

April 17, 2018

Ms. Pam Castaneda, Hearing Clerk
New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us



**Re: Public Comment about Proposed Ground Water Discharge Permit 1132 (DP-1132)
Radioactive Liquid Waste Treatment Facility at Los Alamos National Laboratory - GWB 17-20 (P)**

Dear Ms. Castaneda:

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Thank you for your careful consideration of my comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Wynward".

[Please print your contact information]

toddwynward@gmzil.com
taos, nm

17020

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Sasha Ryerson
510-725-0399

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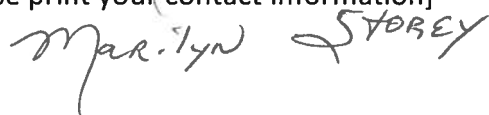
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RENO MYERSON - 1542 CERRO GORDO Rd - Santa Fe
87505

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Sincerely, *Bridgette Kennedy*

[Please print your contact information]

*2125 Paseo Primero
Santa Fe, NM 87501
505 986 0460
janetdegan@hotmail.com*

17027

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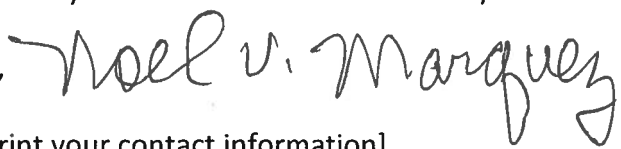
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635 N 13th ST,
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Arthur R. Alfred
7131 Toulon Dr NE ABQ 87122-3328 17030

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6000 Montano Plaza Dr. NW
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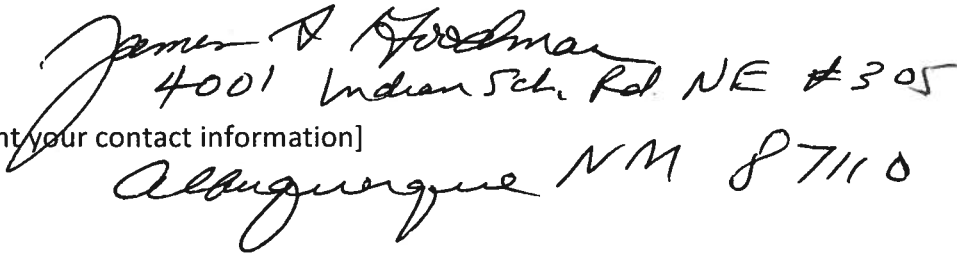
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Thank you for your careful consideration of my comments.

Sincerely, 

[Please print your contact information]

Betty Kuhn
1419 Minaceros Ln S
Santa Fe, NM 87505

April 17, 2018

Ms. Pam Castaneda, Hearing Clerk
New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

**Re: Public Comment about Proposed Ground Water Discharge Permit 1132 (DP-1132)
Radioactive Liquid Waste Treatment Facility at Los Alamos National Laboratory - GWB 17-20 (P)**

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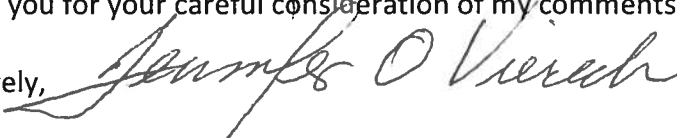
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Thank you for your careful consideration of my comments.

Sincerely, 

Jennifer O'Viereck
3846 W Alameda
Santa Fe NM 87507

[Please print your contact information]

April 15, 2018

Ms. Pam Castaneda, Hearing Clerk
New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

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Sincerely,



[Please print your contact information]

Megan White
megantrulove@gmail.com

17036

April _____, 2018

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New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

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Sincerely,

[Please print your contact information]
jamokres@cybermesa.com

April 15, 2018

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New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

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Thank you for your careful consideration of my comments.

Sincerely,

Mary Ribeau

[Please print your contact information]

m1bbeau@unm.edu

505-417-6074

17038

April 14, 2018

Ms. Pam Castaneda, Hearing Clerk
New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

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Thank you for your careful consideration of my comments.

Sincerely,
 Kay Gries, 1221 Jeanette SW, APO, NM 87105
[Please print your contact information]

April 15, 2018

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New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

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Thank you for your careful consideration of my comments.

Sincerely, *Charlene L. Smith*

[Please print your contact information]

*Charlene L. Smith
316 S. James St.
Carrizosa, NM 87002 217-249-4068*

17040

April 15, 2018

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New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

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[Please print your contact information]

Jo Ann Benenati
3502 Church Rock St.
Gallup NM 87301

April _____, 2018

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Sincerely, 

[Please print your contact information]
1001 Susan Ave. 505-722-8922
Gallup, NM 87301

April 15, 2018

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New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

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Sincerely, 

[Please print your contact information]
LINDA HEITKAMP
701 640 6080
ALBUQUERQUE NM 87105

April 17, 2018

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New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
By email to: Pam.Castaneda@state.nm.us

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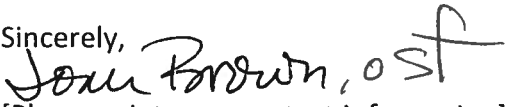
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Thank you for your careful consideration of my comments.

Sincerely,

[Please print your contact information]
1004 Major Ave NW
ABQ, NM 87107
joan.kansas@swcp.com

17044



R E C E I P T

On April 19, 2018, I received _____ individually signed public comment letters for inclusion in the Hearing Record for GWB-17-20(P) proceeding *In the Matter of Proposed Discharge Permit 1132 for the Radioactive Liquid Waste Treatment Facility at Los Alamos National Laboratory, Los Alamos, New Mexico.*

Pam Castaneda, Hearing Clerk
New Mexico Environment Department

April _____, 2018

Ms. Pam Castaneda, Hearing Clerk
New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
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Thank you for your careful consideration of my comments.

Sincerely, 

[Please print your contact information] Rachel Carr
1201 Estrella Rd
Taos, NM 87571

17046

April 15, 2018

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New Mexico Environment Department
P. O. Box 5469
1190 St. Francis Drive
Santa Fe, NM 87502
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Thank you for your careful consideration of my comments.

Sincerely, *Marlene Perrotte*
1004 Mayacave NW
[Please print your contact information]

ABQ, NM
87107

17047

Statement from Santa Fe County Commissioner Anna Hansen
April 17, 2018



Good morning Madame Hearing Officer:

My name is Anna Hansen. I am a Santa Fe County Commission, Chair of the Board, member of the Buckman Direct Diversion Project Board, and former Chair of Concerned Citizens for Nuclear Safety.

I am speaking today as a Santa Fe County Commissioner from District 2 which is the location of the Buckman Direct Diversion Plant and our on-going concerns about Los Alamos National Laboratory (LANL) contaminants flowing in surface and ground water towards drinking water supplies in Santa Fe County.

The Pueblo Peoples, the City of Santa Fe, and Santa Fe County have been here long before LANL and Los Alamos County were established. Just like other environmental justice communities impacted by irresponsible discharges of toxic materials by industry that moves into their communities, it is long since time for the Department of Energy (DOE) and LANL, and its federal and state regulators, to accept their responsibilities and meet statutory and regulatory requirements as a site that generates large amounts of hazardous waste.

From the beginning of operations in 1943, raw radioactive liquid wastes generated by LANL were discharged without any treatment directly into Pueblo and Los Alamos Canyons. By the late 1940s, LANL categorized these areas as “highly contaminated,” knew that areas of these canyons that were accessible to the public were contaminated with plutonium and uranium, and that the waste generated at LANL could eventually enter the Rio Grande.

In 2010, Santa Fe County and the City of Santa Fe began diversion of waters from the Rio Grande three miles downstream of where Los Alamos Canyon, which carries Manhattan Project-era LANL pollutants in storm water and snow melt, enters the Rio Grande.

Mortandad Canyon is the location of Outfall 051 and a subject of this hearing. In 2004, independent groundwater hydrologist, George Rice, reviewed DOE and LANL data to determine that contaminants from LANL waste sources, such as Outfall 051, are moving toward the Rio Grande much more quickly than previously estimated. Rice, who has analyzed contaminant transport at several DOE sites, found that a contaminated particle leaving Outfall 051 and reaching the Rio Grande could travel that distance of eight miles in 26 years or

less. At the time Rice wrote the report, LANL was stating publicly that the travel times were hundreds of years. For decades, the springs along the Rio Grande have carried LANL contaminants to the river.

Further, the growing co-located hexavalent chromium and perchlorate groundwater plumes below LANL are moving to Los Alamos County drinking water wells. Santa Fe County is concerned about the safety of the deep waters pumped from the Buckman Well Field, directly east of Mortandad Canyon and the Rio Grande.

Madame Hearing Officer, you have an opportunity to stop this public hearing for a groundwater discharge permit that will never go into effect. There is no discharge; there has not been a discharge since November 2010.

Following the Cerro Grande fire in May 2000, Congress provided funding for LANL to construct and operate the Waste Mitigation Risk Management (WMRM) which contains six 50,000 gallon tanks to store low-level waste influent. Four of those tanks – or storage for 200,000 gallons - are reserved for emergencies. If LANL needs to do maintenance on the Radioactive Liquid Waste Treatment Facility, it can use those tanks for storage purposes.

Since 1963, when it began operations, the Radioactive Liquid Waste Treatment Facility is a radioactive and hazardous liquid waste storage and treatment facility. The influent to the Facility and the effluent from it contains hazardous materials. The sludge that is generated is shipped off-site for disposal at facilities regulated by the federal Resource Conservation and Recovery Act. As such, it is required to be regulated by the New Mexico Hazardous Waste Act and the federal Resource Conservation and Recovery Act (RCRA).

Over the past 24 years, the New Mexico Environment Department has requested permit applications to regulate the Facility under the hazardous waste laws and regulations. Now is the time to get that done.

Thank you for this opportunity to express the concerns of the County of Santa Fe.

Sincerely,

Anna Hansen,
Santa Fe County Commissioner, District 2

Attention NM Environment Department

Welcome to San Ildefonso Pueblo and Santa Clara land which CANZ (you) took without any permit
A beautiful setting for headquarters of the ANIMATORS.
This is a very personal topic to discuss more ways to ~~disintegrate~~ exterminate radiate ambulate our brothers and sisters (perfecting the weapon tools).

I was Born in 1942 around the beginning of this Manhattan project (giving that fine N.Y. thorough a bad name) I grew up hating Hitler, Mussolini and the so called "JAPS". As a child I could not understand why ^{my} government would want to bomb babies, grandmas and grandpas and ANY CIVILIANS. Were we trying to get back at their soldiers? I do not hate you, but I hate your behavior the way we (1)

EXHIBIT
PC. 4

hate vicious behavior of our
children but love them.

You are scientists, or represent
some of the alleged "great minds"
of our nation or the west, great
chemists, physicists, mathematicians,
How about biology, or the
humanities, philosophy, sociology
etc. maybe those fields might have
helped to modify the desire
to destroy the world or at
least the so called enemies
world.

Even dastardly, murderous
deeds committed by ^{JUAN} Onate,
Kit Carson, Geronimo and others
of all backgrounds. Even
their vicious acts like Onate's
cutting off of right feet of all
A com^{puter}men do not compare to
Nuke atrocities like Hiroshima
Nagasaki and all planned nuclear
weapon attacks.

ONATE, KIT CARSON, GERONIMO
ABHORENT BEHAVIOR

(2)

side
comment
→

Chromium discharge problem

What is being done, now that the horse is already out of the barn. How has it been brought back to original nature not somewhat ~~but~~ but completely.

Why would effluent evapor-
ation be any safer in the air or as a liquid. It could remain toxic or lethal in our fragile air or ground-water.

Based on LANL's past screw-ups over the past 46 years, I have lived in Santa Fe County, why should LANL continue in weapons related science, including pit production, etc, any more than Rocky Flats was allowed to continue their disastrous work in Colorado. The weapons production and science related at Los Alamos SHOULD BE CURTAILED immediately, (3)

before more HAZARDOUS ^{harm} ~~is~~ is committed to New Mexico and its citizens, flora and fauna.

Are NUKE weapons the very best response or solution that a so called civilized people can come up with to resolve disagreements or differences. I believe the world definitely has an over-population problem, but there are other ways, methods besides nuking one another or China's one baby edict.

Can't LANL scientists or any U.S. intellectual leaders come up with alternatives short of war or possible extinction of life as we know it.

As to discussions of groundwater and its behavior or nature, we all know it is ultimately unpredictable. This is the same with water tables.

aquifers and any subterranean activity including seismic or plate shifts (still a mystery, as far as predictability). Look at the fuel leak near Kirtland Air Force Base in Albuquerque. Still unresolved or stopped after numerous years.

These various hearings for permits to expand, modify, adapt, etc. the nuclear weapons program amounts to a rearranging of the deck chairs on the Titanic. Obfuscation to perpetuate hazardous operations to develop heinous, radioactive doomsday weapons.

April 19, 2018

Respectfully submitted by

Michael Truax Collins

3 Old Santa Fe Way

Santa Fe, NM 87505

mtruaxcollins@yahoo.com

5

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

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



No. GWB 17-20 (P)

**NEW MEXICO ENVIRONMENT DEPARTMENT GROUND WATER QUALITY
BUREAU'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In accordance with 20.6.2.3110.I and 20.1.4.500(B)(4) NMAC, the New Mexico Environment Department (“NMED” or “Department”) hereby submits its Proposed Findings of Fact and Conclusions of Law in this proceeding, involving the issuance of Ground Water Discharge Permit No. 1132 (DP-1132), issued for the Los Alamos National Laboratory (“LANL”) Radioactive Liquid Waste Treatment Facility (“RLWTF”).

BACKGROUND

Construction of the RLWTF began in July 1961, and the processing of radioactive liquid waste began in June 1963. On April 3, 1996, the Department notified the U.S. Department of Energy (“DOE”) and Los Alamos National Security, LLC (“LANS”) (collectively “LANS/DOE or the “Applicants”) that a discharge permit was required. The application (i.e., discharge plan) consists of the materials submitted by the Applicants on August 19, 1996, an updated application submitted to NMED on February 16, 2012, an amendment to the application submitted to NMED on August 10, 2012, supplemental information submitted on June 6, 2016, and materials contained in the administrative record prior to issuance of this Discharge Permit. On November 1, 2007, the Applicants submitted a Notice of Intent (“NOI”) for the discharge of treated effluent water to the Solar Evaporative Tank (“SET”). NMED responded to the NOI requiring a new, up-

to-date, and comprehensive application. In December 2015, the Applicants submitted a draft Closure Plan for inclusion into the Discharge Permit.

Public notice associated with the draft Discharge Permit occurred at three stages of the permitting process: the notification of the Department's receipt of the discharge permit application (Public Notice 1 or PN1), the notification of the availability of a draft discharge permit for public comment and for request of a public hearing (Public Notice 2 or PN2), and the notification that a hearing is to occur (Hearing Notice). Each of these notification processes took place in accordance with 20.6.2.3108 NMAC and may have occurred multiple times due to changing circumstances.

The notification of the Department's receipt of the discharge permit application (PN1) occurred in accordance with 20.6.2.3108.B NMAC. The Applicants posted the required signs, provided written notice to nearby property owners, and published the required display add in the local newspaper. The Department posted a notice of receipt of the application on its website, mailed notices to affected public agencies, and mailed notices to persons on general and facility specific mailing lists. PN1 included all information required of such notices as specified at 20.6.2.3108.F NMAC. DP-1132 PN1 occurred two times, first in November of 1996 and then in March of 2012.

The notification of the availability of a draft permit for public comment and for request of a public hearing (PN2) occurred in accordance with 20.6.2.3108.H NMAC. The Department posted a draft Discharge Permit on the Department's website, published notice in the Albuquerque Journal and the Los Alamos Monitor, mailed a notice to persons on the facility-specific mailing list, and mailed a notice to affected public agencies and tribal entities. PN2 included all information required of such notices as specified at 20.6.2.3108.F and 20.6.2.3108.I NMAC, and allowed for a 30-day comment period. PN2 for DP-1132 occurred six times,

primarily to provide the public with the opportunity to review a draft discharge permit revised because of comments received during the previous public comment period. DP-1132 PN2 occurred in August 2003, April 2005, August 2013, November 2013, May 2017, and March 9, 2018.

On May 5, 2017, the Department issued the final public notice offering the draft Discharge Permit that is the subject of this hearing, and for which the Department held multiple listening sessions and meetings, received numerous notices concerning minor modifications to the Facility as addendums to the original Discharge Permit application, and on numerous occasions requested additional information from the Applicants. On March 05, 2018, the Department re-noticed the draft Discharge Permit, correcting the previous notice by providing the current and correct version of the Closure Plan dated September 2016.

Upon the Department's determination that a hearing was to occur, the Department notified the public of the hearing determination by posting the notice on the Department's website, publishing a Hearing Notice in the Albuquerque Journal, the Santa Fe New Mexican, and the Los Alamos Monitor, mailing a Notice to persons on the facility-specific mailing list, and mailing a Notice to affected public agencies and tribal entities. This Hearing Notice included all information required of such notices as specified at 20.6.2.3108.L NMAC and described the time and place of the hearing and a brief description of the hearing process. Due to changes in both the hearing date and location, the Department's Hearing Notices occurred on December 15, 2017, January 14, 2018, and March 9, 2018. The Department provided both English and Spanish versions of the Hearing Notices. The March 9, 2018, Hearing Notice is marked as NMED Exhibit 5

The Department proposes approval of DP-1132 admitted as NMED Exhibit 1 at the hearing.

PROPOSED FINDINGS OF FACT

A. PURPOSE OF AND NEED FOR THE DISCHARGE

1. The RLWTF consists of an underground collection system that conveys radioactive liquid waste (“RLW”) water to Technical Area (“TA”) 50 from generators at LANL; structures at TA-50; and the Solar Evaporation Tank (“SET”) at TA-52. **NMED Exhibit 4 at page 4, lines 15 – 18.**
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. **NMED Exhibit 4 at page 5, lines 2 – 4.**
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. **NMED Exhibit 4 at page 5, lines 4 – 6.**
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. **NMED Exhibit 4 at page 5, lines 6 – 11.**

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. **NMED Exhibit 4 at page 5, lines 11 – 15.**

B. THE PROPOSED DISCHARGE

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. **NMED Exhibit 4 at page 5, lines 18 – 20.**
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. **NMED Exhibit 4 at page 5, lines 20 – 23 and page 6, line 1.**
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. **NMED Exhibit 4 at page 6, lines 2 – 9.**

C. DP-1132 REQUIREMENTS

9. The proposed discharge is to the MES, the SET, or Outfall 51 as described *supra*. **NMED Exhibit 4 at page 5, lines 2-20.**

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. **NMED Exhibit 4 at pages 17, line 5 through page 29, and line 12.**

D. COMMENTS RECEIVED

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 Nos. 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 Nos. 13495-13761.**

E. HEARING DETERMINATION AND PUBLIC HEARING

13. The Secretary of Environment (Secretary) granted Communities for Clean Water's ("CCW") request for a public hearing on September 18, 2017. Each party was notified of this determination on March 18, 2016. **AR Nos. 13811-13814.**
14. 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. **NMED Exhibits 2, 4; LANS/DOE Exhibits 1, 2, 7, 8, 10 and 11.**
15. 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. **Hearing Transcript (Hrg. Trans.) 1:13-17.**
16. At the public hearing, appearances were entered on behalf of the Applicants, the Department, and CCW. **Hrg. Trans. 2:7-3:20.**
17. 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. **Hrg. Trans. 17:11-44:8.**
18. 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. **Hrg. Trans. 20:7-22:19. Public Comment Exhibit 2.**

19. At the public hearing, technical testimony was provided by witnesses for the Applicants, and the Department. **Hrg. Trans. 48:16-58:15, 134:8-152:21, 158:12-164:6, 178:9-189:17.**
20. 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. **NMED Exhibit 4 at page 1, lines 2-4; Hrg. Trans. 180:22-181:17.**
21. Mr. Pullen has 30 years' experience in the environmental field, 27 of those years with NMED. **NMED Exhibit 2. NMED Exhibit 4 at page 1, lines 2-4; Hrg. Trans. 178:21-180:4.**
22. 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. **NMED Exhibit 4; Hrg. Trans. 182:18-184:14, 187:4-189:17.**
23. At the public hearing, Mr. Pullen 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. **Hrg. Trans. 193:22-218:21.**
24. Witnesses for the Applicants at the hearing included Robert S. Beers, Danny Katzman, and Karen E. Armijo. **Hrg. Trans. 4:21-5:14; LANS/DOE Exhibits 1, 2, 7, 8, 10 and 11.**
25. 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. **LANS/DOE Exhibits 1, 5, 6; Hrg. Trans. 48:19-58:16.**

26. 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. **Hrg. Trans. 65:5-102:7, 109:6-128:24.**

27. 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. **LANS/DOE Exhibits 7, 9; Hrg. Trans. 134:4-152:21.**

28. 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. **Hrg. Trans. 158:12-164:9.**

F. MOTION TO DISMISS

29. 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." **Motion at 2.**

30. 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. **Motion at 1.**

31. On April 2, 2018, NMED and LANS/DOE 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.

32. On April 6, 2018, CCW filed its Reply Brief.

33. 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.
34. On April 18, 2018, the Hearing Officer denied the Motion “after reviewing all the pre-hearing briefing.”

PROPOSED CONCLUSIONS OF LAW

All relevant proposed findings of fact in the preceding paragraphs are incorporated herein by reference.

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 require a discharge permit, to be evaluated by the Department. 20.6.2.3104 and 20.6.2.3018 NMAC.
8. The discharge permit application for DP-1132 complied with the requirements of Section 74-6-5 and 20.6.2.3106 NMAC.
9. 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).
10. The Department provided the public, including the Applicants, with notice of the proposed discharge permit in accordance with the regulations at section 20.6.2.3108.H NMAC.
11. 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.
12. 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.
13. 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.
14. 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).
15. The Motion was fully briefed and decided pursuant 20.1.4.200.D NMAC, any additional argument on this matter in this proceeding would therefore be improper.

CONCLUSION

The Secretary should grant to the Applicants the discharge permit DP-1132 as filed as NMED Exhibit 1.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

/s/ John Verheul

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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 June 4, 2018:

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John Verheul

NEW MEXICO ENVIRONMENT DEPARTMENT
BEFORE THE SECRETARY OF THE ENVIRONMENT



IN THE MATTER OF 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)

GWB 17-20(P)

**COMMUNITIES FOR CLEAN WATER (“CCW”) CLOSING ARGUMENT,
REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. CLOSING ARGUMENT.

Before the April 19, 2018 hearing in this matter, CCW moved for dismissal of this DP-1132 permitting proceeding on the ground that the Radioactive Liquid Waste Treatment Facility (“RLWTF”) at Technical Area 50 of Los Alamos National Laboratory (“LANL” or the “Lab”) is operating outside the New Mexico Environment Department’s (“NMED”) statutory jurisdiction under the Water Quality Act, NMSA 1978, § 74-6-1 *et seq.* (“WQA”). CCW pointed out that, by its plain language, the WQA does not reach the RLWTF, because the RLWTF does not discharge, nor plan to discharge, any water or water contaminants. Thus, there is no statutory basis for regulation under the WQA, and a permit would be a nullity. This is so for the further reason that the RLWTF is subject to regulation under the Hazardous Waste Act, NMSA 1978, § 74-4-1 *et seq.* (“HWA”) (implementing the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (“RCRA”) in New Mexico). The Hearing Officer summarily denied the motion. (Order, April 18, 2018). At the public hearing on April 19, 2018, however, CCW, through cross examination

**NEW MEXICO ENVIRONMENT DEPARTMENT
BEFORE THE SECRETARY OF THE ENVIRONMENT**

IN THE MATTER OF APPLICATION OF THE)
UNITED STATES DEPARTMENT OF ENERGY)
AND LOS ALAMOS NATIONAL SECURITY, LLC.,)
FOR A GROUNDWATER DISCHARGE PERMIT) **GWB 17-20(P)**
(DP-1132) FOR THE RADIOACTIVE LIQUID)
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of witnesses from LANL and NMED, adduced evidence establishing that the substantive basis of the CCW motion to dismiss was and is correct.

II. REQUESTED FINDINGS OF FACT.

A. Background Facts on the RLWTF.

1. The RLWTF was constructed in the early 1960's to treat, store, and dispose of radioactive and hazardous liquids generated by several LANL facilities, the waste liquids of which are transported to the RLWTF by pipes and trucks. [AR at 00117, 00123]. 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.

2. LANL has operated the RLWTF on the basis that the RLWTF is exempt from HWA regulation under the Wastewater Treatment Unit exception. *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)). For example, liquid waste from the Plutonium Facility ("PF-4"), was sent to the RLWTF and deemed exempt from hazardous waste regulation. [AR at 02323].

3. Since the RLWTF was considered exempt from hazardous waste regulation, it followed that it was eligible for regulation under the WQA. The WQA does not apply to any activity that is regulated by the HWA. NMSA 1978, § 74-6-12.B. But if the facility were exempt, a WQA permit could be issued without a conflict with the HWA.

4. 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].

5. Against this regulatory background, LANL announced its commitment to eliminate liquid discharges from the RLWTF. A 1998 LANL report¹ stated:

Determining viable options for eliminating the discharge of treated radioactive liquid waste to Mortandad Canyon was the directive of the outfall 051 elimination working group.²

6. 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") stated:

We agree that the Laboratory should set a goal of zero discharge of radioactive liquid effluent to the environment. To reach this ambitious goal, ESH and EM Divisions will jointly initiate the Radioactive Liquid Waste Zero Discharge Project.

Id.

7. LANL told NMED that the project would include gas-fired evaporation units [Mechanical Evaporation System or "MES"] and, later, evaporative basins [Solar

¹Moss, *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 were provided on CD-ROM to the parties, the Hearing Officer, the Hearing Clerk, and the Court Reporter, and were made part of the record of this proceeding.

² *Id.* at v (Ex. A to Request).

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”), DOE determined to pursue design of a Zero Liquid Discharge RLWTF.⁴ In a later ROD, DOE decided to construct and operate a new RLWTF and operate the Zero Liquid Discharge facility.⁵

8. Thus, 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”:

A new rad/liquid waste facility will be constructed within 3-5 years that will eventually discharge preferentially to the new evaporative basins or, under emergency, to Mortandad canyon under the NPDES permit and DP.

[AR at 03548].

9. 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].

10. A March 20, 2012 NMED inspection report states that LANL intended to use evaporation processes—the mechanical evaporator and solar evaporation tanks—to dispose of all liquid output from the RLWTF:

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).

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).

LANL has not discharged to the NPDES outfall for over a year and they are not intending to discharge due to the difficulty in treating the effluent to meet the NPDES copper limitations. Currently, the facility has been mechanically evaporating all effluent. The mechanical evaporators were determined not to require an air quality permit.

At the time of inspection, LANL was nearing completion of the uncovered Solar Evaporative Tanks (SET). All treated effluent from the RLWTF will be discharged via a 3,500 foot single-lined gravity fed conveyance pipe (with welds every 500 feet) to the SET. LANL is anticipating having the as-built drawings for the SET completed by mid-May and would be looking at placing the SET on-line and commencing discharge approximately 3-4 months after that.

[AR at 08122].

11. LANL responded to the NMED report on July 10, 2012, not contesting the description of its discharge plans, but adding that “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].**

12. However, by the end of November 2010, discharges from Outfall 051 ended. As LANL stated in a 2014 report: “Discharges from Outfall 051 decreased significantly after the mid-1980s and effectively ended in late 2010.”⁶ In late 2014 NMED reported to U.S. Environmental Protection Agency (“EPA”) Region 6 that Outfall 051 had not discharged since November 2010.⁷ A LANL web site states that “a mechanical evaporator

⁶ 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).

⁷ Letter, Yurdin to Dorries with Inspection Report, at 4th page (August 5, 2014) (Ex. QQ to Request).

was installed so no water has been discharged at Outfall 051 since November 2010.”⁸ 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 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.

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

⁸ At the pull down menus for Outfall 051:
<http://www.lanl.gov/environment/protection/compliance/industrial-permit/outfall-map.php>
(reviewed on May 17, 2018).

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).

new Discharge Permit—existing (unpermitted) facility” and which refers to discharges through Outfall 051:

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.

[AR at 5348]. In fact, such discharges stopped seven and a half years ago.

15. Although there are no discharges, LANL demands that a discharge permit issue and insists that the RLWTF is, therefore, exempt from HWA regulation. For example, LANL has argued that it was inappropriate for the draft permit to impose conditions from the Hazardous Waste regulations, because LANL claimed the RLWTF was exempt:

General Comment No. 1, Permit Condition II.V, Page 6 (Definition of Secondary containment):

This permit condition defines “secondary containment” by incorporating (verbatim) the definition of “secondary containment” as that term is used under the New Mexico Hazardous Waste Regulations (NMAC 20.4.2.1 et seq.) and EPA rules under the Resource Conservation and Recovery Act of 1976 (“RCRA”, 42 U.S.C. § 6901 et seq.) at 40 C.F.R. § 264.193. This proposed condition is inappropriate for at least four reasons. First, the RLWTF is a wastewater treatment unit which is exempt from the requirements of 40 C.F.R. § 264.193 and 20.4.2.1 NMAC.

[AR at 09794] (Dec. 12, 2013).

16. LANL has argued that:

RCRA contains very prescriptive requirements which NMED-GWQB [Ground Water Quality Bureau] 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.

Id. LANL also commented that NMED could not lawfully use RCRA language concerning emergency plans. **[AR at 09799]** (Dec. 12, 2013).

17. 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:

LANL has several reports going back to the 1970’s of its studies on the need and efficacy of turning the RLWTF into a “zero-liquid-discharge” facility. In its application, as well as previous studies of the RLWTF, LANL points to the fact that its discharges from the facility are already extremely minimal. Given the data that LANL has provided, it is questionable whether this facility should receive an NPDES permit or should be permitted as a RCRA hazardous waste processing facility.

[AR at 09663].

18. In further comments on December 12, 2013, CCW maintained 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].**

19. Later, 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. CCW explained that the transfer of water within the RLWTF to the evaporator unit or to the evaporative tanks did not constitute a “discharge,” because it did not constitute a release that may move toward ground water or interfere with health:

The Authorization to Discharge (sec. V.C) is unnecessary and should not be given to the Permittees, since no discharges are planned. The statements in section V.C, authorizing the Permittees to “discharge” into the Mechanical Evaporator System (“MES”) or the Solar Evaporative Tank (“SET”) System are not logical, because “discharge” is defined as a release that may move

directly or indirectly into ground water or interfere with health, etc. (sec. II.G.) A discharge into the MES or the SET is not calculated to move into ground water or interfere with health. Further, the authorization to discharge through Outfall 051 is not proper, since the Permittees state that the RLWTF will be a “zero-discharge” facility; Permittees do not propose to make any discharges through Outfall 051 and should not be given authority to do so.

[AR at 13690] (Nov. 23, 2015).

20. 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] (Aug. 29, 2016). CCW emphasized that the unsupported discharge permit would give the RLWTF an unfounded exemption from hazardous waste regulation. [AR 13756-13758] (Jan. 13, 2017).

21. Despite the above facts, GWQB has persisted in issuing the draft DP-1132 WQA permit. It is patent, however, that a permit based upon such concepts would be contrary to law. *See generally* Requested Conclusions of Law at § III *infra*.

B. Evidence Presented At The Public Hearing.

(a) No discharge is currently made or planned for the RLWTF:

22. Robert S. Beers of Los Alamos National Laboratory testified in support of the proposed permit. He stated that “there would be three discharges regulated by DP-1132. Those are to the SET, the solar evaporation tank system; the MES, mechanical evaporation system; and, third, 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.”) (April 19, 2018) at 70:25-71:14.

23. 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.

24. He agreed that being allowed or authorized to discharge is not the same thing as actually discharging. Tr. at 100-01.

25. Mr. Steven Pullen, who testified for NMED, agreed that the SET has not begun operation. Tr. at 205. Moreover, Mr. Pullen also agreed that, when it operates, normally, effluent introduced into it would not touch the ground. Tr. at 207-08.

26. Mr. Pullen testified that, when the MES operates normally, water is evaporated and escapes in the vapor phase. Tr. at 208.

27. When asked whether he was confident that the MES, which turns water into steam, will send effluent to ground water, Mr. Pullen said, “No. I am confident that it will not, because this permit exists to ensure that there are controls in place that it does not.” Tr. at 209.

28. None of the Lab’s witnesses, nor Mr. Pullen of NMED, stated that there were any *actual* statutory discharges, whereby water is released from containment in the facility, from the RLWTF. All testimony on this issue dealt with potential discharges. *See generally*, 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 (April 19, 2018).

(b) Water directed to the MES or the SET will not be released to reach the surface of the earth.

29. LANL stated 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].

30. 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.

(c) Recitals in the draft DP-1132 concerning occurrence of discharges are not based on the facts.

31. In the course of cross examination, Mr. Pullen, the NMED employee responsible for the permit, was asked about the basis for statements, both in his testimony and in the draft permit, which recite 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.

32. At first, Mr. Pullen testified that he had, “made sure that there was actually a discharge of effluent or leachate from the facility.” Tr. at 200. He then admitted that the

only “discharges” currently occurring were releases to the MES and that discharges from Outfall 051 had only taken place in the past. *Id.*

33. He added that it was “possible” that, by the time the permit is issued, discharges will be occurring at all three locations, *i.e.*, the MES, the SET, and Outfall 051. Tr. at 201. But he acknowledged that this statement was predicated on the notion that, “anything is possible” and concurred that there have been no discharges from the RLWTF since November 2010. Tr. at 201, 204.

34. Mr. Pullen stated that the paragraphs in the DP-1132 draft, which recite that discharges are occurring, will be true if a discharge goes to Outfall 051, but that has not been true since 2010. Tr. at 204-05.

(d) Discharges from Outfall 051 may occur only under conditions, the occurrence of which is speculative, and no discharge has occurred for a long time.

35. 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.

36. Mr. Beers testified that the Lab intends to discharge to Outfall 051, but only under certain conditions, which will determine whether a discharge occurs, 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.

37. Mr. Beers acknowledged in his testimony that the Lab's purpose in maintaining a federal NPDES permit for Outfall 051 is to maintain capacity to discharge should the MES and/or the SET become unavailable due to maintenance, malfunction, and/or if there is an increase in treatment capacity caused by changes to LANL's scope/mission. He agreed that this is one of the Lab's purposes in seeking issuance of DP-1132. Tr. at 101.

38. 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.

(e) LANL and NMED seek a permit, nevertheless, for the MES and the SET, based upon an asserted *potential* to discharge.

39. 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, even disregarding discharges through Outfall 051, and considering only discharges to the MES and SET, 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*). It is because of the *potential* for discharge that Mr. Beers advocates adoption of DP-1132. Tr. at 110.

40. According to Mr. Beers, when effluent is piped to the MES 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. Tr. at 112. Mr. Beers explained that, "there is a potential for a failure of the containment system, in which case an unintended

release could reach ground water.” Tr. at 112. He referred to a possible failure of the containment system in the MES or the SET. Tr. at 113.

41. 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

42. 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.

43. Ultimately, in his testimony, Mr. Beers agreed that, in the case of DP-1132, NMED is proposing to issue a permit for a *potential* discharge, a practice Mr. Beers believes is a fundamental part of the NMED permitting program. Tr. at 119

44. Mr. Pullen testified, as to water directed to the MES, that “[t]he *potential* for any of this effluent to move to ground water is the reason we permit the mechanical evaporator.” *Id.* [emphasis added]. The same is true as to the solar evaporation tanks. *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].

45. 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:

A. I believe it is a transfer of water from a treatment system to some sort of a discharge point, be it evaporation or to an outfall. We consider that an actual -- or some sort of a discharge that may cause effluent to migrate to groundwater.

Q. When you say “may,” you're just saying that it's not impossible; is that right?

A. That's right.

Id.

46. Pressed as to whether the release of steam by the MES 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 reason for requiring a permit is the possibility of a failure of containment:

Q. But that's what's going on, it's an escape of steam at the present?

A. That's not what we're concerned about. We're concerned about wastewater transferring between the treatment units and the mechanical evaporator that may move directly or indirectly into groundwater.

Q. Wastewater, you said, transferring between treatment units?

A. Between the treatment unit and the discharge unit.

Q. Okay.

A. That may escape that piping system, a break in the pipe, that could drip for some period of time and migrate to groundwater.

Q. Are you aware of any such leak occurring now?

A. At the -- at -- associated with the Radioactive Liquid Waste Treatment Facility?

Q. Yes.

A. No, sir.

Tr. at 215-216.

47. At the same time, in his testimony Mr. Pullen also conceded that the Water Quality Act does not allow NMED to permit a “potential” discharge. Tr. at 212.

(f) DP-1132 will not go into effect absent a statutory discharge, which is neither planned nor intended.

48. 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. Mr. Pullen went on to explain in his testimony that, “Again, it’s the *potential* for impact to ground water.” Tr. at 215 (emphasis added). Mr. Pullen further testified that, “[a] discharge permit would go into effect the moment it is signed, regardless of when the discharge actually occurs.” Tr. at 218.

49. Since DP-1132 is a new NMED permit for a facility that has operated without a permit for its operational life, and since the asserted “discharges” to the MES and the SET would be new “discharges,” never before made or permitted, 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), they are *not* discharges under the Water Quality Act. Thus, a permit authorizing such alleged discharges will not come into effect under the requirements of NMSA 1978, § 74-6-5.I.

III. REQUESTED CONCLUSIONS OF LAW.

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

50. The Hearing Officer has 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.

51. In determining issues of law concerning an agency action, a tribunal 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; *Gila Resources Information Project v. Water Quality Control Commission*, 2005 NMCA 139, ¶ 15, 138 N.M. 625, 629.

52. 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, 67 N.M. 41, 48-49; *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 19, 147 N.M. 523, 529.

53. 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.

54. 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].

55. “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.

56. NMED and the WQCC are statutory creations, 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. Env’tl. 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).

57. 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.

58. On review, 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).

59. 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.

60. Furthermore, “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.

61. 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

62. By virtue of these statutorily and regulatorily defined authorities, 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.

63. 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.

64. NMED seeks to issue a discharge permit (“DP-1132”) under the WQA for the RLWTF. For four principal reasons, this discharge permit may not issue:

65. 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).

66. 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 examiner 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: 3×10^5 (300,000) gallons with 2×10^5 (200,000) specifically reserved for emergencies.¹⁰

67. The occurrence of any of the named circumstances, said 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 described as calling 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 20.6.2.3106.A, B). No discharge permit should be issued for Outfall 051 or any other location connected to the RLWTF.

68. 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”

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.”

(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)

69. 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*, 2013 N.M. App. Unpub. Lexis 95, ¶ 14.

70. 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).

71. 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. Specifically:

In issuing this Discharge Permit, NMED finds:

The Permittees are discharging effluent or leachate from the Facility so that such effluent or leachate may move directly or indirectly into ground water within the meaning of 20.6.2.3104 NMAC.

The Permittees are discharging effluent or leachate from the Facility so that such effluent or leachate may move into ground water of the State of New Mexico which has an existing concentration of 10,000 mg/L or less of total dissolved solids (TDS) within the meaning of 20.6.2.3101.A NMAC

The discharge from the Facility is within or into a place of withdrawal of ground water for present or reasonably foreseeable future use within the meaning of the WQA, NMSA 1978, § 74-6-5.E.3, and the WQCC Regulations at 20.6.2.3103 NMAC.

The discharge from the Facility to Outfall 051 is subject to the exemption set forth in 20.6.2.3105F NMAC, to the extent that effective and enforceable effluent limitations (not including monitoring requirements) are imposed, unless the NMED Secretary determines that a hazard to public health may result.

[AR at 12984] (May 5, 2017).

72. 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).

73. The Draft Permit also contains an “authorization to discharge,” purportedly allowing LANL to “discharge” contaminated water from one tank to another within the RLWTF:

B. The Permittees are authorized to discharge up to 40,000 gpd of low-level and transuranic radioactive industrial waste water using a series of treatment processes as described in Section V(D) of this Discharge Permit in accordance with the Conditions set forth in Section VI of this Discharge Permit.

C. The Permittees are authorized to discharge up to 40,000 gpd of treated waste water, in accordance with the Conditions set forth in Section VI of this Discharge Permit. Discharges shall be to either the Mechanical Evaporator System (MES), the synthetically lined Solar Evaporation Tank System (SET), or through an outfall (Identified as Outfall 051) also regulated by a National Pollutant Discharge Elimination System (NPDES) permit (Permit No. NM0028355) issued by the United States Environmental Protection Agency [20.6.2.3104 NMAC, 20.6.2.3106C NMAC, 20.6.2.3109.C NMAC].

[AR at 12984]

74. 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.

75. 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.

76. 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

77. Second, NMED has no authority to issue a WQA permit for a “possible” or “potential” discharge, where there is no actual discharge.

78. 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

¹¹ Indeed, 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”:

C. The Water Quality Act does not authorize the commission to adopt any regulation with respect to any condition or quality of water if the water pollution and its effects are 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.

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, the statutory basis for issuing a permit has not been established.

79. 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.

80. 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.

81. 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.

82. 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.

83. 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.

84. CCW respectfully submits that the New Mexico Legislature did not enact the WQA to assign NMED the task of promulgating such a nullity.

85. 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.*

86. 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).

87. 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).

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).

88. 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.

89. As NMED itself has stated, the availability of the Wastewater Treatment Unit exemption depends upon the RLWTF discharging through a Clean Water Act outfall:

4.6 TA-50 RADIOACTIVE LIQUID WASTE TREATMENT FACILITY
The Permittees 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.

2010 LANL HWA permit at 86.

90. However, 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 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.

91. 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).

92. 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.

93. 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:

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.¹³

94. LANL noted that loss of the RCRA exemption was an “important consideration” in its planning, and:

Loss of this exemption would mean that the RLWTF would be required to meet additional RCRA regulatory guidelines regarding waste treatment practices. 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.¹⁴

In sum:

[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.¹⁵

95. With its eyes open, LANL established zero liquid discharge from the RLWTF as its “ultimate goal.”¹⁶ LANL repeatedly so stated.¹⁷ NMED has stated publicly that elimination of Outfall 051 is a desirable goal.¹⁸

96. When RCRA regulation is required, the WQA does not apply. NMSA 1978, § 74-6-12(B). As no WQA permit may be issued, this proceeding must be dismissed.

¹³ *Id.* 12 (Ex. A to Request) (June 1998).

¹⁴ *Id.* 32.

¹⁵ *Id.* Table 6.

¹⁶ 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).

¹⁷ 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).

¹⁸ Letter from Yanicak (NMED) to Coghlan at 2 (May 12, 1999) (Ex. F to Request).

IV. CONCLUSION.

There is no basis in law or fact for issuing DP-1132. The RLWTF has changed fundamentally since this proceeding began. Plainly, LANL now has no plan to discharge water from the contained system of the RLWTF so that it can move toward ground water. The permit originally sought is no longer appropriate or lawful. However, the functions of the RLWTF clearly include the management of hazardous wastes; the HWA applies to those activities, and under New Mexico law the WQA can have no application. This proceeding must be dismissed.

The outcome sought by LANL and NMED GWQB would nullify environmental regulation of the RLWTF. There would be no regulation under the WQA, because there would be no discharges, and DP-1132 would not come into effect. Moreover, there likewise would be no regulation under the HWA, because NMED's issuance of a WQA permit stands as an obstacle to applying the HWA to the RLWTF. For a facility of such importance, that outcome is highly unfortunate—and also illegal.


In its decision, the agency must provide a reasoned basis for its actions to enable review to proceed. *Gila Resources Information Project v. Water Quality Control Commission*, 2005 NMCA 139, ¶¶ 34, 38, 43, 138 N.M. 625, 633-634, 636. In the absence of written factual and legal bases for an agency's decision, the hearing officer may not look for a factual or legal basis to support an agency's decision that is not stated by the agency as the underlying reason for its decision. *Id.*

CCW requests that the Hearing Officer recommend to the Secretary that the issuance of DP-1132 be denied based upon the testimonial and record evidence in this

proceeding that the requested permit is not for an anticipated actual discharge from the RLWTF, and that, therefore, as a matter of law, as set forth above, the issuance of such a permit is without statutory authority under the Water Quality Act and regulations promulgated thereunder. CCW also requests, in light of the facts and law in this matter, that the Hearing Office also recommend to the Secretary that the RLWTF would be properly and lawfully regulated under the New Mexico HWA and RCRA.

DATED AT: Santa Fe, New Mexico, this 4th day of June, 2018

Respectfully submitted:

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CERTIFICATE OF SERVICE

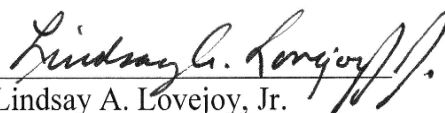
The undersigned certifies that on June 4, 2018, two copies of the foregoing CCW's *Closing Argument, Requested Finding of Fact and Conclusions of Law* were served by hand delivery on the Hearing Clerk, New Mexico Environment Department, 1190 St. Francis Drive, Suite S-2103, Santa Fe, NM 87502, and copies were emailed and sent by U.S. Postal Service, First Class, pre-paid to:

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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUND WATER DISCHARGE PERMIT (DP-1132)
FOR THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY

No. GWB 17-20(P)

**THE UNITED STATES DEPARTMENT OF ENERGY
AND LOS ALAMOS NATIONAL SECURITY, LLC's
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Introduction

Applicants the United States Department of Energy (“DOE”) and Los Alamos National Security, Inc. (“LANS”) (collectively “DOE/LANS”), in accordance with 20.6.2.3110(I) and 20.1.4.500(B)(4) NMAC, hereby respectfully submit this post-hearing submission in this matter. This post-hearing submission is made pursuant to the Hearing Officer’s direction in the April 19, 2018 public hearing in Los Alamos, New Mexico, on DOE/LANS’s application for a discharge permit (“DP-1132”). See Transcript of Hearing (“Tr.”) p. 223, lines 1-25. Part I of this submission contains a brief Closing Position Statement of DOE/LANS. Part II contains DOE/LANS’s proposed Findings of Fact (“FOF”), together with citations to the evidentiary support for each proposed finding. Part III contains DOE/LANS’s proposed Conclusions of Law (“COL”), together with cross-references to the relevant FOFs and/or citations to any evidentiary underpinnings for each conclusion. Citations to pertinent legal sources which either make the conclusion material or otherwise support the conclusion are also provided. DOE/LANS’s closing position statement and proposed findings and conclusions presented herein are offered in support of issuance of DP-1132.

I. CLOSING POSITION STATEMENT

DOE, LANS and the New Mexico Environment Department (“NMED”) all supported the issuance of DP-1132 with qualified and admitted experts. No party or interested participant in the April 19, 2018 hearing offered expert witness testimony to challenge the issuance of DP-1132 or specific provisions or conditions contained in NMED’s draft permit that was the subject of the public notice and hearing herein. The only other party in the hearing, Communities for Clean Water (“CCW”), expressly declined the opportunity to present technical testimony in opposition to the issuance of DP-1132. Specifically, as set forth in its two-page April 9, 2018 Notice of Intent (“NOI”) filing, CCW “*determined that it is not useful to present technical testimony*” and stated “*it will not present such testimony.*” CCW NOI par. 4, p. 2 (emphases added).

Instead, CCW relied on the fact that, prior to the hearing, it had filed a Motion to Dismiss in which it took the position that NMED lacked “any statutory authority to issue a ground water discharge permit for the Radioactive Liquid Waste Treatment Facility (“RLWTF”) at Los Alamos National Laboratory (“LANL”), because there is no discharge at present or planned.” CCW’s NOI par. 2, pp. 1-2. After the parties fully briefed the issues and countered CCW’s asserted facts raised in CCW’s motion, however, the Hearing Officer issued an April 18, 2018 Order Denying Motion to Dismiss “on its merits based on the briefing submitted.” Order Denying Motion to Dismiss, p. 1. Accordingly, although CCW focused its efforts at the hearing on unsuccessfully attempting to bolster the false premise of its Motion to Dismiss that “there is no discharge at present or planned,” and although DOE/LANS fully expects that CCW will attempt to re-litigate its motion through the vehicle of its post-hearing submission, the motion

already has been conclusively decided on its merits and the Hearing Officer should decline any invitation to revisit CCW's flawed arguments.

DOE and LANS, as the applicants, have the burden of proof that the permit, DP-1132, should be issued and not denied under 20.1.4.400.A(1) NMAC. Under the same regulation, “[a]ny person who contends that a permit condition is inadequate, improper or invalid, or who proposes to include a permit condition shall have the burden of going forward to present an affirmative case on the challenged condition,” in which case “[t]he Division has the burden of proof for a challenged condition” *Id.* In this case, as established through DOE/LANS's three admitted experts, and as further demonstrated by the FOFs and COLs set forth and supported in Parts II and III herein, DOE and LANS clearly established that DP-1132 should be issued and not denied. Meanwhile, CCW and other interested participants failed to meet their burden of going forward on any specific permit condition, because they offered no technical witnesses and presented no affirmative case offering to include a permit condition or challenging a permit condition as inadequate, improper or invalid. Even if CCW or other interested participants did meet the burden of going forward under 20.1.4.400.A(1) NMAC, however, NMED met the ultimate burden of proof—through its own admitted expert and those offered by DOE/LANS—that the conditions of NMED's draft DP-1132 are adequate, proper and valid.

II. PROPOSED FINDINGS OF FACT

1. The Radioactive Liquid Waste Treatment Facility (“RLWTF”) is a wastewater treatment facility that supports Los Alamos National Laboratories’ (“LANL”) programs by treating radioactive liquid waste wastewaters received from technical areas throughout the laboratory. Tr. p. 51, lines 2-6, NMED Exhibit 1, p. 8.

2. The RLWTF has an influent collection and storage system, a main treatment process for low-level radioactive waste (“RLW”), a process for treating transuranic radioactive liquid waste, and a secondary treatment process for waste streams from both the low-level and transuranic treatment processes. Tr. p. 51, lines 7-12.

3. The RLWTF is situated within the interior of the LANL boundary and is located within the LANL security perimeter, which limits LANL access to badge holders. Tr. P. 162, lines 15-20; NMED Exhibit 1, p. 8; DOE/LANS Exhibit 10, p. 3.

4. The RLWTF consists of (a) an underground collection system that conveys RLW to a Technical Area (“TA”) 50 from generators at LANL; (b) structures at TA-50, (c) Evaporation Tank (“SET”) at TA-52. The primary RLWTF structure at the TA-50 is Building 50-01; it houses primary and secondary processes for the treatment of low-level RLW, process storage tanks, and facility support functions. Rooms 60 and 60A in Building 50-01 house treatment processes for transuranic RLW. TA-50 structures located adjacent to Building 50-01 and associated with the RLWTF primarily provide for additional RLW storage. NMED Exhibit 4, p. 4, lines 16-23.

5. Draft DP-1132 is a forward-looking permit, does not purport to address pre-existing groundwater conditions, and only addresses potential new releases from the permitted facility. NMED Exhibit 1, p. 38-39; DOE/LANS Exhibit 7, p. 13.

6. Draft DP-1132 authorizes the discharge of treated effluent to three locations: (1) to a natural gas-fired mechanical evaporator that receives treated effluent for evaporation, referred to as the Mechanical Evaporator System (“MES”), (2) to the synthetically lined Solar Evaporation Tank System, referred to as the “SET”, (3) and through Outfall 051 that is the subject of a NPDES Permit issued by Regions 6 of the United States Environmental Protection

Agency (Permit #NM0028355). Tr. p. 53 lines 10-16, p.54, lines 9-13, p. 188, lines 5-9; NMED Exhibit 1, p. 9-11; DOE/LANS Exhibit 1, p. 5.

7. DP-1132 would authorize DOE/LANS 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. NMED Exhibit 1, p. 9, Exhibit 4, p. 5, lines 18-20.

8. Draft DP-1132 establishes effluent standards that must be met to ensure protection against discharges and potential releases that may, directly or indirectly, reach groundwater regulated by the WQCC under the Water Quality Act and the regulations adopted under the Act. Tr. p. 54, lines 24-25, p. 55, lines 1-3; NMED Exhibit 1, p. 22-24.

9. Discharges authorized by DP-1132 shall not exceed the effluent quality limits specified in permit condition 16 (for discharges through NPDES Outfall 051) and 17 (for discharges through the MES & SET). Tr. p. 54, lines 22-25, p. 55, lines 1-17; NMED Exhibit 1, p. 22-24; DOE/LANS Exhibit 1, p. 5.

10. Draft DP-1132 sets forth requirements for an operational plan, monitoring and reporting, contingency plans and a closure plan, which are each designed to ensure protection of groundwater and compliance with regulatory requirements. NMED Exhibit 1, p. 14-28; DOE/LANS Exhibit 1, p. 7.

11. The Operation Plan in Section VI.A of Draft DP-1132 contains 22 conditions with specific requirements for the operation and maintenance of the units identified in the permit. NMED Exhibit 1, p. 14-28 The Operational Plan requirements include testing of, and demonstrations for, various systems intended to convey, treat, store or dispose of liquid or semi-liquid waste streams to ensure that they are not leaking; corrective actions to be taken to repair or permanently cease operation of a system in the event successful demonstrations cannot be made;

annual update requirements; communicating with and obtaining NMED approval for proposed changes to the existing facility; entry restrictions and signage; secondary containment verifications and certifications of leak detection systems; inspection, maintenance, measurement, containment and calibration requirements; and corrective action and emergency response procedures and personnel qualifications and requirements. NMED Exhibit 1, p. 14-28; DOE/LANS Exhibit 1, p. 7.

12. The Operational Plan includes a requirement that signage be posted in English and Spanish. NMED Exhibit 1, p. 15; DOE/LANS Exhibit 10, p. 3.

13. The Operational Plan also includes standards for emergency response procedures, including a written summary of the emergency response procedures that are to be submitted to NMED within 120 days of the effective date of the permit, but does not dictate emergency response procedures or designate seats on the Emergency Operations Center. NMED Exhibit 1, p. 26-27; DOE/LANS Exhibit 10, p. 4.

14. DP-1132 contains Monitoring and Reporting Requirements that prescribe in detail how data on both water quality and quantity are reported to NMED. NMED Exhibit 1, p. 28-38. These conditions include prescribed methods for conducting sampling and analysis; monitoring reporting requirements to NMED; the requirement to maintain current written and electronic waste-tracking data; the installation of a soil moisture monitoring system; and monitoring well replacements, construction, quarterly monitoring and analysis, yearly monitoring and analysis. NMED Exhibit 1, p.28-38; DOE/LANS Exhibit 1, p. 8.

15. Draft DP-1132 sets forth contingency plans to mitigate damages, provide notifications and take corrective actions in the event of spill or unauthorized release. NMED Exhibit 1, p. 39-40. This includes a requirement for DOE/LANS to notify NMED within 24-

hours of a spill or unauthorized release, sets forth requirements for DOE/LANS to submit corrective action plans to address any failure and sets forth conditions for implementing such plans. NMED Exhibit 1, p. 39-40; DOE/LANS Exhibit 1, p. 8-9.

16. Draft DP-1132 includes specific closure plan requirements for how each unit and system at the RLWTF will be closed; actions to be taken to decommission, demolish, and remove each unit, system or other structure; actions and controls that will be implemented during closure to prevent the release of water contaminants into the environment; methods to be used for decontamination of the site and decontamination of equipment used during closure; action that will be taken to reclaim the site; monitoring, maintenance and repair controls that will be implemented after closure; a groundwater monitoring plan to detect water contaminants that might move directly or indirectly into groundwater after closure; methods that will be used to characterize waste after closure; actions that will be taken to investigate and characterize the potential impact to soil and groundwater from the system, facility or individual unit; methods that will be used to remove, transport, treat, recycle, and dispose of all wastes generated during closure; and a detailed schedule for closure and remove of units and systems. NMED Exhibit 1, p. 40-44; DOE/LANS Exhibit 1, p. 9-10.

17. Draft DP-1132 requires flow meters for the effluent lines to the SET, MES and Outfall 051 to be calibrated to “plus or minus 5 percent of actual flow, as measured under field conditions,” and requires the influent line to the RLWTF to be calibrated “plus or minus 10 percent of actual flow, as measured under field conditions.” NMED Exhibit 1, p. 28, Condition VI.A.22; DOE/LANS Exhibit 5, p. 5.

18. Draft DP-1132 requires the installation of two new alluvial groundwater monitoring wells in the canyon downgradient of Outfall 051, which will allow LANL to detect any unpermitted releases from Outfall 051. NMED Exhibit 1, p. 34; DOE/LANS Exhibit 7, p. 8.

19. The new alluvial groundwater monitoring wells are subject to approval by NMED and will be constructed in accordance with NMED's guidelines. NMED Exhibit 1, p. 34; DOE/LANS Exhibit 7, p. 12.

20. The new alluvial groundwater monitoring wells will be sampled quarterly for total Kjedahl nitrogen, nitrate, total dissolved solids, chloride, perchlorate and fluoride and will be sampled annually for a full suite of constituents that includes organic compounds, metals, radioactivity and general inorganic compounds. NMED Exhibit 1, p. 36-38; DOE/LANS Exhibit 7, p. 9; Tr. p. 151, lines 6-10.

21. Draft DP-1132 requires monitoring at a perched-intermediate downgradient monitoring well, MCOI-6, which will allow LANL to detect any unpermitted releases from Outfall 051. NMED Exhibit 1, p.36-38; DOE/LANS Exhibit 7, p. 8; Tr. p. 150, lines 7-18.

22. Draft DP-1132 requires groundwater monitoring for the MES through the use of four regional groundwater monitoring wells, R-1, R-14, R-46 and R-60, located downgradient of the facility. NMED Exhibit 1, p. 36-38; DOE/LANS Exhibit 7, p. 11; Tr. p. 150, lines 19-25.

23. Existing monitoring wells are all constructed in accordance with NMED construction and design guidelines, which include monitoring well attributes such as well diameter, well materials, and the type and width of construction materials surrounding the wells. Tr. p. 151, lines 20-25, p. 152, lines 1-7; DOE/LANS Exhibit 7, p. 11-12. Draft DP-1132 requires the installation of two new alluvial groundwater monitoring wells in the canyon

downgradient of Outfall 051, which will allow LANL to detect any unpermitted releases from Outfall 051. NMED Exhibit 1, p. 34; DOE/LANS Exhibit 7, p. 11-12.

24. The regional groundwater monitoring wells will be sampled annually for a full suite of constituents that include a large list of organic compounds, metals, radioactivity and general inorganic compounds, including perchlorate. NMED Exhibit 1, p. 36-38; DOE/LANS Exhibit 7, p. 11; Tr. p. 151, lines 10-17.

25. Draft DP-1132 requires DOE/LANS to submit a work plan that will propose a moisture monitoring approach for monitoring potential leaks beneath the SET. NMED Exhibit 1, p. 32-33; DOE/LANS Exhibit 7, p. 10.

26. Draft DP-1132 sets forth requirements and conditions for any future exceedance from non-compliant releases in Condition 37. NMED Exhibit 1, p. 38-39.

27. Construction began on the RLWTF in July 1961, and the processing of RLW began in June 1963. NMED Exhibit 4, p. 6.

28. On April 3, 1996 the New Mexico Environment Department ("NMED") requested and DOE/LANS submitted an application for a discharge permit on August 19, 1996. AR 00016-00018; Tr. p. 51, lines 24-25; NMED Exhibit 4, p. 6, DOE/LANS Exhibit 1, p. 3.

29. In November 2011, NMED requested a new, updated permit application, which LANL provided to NMED on February 16, 2012 with an amendment to the application submitted August 10, 2012. AR 05259-05260; 05336-08003, 08096-08097, 08134-08151, 08268-08313, 08314-08315, 08335-08336; Tr. p. 52, lines 2-4; NMED Exhibit 4, p. 6-7.

30. On March 2, 2012, NMED issued an administrative completeness determination for the permit application. AR 08202-08214.

31. DOE/LANS submitted supplemental information to the 2012 permit application on June 3, 2016. AR 13272-13355; NMED Exhibit 4, p. 7, DOE/LANS Exhibit 1, p. 3.

32. From 2014-2017 DOE/LANS continued to provide supplemental information to the 2012 permit application to NMED. AR 12679-12682, 23968-12723, 12731-12751, 13259-13260, 13442-13472, 13782-13786, 13883-13890, 13893-13897.

33. DOE/LANS 2012 permit application is the application that led to the issuance of Draft DP-1132, which is the subject of this hearing. Tr. p. 52, lines 4-7; NMED Exhibit 4, p. 7.

34. NMED's public notice associated with draft DP-1132 occurred at three stages of the permitting process: the notification of NMED's receipt of the 2012 discharge permit application (public notice 1, or PN1), the notification of availability of a draft discharge permit for public comment and for request for public hearing (public notice 2, or PN2), and the notification that a hearing is to occur (hearing notice). AR 08108-08133, AR 09449-09450; 13481-13494, 14031-14051; Tr. p. 184, lines 22-25, p. 185, lines 1-2; NMED Exhibit 4, p. 7.

35. NMED issued the first public notice in association with the 2012 DOE/LANS application in March of 2012. AR 08108-08113, Tr. p. 185, lines 13.

36. NMED issued a second public notice in association with the 2012 DOE/LANS application four separate times: in August 2013, November 2013, May 2017 and March 2018. AR 09449-09450; 13481-13494; 14045; Tr. p. 185, lines 19-22.

37. NMED issued the hearing notice on December 15, 2017, January 14, 2018, and March 9, 2018 due to changes in the hearing date and location. AR 14031-14044, 14046-14051; Tr. p. 186, lines 6-11; NMED Exhibit 4, p. 7, lines 14-23.

38. NMED's public notice occurred in various forms including newspaper ads, mail-outs, emails to interested parties, and posting of the notices on the NMED's Ground Water

Quality Bureau's web page. AR 08108-08133, AR 09449-09450; 13481-13494, 14031-14051; Tr. p. 186, lines 18-21.

39. A public hearing on DP-1132 was held on April 19, 2018, beginning at 9:30 AM at Fuller Lodge, 2132 Central Avenue, Los Alamos, New Mexico 87544. Tr. p. 1, lines 12-17.

40. At the public hearing NMED, DOE/LANS, and the Communities for Clean Water entered appearances. Tr. p. 11, lines 18-19, 13, lines 20-25, p. 14, lines 1-17.

41. At the public hearing, only DOE/LANS and NMED offered technical testimony. Tr. p. 48, lines 21-25, p.49-103, p.104, lines 1-4, p.109, lines 7-25, p.110-217. P. 218, lines 1-20.

42. DOE/LANS's first witness, Robert S. Beers, is an environmental professional at Los Alamos National Security. In that position he has been responsible for leading preparation of the permit application materials that resulted in the issuance of Draft DP-1132, and he serves as LANS's principal point of contact with NMED for regulatory compliance with the Water Quality Act ("WQA") and the Water Quality Control Commission's ("WQCC") regulations under the WQA. Tr. p. 49, lines 4-17. His résumé was admitted as DOE/LANS Exhibit 2.

43. At the public hearing, Mr. Beers testified as to permit history for DP-1132, the coverage of the draft permit and how the permit conditions are protective of the environment and of groundwater within the State of New Mexico. Tr. p. 48, lines 21-25, p.49-103, p.104, lines 1-4, p.109, line 7-25, p. 110-129, p. 130, lines 1-18, DOE/LANS Exhibit 1.

44. DOE/LANS's second witness, Danny Katzman, is a lead scientist for the Environmental Management Division at LANL, where he provides technical oversight over LANL's groundwater program—specifically for oversight of groundwater monitoring wells installation, monitoring and remediation. Tr. p.134, lines 14-23. His résumé was admitted as DOE/LANS Exhibit 8.

45. At the public hearing, Mr. Katzman testified that DP-1132 is protective of New Mexico's groundwater resources. Specifically, he offered testimony regarding DP-1132's proposed groundwater monitoring at LANL; the complex hydrogeologic setting at LANL; the adequacy of the proposed groundwater monitoring under DP-1132; the quality of the groundwater monitoring wells to be used for groundwater monitoring under DP-1132; and the pre-existing conditions at LANL. Tr. p. 134, lines 13-25, p. 135-156, p. 157, lines 1-13, DOE/LANS Exhibit 7.

46. DOE/LANS's third witness, Karen Armijo, is a physical scientist at the National Nuclear Security Administration where she oversees environmental compliance programs for water quality management and hazardous and radiological waste management. She also provides contract oversight of LANS' performance on environmental compliance. Tr. p. 158, lines 14-25, p. 159, lines 1-25, p. 160, lines 1-15. Her résumé was admitted as DOE/LANS Exhibit 11.

47. Ms. Armijo testified concerning comments received on Draft DP-1132 regarding signage in the vicinity of the RLWTF and the staffing of LANL's Emergency Operations Center. She explained why the signage requirements of DP-1132 are adequate based on where the RLWTF is located within the LANL boundary. Ms. Armijo further explained how DOE restrictions regarding staffing to the EOC implicate who can serve on the EOC, and how the current proposed composition of the EOC is adequate. Tr. p. 158, lines 14-25, 159-174, p. 175, lines 1-16. DOE/LANS Exhibit 10, p. 3-4.

48. NMED's technical expert witness was Mr. Stephen Pullen, the Section Manager of the Pollution Prevention Section of the Ground Water Quality Bureau of NMED. Mr. Pullen testified as to the technical need for the discharge permit and how the proposed discharge permit

is protective of groundwater. He expressed his support of issuance of the proposed discharge permit DP-1132. Tr. p. 178, lines 11-25, p. 179-217. P. 218, lines 1-20, NMED Exhibit 4.

49. At the hearing the Hearing Officer, members of the public, and CCW cross-examined the Applicants' and NMED's witnesses. Tr. p. 65, lines 7-25, p. 66-103, p. 101, p. 102, lines 1-7, p. 109, lines 7-25, p. 110-128, p. 129, lines 1-11, p. 152, line 25, p. 153-156, p. 157, lines 1-10, p. 164, lines 11-25, p. 165-174, p. 175, lines 1-15, p.193, lines 24-25, p. 194-217, p. 218, lines 1-21.

50. CCW's cross-examination of Mr. Beers and Mr. Pullen largely attempted to illicit admissions that there was not a discharge at the RLWTF. 65, lines 7-25, p. 66-103, p. 101, p. 102, lines 1-7, p. 109, lines 7-25, p. 110-128, p. 194-217, p. 218, lines 1-21.

51. On cross-examination, Mr. Beers testified regarding the history of discharges at the RLWTF, the current discharges at the RLWTF, and the planned and potential discharges at the RLWTF following permit issuance. Tr. p. 71, lines 3-25, p. 72-80, p. 81, lines 1-23, p. 93, lines 6-25, p. 94-95. P. 96, line1, p. 101, lines 5-25, p. 102, lines 1-7, p. 110, lines 9-25, p. 112, lines 3-36, p. 113, lines 1-18, p. 118, lines 10-25, p. 127, lines 6-25.

52. On cross-examination, Mr. Pullen testified regarding the history of discharges at the RLWTF, the current discharges at the RLWTF, and the discharges that would be authorized at the RLWTF following permit issuance. Tr. p. 200, lines 7-25, p. 201, lines 1-18, p. 204, lines 9-24, p. 205, lines 6-25, p. 208, lines 1-25, p. 210-211, p. 212, lines 1-14, p. 214, lines 15-25, p. 215, lines 1-14.

III. PROPOSED CONCLUSIONS OF LAW

1. Pursuant to the WQA, the WQCC “may require persons to obtain from a constituent agency designed by the commission a permit for the discharge of any water contaminant.” NMSA 1978, §74-5-5(A).

2. The implementing regulations of the Act 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. The RLWTF has previously, is currently, and will in the future discharge water such that a discharge permit is required under the Regulations. DOE/LANS’s Response to CCW’s Motion to Dismiss, FOFs 28-30, 45, 48 and 49.

5. The NMED is charged by the Regulations with evaluating applications for discharge permits, and recommending approval or disapproval by the Secretary. 20.6.2.3018 NMAC.

6. The activities described as occurring or planned by DOE/LANS require a discharge permit, to be evaluated by the NMED. 20.6.2.3104 and 20.6.2.3108 NMAC.

7. The draft DP-1132 for DOE/LANS’s RLWTF and the evidence in this case have demonstrated that neither a hazard to public health nor any undue risk to property will result from issuance of DP-1132 for the activities and discharges that are occurring or planned by DOE/LANS. 20.6.2.3109.A NMAC; FOF Nos. 8-26, 40, 42, 44, and 45.

8. Ground water with TDS of 10,000 mg/l or less will not be adversely affected by the issuance of DP-1132 as requested by DOE/LANS and proposed by NMED. 20.6.2.3109.B NMAC; FOF Nos. 8-26, 40, 42, 44, and 45.

9. Approval and issuance of DP-1132 will not result in either concentrations that are in excess of Section 3103 standards or the presence of any toxic pollutant at any place of withdrawal of water for present or reasonably foreseeable future use. 20.6.2.3109.B NMAC; FOF No. 8-26, 40, 42, 44, and 45.

10. No effluent or nitrogen in effluent will enter the subsurface from any surface impoundment as a result of issuance of DP-1132 as requested by DOE/LANS or proposed by NMED. 20.6.2.3109.C NMAC; FOF Nos. 8-26, 40, 42, 44, and 45.

11. The draft DP-1132 includes provisions for representative sampling of water as well as adequate flow monitoring so that the amount being discharged to below the surface of the ground can be determined. 20.6.2.3109.D NMAC; FOF Nos. 8-26, 40, 42, 44, and 45 .

12. The signage requirements in the draft DP-1132 are adequate under the Regulations, and there is no need to require that all signage be translated to Tewa as the RLWTF is entirely within the LANL boundary and does not share a boundary with the Pueblo of San Ildefonso. FOF 12, 44.

13. There is no need under the Regulations to set forth specific requirements for who should be a part of the LANL EOC that are different from what DOE itself provides for. FOF13, 44.

14. All other requirements of Part 2 of the WQCC's regulations have been met, including but not limited to the discharge permit application requirements in Section 3106, all

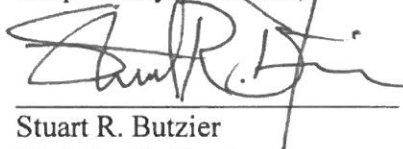
requirements of NMED under Section 3107, and the public notice and participation requirements in Section 3108. 20.6.2.3109.E NMAC. FOF 8-26, 28-35, 40, 42, 44, and 45.

15. DOE/LANS's discharge permit application for DP-1132 complied with the requirements of NMSA 1978, §74-6-5 and 20.6.2.3100-3109 NMAC. FOF 8-26, 28-35, 40, 42, 44, and 45.

Conclusion

For all of the foregoing reasons, and for reasons amply illuminated in the Hearing and Administrative Record, DOE/LANS respectfully requests that its proposed Findings of Fact and Conclusions of Law be adopted, and that DP-1132 be issued as drafted.

Respectfully submitted,

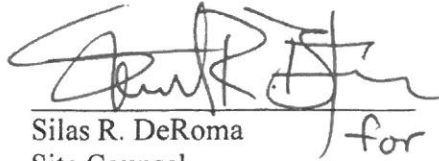


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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, a copy of the foregoing was hand-delivered to the following:

Pam Castaneda
Hearing Clerk
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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUND WATER DISCHARGE PERMIT (DP-1132)
FROM THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY

No. GWB 17-20 (P)

NOTICE OF POST HEARING PROCEDURES

On July 19, 2018, a Hearing Officer's report was filed. The parties have fifteen (15) days after service to file arguments for or against modifications to the Hearing Officer report pursuant to 20.1.4.500(C)(2) NMAC. The deadline for filing is Friday, August 3, 2018.

Erin Anderson, Hearing Officer for GWB 17-20 (P)

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**



**IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUND WATER DISCHARGE PERMIT (DP-1132)
FOR THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY**

No. GWB 17-20 (P)

HEARING OFFICER’S REPORT PURSUANT TO 20.6.2.3110(K) NMAC

On April 9, 2018, the appointed Hearing Officer conducted a public hearing pursuant to 20.6.2.3110 NMAC at Fuller Lodge, Los Alamos in Los Alamos, New Mexico. Stuart Butzier and Christina Sheehan appeared on behalf of Los Alamos National Security, LLC (“LANS”) as well as Susan McMichael, Office of General Counsel at Los Alamos National Lab, and Silas De Roma appeared on behalf of the United States Department of Energy (“DOE” and jointly “Applicants”). John Verheul, Office of General Counsel, appeared on behalf of the Ground Water Quality Bureau of the New Mexico Environment Department (“Department”). Lindsay Lovejoy, Jr. appeared for Communities for Clean Water as well as Jonathan Block for the New Mexico Environmental Law Center, Ms. Joni Arends appeared on behalf of Citizen’s Concerned for Nuclear Safety. Sanchez, Environmental Health and Justice Program Manager for Tewa Women United, appeared on behalf of Communities for Clean Water (“CCW”).

Applicants seek approval of a ground water discharge permit (“DP-1132”) for Los Alamos National Laboratory (“LANL”). Applicants presented the technical testimony of Danny Katzman, Bob Beers, and Anna Armijo in support of approval. New Mexico Environment Department Provided testimony by technical testimony of Steve Pullen in support of the approval of the ground water discharge permit with sixty (60) proposed conditions reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific

conditions. The Department presented the technical testimony of Steve Pullen and Patrick Longmire in support of approval. CCW presented no technical testimony and challenged the necessity for a permit.

No other person entered an appearance to provide technical testimony in advance of the public hearing. Comments from the public included Scott Kovac, Rachel Conn, Beata Tsosie, Kathy WanPovi Sanchez, Marlene Perrotte, Joan Brown, Joe Zupan, Michael Collins, Corinna Bethke, and Anna Hansen. The Hearing Officer asked clarifying questions, admitted all exhibits offered by the parties (Applicants' Exhibits 1-13, Department's Exhibits 1-4, and CCW's Exhibit 1-4), additional public comments were submitted electronically within two weeks of the conclusion of the public hearing and the closing of the record. The record proper also contains the administrative record and all documents filed with the Hearing Clerk.

The public hearing lasted one day and the Hearing Officer conducted it in accordance with 20.6.2.3110 NMAC and the Department's Permit Procedures found in 20.1.4 NMAC, except to the extent any of these procedures conflicted with 20.6.2.3110 NMAC. The parties submitted proposed findings of fact and conclusions of law, which the Hearing Officer considered and adopted in relevant part as set forth herein.

FINDINGS OF FACT

BACKGROUND

Construction of the RLWTF began in July 1961, and the processing of radioactive liquid waste began in June 1963. On April 3, 1996, the Department notified the U.S. Department of Energy ("DOE") and Los Alamos National Security, LLC ("LANS") (collectively "LANS/DOE or the "Applicants") that a discharge permit was required. The application (i.e., discharge plan) consists of the materials submitted by the Applicants on August 19, 1996, an updated application

submitted to NMED on February 16, 2012, an amendment to the application submitted to NMED on August 10, 2012, supplemental information submitted on June 6, 2016, and materials contained in the administrative record prior to issuance of this Discharge Permit. On November 1, 2007, the Applicants submitted a Notice of Intent (“NOI”) for the discharge of treated effluent water to the Solar Evaporative Tank (“SET”). NMED responded to the NOI requiring a new, up-to-date, and comprehensive application. In December 2015, the Applicants submitted a draft Closure Plan for inclusion into the Discharge Permit.

Public notice associated with the draft Discharge Permit occurred at three stages of the permitting process: the notification of the Department’s receipt of the discharge permit application (Public Notice 1 or PN1), the notification of the availability of a draft discharge permit for public comment and for request of a public hearing (Public Notice 2 or PN2), and the notification that a hearing is to occur (Hearing Notice). Each of these notification processes took place in accordance with 20.6.2.3108 NMAC and may have occurred multiple times due to changing circumstances.

The notification of the Department’s receipt of the discharge permit application (PN1) occurred in accordance with 20.6.2.3108.B NMAC. The Applicants posted the required signs, provided written notice to nearby property owners, and published the required display add in the local newspaper. The Department posted a notice of receipt of the application on its website, mailed notices to affected public agencies, and mailed notices to persons on general and facility specific mailing lists. PN1 included all information required of such notices as specified at 20.6.2.3108.F NMAC. DP-1132 PN1 occurred two times, first in November of 1996 and then in March of 2012.

The notification of the availability of a draft permit for public comment and for request of a public hearing (PN2) occurred in accordance with 20.6.2.3108.H NMAC. The Department

posted a draft Discharge Permit on the Department's website, published notice in the Albuquerque Journal and the Los Alamos Monitor, mailed a notice to persons on the facility-specific mailing list, and mailed a notice to affected public agencies and tribal entities. PN2 included all information required of such notices as specified at 20.6.2.3108.F and 20.6.2.3108.I NMAC, and allowed for a 30-day comment period. PN2 for DP-1132 occurred six times, primarily to provide the public with the opportunity to review a draft discharge permit revised because of comments received during the previous public comment period. DP-1132 PN2 occurred in August 2003, April 2005, August 2013, November 2013, May 2017, and March 9, 2018.

On May 5, 2017, the Department issued the final public notice offering the draft Discharge Permit that is the subject of this hearing, and for which the Department held multiple listening sessions and meetings, received numerous notices concerning minor modifications to the Facility as addendums to the original Discharge Permit application, and on numerous occasions requested additional information from the Applicants. On March 05, 2018, the Department re-noticed the draft Discharge Permit, correcting the previous notice by providing the current and correct version of the Closure Plan dated September 2016.

Upon the Department's determination that a hearing was to occur, the Department notified the public of the hearing determination by posting the notice on the Department's website, publishing a Hearing Notice in the Albuquerque Journal, the Santa Fe New Mexican, and the Los Alamos Monitor, mailing a Notice to persons on the facility-specific mailing list, and mailing a Notice to affected public agencies and tribal entities. This Hearing Notice included all information required of such notices as specified at 20.6.2.3108.L NMAC and described the time and place of the hearing and a brief description of the hearing process. Due to changes in both the hearing date and location, the Department's Hearing Notices occurred on December 15, 2017, January 14,

2018, and March 9, 2018. The Department provided both English and Spanish versions of the Hearing Notices. The March 9, 2018, Hearing Notice is marked as NMED Exhibit 5.

FINDINGS OF FACT

A. PURPOSE OF AND NEED FOR THE DISCHARGE

1. The RLWTF consists of an underground collection system that conveys radioactive liquid waste (“RLW”) water to Technical Area (“TA”) 50 from generators at LANL; structures at TA-50; and the Solar Evaporation Tank (“SET”) at TA-52. NMED Exhibit 4 at page 4, lines 15 – 18.
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. NMED Exhibit 4 at page 5, lines 2 – 4.
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. NMED Exhibit 4 at page 5, lines 4 – 6.
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. NMED Exhibit 4 at page 5, lines 6 – 11.

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. NMED Exhibit 4 at page 5, lines 11 – 15.

B. THE PROPOSED DISCHARGE

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. NMED Exhibit 4 at page 5, lines 18 – 20.
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. NMED Exhibit 4 at page 5, lines 20 – 23 and page 6, line 1.
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. NMED Exhibit 4 at page 6, lines 2 – 9.

C. DP-1132 REQUIREMENTS

9. The proposed discharge is to the MES, the SET, or Outfall 51 as described *supra*. NMED Exhibit 4 at page 5, lines 2-20.
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. NMED Exhibit 4 at pages 17, line 5 through page 29, and line 12.

D. COMMENTS RECEIVED

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 Nos. 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 Nos. 13495-13761.

E. HEARING DETERMINATION AND PUBLIC HEARING

13. The Secretary of Environment (Secretary) granted Communities for Clean Water's ("CCW") request for a public hearing on September 18, 2017. Each party was notified of this determination on March 18, 2016. AR Nos. 13811-13814.
14. 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. NMED Exhibits 2, 4; LANS/DOE Exhibits 1, 2, 7, 8, 10 and 11.
15. 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. Hearing Transcript (Hrg. Trans.) 1:13-17.
16. At the public hearing, appearances were entered on behalf of the Applicants, the Department, and CCW. Hrg. Trans. 2:7-3:20.
17. 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. Hrg. Trans. 17:11-44:8.

18. At the public hearing, Ms. Conn consolidated the 28 public comments letters and submitted them to the hearing clerk, and rather than read their entire contents into the record, offered a summary, supporting the position that the RLWTF should be regulated under the New Mexico Hazardous Waste Act. Hrg. Trans. 20:7-22:19. Public Comment Exhibit 2.
19. At the public hearing, technical testimony was provided by witnesses for the Applicants, and the Department. Hrg. Trans. 48:16-58:15, 134:8-152:21, 158:12-164:6, 178:9-189:17.
20. 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. NMED Exhibit 4 at page 1, lines 2-4; Hrg. Trans. 180:22-181:17.
21. Mr. Pullen has 30 years' experience in the environmental field, 27 of those years with NMED, and previously permitted under the Hazardous Waste Bureau. NMED Exhibit 2. NMED Exhibit 4 at page 1, lines 2-6; Hrg. Trans. 178:21-180:4.
22. 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. NMED Exhibit 4; Hrg. Trans. 182:18-184:14, 187:4-189:17.
23. At the public hearing, Mr. Pullen 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. Hrg. Trans. 193:22-218:21.
24. Witnesses for the Applicants at the hearing included Robert S. Beers, Danny Katzman, and Karen E. Armijo. Hrg. Trans. 4:21-5:14; LANS/DOE Exhibits 1, 2, 7, 8, 10 and 11.

25. At the public hearing, Mr. Beers testified about 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. LANS/DOE Exhibits 1, 5, 6; Hrg. Trans. 48:19-58:16.
26. 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. Hrg. Trans. 65:5-102:7, 109:6-128:24.
27. At the public hearing, Mr. Katzman introduced 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. LANS/DOE Exhibits 7, 9; Hrg. Trans. 134:4-152:21.

28. 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"). 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. Hrg. Trans. 158:12-164:9. TEWA Women United and Honor Our Pueblo Existence, provided public comments which included a narrative history of touring the EOC facility and a request for trilingual signage in the event of a contingency warning people of the danger of contamination and advising them to keep out. Administrative Record, Correspondence dated April 27, 2018.

F. MOTION TO DISMISS

29. 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." Motion at 2.

30. 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. Motion at 1.

31. On April 2, 2018, NMED and LANS/DOE 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.
32. On April 6, 2018, CCW filed its Reply Brief.
33. 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.
34. On April 18, 2018, the Hearing Officer denied the Motion “after reviewing all the pre-hearing briefing.”

CONCLUSIONS OF LAW

All relevant proposed findings of fact in the preceding paragraphs are incorporated herein by reference.

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 require a discharge permit, to be evaluated by the Department. 20.6.2.3104 and 20.6.2.3018 NMAC.
8. The discharge permit application for DP-1132 complied with the requirements of Section 74-6-5 and 20.6.2.3106 NMAC.
9. 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).
10. The Department provided the public, including the Applicants, with notice of the proposed discharge permit in accordance with the regulations at section 20.6.2.3108.H NMAC.
11. 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.
12. 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.
13. 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.
14. 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).
15. The Motion was fully briefed and decided pursuant 20.1.4.200.D NMAC.

CONCLUSION AND RECOMMENDED DECISION

Upon review of the entire record proper in this matter, the Hearing Officer recommends that the Secretary approve the ground water discharge permit with the sixty (60) proposed conditions reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions. Finally, the Hearing Officer recommends that the Secretary approve the ground water discharge permit as submitted by the Department as Attachment 1.



Erin Anderson, Administrative Law Judge
New Mexico Environment Department
Hearing Officer for GWB 17-20 (P)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Hearing Officer's Report & Final Decision** was sent via the stated methods below to the following parties via email on July 19, 2018 and via U.S. mail on July 19, 2018:

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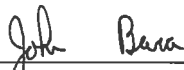
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John Baca, Hearing Clerk



**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUND WATER DISCHARGE PERMIT (DP-1132)
FOR THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY**

No. GWB 17-20(P)

**THE UNITED STATES DEPARTMENT OF ENERGY
AND LOS ALAMOS NATIONAL SECURITY, LLC'S
COMMENTS ON HEARING OFFICER'S REPORT**

The United States Department of Energy (“DOE”) and Los Alamos National Security, LLC (“LANS”), pursuant to 20.1.4.500(C)(2) NMAC, hereby submit the following comments to clarify the Hearing Officer’s Report. Aside from these suggested revisions, DOE/LANS fully supports the findings in the Hearing Officer’s Report and would suggest the Secretary adopt the Hearing Officer’s Report in its entirety.

COMMENTS

On July 19, 2018, Hearing Officer Erin Anderson filed a Hearing Officer’s Report in this matter. In accordance with 20.1.4.500(C)(2) NMAC, DOE/LANS offer the following comments in order to correct minor typographical errors contained in the 19, 2018 Hearing Officer’s Report:

- Page 1 of the Hearing Officer’s Report states that: “On April 9, 2018, the appointed Hearing Officer conducted a public hearing pursuant to 20.6.2.3110 NMAC....” DOE/LANS suggest correcting the date to accurately state that the public hearing occurred on April 19, 2018.
- Page 1 of the Hearing Officer’s Report states that “Sanchez, Environmental Health and Justice Program Manager for Tewa Women United, appeared on behalf of Communities

for Clean Water...” DOE/LANS suggest striking this sentence, since Ms. Sanchez appeared as an “elder from San Ildefonso Pueblo...” who stated that she was “not representing our tribal government, but speaking for myself in recognition of ancestral, heartfelt, spirit-rooted peoples in the sacred Jemez Mountains...” Hrg. Trans: p. 26, lines 21-25, or correcting it to include Ms. Sanchez’s full name, Kathy Sanchez.

- Page 1 of the Hearing Officer’s Report states that” “Applicants seek approval of a ground water discharge permit (“DP-1132”) for Los Alamos National Laboratory (“LANL”).” DOE/LANL suggest changing this sentence to read, “Applicants seek approval of a ground water discharge permit (“DP-1132”) for Los Alamos National Laboratory’s (“LANL”) Radioactive Liquid Waste Treatment Facility” for clarification purposes.
- Page 1 of the Hearing Officer’s Report states that: “Applicants presented the testimony of Danny Katzman, Bob Beers, and Anna Armijo in support of approval.” DOE/LANS suggest correcting the names of the following testifying experts: “Bob Beers” to Robert Beers and “Anna Armijo” to Karen Armijo.
- Page 13 of the Hearing Officer’s Report, Conclusion of Law 15, states “The Motion was fully briefed and decided pursuant to 20.1.4.200.D NMAC.” For clarification, DOE/LANS suggest stating “CCW’s Motion to Dismiss was fully briefed and was properly decided pursuant to 20.1.4.200.D NMAC.”

In addition to the aforementioned revisions to the Hearing Officer’s Report, DOE/LANS recommends that the Secretary review DOE/LANS’s Proposed Findings of Facts and Conclusions of Law to see if additional facts or conclusions DOE/LANS offered would be useful to include in the Secretary’s final order. DOE/LANS offered detailed descriptions of both the RLWTF and the draft discharge permit requirements for the RLWTF that are generally referred to in the Hearing

Officer's Report, but are not specifically stated therein; such detail might be useful for the Secretary to review and to ultimately include in a final order. Additionally, DOE/LANL's Proposed Finding and Facts and Conclusion of Law clarify certain permit conditions and therefore may be appropriate to include in a final order. For example, DOE/LANS would suggest the Secretary consider adopting the following proposed findings of facts (citations to the record have been omitted for these purposes):

- DOE/LANS's Proposed FOF 3: The RLWTF is situated within the interior of the LANL boundary and is located within the LANL security perimeter, which limits LANL access to badge holders.

DOE/LANS suggests including this fact in a final order since the Hearing Officer's Report does not include a description of the physical location or orientation of the RLWTF in the LANL facility, which is useful context to provide for a number of the requirements set forth in the draft discharge permit.

- DOE/LANS's Proposed FOF 5: Draft DP-1132 is a forward-looking permit, it does not purport to address pre-existing groundwater conditions, and only addresses potential new releases from the permitted facility.

DOE/LANS suggests including this finding in a final order because it offers a useful clarification of the permit that currently does not exist with the Hearing Officer's suggested findings of fact.

CONCLUSION

DOE and LANS supports the findings of the Hearing Officer's Report and respectfully request that the Secretary wholly adopt the Hearing Officer's proposed recommendations with the minor corrections and suggested adoptions by DOE and LANL as outlined above.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August, 3, 2018, a copy of the foregoing was hand-delivered to the following:

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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

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



No. GWB 17-20 (P)

**NEW MEXICO ENVIRONMENT DEPARTMENT GROUND WATER QUALITY
BUREAU'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT**

In accordance with 20.1.4.500(C)(2) NMAC and the Notice of Post Hearing Procedures (filed July 19, 2018), the New Mexico Environment Department submits these Exceptions to the Hearing Officer's Report Pursuant to 20.6.2.3110.K NMAC ("Report") (filed July 19, 2018).

EXCEPTIONS

1. On page 1, in the penultimate sentence of the first paragraph, "Citizen's Concerned for Nuclear Safety" should read either "Concerned Citizens for Nuclear Safety" or "Communities for Clean Water".
2. On page 1, the final sentence of the first paragraph should begin with "Kathy Sanchez" rather than "Sanchez".
3. On page 1, in the second sentence of the second paragraph, "Anna Armijo" should be replaced with "Karen Armijo".
4. On page 1, in the third sentence of the second paragraph should be replaced with: "The Department provided the technical testimony of Steve Pullen in support of issuance of DP-1132."

5. On page 2, the sentence “The Department presented the technical testimony of Steve Pullen and Patrick Longmire in support of approval” should be removed, as it duplicates information contained in the prior sentence, and Dr. Longmire provided no technical testimony.
6. On page 2, the sentence “CCW presented no technical testimony and challenged the necessity for a permit” should be replaced with “CCW presented no technical testimony, instead using the hearing to challenge the legal and factual basis for issuance of a discharge permit under the Water Quality Act.”
7. On page 9, the first sentence of paragraph 21 should read “Mr. Pullen has 30 years’ experience in the environmental field, 27 of those years with NMED, and previously worked for the Hazardous Waste Bureau.”
8. On page 9, the first sentence of paragraph 23 should read “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.” This reflects a more accurate summary of the 25 pages of the hearing transcript cited.
9. On page 10, the first sentence of paragraph 26 should read “At the public hearing, Mr. Beers was cross examined at length by counsel for CCW as to the likelihood of a discharge from the RLWTF, and Mr. Beers’ understanding of the regulatory basis for issuance of a discharge permit under the Water Quality Act.” This reflects a more accurate summary of the 56 pages of the hearing transcript cited.
10. On page 14, NMED suggests the first sentence should have “, as submitted by the Department as NMED Exhibit 1” appended onto the end, and the second sentence deleted in its entirety.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

/s/ John Verheul

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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 August 3, 2018:

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NEW MEXICO ENVIRONMENT DEPARTMENT
BEFORE THE SECRETARY OF THE ENVIRONMENT



IN THE MATTER OF 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)

COPY

GWB 17-20(P)

**COMMUNITIES FOR CLEAN WATER (“CCW”)
COMMENTS ON HEARING OFFICER’S DRAFT REPORT**

Communities for Clean Water (“CCW”) present comments on the draft report of the Hearing Officer, dated July 19, 2018 (the “Report”) with an addendum correcting typographical and minor factual errors in the Report.

The Report has the important purpose of explaining the decisions of the New Mexico Environment Department (“NMED”) concerning the proposed Ground Water Discharge Permit, DP-1132. *See Fasken v. Oil Conservation Comm'n*, 87 N.M. 292, 294, 532 P.2d 588, 590 (1975) (determining disclosure by agency of its reasoning in reaching its ultimate findings to be utterly lacking and stating: "We do not have the vaguest notion of how the [agency] reasoned its way to its ultimate findings. We have only the theories stated in argument of counsel which we are ill-equipped to gauge."); *Atlixco Coalition*, 1998 NMCA 134, ¶ 17, 125 N.M. 786 (stating that "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 (decisions of administrative agencies must meet certain standards, including the requirement that a hearing officer's decision adequately reflect the basis for the determination, the reasoning relied upon to

formulate that determination, and the reason for the hearing officer's determination that more or less weight was to be given certain testimony or other evidence in arriving at a decision).

The Department's decision is, in turn, reviewable by the Water Quality Control Commission ("WQCC") and thereafter in the Court of Appeals. NMSA 1978, § 74-6-7. Judicial review cannot proceed without a clear statement of the reasons for the agency's decision. In the absence of such a statement, the agency's action will be vacated:

We must be able to provide effective, meaningful judicial review. We are unable to do so if an administrative agency's adjudicatory decision of dismissal with prejudice is founded on unexplained conclusions with inadequate support in the record.

Gila Res. Info. Project v. N.M. Water Quality Control Comm'n, 2005-NMCA-139 at ¶ 33, 138 N.M. 625, 633-634. In a similar case, the permitting action was vacated and remanded:

However, because the Secretary has failed to adequately state the reasons for rejecting the proposed permit conditions regarding the additional groundwater monitoring well and the liner between Cells 3 and 4, we set aside the provisions of the final order which concern those proposed permit conditions and remand for more reasoned decisionmaking.

Atlixco Coalition v. Maggiore, supra, ¶ 2.

In this case, where the applicant does not plan to discharge from the Radioactive Liquid Waste Treatment Facility ("RLWTF"), the key question is whether NMED may issue a ground water discharge permit for the facility. CCW raised this question in its Motion to Dismiss (March 16, 2018) and pressed forward with the issue again in its Closing Argument (June 4, 2018). To date, the Hearing Officer has ruled once on this

issue (Order, April 18, 2018) and rules again in the Report. Yet, neither of these rulings contains any reasoning; instead, they only convey that the Hearing Officer has decided a permit would be lawful.

CCW respectfully submits that such information is insufficient for judicial review or, indeed, for the Secretary's consideration. A reviewing 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:

Unable to effectively and meaningfully review the Commission's dismissal of GRIP's formal appeal, we reverse the dismissal and remand for further administrative proceedings as are necessary to adjudicate the issues surrounding GRIP's formal appeal. *Cf. Atlixco Coalition*, 1998 NMCA 134, P24, 125 N.M. 786, 965 P.2d 370 (holding that administrative action standard of review required agency to provide a "rational connection between the facts found and the choices made"). We hold that the Commission was required to provide reasoned bases for its conclusions. It did not do so. This Court will not attempt to "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (internal quotation marks and citation omitted).

Gila Res. Info. Project, supra, ¶ 38. Plainly, were NMED to issue a decision in the form of the draft Report, a reviewing court would have no choice but to vacate and remand. Therefore, CCW respectfully requests that the final Report include a statement of reasons and fact-findings that supporting such reasons.

Furthermore, CCW submits that the final Report should support dismissal of this permitting proceeding. Thus, the Report should point out that: (a) the operators of the RLWTF have not discharged any water or contaminants from the RLWTF since

2010, and (b) the operators do not now plan to discharge any water or contaminants via Outfall 051 and seek a permit only as an “option” for use in certain unlikely situations.¹

At the April 19, 2018 hearing, representatives of Los Alamos National Laboratory (“LANL”) and of NMED testified that the purpose of licensing the RLWTF was to prepare for a possible discharge from Outfall 051 in certain hypothetical circumstances, *e.g.*, if the RLWTF’s two existing evaporation systems are both inoperative. Thus, Mr. Beers was clear that the discharge from Outfall 051 was “a potential discharge subject to certain conditions occurring.” 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.”)* (April 19, 2018) at 101. Mr. Pullen stated that “Outfall 051 [is] an option that the Lab would use only in certain conditions using this permit.” Tr. at 211. Thus, the witnesses described only *potential* future discharges, under possible conditions whose occurrence was deemed “speculative,” as opposed to planned discharges, which are part of the facility’s actual operation. Tr. at 74-75, 79, 101, 112-13, 119 (Beers); Tr. at 208-209, 211-212, 215-16 (Pullen).

As for other supposed “discharges,” Mr. Pullen testified that treated water that is directed to the mechanical evaporator (“MES”) is not released to flow to ground water. Tr. at 208, 209: 7-11. Mr. Beers concurred. Tr. at 93. Mr. Pullen further testified that the solar evaporation tanks (“SET”) are not yet in operation and are designed to contain and

¹ Thus, the material question is whether the operators intend to discharge any water or contaminants—not whether the RLWTF will “never” discharge water or contaminants, as the draft Report erroneously suggests. Report (July 19, 2018) at ¶¶ 23, 26.

evaporate any treated water that is directed to them. Tr. at 207-208. LANL told NMED that there is no reasonable probability that water directed to the SET will move toward ground water. Tr. at 88, Administrative Record at 03654-57. Mr. Beers and Mr. Pullen also testified to a potential for failure of the containment system, resulting in a discharge, but they could not identify the likelihood of such a failure and agreed that such an occurrence was “speculative.” Tr. at 112-14 (Beers); Tr. at 208-09, 215-16 (Pullen).

Plainly, there is no plan to discharge any water contaminant from the RLWTF. Therefore, the RLWTF is *not* subject to the Water Quality Act, which is limited to the regulation of actual discharges:

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) (*emphasis supplied*). Thus, an applicant for a ground water discharge permit must *intend* to make an actual discharge. *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. The regulations state, in pertinent part, 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 also state that a “discharge permit” is an approved discharge plan, which is, in turn, defined as:

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. Additionally, “ground water” 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(Z) NMAC.

In sum, three possible discharge points from the RLWTF are under consideration. Outfall 051 is not planned for use at all, except in unusual, indeed speculative, circumstances, when all other available alternatives are out of operation. The MES is currently in use, but all water directed to the MES is evaporated and released to the atmosphere; none may move directly or indirectly to ground water. The SET is not yet in use and, in any event, would operate by evaporating treated water; again, none of the water would go directly or indirectly to ground water. Consequently, there is no basis for issuing a ground water discharge permit.

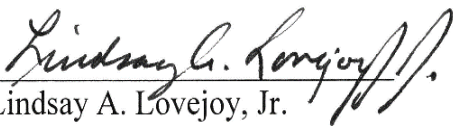
CONCLUSION


Wherefore, CCW respectfully requests that the Hearing Officer revise the draft Report to include the necessary findings of fact and conclusions of law to support the reasoning therein, and recommend to the Secretary that the issuance of DP-1132 be denied based upon the testimonial and record evidence in this proceeding that the requested permit is not for an actual discharge from the RLWTF, and that, therefore, as a

matter of law, as set forth above, the issuance of DP-1132 is without statutory authority under the Water Quality Act and the regulations promulgated thereunder.

Respectfully submitted this 3d day of August 2018:

COMMUNITIES FOR CLEAN WATER

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Addendum Correcting Typographical Errors

First page, first paragraph, line 1: On April 19, 2018, not April 9.

First page, first paragraph, lines 7 -10: Lindsay Lovejoy, Jr. and Jonathan Block, of the New Mexico Environmental Law Center, appeared for the Communities for Clean Water (“CCW”). Ms. Joni Arends, Executive Director of Concerned Citizens for Nuclear Safety, appeared on behalf of CCW. Ms. Kathy WanPovi Sanchez, Environmental Health and Justice Program Manager for Tewa Women United, appeared on behalf of CCW.

First page, second paragraph, line 4: remove “testimony by”

Page 2, first full paragraph, line 6: additional public comments were submitted electronically by Tewa Women United and Honor Our Pueblo Existence on April 27, 2018, within two weeks

Page 7, No. 11, add: Amigos Bravos. Correct Honor our Pueblo Existence by capitalizing the “O” in “Our.” Please correct throughout the Hearing Officer’s Report.
Page 8, No. 13. Each party was notified of this determination on or before December 15, 2017 – not March 18, 2016.

Certificate of Service. CCNS’s address should be: P. O. Box 31147, Santa Fe, NM 87594-1147.

CERTIFICATE OF SERVICE

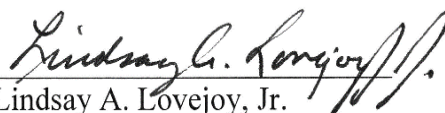
The undersigned certifies that on August 3, 2018 two copies of the foregoing *CCW's Comments on Hearing Officer's Draft Report* were served by hand delivery on the Hearing Clerk, New Mexico Environment Department, 1190 St. Francis Drive, Suite S-2103, Santa Fe, NM 87502, and copies were emailed and sent by U.S. Postal Service, First Class, pre-paid to:

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BY: 
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**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**



No. GWB 17-20 (P)

**IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUND WATER DISCHARGE PERMIT (DP-1132)
FOR THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY**

REVISED HEARING OFFICER'S REPORT PURSUANT TO 20.6.2.3110(K) NMAC

On April 19, 2018, the appointed Hearing Officer conducted a public hearing pursuant to 20.6.2.3110 NMAC at Fuller Lodge, Los Alamos in Los Alamos, New Mexico. Stuart Butzier and Christina Sheehan appeared on behalf of Los Alamos National Security, LLC (“LANS”) as well as Susan McMichael, Office of General Counsel at Los Alamos National Lab, and Silas De Roma appeared on behalf of the United States Department of Energy (“DOE” and jointly “Applicants”). John Verheul, Office of General Counsel, appeared on behalf of the Ground Water Quality Bureau of the New Mexico Environment Department (“Department”). Lindsay Lovejoy, Jr. appeared for (“Communities for Clean Water”). Jonathan Block appeared for the New Mexico Environmental Law Center and acted as co-counsel with Mr. Lovejoy on behalf of CCW. CCW represented the interests of several NGO’s including: Concerned Citizens for Nuclear Safety, Amigos Bravos, Tewa Women United, Honor Our Pueblo Existence, and Partnership for Earth Spirituality at the public hearing.

Applicants seek approval of a ground water discharge permit (“DP-1132”) for Los Alamos National Laboratory (“LANL”) Radioactive Liquid Waste Treatment Facility. Applicants presented the technical testimony of Danny Katzman, Robert Beers, and Karen Armijo in support of approval. The Department provided the technical testimony of Steve Pullen in support of issuance of DP-1132. CCW presented no technical testimony, instead using the hearing to

challenge the legal and factual basis for issuance of a discharge permit under the Water Quality Act. Additional public comments were submitted electronically by Tewa Women United and Honor Our Pueblo Existence on April 27, 2018.

No other person entered an appearance to provide technical testimony in advance of the public hearing. Comments from the public included Scott Kovac, Rachel Conn, Beata Tsosie, Kathy WanPovi Sanchez, Marlene Perrotte, Joan Brown, Joe Zupan, Michael Collins, Corinna Bethke, and Anna Hansen. The Hearing Officer asked clarifying questions, admitted all exhibits offered by the parties (Applicants' Exhibits 1-13, Department's Exhibits 1-4, and CCW's Exhibit 1 -4), additional public comments were submitted electronically within two weeks of the conclusion of the public hearing and the closing of the record. The record proper also contains the administrative record and all documents filed with the Hearing Clerk.

The public hearing lasted one day and the Hearing Officer conducted it in accordance with 20.6.2.3110 NMAC and the Department's Permit Procedures found in 20.1.4 NMAC, except to the extent any of these procedures conflicted with 20.6.2.3110 NMAC. The parties submitted proposed findings of fact and conclusions of law, which the Hearing Officer considered and adopted in relevant part as set forth herein.

FINDINGS OF FACT

BACKGROUND

Construction of the RLWTF began in July 1961, and the processing of radioactive liquid waste began in June 1963. On April 3, 1996, the Department notified the U.S. Department of Energy ("DOE") and Los Alamos National Security, LLC ("LANS") (collectively "LANS/DOE or the "Applicants") that a discharge permit was required. The application (i.e., discharge plan) consists of the materials submitted by the Applicants on August 19, 1996, an updated application

submitted to NMED on February 16, 2012, an amendment to the application submitted to NMED on August 10, 2012, supplemental information submitted on June 6, 2016, and materials contained in the administrative record prior to issuance of this Discharge Permit. On November 1, 2007, the Applicants submitted a Notice of Intent (“NOI”) for the discharge of treated effluent water to the Solar Evaporative Tank (“SET”). NMED responded to the NOI requiring a new, up-to-date, and comprehensive application. In December 2015, the Applicants submitted a draft Closure Plan for inclusion into the Discharge Permit.

Public notice associated with the draft Discharge Permit occurred at three stages of the permitting process: the notification of the Department’s receipt of the discharge permit application (Public Notice 1 or PN1), the notification of the availability of a draft discharge permit for public comment and for request of a public hearing (Public Notice 2 or PN2), and the notification that a hearing is to occur (Hearing Notice). Each of these notification processes took place in accordance with 20.6.2.3108 NMAC and may have occurred multiple times due to changing circumstances.

The notification of the Department’s receipt of the discharge permit application (PN1) occurred in accordance with 20.6.2.3108.B NMAC. The Applicants posted the required signs, provided written notice to nearby property owners, and published the required display add in the local newspaper. The Department posted a notice of receipt of the application on its website, mailed notices to affected public agencies, and mailed notices to persons on general and facility specific mailing lists. PN1 included all information required of such notices as specified at 20.6.2.3108.F NMAC. DP-1132 PN1 occurred two times, first in November of 1996 and then in March of 2012.

The notification of the availability of a draft permit for public comment and for request of a public hearing (PN2) occurred in accordance with 20.6.2.3108.H NMAC. The Department

posted a draft Discharge Permit on the Department's website, published notice in the Albuquerque Journal and the Los Alamos Monitor, mailed a notice to persons on the facility-specific mailing list, and mailed a notice to affected public agencies and tribal entities. PN2 included all information required of such notices as specified at 20.6.2.3108.F and 20.6.2.3108.I NMAC, and allowed for a 30-day comment period. PN2 for DP-1132 occurred six times, primarily to provide the public with the opportunity to review a draft discharge permit revised because of comments received during the previous public comment period. DP-1132 PN2 occurred in August 2003, April 2005, August 2013, November 2013, May 2017, and March 9, 2018.

On May 5, 2017, the Department issued the final public notice offering the draft Discharge Permit that is the subject of this hearing, and for which the Department held multiple listening sessions and meetings, received numerous notices concerning minor modifications to the Facility as addendums to the original Discharge Permit application, and on numerous occasions requested additional information from the Applicants. On March 05, 2018, the Department re-noticed the draft Discharge Permit, correcting the previous notice by providing the current and correct version of the Closure Plan dated September 2016.

Upon the Department's determination that a hearing was to occur, the Department notified the public of the hearing determination by posting the notice on the Department's website, publishing a Hearing Notice in the Albuquerque Journal, the Santa Fe New Mexican, and the Los Alamos Monitor, mailing a Notice to persons on the facility-specific mailing list, and mailing a Notice to affected public agencies and tribal entities. This Hearing Notice included all information required of such notices as specified at 20.6.2.3108.L NMAC and described the time and place of the hearing and a brief description of the hearing process. Due to changes in both the hearing date and location, the Department's Hearing Notices occurred on December 15, 2017, January 14,

2018, and March 9, 2018. The Department provided both English and Spanish versions of the Hearing Notices. The March 9, 2018, Hearing Notice is marked as NMED Exhibit 5.

FINDINGS OF FACT

A. PURPOSE OF AND NEED FOR THE DISCHARGE

1. The RLWTF consists of an underground collection system that conveys radioactive liquid waste (“RLW”) water to Technical Area (“TA”) 50 from generators at LANL; structures at TA-50; and the Solar Evaporation Tank (“SET”) at TA-52. **NMED Exhibit 4 at page 4, lines 15 – 18.**
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. **NMED Exhibit 4 at page 5, lines 2 – 4.**
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. **NMED Exhibit 4 at page 5, lines 4 – 6.**
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. **NMED Exhibit 4 at page 5, lines 6 – 11.**

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. **NMED Exhibit 4 at page 5, lines 11 – 15.**

B. THE PROPOSED DISCHARGE

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. **NMED Exhibit 4 at page 5, lines 18 – 20.**
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. **NMED Exhibit 4 at page 5, lines 20 – 23 and page 6, line 1.**
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. **NMED Exhibit 4 at page 6, lines 2 – 9.**

C. DP-1132 REQUIREMENTS

9. The proposed discharge is to the MES, the SET, or Outfall 51 as described *supra*. **NMED Exhibit 4 at page 5, lines 2-20.**
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. **NMED Exhibit 4 at pages 17, line 5 through page 29, and line 12.**

D. COMMENTS RECEIVED

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 Nos. 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 Nos. 13495-13761.**

E. HEARING DETERMINATION AND PUBLIC HEARING

13. The Secretary of Environment (Secretary) granted Communities for Clean Water's ("CCW") request for a public hearing on September 18, 2017. Each party was notified of this determination on March 18, 2016. **AR Nos. 13811-13814.**
14. 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. **NMED Exhibits 2, 4; LANS/DOE Exhibits 1, 2, 7, 8, 10 and 11.**
15. 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. **Hearing Transcript (Hrg. Trans.) 1:13-17.**
16. At the public hearing, appearances were entered on behalf of the Applicants, the Department, and CCW. **Hrg. Trans. 2:7-3:20.**
17. At the public hearing, public comment was heard from ten people: Scott Kovac, Rachel Conn, Beata Tsosie, Kathy WanPovi 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. **Hrg. Trans. 17:11-44:8.**

18. At the public hearing, Ms. Conn consolidated the 28 public comments letters and submitted them to the hearing clerk, and rather than read their entire contents into the record, offered a summary, supporting the position that the RLWTF should be regulated under the New Mexico Hazardous Waste Act. **Hrg. Trans. 20:7-22:19. Public Comment Exhibit 2.**
19. At the public hearing, technical testimony was provided by witnesses for the Applicants, and the Department. **Hrg. Trans. 48:16-58:15, 134:8-152:21, 158:12-164:6, 178:9-189:17.**
20. 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. **NMED Exhibit 4 at page 1, lines 2-4; Hrg. Trans. 180:22-181:17.**
21. Mr. Pullen has 30 years' experience in the environmental field, 27 of those years with NMED, and previously worked for the Hazardous Waste Bureau. **NMED Exhibit 2. NMED Exhibit 4 at page 1, lines 2-6; Hrg. Trans. 178:21-180:4.**
22. 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. **NMED Exhibit 4; Hrg. Trans. 182:18-184:14, 187:4-189:17.**
23. 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. Pullens' understanding of the regulatory basis for issuance of a discharge permit under the Water Quality Act. **Hrg. Trans. 193:22-218:21.**

24. Witnesses for the Applicants at the hearing included Robert S. Beers, Danny Katzman, and Karen E. Armijo. **Hrg. Trans. 4:21-5:14; LANS/DOE Exhibits 1, 2, 7, 8, 10 and 11.**
25. At the public hearing, Mr. Beers testified about 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. **LANS/DOE Exhibits 1, 5, 6; Hrg. Trans. 48:19-58:16.**
26. At the public hearing, Mr. Beers was cross examined at length by counsel for CCW, as to the likelihood of a discharge permit under the Water Quality Act. **Hrg. Trans. 65:5-102:7, 109:6-128:24.**
27. At the public hearing, Mr. Katzman introduced 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. **LANS/DOE Exhibits 7, 9; Hrg. Trans. 134:4-152:21.**

28. 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"). 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. **Hrg. Trans. 158:12-164:9.**

29. TEWA Women United and Honor Our Pueblo Existence, provided public comments which included a narrative history of touring the EOC facility and a request for trilingual signage in the event of a contingency (emergency) warning people of the danger of contamination and advising them to keep out. The signage would be in the interior portion of the LANL site, including warning signs in English, Spanish, and Tewa, and could assist first responders or others that could possibly stray within the interior of LANL's borders. The Los Conchas fire further demonstrated the need for clear communication during wildfires or other natural disasters. The absence of tribal or pueblo members from the EOC was notable, given the historical, cultural, and spiritual relationships of native people to the surrounding land that pre-date the Los Alamos National Laboratory. **Administrative Record, Correspondence dated April 27, 2018.**

F. MOTION TO DISMISS

30. 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.” **Motion at 2.**
31. 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. **Motion at 1.**
32. On April 2, 2018, NMED and LANS/DOE 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.
33. On April 6, 2018, CCW filed its Reply Brief.
34. 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.
35. On April 18, 2018, the Hearing Officer denied the Motion “after reviewing all the pre-hearing briefing.”

CONCLUSIONS OF LAW

All relevant proposed findings of fact in the preceding paragraphs are incorporated herein by reference.

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 require a discharge permit, to be evaluated by the Department. 20.6.2.3104 and 20.6.2.3018 NMAC.
8. The discharge permit application for DP-1132 complied with the requirements of Section 74-6-5 and 20.6.2.3106 NMAC.
9. 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).
10. The Department provided the public, including the Applicants, with notice of the proposed discharge permit in accordance with the regulations at section 20.6.2.3108.H NMAC.

11. 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.
12. 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.
13. 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.
14. 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).
15. CCW’s Motion to dismiss was fully briefed and was properly decided pursuant to 20.1.4.200.D NMAC.

CONCLUSION AND RECOMMENDED DECISION

Upon review of the entire record proper in this matter, the Hearing Officer recommends that the Secretary approve the ground water discharge permit with the sixty (60) proposed conditions reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions. Finally, the Hearing Officer recommends that the Secretary approve the ground water discharge permit as submitted by the Department as Attachment 1.

/s/Erin Anderson

Erin Anderson, Administrative Law Judge
New Mexico Environment Department
Hearing Officer for GWB 17-20 (P)