectly” means that NMED, as a constituent agency of the WQCC, has the authority to require a discharge permit from any person, if the activities of that person may result in one or more water contaminants moving directly or indirectly into groundwater. That phrase is not unique to Section 3104, it is repeated six times throughout the regulations. *See* 20.6.2.7.R NMAC; 20.6.2.3104 NMAC; 20.6.2.3105 NMAC; 20.6.2.3105 NMAC.

c. The Possibility of a Discharge Triggers the Secretary’s Authority to Require and Issue a Discharge Permit

CCW asserts that, since the RLWTF is designed as a “zero-discharge” facility, there can be no possible discharges, and therefore the Secretary is without authority to issue a discharge permit. CCW Brief at 15-16. Indeed, CCW’s comments submitted on the draft DP-1132 in 2015 attempt to make a similar point. [AR 13690]. This assertion is incorrect for several reasons.

First, nowhere in the WQA or its implementing regulations is a discharge required to be actual, or already occurring, for a permit to be issued. CCW implies that a discharge must be

“planned” in order for a discharge permit to be issued. CCW Brief at 15 (“There is no plan to discharge from Outfall 051 in the future.”). The words “shall cause or allow” in 20.6.2.3104 NMAC contemplate that such discharge may occur simply as a result of the activities of the person, and that there is no requirement that such discharges be planned, ongoing, or intentional. Contrary to CCW’s assertions, it is the potential for the discharge of water contaminants that may move into groundwater that triggers the authority of the WQA, and thus the Secretary’s authority to issue a discharge permit. As such, CCW’s assertion that “NMED has no authority to issue a WQA permit for a ‘possible’ or ‘potential’ discharge” is plainly wrong.

Second, in order to prevent water pollution, as is the purpose of the WQA and its implementing regulations, it is necessary to contemplate and acknowledge the possibility of failures of mechanical systems and correlated operations. CCW appears certain that there will never be a discharge from the RLWTF. CCW Brief at 15 (“First, the RLWTF does not and will not *discharge* any water or contaminants”). While the confidence CCW places in the permittees is commendable, it is hard to understand how CCW can predict the future operations of the RLWTF with such certainty, and conclude there will never be an event that would lead to an unplanned or emergency discharge. Yet the Applicants have repeatedly stated that emergency discharges remain a possibility in the event of a system failure. They argued this as recently as this year, before the EPA’s Environmental Appeals Board (“EAB”). *See In re Los Alamos National Security, LLC, and the U.S. Department of Energy*, NPDES Appeal No. 17-05, slip op. at 5-6 (EAB Mar. 14, 2018) [AR 15237-15238]. The Applicants argued in that case that discharges to Outfall 051 pursuant to their NPDES permit would be necessary in the event that the “Mechanical Evaporator and/or Zero Liquid Discharge tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory’s] scope/mission.” *Id.* The

EAB agreed, holding that discharges to Outfall 051 would be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage, and were therefore indeed a possibility. *Id* at 1; [AR 15233]. One of CCW's member organizations, Concerned Citizens for Nuclear Safety ("CCNS"), made similar arguments before the EAB in the aforementioned proceeding as CCW makes now - namely that a discharge permit should not be issued when there has not been a discharge since 2010 and no future discharges are planned. *Id* at 6; [AR 15238]. The EAB found that the Regional EPA Administrator's denial of CCNS' request to terminate the NPDES permit in this context did not constitute error or abuse of discretion. *Id* at 19; [AR 15251].

Similarly, discharges to the SET and MET are not without the potential for failure, and resultant discharge. NMED made that determination years ago in the "Authorization to Discharge" section of the draft DP-1132. [AR 13690]. NMED has issued many permits that limit discharges to evaporative systems, and therefore are designed as "zero discharge" (to surface or groundwater), as a mechanism in which to avoid the impact of the discharge on groundwater. Examples include power plants and many small-scale systems associated with mobile home parks and car washes. Two examples of evaporative-only facilities regulated with a WQA discharge permit are the Alamogordo Brackish Water RO Plant (DP-1827) and the PNM San Juan Generating Station (DP-1327).² [AR 15048-15100]. As explained *supra*, as well as in responses to comments in 2017 [AR 13815-13824], NMED chooses to retain its authority to regulate such systems, as no system is infallible. Granting CCW's Motion would severely undermine NMED's authority to continue requiring and enforcing discharge permits such as these.

² A complete list of discharge permits issued by the NMED Ground Water Quality Bureau Pollution Prevention Section is available at <https://www.env.nm.gov/gwb/NMED-GWQB-PollutionPrevention.htm>.

It would be unreasonable for NMED to only have the authority to regulate a discharge that is planned, regular, or already occurring if the purpose of the WQA is to prevent and abate water pollution. Were that so, then the purpose would solely be to abate water pollution that has already occurred, as prevention clearly implies taking proactive regulatory action prior to the activities or potential failures which may result in water pollution. To interpret the WQA otherwise, as CCW does in its Brief, leads to an absurd result – that the Secretary only has authority to regulate once pollution has already occurred. Statutes must be construed according to the purpose for which they were enacted and not in a manner which leads to absurd or unreasonable results. *State v. Romero*, 2002-NMCA-106, ¶ 8, 132 N.M. 745, 747.

2. The Activities Regulated by DP-1132 are Not Specifically Addressed by the Hazardous Waste Act

CCW argues that the RLWTF should be regulated by NMED pursuant to the HWA. CCW Brief at 20-23. Again, this argument is premised on CCW's incorrect assertion that there will never be a discharge from the RLWTF. CCW Brief at 16 ("No water at all, and no contaminants, are being released or will be released."). NMED has independent authority under the WQA to issue, or propose to issue, a discharge permit for this facility separate and aside from any obligation CCW perceives NMED to have under the HWA. CCW argues that this proceeding should be dismissed because NMED does not have authority to regulate such activities that would fall under the Hazardous Waste Act, based on the statutory provisions found in NMSA 1978, § 74-6-12(B). CCW Brief at 20-22. Specifically, Section 74-6-12(B) states: "[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, the Ground Water Protection Act or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge."

Section 74-6-12(B) is not applicable because NMED is not attempting to use the WQA to regulate an "...activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act." The activities and conditions addressed by DP-1132 are specifically included in the WQA and its implementing regulations, and there are specific regulatory provisions approved by the WQCC to address such events. As can be found in 20.6.2.3104 NMAC and as discussed *supra*, the Ground and Surface Water Protection Regulations allow for the regulation of discharges of "effluent or leachate" which "may move directly or indirectly into ground water" via the requirement of a discharge permit. The discharge permit DP-1132 is being used for precisely such regulation, the activities and conditions it regulates are not specifically provided for in the HWA.

B. The Public Was Afforded Statutory Due Process

Petitioner complains that substance of the public views and arguments were not taken into account in the Secretary's final decision. CCW Brief at 28. This ignores the substance of the public comments received in the context of the pre-hearing briefing. Ten people provided public comment at the hearing (some of whom also submitted written comments), while an additional 28 people provided only written comments. [4-9-18 1 Tr. 15:12-44:8, 104:6-108:6]; [AR 14299-14335]. A majority of the written comments were identical form letters. [AR 14299-14326]. A review of the substance of these comments reveals that all but one commenter³ argued that the RLWTF should be regulated pursuant to the federal Resource Conservation and Recovery Act ("RCRA"), rather than the New Mexico Water Quality Act, due to the alleged absence of any discharge.

These are legal arguments disguised in the form of public comment. Furthermore, they are the same legal arguments made by CCW in their pre-hearing Motion to Dismiss DP-1132

³ The comments of Michael Truax Collins did not appear to be related to the issuance of a groundwater discharge permit. [4-9-18 1 Tr. 39:19-42:3]; [AR 14331-14335]

Proceeding [AR 15255-15274]. This matter was fully briefed by all parties [AR 15164-15222, 15223-15252, 15154-15163, 15048-15100], and finally denied by the Hearing Officer [AR 14620-14622]. This matter having been fully briefed and ruled upon prior to hearing, and the public comments adding no additional information and raising no new arguments, there was no need to address the substance of the comments, that topic having been fully briefed and already decided. As a result, both the Hearing Officer's Report and Revised Hearing Officer's Report simply noted the identities of the commenters at hearing, the submission of written comments, and the nature of the comments. [AR 14220-14224, 14185-14189]. In short, the substance of the comments has been thoroughly addressed.

CCW attempts now to somehow transform their argument that the substance of the comments was not addressed into a defective notice issue. Normally, when a party claims that public comment in an administrative proceeding in New Mexico was not taken into consideration by the agency before whom the hearing was held, they cite *In re Application of Rhino Envtl. Services*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939. CCW Brief at 27-28. Here, Petitioner attempts to claim that, because the public notice stated that “[t]he 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” [AR 14046-14051] (emphasis added), and because the final decision and reports allegedly do not address the substance of these comments, that the public notice was defective.

As explained above, the substance of the comments was thoroughly addressed in pre-hearing briefing, and so the hearing notice was in no way “ambiguous, misleading or unintelligible to the average citizen”. CCW Brief at 29. The Hearing Officer's *Order Denying Motion to Dismiss* states that the motion “was decided on its merits based on the briefing submitted” [AR 14620],

and so that briefing is the consideration of the substance of the comments received, and is part of the administrative record. [AR 15164-15222, 15223-15252, 15048-15100]. Even assuming, *arguendo*, that the Secretary did not consider the substance of the comments received in making his decision, this would not constitute a statutory violation due to defective notice. In this case, repeatedly raising the same issue after it has already been decided on the record does not create the need for the issue to be re-addressed again every time it is raised.

IV. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. The RLWTF consists of an underground collection system that conveys radioactive liquid waste water to Technical Area (“TA”) 50 from generators at LANL; structures at TA-50; and the Solar Evaporation Tank (“SET”) at TA-52. [AR 15003].
2. The RLWTF may discharge treated effluent to three locations; the Mechanical Evaporator System (“MES”) located near Building 50-01, the SET, or through an outfall in Effluent Canyon (Outfall 051), a tributary to Mortandad Canyon. [AR 15004].
3. The MES is co-located with the RLWTF and disposes of RLW treated effluent by mechanical evaporation. This natural gas fired evaporator has been the sole disposal method for the RLWTF for approximately seven years. [AR 15004].
4. The SET system is associated with the RLWTF but located at TA-52. Approximately 3500 feet of high-density polyethylene (HDPE) transfer piping connect the SET and the RLWTF. The SET is a concrete, double synthetically-lined impoundment designed to receive treated effluent from the RLWTF for disposal by evaporation. The SET was constructed and has not yet been put into service pending issuance of DP-1132. [AR 15004].

5. Outfall 051 was the Applicants' sole discharge option until the construction of the MES. No discharges have occurred at the Outfall since 2010. Outfall 051 is regulated by a National Pollutant Discharge Elimination System ("NPDES") permit (Permit No. NM0028355) issued by the United States Environmental Protection Agency ("EPA"). The Applicants maintain the NPDES permit in order to retain Outfall 051 as a discharge option. **[AR 15004]**.

6. The Applicants propose to treat and discharge up to 40,000 gallons per day of treated RLW consisting of Low Level and Transuranic RLW produced through activities at LANL. **[AR 15004]**.

7. The volume of Transuranic RLW treated at the RLWTF is small, typically one percent or less of the volume of Low Level RLW. The Discharge Permit would authorize RLW to be collected via pipeline from TA-03, TA-35, TA-48, TA-50, TA-55, and TA-59 within LANL. A double-walled pipeline influent collection system conveys RLW to the RLWTF at TA-50. Low Level RLW is also transferred to the RLWTF by truck. **[AR 15004-15005]**.

8. The RLWTF treats Low Level RLW via numerous processes: chemical addition, flocculation, micro filtration, ion exchange and reverse osmosis. The RLWTF has a separate treatment train for Transuranic waste which includes sludge solidification. This Transuranic waste system consists of the influent storage tanks for two forms of Transuranic waste stream (acidic and caustic), the associated neutralization unit, pressure filters, the final processing tanks, and other associated Transuranic waste stream conveyance, storage and treatment components. Sludge associated with Transuranic waste is disposed of at an off-site facility permitted to receive Transuranic waste. The liquid component of the Transuranic waste stream is combined and discharged with the RLW stream. **[AR 15005]**.

9. The proposed discharge is to the MES, the SET, or Outfall 51 as described supra. **[AR 15004]**.

10. The Department's purpose in issuing DP-1132, and in imposing the requirements and conditions specified therein, is 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 present and potential future use as domestic and agricultural water supply and other uses and to protect public health. In developing the discharge permit, The Department has determined that the requirements of 20.6.2.3109.C NMAC have been or will be met. **[AR 15016-15028]**.

11. NMED received comments arguing that this discharge permit should not be issued under the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 ("WQA"), but rather via the New Mexico Hazardous Waste Act, from Communities for Clean Water ("CCW"), representing Concerned Citizens for Nuclear Safety, Tewa Women United, Honor our Pueblo Existence, and Partnership for Earth Spirituality. **[AR 13426-13434]**.

12. NMED received a Request for Hearing and technical comments on the draft permit from CCW, representing Concerned Citizens for Nuclear Safety, Amigos Bravos, Tewa Women United, Honor our Pueblo Existence, and Partnership for Earth Spirituality. **[AR 13495-13761]**.

13. The Secretary of Environment ("Secretary") granted CCW's request for a public hearing on September 18, 2017. Each party was notified of this determination on March 18, 2016. **[AR 13811-13814]**.

14. On March 16, 2018, CCW filed its Motion to Dismiss DP-1132 Proceeding ("Motion"). In the Motion, CCW moved for dismissal of the proceeding on the grounds that "the WQA does not reach the RLWTF, because the RLWTF does not discharge, nor plan to discharge. Under the express terms of the WQA, a permit would be a nullity. Further, regulation under the WQA is

precluded by the terms of that Act, because the RLWTF is subject to regulation under the HWA.”
[AR 15256].

15. The Motion identified CCW as being comprised of five organizations: Concerned Citizens for Nuclear Safety, Amigos Bravos, Tewa Women United, Honor our Pueblo Existence, and Partnership for Earth Spirituality. [AR 15255].

16. On April 2, 2018, the Department and the Applicants filed their Response Briefs to the Motion, arguing that the discharges to the SET, MES, and Outfall 51 are discharges under the meaning of the WQA, and therefore the Secretary has authority to issue a discharge permit. [AR 15164-15252].

17. On April 6, 2018, CCW filed its Reply Brief. [AR 15154-15163].

18. On April 9, 2018, NMED filed its Notice of Supplemental Exhibits: Two discharge permits named in the NMED Response Brief that were issued for facilities designed to be “zero discharge”, similarly to the RLWTF. [AR 15048-15100].

19. On April 18, 2018, the Hearing Officer denied the Motion “after reviewing all the pre-hearing briefing.” [AR 15101-15105]. The Commission finds that the reasoning contained in the Response Briefs of the Department and the Applicants is persuasive, and that issuance of DP-1132 comports with the WQA for the reasons detailed therein. [AR 15164-15252].

20. On April 9, 2018, the Department and the Applicants each submitted Statements of Intent to present Technical Testimony (“SOI”). The Department’s SOI included the direct testimony of Stephen Pullen, and the resumes of Stephen Pullen and Dr. Patrick Longmire. The Applicants’ SOI included the direct testimony and the resumes of Robert Beers, Danny Katzman, and Karen Armijo. [AR 14701-14867, 14985-14990, 15000-15044].

21. A public hearing on DP-1132 was held on April 19, 2018, beginning at 9:25 AM at the Fuller Lodge, Pajarito Room, 2132 Central Avenue, Los Alamos, New Mexico. [4-9-18 1 Tr. 1:13-17].

22. At the public hearing, appearances were entered on behalf of the Applicants, the Department, and CCW. [4-9-18 1 Tr. 2:7-3:20].

23. At the public hearing, public comment was heard from ten people: Scott Kovac, Rachel Conn, Beata Tsosie, Kathy Sanchez, Marlene Perrotte, Joan Brown, Joe Zupan, Michael Collins, Corinna Bethke, and Anna Hansen. Five of the commenters stated they believed the RLWTF should properly be regulated under the federal Resource Conservation and Recovery Act (“RCRA”) or the New Mexico Hazardous Waste Act, rather than via a groundwater discharge permit. [4-9-18 1 Tr. 17:11-44:8]. At the public hearing, as part of her public comment, Ms. Conn submitted 28 identical comment letters signed by individuals (including Ms. Conn), also expressing that the RLWTF should be regulated under the New Mexico Hazardous Waste Act. [4-9-18 1 Tr. 20:7-22:19]; [AR 14299-14335]. The Commission finds that the question of whether DP-1132 can be issued pursuant to the WQA, the subject of these comments, was fully briefed in response to CCW’s Motion to Dismiss filed on March 16, 2018 and properly decided by the Hearing Officer on April 18, 2018. [AR 15154-15274, 15048-15100, 14620-14622].

24. At the public hearing, technical testimony was provided by witnesses for the Applicants, and the Department. [4-9-18 1 Tr. 48:16-58:15, 134:8-152:21, 158:12-164:6, 178:9-189:17].

25. The Department’s witness, Stephen Pullen, is the manager of the Pollution Prevention Section of the Ground Water Quality Bureau (GWQB) of the Department. In that position he oversaw the permitting process for DP-1132. His resume was filed as NMED Exhibit 2. [AR 15000]; [4-9-18 1 Tr. 180:22-181:17].

26. Mr. Pullen has 30 years' experience in the environmental field, 27 of those years with NMED. [AR 14985-14990, 15000]; [4-9-18 1 Tr. 180:22-181:17].

27. At the public hearing, Mr. Pullen testified as to the technical need for the discharge permit, how the proposed discharge permit is protective of groundwater, how the department had gone about providing public notice of the hearing and the draft permit, and expressed his support of the issuance of the proposed discharge permit DP-1132. [AR 15000-15044]; [4-9-18 1 Tr. 182:18-184:14, 187:4-189:17].

28. At the public hearing, Mr. Pullen was cross examined at length by counsel for CCW as to the likelihood of a discharge from the RLWTF, and Mr. Pullen's understanding of the regulatory basis for issuance of a discharge permit under the Water Quality Act. [4-9-18 1 Tr. 193:22-218:21].

29. Witnesses for the Applicants at the hearing included Robert S. Beers, Danny Katzman, and Karen E. Armijo. [4-9-18 1 Tr. 4:21-5:14]; [AR 14701-14867].

30. At the public hearing, Mr. Beers testified provided an introduction to the RLWTF and discussed the relevant operations at that facility, including the three discharge pathways identified in Draft DP- 1132. Mr. Beers discussed the permit application for DP-1132 and the regulatory background for issuance of the permit. He provided an overview of the requirements of Draft DP-1132, including the discharges authorized by Draft DP-1132 and the standards applicable to the RLWTF's treated effluent. Mr. Beers testified regarding certain requirements of Draft DP-1132, including requirements for the operational plan, monitoring requirements, reporting requirements, contingency plan provisions and the closure plan for the RLWTF. Mr. Beers also provided testimony and an exhibit responding to public comments submitted by CCW in a letter dated June 5, 2017. [AR 14701-14867]; [4-9-18 1 Tr. 48:19-58:16].

31. At the public hearing, Mr. Beers was cross examined at length by counsel for CCW, unsuccessfully attempting to get the witness to state that there would never be a discharge under the meaning of the WQA from the RLWTF. [4-9-18 1 Tr. 65:5-102:7, 109:6-128:24].

32. At the public hearing, Mr. Katzman provided an introduction to the hydrogeologic setting at LANL and discussed why the setting is relevant to Draft DP-1132. Mr. Katzman described the groundwater monitoring requirements set forth in Draft DP-1132 at each of the discharge points included in the permit, specifically at NPDES Outfall 051, SET, and the MES. Mr. Katzman testified about the hydrogeologic setting of the monitoring wells, the purposes for and adequacy of the monitoring wells, the quality of the monitoring wells, and the frequency and suite of monitoring. Mr. Katzman also testified regarding Draft DP-1132's requirements and procedures for detecting and addressing any future noncompliant releases. He offered testimony about pre-existing conditions at LANL that are relevant to certain conditions in Draft DP-1132. [AR 14701-14867]; [4-9-18 1 Tr. 134:4-152:21].

33. At the public hearing, Ms. Armijo addressed certain comments received on the Draft DP-1132 regarding signage in the vicinity of the RLWTF and the staffing of LANL's Emergency Operations Center ("EOC"). Her testimony explained why the proposed signage requirements of Draft DP-1132 are adequate, and why the suggestions of CCW regarding signage have been resisted by Applicants and not included in Draft DP-1132. Ms. Armijo testified as to certain DOE restrictions regarding the staffing of the EOC, and explained that offsite response interfaces present an opportunity to have tribal involvement in the delivery of emergency services that is the subject of CCW's comments regarding EOC staffing. [4-9-18 1 Tr. 158:12-164:9].

B. Conclusions of Law

1. Pursuant to the WQA, the Water Quality Control Commission (“WQCC”) “may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant.” Section 74-6-5(A).
2. The implementing regulations of the WQA are the New Mexico Ground and Surface Water Protection Regulations (“Regulations”), 20.6.2 NMAC.
3. The WQCC has adopted regulations stating that “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.
4. Applicant DOE is department of the United States. Applicant LANS is a limited liability company (LLC). The Applicants are both “persons” within the meaning of the Regulations. 20.6.2.7.JJ NMAC.
5. The Department is an agency of the executive branch of the state of New Mexico, created by statute. NMSA 1978, § 9-7A-6(B)(3) (1991).
6. The Department is charged by the Regulations with evaluating applications for discharge permits, and recommending approval or disapproval by the Secretary. 20.6.2.3018 NMAC.
7. The activities described by the Applicants in their application constitute a discharge under the meaning of Section 74-6-5 and 20.6.2.3104 NMAC and therefore require a discharge permit, to be evaluated by the Department. 20.6.2.3018 NMAC.
8. The Motion to Dismiss was fully briefed and decided pursuant to 20.1.4.200.D NMAC, the Hearing Officer ruled properly that the activities described by the Applicants in their application constitute a discharge under the meaning of Section 74-6-5 and 20.6.2.3104 NMAC. CCW’s argument is premised on an inaccurate representation of the facts [AR 15170-15171], NMED has

the authority under the WQA to issue a discharge permit for the RLWTF [AR 15171-15173, 15225-15229], and to rule otherwise would severely limit the Department's statutory charge to *prevent* water pollution [AR 15225,15228-15229, 13815-13824, 15048-15100].

9. The discharge permit application for DP-1132 complied with the requirements of Section 74-6-5 and 20.6.2.3106 NMAC.

10. The WQA provides that the constituent agency shall "either grant the permit, grant the permit subject to conditions, or deny the permit." Section 74-6-5(D).

11. The Department provided the public, including the Applicants, with notice of the proposed discharge permit in accordance with the regulations at 20.6.2.3108.H NMAC.

12. The Department provided the public, including the Applicants, an opportunity to comment on the proposed discharge permit in accordance with the regulations at 20.6.2.3108.K NMAC.

13. The Department provided the public, including the Applicants, with notice of the public hearing in accordance with the regulations at 20.6.2.3110 and 20.1.4.200.C(2) NMAC.

14. A public hearing was held on the proposed discharge permit in accordance with the regulations at 20.6.2.3110 and 20.1.4 NMAC.

15. The conditions proposed in the draft DP-1132 "are reasonable and necessary to ensure compliance with the [WQA] and applicable regulations, including site-specific conditions." Section 74-6-5(D).

V. CONCLUSION

NMED respectfully requests that the WQCC find that the Secretary of Environment properly ordered the issuance of DP-1132 pursuant to NMSA 1978, Section 74-6-5 and 20.6.2.3110 NMAC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Hearing Clerk and was served on the following via electronic mail on December 31, 2018:

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