



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

**IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO**

No. GWB 19-24 (P)

**NEW MEXICO ENVIRONMENT DEPARTMENT'S
NOTICE OF FILING OF RESPONSES TO COMMENTS**

Pursuant to 20.6.2.3109(B) NMAC, the New Mexico Environment Department (“Department”) notifies the parties that the Department’s Response to Comments, has been filed with the hearing clerk. That document is included as an attachment to this Notice.

Respectfully submitted,

**NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL**

By: /s/ John Verheul
John Verheul
Assistant General Counsel
121 Tijeras Avenue NE, Ste 1000
Albuquerque, New Mexico 87102
Phone: (505) 383-2063
Email: john.verheul@state.nm.us

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 January 21, 2020:

Stuart R. Butzier
Christina Sheehan
Modrall, Sperling, Roehl, Harris & Sisk, PA
P.O. Box 9318
Santa Fe, New Mexico 87504-9318
stuart.butzier@modrall.com
christina.sheehan@modrall.com

Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

and

and

Susan McMichael
Office of Laboratory Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, New Mexico 87545
smcmichael@lanl.gov

Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa St., Ste. 5
Santa Fe, New Mexico 87505
dmeiklejohn@nmelc.org

*Attorneys for Concerned Citizens for
Nuclear Safety, Honor our Pueblo
Existence, and New Mexico Acequia
Association*

Attorneys for Triad National Security, LLC

Silas R. DeRoma
Attorney
U.S. Department of Energy
National Nuclear Security Administration
1900 Diamond Drive
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Attorney for the U.S. Department of Energy

/s/ John Verheul

John Verheul

RESPONSE TO COMMENTS

Discharge Permit, DP-1132

Los Alamos National Laboratory - Radioactive Liquid Waste Treatment Facility

January 17, 2020



On July 19, 2019, and on August 23, 2019, the New Mexico Environment Department (NMED) published notice of the availability of a draft version of the above-referenced Discharge Permit or “Permit” and invited the public to comment on that Permit. In accordance with Subsection B of 20.6.2.3109 NMAC, NMED provides the following responses to comments received in response to those notices and comments made at or after the DP-1132 hearing held on November 14, 2019. While a number of comments were questions, or were outside the scope of a groundwater discharge permit hearing, NMED has endeavored to provide responses wherever possible.

NMED received numerous comments from a group of four citizen organizations: Tewa Women United, New Mexico Acequia Association, Honor our Pueblo existence, and Concerned Citizens for Nuclear Safety. As a group these responses will refer to them as “Citizens”. Citizens’ comments follow. NMED also received comments from Amigos Bravos, some of which are significantly similar to the comments of the Citizens as to warrant a single response. These similar comments are identified below by a double Asterix (**).

COMMENTS RECEIVED WITH NMED RESPONSE IN *ITALICS*

The Draft Permit is Not Supported by the Water Quality Act - NMED seeks to issue a discharge permit (“DP-1132”) under the Water Quality Act, § 74-6-1 *et seq.* NMSA 1978 (“WQA”) for the RLWTF. For four principal reasons DP-1132 may not issue:

First, the RLWTF does not and will not *discharge* any contaminated water. Without a discharge, NMED has no basis to issue a discharge permit. § 74-6-5(A), (I) NMSA 1978.

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

Third, a WQA permit for the RLWTF would be a nullity, because by law it would not become effective until there is a discharge, *i.e.*—never. A WQA permit that is not in effect may not be enforced for any purpose.

Fourth, the RLWTF is a *hazardous waste management facility*, and under § 74-6-12(B) NMSA 1978, “[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 . . .”

Specifically, the WQA authorizes the Water Quality Control Commission (“WQCC”) *only* to require “a permit *for the discharge* of any water contaminant” (*emphasis supplied*). § 74-6-5 NMSA 1978. The permitting rules are addressed to discharges. 20.6.2.3104 NMAC. Further, the WQA Regulations specifically describe a discharge plan as one that regulates releases of effluent or

leachate “so that it may move directly or indirectly into ground water.” 20.6.2.3104 NMAC (*emphasis supplied*). 20.6.2.7.R NMAC. “Ground water” is further defined by regulation to mean “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. Thus, the WQA applies only to an actual “discharge,” moving toward ground water, which is “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.”

In contrast, the RLWTF is a “zero-liquid-discharge” facility. No water containing regulated contaminants is being released or will be released. No such water will be released that may move in any direction, much less toward water occurring in saturated earth material which is capable of entering a well in sufficient amounts to be utilized as a water supply.

The draft permit erroneously defines “discharge” in broad terms that far exceed the governing regulations:

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.

(Section II.G.) NMED has improperly inserted language into DP-1132 to suggest that a statutory “discharge” is occurring or anticipated. 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.

(Section IV.) These recitals are unsupported and refuted by, among other things, the consistent quarterly reports that show no discharges. The only release of water from the RLWTF that appears in any documentation is a release that contained no contaminants under 20.6.2.3103 that subject the source to permitting.

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

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.

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].

(Section V.)

These findings and authorizations are entirely bogus. It is known that regulated discharges through Outfall 051 stopped in 2010 and are neither occurring nor planned. The purported “authorization” to make discharges through Outfall 051 is meaningless, because LANL has no plans to do so. The other supposed “discharges” are simply transfers among parts of the contained system of the RLWTF, transfers that leave the water and any contaminant isolated from the environment and involve no release to the environment or towards ground water, as the WQA requires.

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 213 at 03655. See AR 221 at 03704; AR 256 at 05217).

DP-1132 cannot be supported on the theory that an unplanned discharge through Outfall 051 is *possible*. 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.” 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. But, by law, only a “discharge” may be regulated. § 20.6.2.3104 NMAC.

A permit for a non-discharging facility is entirely without effect. The WQA specifies that, for a new discharge, “the term of the permit shall commence *on the date the discharge begins.*” § 74-6-5(l) NMSA 1978 (*emphasis supplied*). See also 20.6.2.3109.H NMAC. DP-1132 authorizes new discharges to the MES and the SET. Since the term of such a permit starts only with an *actual* discharge, a

permit to a non-discharging facility never comes into effect. Here, Outfall 051 will indefinitely have 'zero liquid discharge', *i.e.*, no discharge at all. When a permit is not in effect, it cannot be enforced; *i.e.*, there is no penalty for violation of its requirements.

Further, the WQA does not apply to a facility regulated under the HWA. A facility that is subject to the HWA cannot be regulated by the WQA. § 74-6-12.B NMSA 1978. The RLWTF manages hazardous waste, as defined in regulations under the HWA. 42 U.S.C. § 6903(5), (27). Consequently, the RLWTF must have a permit under the Resource Conservation and Recovery Act ("RCRA") or an authorized state program. 42 U.S.C. § 6925, 40 C.F.R. § 270.1(c). But 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" (40 C.F.R. §§ 260.10 (*Tank system, Wastewater treatment unit*), 264.1(g)(6)). NMED itself has stated that the availability of the Wastewater Treatment Unit exemption depends upon the RLWTF discharging through a Clean Water Act outfall. 2010 LANL HWA permit § 4.6, at 86. But the discharges have stopped. 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. Without an exemption, RCRA (*i.e.*, HWA) regulation is required. If a facility is an "activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act," such a facility cannot be regulated by the WQA. (§ 74-6-12.B NMSA 1978). Therefore, no WQA permit may be issued, and this proceeding must be dismissed.

In this situation, clearly requiring full RCRA regulation of the RLWTF, we are appalled to learn that a "replacement" low-level radioactive liquid waste facility and a "replacement" transuranic radioactive liquid waste facility, designed by LANL to receive the same waste streams now going to the RLWTF for treatment, are being constructed by LANL without the prior approval, under a public process, of the proposed construction of a hazardous waste facility, as is required by RCRA.

NMED Response: Citizens assert that, because the RLWTF does not discharge directly to groundwater, the WQCC does not have the authority to require a discharge permit of it. Citizens go on to postulate that, because the New Mexico Water Quality Act (WQA) allegedly does not apply, the facility should be regulated under EIB regulations promulgated pursuant to the Hazardous Waste Act. There is, however, no dispute that the RLWTF is a Wastewater Treatment Plant (WWTP).

Citizens' legal argument is flawed for a number of reasons. First, the WQA only requires "the discharge of any water contaminant" for a permit to be required (NMSA 1978, § 74-5-5.A). There are many WWTPs in New Mexico with similar arrangements to the RLWTF, they discharge only to lined impoundments or to evaporative systems. All of these facilities are regulated by NMED pursuant to discharge permits. There are no WWTPs in New Mexico regulated under EIB regulations promulgated pursuant to the Hazardous Waste Act. Discharge permits are the

appropriate mechanism for WWTPs (such as the RLWTF) because the permits contemplate a failure of one or more of the mechanical systems (either in treatment or impoundment) that protect groundwater from contamination as a result of the discharge. Were Citizens to be correct in their assertion that the WQA does not apply to a WWTP that does not discharge directly to groundwater, there would be a great number of unregulated WWTPs in New Mexico. Any system failure at any of these facilities could then result in groundwater contamination. NMED prefers to retain and exercise its authority to regulate these facilities under regulations promulgated by the WQCC, pursuant to the WQA, in order to protect New Mexico's groundwater.

These arguments are more fully developed in the Responses of NMED and DOE/Triad to the Motion to Dismiss, filed October 23 and 24, 2019.

Specific Issues with the draft Permit - The proposed DP-1132 Permit, [dated] July 19, 2019, presents several specific issues that should be addressed, should NMED determine that a permit must issue here, despite the lack of legal support for the permit and closure plan:

1) Sec. 1 Acronyms. To be consistent with the Closure Plan, please add the following abbreviations:

LLRLW – low-level radioactive waste

LLW – low-level waste

TLW – transuranic liquid waste

NMED Response: NMED considers the inclusion of the referenced acronyms and their associated phrases in the Closure Plan attached to the Permit sufficient to allow the permittee to understand and abide with associated requirements or permit conditions.

2) Sec. II. Definitions.

Fix the definition of "Consent Order" to reflect the 2016 Consent Order and the new contractor, Triad National Security, LLC.

NMED Response: NMED agrees with the comment and has altered the Permit accordingly.

3) Change the definition of "Discharge" to conform to the WQA and 20.6.2.7.R NMAC. The definition of "discharge" has been changed from the earlier language, "may move directly or indirectly into ground water . . ." to "has the potential to move . . ." The new language implies that the water somehow and someday could make it to ground water, even if it is not moving that way right now. This change departs from the statutory language concerning a "discharge" and attempts to describe facts supporting a discharge permit, when in fact the situation required by the law does not exist. Clearly, the legal requirements for a permit cannot be altered by permit language. It must be changed.

NMED Response: Neither the WQA nor 20.6.2.7.R NMAC define "discharge." The commenter's intent is therefore unclear. NMED consider the phrases "may move" and "has the potential to move" as being synonymous and agrees and in fact intends that the language imply that the water

somehow and someday could make it to groundwater, even if it is not moving that way right now. NMED considers this consistent with the WQA, subsection 74-6-5.E(3) requiring denial of a permit if a discharge “would cause or contribute to water contaminant levels in excess of any state...standard.”

4) The definition of Incident Command System is misplaced alphabetically and should make reference to the Department of Homeland Security protocols.

NMED Response: “Incident Command System” is misplaced alphabetically but NMED chooses not to relocate the term. Further, NMED finds it unnecessary to reference the Department of Homeland Security protocols.

5) The definition of Leak Detection System should include such systems applicable to a single-containment unit.

NMED Response: NMED is unaware of the use of “single-containment unit” in any circumstance other than the piping associated with fully treated wastewaters, e.g., the single-walled pipe transporting treated water to the SET. Because the fluid in this pipe has been treated to Permit specified standards, and because of the uncontaminated nature of the fluid in this pipe, a leak detection system is unnecessary.

6) The definition of “tank” follows the RCRA definition. There is no evidence in the Administrative Record that the SET satisfies that definition, insofar as it describes structural support.

NMED Response: NMED considers the Administrative Record to include documentation that the SET satisfies the definition of a tank. The Workplan for a Soil Moisture Monitoring System at the SET dated October 31, 2018, states the SET is an open-topped, subgrade tank with two cells constructed of reinforced-concrete walls and floor. The SET has two synthetic liners (primary and secondary) above the concrete walls and floors.

7) Sec. III. Introduction.

Add “National Nuclear Security Administration (NNSA)” after “United States Department of Energy (DOE).”

NMED Response: NMED finds it unnecessary to reference the National Nuclear Security Administration (NNSA).

8) Change the name of the contractor from LANS to Triad National Security, LLC.

NMED Response: NMED agrees with the comment and has altered the Permit accordingly.

9) Second paragraph: Delete the word “potential” release. The NM WQA does not authorize regulation of a “potential” release, neither is any definition of “potential release” proposed.

NMED Response: 20.6.2.3104 NMAC requires persons discharging a fluid “so that it may move” into groundwater do so under a groundwater discharge permit. As stated earlier, NMED considers the phrases “may move” and “has the potential to move” as being synonymous.

10) Third paragraph: Add information about the 2005 draft DP-1132 permit that was released for public review and comment.

NMED Response: The paragraph describes the permit application and does not address the numerous iterations of the draft permit.

11) Sec. IV. Findings.

The objectionable “findings” to the effect that the facility is discharging effluent or leachate so that such effluent or leachate may move directly or indirectly into ground water should be removed. There is no basis for such statements; they are in fact untrue.

NMED Response: The comment has previously been addressed.

12) Sec. V. Authorization to Discharge.

Subsection C. The objectionable “authorization to discharge” is unchanged in this draft. There is no need and no occasion for such authorization, since no discharge is planned.

NMED Response: The comment has previously been addressed.

13) Subsection D: Drawings of the Influent Collection System, as it now exists, should be put in the Administrative Record.

NMED Response: The design drawings are included in the Administrative Record as the Record is defined at 20.6.2.3109.A NMAC.

14) Subsection D: Drawings of the low-level radioactive waste water (“LLRLW”) treatment system, the TRU waste water treatment system, the secondary treatment system, the MES, and the SET should be in the Administrative Record. The definition of “The Low-level Radioactive Waste Water (RLW) Treatment System” includes “subsequent replacement facilities utilizing the same treatment processes located within the physical confines of TA-50. The process by which the individual treatment units within the low-level radioactive treatment system are utilized may, for attaining compliance with the effluent limits set forth in this Discharge Permit, be altered, bypassed, replaced, or removed in accordance with the Conditions set forth in this Discharge Permit.” This language improperly authorizes almost unlimited changes in the RLWTF treatment system and nullifies any effective regulation thereof.

NMED Response: The design drawings are included in the Administrative Record as the Record is defined at 20.6.2.3109.A NMAC. NMED considers the Permit to sufficiently specify a means by which the Department will remain informed of processes, units and ancillary equipment utilized to treat RLWTF influent, e.g., Condition 1 (Annual Update), Condition 2 (Notification of Changes), Condition 3 (Submittal of Plan and Specifications), and Condition 4 (Construction Report).

15) “The Mechanical Evaporator System (MES)” definition says “units.” It should be explained that the units are movable, so that an inoperative MES unit may be removed and replaced.

NMED Response: NMED agrees and will alter the definition in the next version of the Permit. NMED does not deem it necessary to discuss the mobility of the unit at this time.

16) Sec. VI.A. Conditions.

Subsection A.3.j refers to design specifications for secondary containment. The language should state expressly that this requirement applies to the pipe component of the SET system that conveys treated water to TA-52. Such a statement should also appear in subsection A.3.m. Further, we have requested that the permit state that any change in waste transportation, storage, or treatment equipment or methods constitutes a “discharge permit modification” and requires a public process. This has not been done.

NMED Response: NMED disagrees. Condition 7 establishes criteria for identifying systems or components requiring secondary containment Treated wastewater that meets the effluent limits of the discharge permit need not be contained in double-walled pipe. Further, 20.6.2.7.D(4) NMAC addresses what constitutes a discharge permit modification and NMED considers it unnecessary to duplicate that definition in the Permit.

17) Subsection A.6 – signs referred to should be in Tewa as well as English and Spanish. **

NMED Response: NMED considers the issue of sign language most appropriately resolved between the Permittees and the Tribes. The Ground and Surface Water Protection Regulations do not mandate signage.

18) Subsection A.7 – Verification of secondary containment. It should be stated expressly that this requirement applies to the pipe component of the SET system that conveys treated water to TA-52. Also, there should be a definition of “untreated.”

NMED Response: NMED agrees and has altered the Permit accordingly. As previously stated, because the pipe component of the SET system conveys treated water, secondary containment is unnecessary.

19) Subsection A.8 – water tightness testing. It is unclear what unit or system is referred to that would be used to convey, store, etc. a liquid waste stream without secondary containment, since such units or systems are required to have secondary containment under Conditions referred to above. Please explain and clarify the language.

NMED Response: Condition 8 specifically addresses liquid waste management units or systems without secondary containment. NMED considers the circumstance to be readily identifiable and refrains from identifying specific units or systems so as to maintain a comprehensive and enforceable permit. Units or systems without secondary containment are identified in design drawings included in the Administrative Record.

20) Comparing Table 1 – Effluent Quality Limits for Discharges to Outfall 051 with Table 2 – Effluent Quality Limits for Discharges to MES and SET, we find that the standards are higher in Table 2 than Table 1 for:

	Table 1 mg/L	Table 2 mg/L
Barium (dissolved)	1.0	2.0
Chromium (dissolved)	0.05	0.1
Copper (dissolved)	1.0	1.3
Silver (dissolved)	0.05	0.1

The differences should be explained. Also, there is no explanation why the Organic Chemicals listed in Table 1 are not found in Table 2.

NMED Response: The differences in the two Tables reflect the addition of the NPDES limits for Outfall 051 (Table 1).

21) Subsection A.20—Emergency Response Procedures. The National Incident Management System requires that emergency planning include potentially affected Pueblos. The Permit should state that this will be done. Further, such procedures should be reviewed annually.

NMED Response: NMED considers the issue of tribal involvement in emergency planning most appropriately resolved between the Permittees and the Tribes. The Ground and Surface Water Protection Regulations do not mandate the inclusion of emergency response procedures in a groundwater discharge permit other than the requirement for contingency plans to address the failure of discharge permit or system specified at 20.6.2.3107.A(10).

22) Subsections A.21, A.22—Flow meters: The draft specifies that flow meters be installed 180 days after the effective date of the permit. This is not acceptable, since the permit becomes effective only upon a discharge, and the RLWTF is a zero liquid discharge facility. So the requirements will not arise. Further, 180 days after a discharge is too long a delay. In addition, no justification has been offered for the error-tolerance levels stated for flow meters. No justification is offered for the 10% accuracy level for the flow meter on the ten-inch influent line. No justification is offered for the 2% accuracy level for the soil moisture monitoring system.

NMED Response: The issue regarding zero discharge and whether the Permit is appropriate is addressed above. All required flow meters have been installed and calibrated. Regarding flow meter accuracy, there are numerous reasons NMED considers existing Permit requirements sufficient. 1) The NM WQCC has not specified the necessary accuracy of monitoring equipment in any regulation. 2) The commenters have not specified why the accuracy levels in the discharge permit are insufficient – the comment references “current industry standards” but neglects to recognize that the treatment of radioactive liquid waste is a unique process. 3) DP-1132 only requires measurement of influent and effluent volumes – these volumes are based on the Permittees projections and are presumed conservative. 4) Condition 22 requires Permittees to establish a field calibration method for each meter and specifies accuracy levels for various meters. 5) The discharge permit does not specify what the measurements will be used for, e.g., no reference to using the numbers to perform mass-balance determinations or to use these numbers to identify a possible leak or spill. 6) There are numerous requirements (incentives) to not leak or spill. 7) Condition 23 requires volume measurements for TRU liquid wastes based on tank level measurements. 8) The accuracy of flow measurements depends on the type of flow (e.g., full or

non-full pipe, pressured or non-pressured pipe – open conveyance system (flumes). 9) It appears that the Applicants were not measuring flow volume and are only doing so in response to this permit. 10) There is no reference to “manufacture’s specifications”. 11) WQCC regulations have numerical requirement.

23) Subsections B.23, B.24, B.36: Monitoring and Reporting: No change is made in the reliance on defective regional wells R-46, R-60, R-1, and R-14 for monitoring, which should be disallowed. We object also to the use of “characterization” wells for the purposes of monitoring. (*Please see Appendix A to CCW’s December 13, 2013 comments by Independent Registered Geologist Robert H. Gilkeson, entitled Deficiencies in Ground Water Protection in the Draft Groundwater DP-1132 Permit for more information about the deficiencies in the use of these wells.*)

NMED Response: This comment, based on a 2007 report, is false. Recent data suggests that the wells are producing representative samples. NMED finds that the groundwater monitoring wells referenced in the discharge permit, all located downgradient of the RLWTF and all utilized to monitor for the appearance of contaminant release from the RLWTF and the SET, are providing sufficiently defensible groundwater quality data required for regulatory and scientific purposes. These wells include Regional aquifer monitoring wells R-1, R-14, R-46, and R-60, intermediate-depth well MCOI-6, and alluvial wells MCA-RLW-1 and MCA-RLW-2. That the Regional monitoring wells are not impacted by residual drilling fluids is verified by measurable dissolved oxygen, positive oxidation-reduction potential, and circumneutral pH indicative of natural conditions in the regional aquifer. Concentrations of redox parameters, including dissolved iron, manganese, total organic carbon, Total Kjeldahl nitrogen, sulfate, chromium, and uranium, are within background for the regional aquifer, demonstrating that there are no impacts from residual drilling fluids in the Regional wells.

24) Subsection D.49 – Electronic Posting – The draft states that mandatory posting shall be done within 30 days, but voluntary posting within seven days. It is not clear why the two times should be different. Any public posting should be completed quickly enough so that a member of the public can take action within any applicable deadline.

NMED Response: The Ground and Surface Water Protection Regulations do not mandate permittees post documents for public review. LANL is the only groundwater discharge permitted facility in New Mexico to provide an electronic posting system. The Permit specified posting time limits were negotiated in good faith by stakeholders.

25) Closure Plan: Draft DP-1132 Section VI.A.42 states that the revised closure plan may be modified or amended at any time. This is unacceptable as there is no public process associated with the proposed modification or amendment. A public comment period of 30 days is provided, but there is no requirement for the Applicants to notify the public of the proposed modification or amendment; nor is there a requirement for the Department to notify the public of the public comment period.

NMED Response: NMED has altered the Permit to change the public comment period regarding modified or amended closure plans from 30 to 90 days. This extension of a public review period will allow the public to take desired actions within the deadline.

26) Paragraph VI(A)(42) now says that corrective action for any releases from existing or future SWMUs and AOCs associated with the RLWTF shall be conducted pursuant to the Consent Order. The 2016 Consent Order says that new releases and newly discovered releases of hazardous waste or hazardous constituents from hazardous waste management units shall be addressed in the [LANL RCRA] Permit and not the Consent Order. (Consent Order, June 2016, at VII.A). These provisions appear to contradict one another. TWU, NMAA, H.O.P.E., and CCNS propose that the language on the last page of the Closure Plan be revised to state:

“In accordance with Condition 46 of the Groundwater Permit, closure of the RLWTF shall be conducted solely under the NMED Consent Order of June 2016 and not under the Ground Water Discharge Permit. Through the Consent Order, the NMED establishes priorities for characterization, cleanup and closure of SWMUs and AOCs across LANL. Therefore, actual start date for closure of the RLWTF will be dependent upon the Consent Order process, and may differ from the start date indicated in this schedule.” (EPC-DO-16-208, LAUR- 16-21315, Fig. 4).

The proposed language (above) allows the closure process to be integrated with other remediation efforts in the area of TA-50 rather than viewed as an independent task. The Consent Order would incorporate the closure of the RLWTF into the overall cleanup effort.

NMED Response: NMED considers Condition 42, through its reference to Condition 46, to be sufficiently understandable and enforceable in addressing the actions that will be taken to investigate and characterize the potential impact to soil and groundwater during closure.

27) There is a reference in the Closure Plan to the initiation of treatment of LLW in 2019, contingent on concurrence of NMED. (at 32). It is implied that an NMED bureau would state such concurrence. It should be specified that the Hazardous Waste Bureau must give such concurrence, since the matter is clearly within the HWB’s expertise.

NMED Response: The portion of the Closure Plan referenced in the comment does not reference the low-level waste as being a hazardous waste or a mixed hazardous/radioactive waste. Condition 56 requires the Permittees comply with all applicable laws, regulations, permits, or orders.

CCW comments dated June 5, 2017

28) TWU, NMAA, H.O.P.E., and CCNS request a public hearing on these issues:

"A zero liquid discharge" facility is not properly regulated under the New Mexico Water Quality Act and implementing regulations.

DP-1132 strains to justify a discharge permit (“DP”) for a non-discharging facility, incorporating, e.g., elastic “discharge” definition, false “findings” that the facility is discharging, needless “authorization to discharge.”

It is objectionable to have a permit apply to “subsequent replacement systems,” which have not undergone the required public notice, comment and hearing under RCRA and the Hazardous Waste Act. The new RLW facility, absent an exemption from RCRA/HWA, is subject to the NMED facility-wide hazardous waste permit for LANL. NMED noted that LANL constructed the building at its own risk. See Attachment 16, NMED letter to LANL (October 3, 2014). According to the letter, LANL submitted plans and specifications to NMED for review. NMED did not provide written approval. NMED made no comment regarding “the adequacy of the design, compliance with applicable State, Federal, local statute, code and requirements.” Furthermore, there was no permit then in place for the new facility, nor would one be effective as there was not (and is no) discharge planned. Thus, NMED had no authority to review the “subsequent replacement systems” plans and specifications. DP-1132 Condition 3 requires “prior written approval by NMED” before implementing “any expansion, process modification, or alternation of a system or unit that could constitute a discharge permit modification (as defined in 20.6.2.7.P NMAC) of the intended function, design or capacity of any of the systems, units or components of the Facility’s collection, treatment or disposal systems.” Building a new facility would require a Class 3 permit modification under RCRA/HWA and requires advance public notice, comments and public hearing on request. A non-discharging facility that is not subject to a National Pollutant Discharge Elimination System (“NPDES”) permit is covered under the RCRA/HWA permit.

During discussions of DP-1132, LANL committed to working with Communities for Clean Water (“CCW”) members to produce multilanguage signage warning people to keep out of areas downstream of the RLWTF. **

NMED Response: Comment previously addressed.

29) LANL needs to include representatives of potentially affected Pueblos in emergency incident planning and provide designated seats within the LANL Emergency Operations Center for Pueblo representatives during preparation drills and actual emergencies. **

NMED Response: Comment previously addressed.

30) DP-1132 fails to require monitoring equipment accurate to current industry standards. **

NMED Response: Comment previously addressed.

31) DP-1132 allows groundwater monitoring to be conducted with defective shallow, intermediate and regional wells. **

NMED Response: Comment previously addressed.

32) NMED unilaterally changed the time for posting its submittals to NMED to the LANL Electronic Public Reading Room from seven (7) days to thirty (30) days. LANL’s change effectively eliminates public notice about the thirty (30)-day comment period. See Condition 42 (Closure Plan Amendments and Modifications). Moreover, the DP allows public review and comment on proposed amendments to the closure plan “30 days after the submittal.” This means the public will likely only learn of a comment opportunity after it expires. **

NMED Response: Comment previously addressed.

33) DP-1132 Closure Plan fails to state that closure and post-closure care will take place under the NMED Hazardous Waste Permit for LANL.

NMED Response: Comment previously addressed.

34) Even if closure took place under the Consent Order, closure is deferred, and there is no proposed schedule provided in the DP-1132 Closure Plan.

NMED Response: The Permit addresses closure scheduling sufficiently and appropriately for numerous reasons. 1) NMED discharge permits generally do not include a scheduled implementation for closure – few permitted facilities know when they will cease operation – 2) NMED sees no benefit in including a speculative closure schedule in discharge permits - 3) It is difficult to anticipate when closure of the RLWTF will occur because of the numerous components and possibility of those components being replaced - 4) the Closure Plan schedule includes time estimates for steps in the closure process – 5) Condition 43 requires notice to NMED of any planned closure.

35) DP-1132 Closure Plan is limited to the low-level radioactive liquid waste treatment facility. LANL omitted to provide closure plans for the transuranic treatment facilities, component systems and "replacement" facilities. **

NMED Response: The July 2016 Closure Plan attached to the Permit addresses the transuranic treatment facilities, component systems, and "replacement" facilities.

36) The DP-1132 Closure Plan provides no performance standards that LANL must meet in order for NMED to assess whether LANL has met the standards so as to warrant closure. For example, it appears that underground pipe sections may be left in place, yet there is no justification provided for doing so, and no basis provided for assessing the safety of such a decision. **

NMED Response: DP-1132 Conditions 41 and 42 requires structures be closed so that they no longer receive a waste and can no longer cause a discharge that could impact groundwater. The 2016 Consent Order includes environmental remediation standards applicable to any releases at the RLWTF.

37) The DP-1132 Closure Plan provides limited provisions for ground water monitoring; significantly, there is continued reliance on defective wells for monitoring purposes. **

NMED Response: Comment previously addressed.

38) The DP-1132 Closure Plan does not include required continued monitoring, sampling and reporting of contaminants of concern, e.g., perchlorate and radionuclides.

NMED Response: Closure Plan Section 5.6 addresses post-closure groundwater monitoring and commits to evaluating contaminants that were associated with the RLWTF and have the potential to migrate to groundwater. This Section commits to post-closure groundwater monitoring to

demonstrate there is no potential for residual contamination after achieving standards for a period of eight consecutive quarters at a minimum.

NMED received the following written comments from Bernice Gutierrez, Jean Stevens, David McCoy, Paul Pino, Mark DeVolder, Gregory Corning, Alexa Jaramillo, Cynthia Weehler, Cletus, Paula Garcia, New Mexico Acequia Association, Sheila Gershen, Virginia Miller, John and Marissa Bingham, Patricia Hodapp, Margaret Kuhler, Virginia, Betty Kuhn, Carolyn Kennedy, Justine and Seth Witherspoon, Jeanne Parrot, Mary, Curt Ray, Linda William, Peter White, James Murray, Mark Sardella, Ada Browne, Ron Reinikainen, Jude Pardee, Elizabeth West, Elliott Skinner, Linda Hibbs, Patricia Padilla, and M. Freelove. Many of these comments are similar and are identified below by a double asterisk (**).

39) I oppose the issuance of the New Mexico Environment Department's (NMED) draft Groundwater Discharge Permit (DP-1132) for the 56-year old Radioactive Liquid Waste Treatment Facility (RLWTF) at Los Alamos National Laboratory (LANL). Since 1963, hazardous waste has been handled, managed, treated, and stored at the RLWTF. Over this time, millions of gallons of treated hazardous and radioactive waste has been discharged through Outfall 051 into Effluent Canyon, which flows into Mortandad Canyon. **

In 1998, LANL said it would transition the RLWTF to a zero-discharge facility. In November 2010, discharges through Outfall 051 stopped. LANL began to use a mechanical evaporator system. If there is no discharge, no groundwater discharge permit may be issued. **

As a result, the NM Hazardous Waste Act must regulate the RLWTF. That law provides more protection to human health and the environment, including: **

- enhanced public participation;
- enhanced seismic requirements that address recent (1,400 years ago) surface;
- rupturing earthquakes on the Pajarito Plateau, where LANL is located; and
- protections for the tank systems that are used to treat the contaminated waters, including inspections and reviews by qualified Professional Engineers. **

Please deny the draft permit and make a recommendation to the NMED Secretary that he require LANL to apply for a Hazardous Waste Act permit for the RLWTF. **

NMED Response: Comment previously addressed.

40) Citizen Action NM opposes the issuance of the discharge permit. The permit should be issued under the Hazardous Waste Act (RCRA). The prior corruption surrounding the permit should stop with this hearing by observance of the application of the appropriate law.

NMED Response: Comment previously addressed.

Comments provided by Mark DeVolder:

Solar Evaporation Tank (SET) Issues

41) The depth of the tank is unknown (Note: This becomes important if a person, animal, or airborne debris fall or migrate into the tank.)

NMED Response: The depth of the tank is sufficiently identified in the Permit Application.

42) The freeboard in the tank (that is, the height from maximum water level to the top of the tank) is unknown. (Note: This becomes important as various operating conditions and, emergency conditions potentially change the height of liquid in the tank. Precipitation such as rain and snow can add to the liquid level in the open-air tank. Wind can create waves in the tank and potentially result in spillage outside the tank (perhaps during high-liquid-level situations encountered during emergency conditions. In addition, there may be seismically-induced wave issues / sloshing issues which could result in spillage of tank contents outside the tank.)

NMED Response: Condition 15 sufficiently addresses freeboard, requiring a specific level and response actions should that level be exceeded.

43) Why isn't the tank covered or mostly covered with vent holes to permit the release of evaporated water vapor to the environment?

NMED Response: Permit Section V.D defines the SET as a unit designed to dispose of RLWTF effluent through evaporation. That the tank is open-topped enhances this disposal process and is similar in this regard to numerous other permitted evaporation impoundments in New Mexico.

44) Can vegetation blow into the tank because it is open to the environment?

NMED Response: Condition 10 sufficiently addresses the inspection and removal of solids in the SET.

45) Can vegetation be blown out of the tank and spread contamination to the environment?

NMED Response: NMED's experience is that vegetation blown out of a wastewater evaporative disposal unit has not created an environmental hazard. That the wastewater in the SET is obligated to be treated to groundwater protection standards minimizes this threat.

46) Is any kind of fencing provided to keep vegetation out of the tank?

NMED Response: Condition 5 obligates the Permittees to construct and maintain a barrier surrounding the SET. A five-foot chain-link fence surrounds the SET limiting vegetation from entering the unit.

47) Is there any kind maintenance provided for weed control?

NMED Response: Conditions 13 and 14 require, respectively, the maintenance of the SET's structural integrity and a response should that integrity be compromised.

48) Can weed-control cuttings get into the tank?

NMED Response: The comment has previously been addressed.

49) Can animals (for example, rodents, deer, birds) get into the tank because it is open to the environment?

NMED Response: Condition 5 requires controls to ensure that animals are restricted from entering the SET.

50) Can animals drown and remain in the tank?

NMED Response: Condition 11 requires daily inspections of the SET. Though not specifically addressed and generally outside the scope of a groundwater discharge permit, it is presumed the Permittees would appropriately address any animals inside the SET.

51) Can burrowing or other types of animals get into the tank and then spread contamination outside of the tank to the environment?

NMED Response: Permit Section V.D identifies the SET as a concrete structure. Animals burrowing into the SET is considered improbable. Further, Condition 5 requires controls to ensure that animals are restricted from entering the SET.

52) Can a person fall into the tank and drown?

NMED Response: Condition 5 requires controls to ensure that persons are restricted from entering the SET.

53) Is a two-person rule followed by all personnel visiting the tank when it is full of liquid? (Note: Because the depth of liquid in the tank is not known, it is not known if there is a requirement for personnel visiting the tank to know how to swim. It is not known if fall protection features need to be provided or a flotation device / life preserver needs to be worn by personnel.)

NMED Response: Personnel protection procedures are generally outside the scope of a groundwater discharge permit.

54) If a LANL employee or a contractor falls into the tank or reaches into the tank without appropriate Personal Protection Equipment (for example, gloves), what protective features are provided (for example, emergency response team / ERT personnel, first aid kit, telephone / cell phone / two-way radio, appropriate communications reception in all locations around the tank).

NMED Response: Comment previously addressed.

55) Can wind-borne debris (Styrofoam, paper, candy wrappers, etc.) get into the tank?

NMED Response: A five-foot fence surrounding the SET assists in limiting wind-borne debris from entering the SET. This fence exists to abide with Condition 5.

56) Can floating debris accumulated in the tank become airborne and be blown out of the tank spreading contamination outside the tank?

NMED Response: The five-foot fence surrounding the SET limiting vegetation debris from entering the SET would equally limit debris from spreading contamination.

57) Is there any kind of netting to prevent wind-born debris from getting into or out of the tank?

NMED Response: The Permit does not require netting to prevent wind-born debris from entering or exiting the tank.

58) Is there any kind of fencing in close proximity of the tank to exclude animals, vegetation, and wind-born debris while still allowing maintenance access (that is, tank / liner replacement repair? (Note: it is unknown how much room / space is necessary adjacent to the tank to permit liner replacement.)

NMED Response: The comment has previously been addressed.

59) Can birds get into the tank and then fly out of the tank spreading contamination to the environment?

NMED Response: It is possible for birds to enter and exit the SET. As the wastewater in the SET is obligated to be treated prior to entering the SET to below groundwater protection standards, birds exiting the SET are not considered a threat to the environment.

60) Is the bottom of the tank sloped to permit complete drainage for maintenance purposes?

NMED Response: No - Condition 3 requires the Permittees submit complete facility design and specifications. SET construction details are included in the DP-1132 administrative record.

61) Is there some type of sump in the bottom of the tank?

NMED Response: Yes - SET construction details are included in the DP-1132 administrative record.

62) How is the tank drained?

NMED Response: A 6-inch diameter pipe within the SET removes fluids via suction.

63) Is there a drain pipe at the bottom of the tank (gravity drain) or is there a suction line which extends down into the tank from grade level?

NMED Response: The comment has previously been addressed.

64) If a suction line is utilized is it provided with a suction screen to exclude debris?

NMED Response: Yes (verbal communication with the Permittees) – This issue is generally outside the scope of a groundwater discharge permit.

65) If the suction line is provided with a suction screen, how is suction line inlet / screen cleaned if it becomes clogged with debris? (Note: Debris might include vegetation, weed-control cuttings, dead animals, cardboard, paper, rocks, soil, etc.)

NMED Response: Manually (verbal communication with the Permittees) – This issue is generally outside the scope of a groundwater discharge permit.

66) Is a pump used to drain the tank?

NMED Response: Yes – a transfer pump is attached to the suction line (verbal communication with the Permittees) – This issue is generally outside the scope of a groundwater discharge permit.

67) Is secondary containment (spill pan) provided for a pump if a pump is used?

NMED Response: Unknown - This issue is generally outside the scope of a groundwater discharge permit.

68) If a pump (and secondary containment) is used, are both properly secured (seismically secured)?

NMED Response: Unknown - This issue is generally outside the scope of a groundwater discharge permit.

69) If a pump is serviced (for example, seal or part replacement), can contaminated water be released outside the tank?

NMED Response: Presumably not – Condition 38 includes numerous contingency actions should there be a wastewater release. NMED's experience is that this Applicant is extraordinarily compliant in preventing and reporting fluid releases.

70) Can the contents of a pump freeze and crack the pump?

NMED Response: Presumably not – The pump is located in a heated pump house.

71) Are spare parts available for the pump?

NMED Response: Yes (verbal communication with the Permittees) – This issue is generally outside the scope of a groundwater discharge permit.

72) Are there provisions for a truck to pump out (suction out) the contents of the tank?

NMED Response: Yes (verbal communication with the Permittees) – This issue is generally outside the scope of a groundwater discharge permit.

73) Can maintenance equipment (for example, a motor vehicle, truck, or crane) be inadvertently driven into the tank?

NMED Response: Yes – This issue is generally outside the scope of a groundwater discharge permit.

73) Are there bollards or other features which prevent a vehicle from inadvertently entering the tank.

NMED Response: *A chain-link fence located in conformance with Condition 5 would deter a vehicle from inadvertently entering the tank.*

74) How are floating / submerged debris removed from the tank (for example, nets with cables, nets on poles, etc.)?

NMED Response: *Condition 10 requires the Permittees submit, when necessary, a solids removal plan for NMED's approval that will maintain the structural integrity of the unit.*

75) Is there a concrete pad for removing and collecting debris from the tank?

NMED Response: *No.*

76) How are debris (for example, foreign material like Styrofoam cups, paper, cardboard boxes, candy wrappers, plastic sheeting, CAUTION tape, vegetation, dead animals) handled after removal from the tank to prevent the spread of contamination to the environment.

NMED Response: *Condition 10 requires the Permittees submit a solids removal and disposal plan for NMED's approval that addresses the removal, transport, and disposal of all solids. Disposal shall be in accordance with all applicable local, state, and federal laws and regulations.*

77) What is the composition of the tank liners?

NMED Response: *The tank liners are composed of a High Density Polyethylene (HDPE) synthetic liner.*

78) Is there any potential that the expansion strip material in the concrete tank basin could chemically react with the liner material (that is, a chemical incompatibility issue) and result in a leak to the environment? (Note: Polyvinyl Chloride can adversely react with asphaltic materials over time.)

NMED Response: *Condition 3 requires the Permittees submit plans and specifications for all units. Sub-condition f requires the plan include information demonstrating the compatibility of the unit or system's constructed material with the waste stream. Similar information for the SET is included in the Application. Condition 17 establishes stringent constituent concentration limits for the waste water discharged to the SET. Condition 29 requires fluids discharged to the SET undergo quarterly characterization for a comprehensive list of constituents. Note that the concrete tank basin is protected by the SET design which includes two synthetic liners and an internal leak detection system.*

79) Are both tank double-thickness tank liners (that is, primary containment and secondary containment) made of the same material?

NMED Response: *Yes.*

80) If both liners are made from the same material, is there a potential for a common-cause failure? (Note: A common cause failure means that both the primary confinement and the secondary could fail in the same way and possibly at the same time. To avoid common-cause failures, different materials and/or engineered configurations with differing failure modes may be utilized).

NMED Response: The SET design minimizes "common-cause failure" through the utilization of multiple materials including a concrete basin with two synthetic liners.

81) What is the projected service life of the liners?

NMED Response: Unknown – fluid detection systems both within and below the SET will provide evidence of system/unit failure.

82) Was the vendor who provided the liner made aware of the complete spectrum of chemicals and radionuclides which would be present in the water contained by the tank liner?

NMED Response: Yes.

83) Did the vendor who provided the liner provide any kind of warranty for the liner?

NMED Response: Unknown – The Permit requires administrative and engineering controls to prevent, minimize or effectively address the release of a fluid at the SET. In addition, this Permit is protective because it requires waste water discharged to the SET adhere to stringent groundwater protection standards. Finally, the Permit is protective because it requires a groundwater monitoring and reporting program to insure the effectiveness of the operational controls and discharge limits.

84) What type of quality assurance information is available on the integrity of the liner (that is, material composition, liner thickness, sealing of seams, handling pre-cautions, installation requirements, rework or repair of the liner during construction)?

NMED Response: SET liner quality assurance information exists the in the Administrative Record.

85) Is each liner a one-piece configuration or is each liner fabricated and sealed in place within the concrete basin (that is, a built-up assembly)?

NMED Response: Each of the two synthetic liners consist of multiple liner panels sealed in-place in accordance with manufacture's specifications.

86) Are there vendor requirements / procedures available governing the installation of the liners?

NMED Response: Yes.

87) Can any kind of debris, sharp-edge machinery, sampling equipment, etc. result in a breach of the liner(s).

NMED Response: It is possible that these materials could result in a breach of one, and possibly both, of the synthetic liners. However, Condition 10 requires the Permittees submit a solids removal plan for NMED's approval that addresses how the Permittees will maintain the structural integrity of the unit.

88) It is not known what security features have been provided (fences, locked access / egress locations, signs) to exclude the general LANL population from the tank area.

NMED Response: SET security features include a fence, locked gates, and signs in accordance with Conditions 5 and 6.

89) Could LANL employees or contractor personnel throw rocks or coins into the tank for fun (that is, horseplay)?

NMED Response: Yes.

90) Could a disgruntled LANL employee, LANL employee not following procedures, or contractor personnel damage the tank liner and/or instrumentation monitoring system?

NMED Response: Yes – though there are access restrictions as previously addressed.

91) If the liner system is damaged and LANL has insufficient funding to make repairs due a budgetary shortfall, what happens (contingency plans)?

NMED Response: NMED would find the Permittee to be out-of-compliance with the Permit and would initiate an enforcement action to rectify the damage.

92) Given that the liners will be exposed to chemical and radioactive contamination (that is, an "undefined" current and future spectrum of both chemicals and radionuclides), will either the chemical or radioactive materials degrade the integrity of the liners over time?

NMED Response: The chemical characteristics of the fluid in the SET will be comprehensively understood through the Permittees' compliance with Conditions 17 and 29. The radioactive characteristics of the fluid within the unit are outside NMED's regulatory authority and the scope of a groundwater discharge permit, however NMED believes the Permittees have internal requirements and sufficient incentive to fully characterize the radioactive characteristics of the fluid. Note that NMED's expectation is that ultraviolet (UV) radiation from the sun poses the largest degrade potential to the liners. Note also that the Permit imposes multiple leak detection systems for the SET and that the fluid in the SET is obligated by the Permit to be relatively non-contaminated.

93) Has or will LANL perform any advanced aging tests on samples of the liner materials to determine when a liner failure might occur?

NMED Response: The Permit does not have such a requirement.

94) What is the configuration of the interstitial leak monitoring system between the liners? (Note: It is not known if the interstitial monitoring system consists of continuous sensor features / sensor material in all locations between both liners or is a system of sensors distributed in a pre-determined number of locations.)

NMED Response: Detail – The SET has six layers total – 1 primary liner – 2 geonet to provide space between the liners – 3 leak detection tape – 4 secondary liner – 5 geotextile to provide space between liners – 6 reinforced concrete floor and walls.

95) What are the failure modes for the monitoring instrumentation (for example, the pathway from the sensors to the instrumentation, cables, plugs connectors, the monitoring instrumentation, etc.)?

NMED Response: The leak detection tape measures electrical resistivity which triggers a failure alarm in the presence of water.

96) How are the tank liner monitoring instrumentation systems operated, calibrated, maintained, etc.

NMED Response: Condition 11 requires monthly inspections of all leak detection systems to ensure proper function. Condition 13 requires maintenance of the functionality of the “Facility,” including all instrumentation, at all times. The Application includes plans and specifications detailing the tank liner monitoring instrumentation system.

97) Is the monitoring instrumentation local or remote? (Note: If a failure occurs, is a local signal provided at the instrument monitoring location or is there a remote indication in the RLWTF Control Room?)

NMED Response: A failure signal is located proximal to the SET. Condition 11 requires the Permittees inspect the SET daily and the SET liner monitoring system weekly.

98) If a failure occurs in the liners as shown by the instrumentation, how long will it take to remedy the problem (that is, a failure of instrumentation sensor / cabling /instrumentation monitor or remote instrumentation interface in the RLWTF Control Room)?

NMED Response: Condition 12 specifies the actions required should the SET liner monitoring system indicate a failure. The Condition is comprehensive and requires immediate action upon failure.

99) How is the leak detection instrumentation protected (ruggedized instrumentation enclosure) from heat, cold, dust, moisture, wind, precipitation – rain and snow, rodents, and insects?

NMED Response: The leak detection instrumentation is located proximal to the SET in the heated pumphouse.

100) It is not known if there is level instrumentation (high level) provided for the tank.

NMED Response: *There is not a fluid level measurement instrument at the SET however Condition 11 requires the unit be inspected daily. It is anticipated that the SET will not overtop given that Condition 15 sets protective freeboard limits, Condition 27 requires daily discharge volume measurements to the SET, and the daily inspections monitor the adherence to the freeboard limits.*

101) The failure modes for any level instrumentation provided are not known.

NMED Response: *The comment has previously been addressed.*

102) It is not known how the setpoint on any level or high-level instrumentation would adjust to accommodate changes in operating conditions or emergency situations.

NMED Response: *The comment has previously been addressed*

103) The procedures governing the operation and maintenance of the SET were not discussed in any detail during the DP-1132. The extent of training for LANL employees and contractor employees (that is, operators, maintenance personnel, engineering personnel, supervisory personnel, visitors, etc.) working or visiting the SET were not discussed in any detail during the DP-1132 hearing. The efficacy of both the procedures and the training are unknown.

NMED Response: *The procedures governing the operation and maintenance of the SET are sufficiently addressed in the Permit.*

104) There may be a perception that the risks associated with the SET are low because of the low levels of chemical and radioactive contamination present in the contaminated water. However, appropriate precautions should be taken as they would be in any kind of nuclear facility. For example, are there signs around the perimeter of the tank which indicate CHEMICALLY / RADIOACTIVELY CONTAMINATED WATER – NOT POTABLE WATER – DO NOT DRINK.

NMED Response: *Condition 6 requires signs with appropriate language.*

105) Is there a full set of Hazard Communication Information available (for example, Material Safety Data Sheets / MSDS's for all chemical constituents potentially present in the contaminated water and as well as information on radionuclides present)?

NMED Response: *Condition 48 requires the retention of numerous records, including monitoring reports submitted pursuant to the Permit that identify the chemical characteristics of the SET fluid. As stated previously, fluids discharge to the SET are obligated to conform to Permit established treatment standards which are the groundwater protection standards. The groundwater protection standards are considered protective of human and animal consumption. MSDS's are generally associated with chemicals or manufactured chemical products and not considered applicable to waters treated to these standards.*

106) Although general geotechnical information was provided during the DP-1132 hearing, there was a lack of specific report information provided on soil conditions found immediately below the concrete basin. For a sub-surface (below-grade) basin, soil must have required excavation, relocation and/or removal by heavy construction equipment. Prior to such work, soil surveys were most likely completed to establish integrity of the soil in and around the proposed construction site. During construction, any kind of soil anomaly (including unusual geological features, abandoned facility systems, pre-existing structural foundations or other buried materials) would typically be reported. Tuff which is present in areas around TA-35, TA-50, and TA-55 is by nature a brittle and porous material. Tuff formations may include fractures, crevices, sink holes and related features which might be uncovered during excavation and/or construction activities. Any issues would require some type of remediation during the construction effort and prior to any concrete placement. No such report information was provided during the DP-1132 hearing?

NMED Response: The SET was constructed over a 6-inch basecourse with compacted substrate as described in plans and specification provided with the Application. The SET has redundant synthetic liners and leak detection systems creating a sufficiently protective wastewater disposal system.

107) What quality assurance /integrity information is available on the concrete basin (for example, concrete mix information, data on the reinforcing bar used, thickness of the concrete, concrete strength, smoothness of concrete, any rework required, presence of sharp edges on concrete, data on expansion strip material, photographs, daily construction reports, etc.)?

NMED Response: The SET was constructed as described in plans and specification provided with the Application. The SET has redundant synthetic liners and leak detection systems creating a sufficiently protective wastewater disposal system.

108) What is the composition and configuration of the expansion joints in the concrete basin?

NMED Response: The SET was constructed as described in plans and specification provided with the Application.

109) The tank was tested with water which did not have any chemical and/or radiological content. This was a reasonable practice to prepare for introduction of chemically- and radiologically-contaminated water.

NMED Response: This comment appears to concur with the test. Wastewater to be discharged to the SET is obligated to comply with the groundwater protection standards at 20.6.2.3103.

110) The Rocky Flats Plant also had contaminated liquid ponds. Those facilities leaked and contaminated downstream sources of drinking water utilized by nearby communities. This forced communities such as Broomfield to find other sources of drinking water.

NMED Response: Wastewater to be discharged to the SET is obligated to comply with the groundwater protection standards at 20.6.2.3103 NMAC.

Mechanical Evaporation System (MES) Issues

111) The type and configuration of the evaporator is unknown. It is not known if a single-effect / single-stage evaporator system or a multiple effect evaporator system will be used. It is not known if the evaporator has a circulation pump or some type of natural gas-fired heat exchanger. It is not known if the evaporator is a thin-film type with mechanical wipers to remove accumulated solids.

NMED Response: The MES was constructed as described in plans and specifications provided with the Application. The level of detail addressed in the comment is not called for in a groundwater discharge permit application.

112) It is not known how any solids might be separated from the evaporator effluent or how any separated solids might be handled further downstream.

NMED Response: The MES was constructed as described in plans and specification provided with the Application. The Application does not identify secondary waste streams from the MES.

113) A Process Flow Diagram (PFD) and/or Piping and Instrumentation Diagram (P&ID) was not provided during the DP-1132 hearing. A PFD typically contains information on inlet and outlet stream characteristics to / from the evaporator such as flow rate (minimum, average, and maximum) composition of stream (minimum, average, and maximum weight or concentration of various constituents), and temperature (minimum, average, and maximum). It is assumed that the evaporator operates at ambient pressure and is not provided with vacuum-type features. The characteristics of the product or effluent discharged from the evaporator are unknown. It is not known if the effluent stream contains evaporated solids, dissolved solids, etc. This makes any analysis of the evaporator system an exercise in speculation.

NMED Response: The MES PFD is included in the Application. A MES P&ID is outside the scope of a groundwater discharge permit.

114) It is not known if any additional chemicals are added to the influent prior to being sent to the evaporator or reverse osmosis system (for example, addition of acid or caustic to adjust pH).

NMED Response: Chemicals added in the treatment process are identified in the Application.

115) It is not known exactly which stream is being evaporated (the influent stream from the Waste Mitigation R____ M____ (WMRM) tanks, an accumulated stream from the reverse osmosis system, or a flush stream from the reverse osmosis unit).

NMED Response: The MES PFD is included in the Application.

116) A P&ID was not provided; therefore, any operating characteristics such as pressure or temperature are unknown. Any definition of instrumentation is also unknown. It may be assumed that evaporators may contain some type of temperature control and level control (high level / low level alarms).

NMED Response: A MES P&ID is outside the scope of a groundwater discharge permit.

117) The configuration of the evaporator is unknown. The size and capacity of the evaporator as well as the weight of evaporator components was not defined. The composition of the evaporator shell (perhaps stainless steel or some other alloy) is unknown. What is known is that the evaporator shell or evaporator heat exchanger (and pump if used) must be able to withstand temperatures created by a natural gas-fired heating system.

NMED Response: The MES configuration, size, capacity, and construction material are included in the Application.

118) Evaporator systems which operate at elevated temperatures and contain acidic or caustic effluents or dissolved solid effluents are potentially subject corrosion, leakage, and external radioactive contamination. Fouling (solids accumulation) on internal evaporator surfaces (particularly heat exchanger surfaces) may occur. It is unknown how such surfaces are cleaned and maintained for reasonable evaporator operation / efficiency.

NMED Response: Condition 13 requires maintenance of the MES at all times. The Condition requires a log of maintenance activities and an annual report to NMED identifying those activities.

119) It is not known if evaporator instrumentation is subject to corrosion, fouling, etc. The accumulation of solids on thermowells (containers for temperature instrumentation) may result in erroneous operating temperature readings.

NMED Response: The comment has previously been addressed. See response to Comment 118.

120) The natural-gas heating system was not defined during the DP-1132 hearing. Typically, natural gas systems are provided with a pressure regulator, an automatic shutoff valve, a tee in the line which permits external venting of natural gas venting to the atmosphere via an automatic vent valve, and another automatic vent valve (that is, a double block and bleed arrangement).

NMED Response: The level of detail regarding the MES natural gas heating system addressed in the comment is outside the scope of a groundwater discharge permit.

121) There was no discussion in the DP-1132 hearing about evaporator maintenance or equipment required for maintenance (for example, cranes or lifts).

NMED Response: *The comment has previously been addressed. See response to Comment 118.*

122) No information was provided on the service life of evaporator equipment and what is required for evaporator equipment replacement.

NMED Response: *The service life of particular treatment equipment is outside the scope of a groundwater discharge permit. NMED instead relies on permit conditions requiring treatment equipment attain specific performance standards.*

123) In the event of a budgetary shortfall at LANL, no discussion was provided about operating evaporator equipment beyond its useful service life.

NMED Response: *NMED relies on its enforcement authority and the penalty provisions of Conditions 54 and 55 to incentivize the Permittees to ensure evaporator equipment is replaced in a timely manner.*

124) It is not known if the evaporator is provided with some type of entrainment separator, High Efficiency Particulate Air or HEPA filter, and a vent to the interior of the tent-like structure.

NMED Response: *MES air emissions are outside the scope of a groundwater discharge permit.*

Secondary Containment

125) A photograph shown in Mr. Beers' DP-1132 hearing presentation showed a tent-like structure supported by a tubular metal frame. (Note: It is not known if tent-like structure is being used for secondary containment or there is some other type of secondary containment around the evaporator which could not be seen in the photograph.)

NMED Response: *The primary containment vessel and the evaporator have a secondary containment substructure in part constructed of Hypalon. The tent-like structure is ancillary to the MES and the associated permit conditions.*

126) It is not known if the tent-like enclosure is considered a confined space.

NMED Response: *Confined space protection procedures and associated regulatory requirements are outside the scope of a groundwater discharge permit.*

127) It is not known where the evaporator (and any pumps, heat exchangers, instrumentation, etc.) are located within the tent-like structure.

NMED Response: *The comment has previously been addressed.*

128) It is not known if instrumentation inside the tent-like enclosure is monitored locally or remotely. Do personnel have to access the tent-like enclosure to monitor evaporator performance?

NMED Response: Treatment equipment operation and monitoring is generally outside the scope of a groundwater discharge permit. NMED instead relies on permit conditions requiring treatment equipment attain specific performance standards.

129) Tours (for NMED personnel) were provided of the RLWTF facilities, but no data on the configuration of the MES was forthcoming from any NMED personnel who went on those tours. It is not known if there were restrictions on dissemination of classified or UCNI-type information. Alternately, there may have been restrictions due to dissemination of confidential / propriety information protected by equipment vendors so that it could not be made available to the Public.

NMED Response: NMED understands that entities other than the agency have toured the facility. The Permit Administrative Record does not contain any UNCI information.

130) It is not known if the tent-like structure is simply an environmental boundary to protect workers from external environmental conditions.

NMED Response: The tent and associated worker protection precautions are generally outside the scope of a groundwater discharge permit.

131) It is not known if the tent-like structure serves as a chemical barrier (including Category I chemicals or suspected carcinogens) and / or radioactive contamination barrier.

NMED Response: The comment has previously been addressed.

132) It is not known if the tent-like structure is sealed.

NMED Response: The comment has previously been addressed.

133) It is not known if the tent-like structure is provided with an airlock.

NMED Response: The comment has previously been addressed.

134) It is not known if access to the tent-like structure requires the wearing of anti-contamination clothing (anti-c's) and where donning and doffing of such personal protective equipment (PPE) might be accomplished.

NMED Response: The comment has previously been addressed.

135) It is not known what kind of radiological monitoring equipment is provided or where it is located.

NMED Response: Radiological protection is outside NMED's authority and is outside the scope of a groundwater discharge permit.

136) It is unknown why the MES was not located in a more robust structure equipped airlocks, facilities for with donning / doffing anti-contamination personal protective

clothing (anti-c's) and other personal protective equipment (PPE) such as respirators and self-contained breathing apparatus (SCBA) units, and active ventilation features (that is, fans, high efficiency particulate air or HEPA filters, ventilation control instrumentation).

NMED Response: Radiological protection is outside NMED's authority. The comment has previously been addressed.

137) The tent-like structure is supported by a tubular frame. It would appear from the photograph in Mr. Beers' DP-1132 presentation that there are tabs which support the tent-like structure. It is not known if the tabs and tubular frame can support the 30 pound per square foot snow loading typically required for most LANL / DOE facilities.

NMED Response: Comments regarding the tent have previously been addressed.

138) The composition of the tent-like structure is not known.

NMED Response: Comments regarding the tent have previously been addressed.

139) It is not known if the tent-like structure is positioned on a concrete pad or an asphalt pad. (Note: If the tent-like structure is composed of polyvinyl chloride or PVC it could potentially react with asphaltic material and breach (chemical incompatibility). This could potentially result in the release airborne chemical and radioactive materials to the environment during either operation or maintenance activities.

NMED Response: Comments regarding the tent, air emissions, and radiological protection have previously been addressed.

140) It is not known if the tent-like structure is equipped with some type of integral filter to admit air to the natural gas-fired heating system.

NMED Response: Comments regarding the tent have previously been addressed.

141) It is not known if a filter on the tent-like structure could plug causing any of the following: depleted oxygen content which could have an adverse effect on workers, incomplete combustion of natural gas, decreased evaporator operating temperature, collapse and / or implosion of the tent-like structure, and / or tearing / leakage of the tent-like structure. (Note: A natural gas-fired system and operations / maintenance personnel may both compete for oxygen in the tent-like enclosure. If this is the case, SCBAs may be a requirement instead of respirators.)

NMED Response: Comments regarding the tent have previously been addressed.

142) It is unknown how the discharge of hot natural gas combustion gas out of the tent-like structure is accomplished or how any discharge feature is sealed.

NMED Response: Comments regarding the tent and associated air emissions have previously been addressed.

143) It is not known how the natural gas supply line double block and bleed vent penetrates the tent-like structure or how that penetration is sealed. (Note: It is unknown if the entire double block and bleed system is located external to the tent-like structure.)

NMED Response: Comments regarding the tent and associated air emissions have previously been addressed.

144) It is unknown if an external vent penetration is provided from the evaporator (entrainment separator or HEPA filter) to the outside of the tent-like structure.

NMED Response: Comments regarding the tent and associated air emissions have previously been addressed.

145) It is unknown if an evaporator vent penetration in the tent-like structure is sealed.

NMED Response: Comments regarding the tent and associated air emissions have previously been addressed.

146) The positioning of the evaporator, natural gas fired heating system, pump (if any) is not known. Therefore, it is not possible to determine if the evaporator system components could cause ignition of the tent-like structure due to radiant and / or convective heat transfer. (Note: I do not know if there is any kind of fire suppression system inside the tent-like structure. There is a new type of fire suppression system on the market which generates a water mist. The system is a vast improvement over Halon-type fire suppression systems or carbon dioxide fire suppression systems because the water mist does not degrade the oxygen concentration necessary for personnel to breath and permits personnel to evacuate from the scene of a fire. In this case, it would be the interior of the tent-like structure.)

NMED Response: Comments regarding the tent have previously been addressed.

147) It is not known if the evaporator vessel provided is with any kind of pressure relief valve, pressure safety valve / rupture disk.

NMED Response: Comments regarding the tent have previously been addressed.

148) It is not known if a discharge line from a pressure relief valve / pressure safety valve / rupture disk on the evaporator vents to the interior of the tent-like structure or exterior of the tent-like structure.

NMED Response: Comments regarding the tent and associated air emissions have previously been addressed.

149) It is not known how a pressure relief valve / pressure safety valve / rupture disk discharge line which penetrates the tent-like structure is sealed.

NMED Response: Comments regarding the tent and associated air emissions have previously been addressed.

150) It is not known if a pressurized release from a discharge line from a pressure relief valve /pressure safety valve / rupture disk discharge line could result in internal over-pressurization of the tent-like structure. (Note: This assumes that the discharge line vents within the tent-like structure.)

NMED Response: Comments regarding the tent and associated air emissions have previously been addressed.

151) It is not known what the consequences will be if chemically- or radiologically-contaminated liquid from the evaporator is discharged from a pressure relief valve /pressure safety valve / rupture disk discharge line to the atmosphere. (Note: This assumes that the discharge line vents to the exterior of the tent-like structure.)

NMED Response: Comments regarding the tent, air emissions, and radiological protection have previously been addressed.

152) It is not known how the tent-like structure will withstand the combined effects of natural gas-fired heating inside of the structure, temperature cycling (hot and cold ambient temperatures outside the structure, and exposure to sunlight (ultraviolet light).

NMED Response: Condition 13 requires the structural integrity of the MES be maintained at all times.

153) Surveillance of the tent-like structure for cracks, leaks, etc. was not defined.

NMED Response: Condition 13 requires the structural integrity of the MES be maintained at all times.

154) No information was provided on soil conditions for the concrete pad / asphalt pad which supports the tent-like structure, evaporator, ancillary equipment, and secondary containment.

NMED Response: This comment is outside the scope of a discharge permit.

155) No quality assurance information (for example, design mix, reinforcing bar information, concrete strength, etc.) was provided the concrete pad which supports the tent-like structure. Alternately, no information was provided for the asphalt which supports the tent-like structure.

NMED Response: This comment is outside the scope of a discharge permit.

156) There was no discussion of how a hypothetical organic and inorganic waste stream would be processed through a reverse osmosis system and / or the evaporator.

NMED Response: The MES PFD is included in the Application. The Permit does not include specific conditions regarding RO systems and instead relies on conditions requiring treatment equipment attain specific performance standards.

157) There was no discussion about the potential for a hypothetical waste stream containing organics and inorganics flowing to the RLWTF and being concentrated in the evaporator.

NMED Response: Condition 28 requires tracking of all waste influents to the RLWTF. The Permit relies on conditions requiring treatment equipment attain specific performance standards.

158) I was depending on information in the NMED Fact Sheet for the DP-1132 to make a final determination on the efficacy of the Engineering and Administrative Controls for RLWTF processes. It appeared that there was very little useful information to establish the efficacy of the Engineering and Administrative Controls for either the Solar Evaporation Tank (SET) or the Mechanical Evaporator System (MES). Such information might include but is not limited to the following: General Flow Diagrams / Block Diagrams, Process Flow Diagrams (PFDs), Piping and Instrumentation Diagrams (P&IDs), a listing of LANL facilities providing effluents to the RLWTF (that is, partial flows which make up the WMRM influent), chemical and radionuclide composition of influent to the WMRM, detailed descriptions of RLWTF primary and secondary treatment processes (that is, pre-existing processes which will continue to be utilized, proposed processes, and processes which will be decommissioned), Equipment Data Book information (for example, vendor literature on process equipment, capacity information on MES equipment), hazard analyses for processes, annual summaries of and individual Unreviewed Safety Question Determinations or USQDs, operating / inspection / maintenance procedures for processes (for example, procedures for installing gaskets and torquing piping flanges), procedures for related administrative activities (for example, acquisition of chemical samples requiring chemical / radiological analysis), Office of Nuclear Safety documentation (for example, Operating Experience Weekly Summary information as it pertains to the LANL RLWTF, DOE Occurrence Reporting information as it pertains to the LANL RLWTF, LANL Title I / Title II / Title III engineering documents for new RLWTF processes and structures, Quality Assurance data on Systems / Structures / Components (SSCs) (for example, design mix information for concrete, data on reinforcing bar, concrete placement information, metal certifications / mill certifications, information on rework, etc.), calculations, seismic calculations / analyses, construction reports, construction photos, etc.). Without such information, there is no way to determine the safety or reliability of the processes proposed for DP-1132 permitting or the adequacy of engineering and administrative controls.

NMED Response: The purpose of the Fact Sheet is stated in 20.6.2.3108.I NMAC. The information requested above is satisfied by Condition 3, which requires the submittal of plans of plans and specifications which comply with the New Mexico Engineering and Surveying Practice Act.

159) Per the NMED Fact Sheet found on the NMED website, NMED is responsible for assuring the safe operation of the proposed RLWTF processes. There exists a concern on my part that NMED did not provide a sufficient basis for assuring that the processes are safe.

After reviewing the NMED fact sheet, I am also at a loss to understand which if any of the RLWTF processes will be decommissioned and when that decommissioning will occur.

NMED personnel toured the facilities / processes proposed for DP-1132 permitting. However, NMED personnel provided virtually no technical information on the configuration or safety of the facilities or proposed processes during the DP-1132 hearing. Similarly, there was little if any discussion about operating / inspection / maintenance procedures or administrative procedures.

It would appear that NMED has worked well with LANL in the past and trusts the judgement and actions of LANL and DOE personnel. NMED has guidelines for monitoring well configurations. Various requirements for the discharge of treated water effluents are specified in the New Mexico Administrative Code (NMAC). When LANL / DOE work to implement the guidance / requirements, it probably establishes what NMED perceives as acceptable compliance behavior. However, the lack of technical information about liquid waste treatment processes and specific feedback from NMED personnel on the proposed processes (that is, NMED tour reports of facilities / processes and NMED reports on the efficacy of engineering and administrative controls) begins to show a certain lack of independency from LANL / DOE. If it is the responsibility of NMED to assure that the operation of the proposed RLWTF processes is safe, there was insufficient evidence presented during the DP-1132 hearing to confirm that the necessary technical information was made available by LANL / DOE to complete an adequate safety assessment and that NMED thoroughly evaluated such information (for example, the previously listed technical information related to engineering and administrative controls).

NMED Response: The Fact Sheet comports with the requirements and intent of the regulations at 20.6.2.3108.1 NMAC. Groundwater discharge permits generally do not specify a time to decommission a particular aspect of a permitted facility and instead specify a methodology and cleanup standard.

160) It would appear that the influent from the WMRM is gathered from upstream LANL (radiological / other) facilities and processes. (Note: There is some confusion on my part about Low Level Liquid Waste (LLLW) which I thought was processed by the RLWTF and other terms such as Transuranic Waste [Transuranic Liquid Waste], LLLW Facilities, and TRU Waste Facilities. It would be helpful as a member of the Public if I had a better understanding of this terminology as it relates to LANL liquid waste streams and facilities.) Lacking any detailed information and trying to decode the vague information provided in the NMED fact sheet, it appears that influent from the WMRM is fed to a variety of parallel waste treatment processes (or a sequence of primary and secondary waste treatment processes). There may be interim tank storage of treated effluent from the various processes. The stored effluent may be sampled and analyzed to determine if further processing is needed to remove additional chemical and / or radiological contamination in order to meet discharge limits. If discharge limits are met, then treated effluent in some type of interim storage tank may be routed to Outfall 051. It is unknown how much additional treatment is required to meet discharge limits (that is, internal recycling of treated effluent or distribution to various waste treatment processes). It is unknown if there is any mixing or blending of treated waste effluent and how this effort might be accomplished. It is unknown if there are any radioactive solids which are extracted from

the liquid waste streams and how those solids are processed further downstream. (Note: There is mention of a filtration process in the NMED Fact Sheet.) This may account for the separation of radioactive solids (from radioactive liquid wastes) and designated as TRU solid waste which may be packaged in drums and shipped to WIPP. The scope of the TRU waste would seemingly be outside of the scope of the DP-1132 Permit effort for the RLWTF. However, it may be that the Mechanical Evaporator System (MES) has the potential of creating TRU solids during operation. Again, this points to the need for Process Flow Diagrams, Piping and Instrumentation Diagrams, and Process Descriptions to establish what the feedstocks (influent) and products are associated are from various RLWTF processes. The monitoring wells help to confirm that effluent from Outfall 051 was properly analyzed prior to release and that process upsets / transients / emergency situations / conduct of operations issues (for example, improper valve line-ups), or maintenance issues (for example, internally leaking valves) did not somehow corrupt the release and or quality of treated effluents which were supposed to be within discharge limits. Most of this is conjecture on my part. To the Public, such processing might seem bewildering; however, such recycling / blending operations are quite common and useful in the refining and chemical processing industries (CPI). It is clear that RLWTF personnel at LANL, DOE personnel, and NMED most likely have a much better understanding of the RLWTF operations having monitored those operations for some number of years. It is disappointing that the processing methodology cannot in some manner be conveyed in a logical and understandable manner to the Public. This would allow for better and more informed decision making as well as improved confidence by the Public in the safety of the facilities as well as safe operating and maintenance practices deemed necessary by LANL, DOE, and NMED.

NMED Response: Drawings and flow diagrams of all components are provided to NMED to keep in the administrative record. Furthermore, per Condition 49, LANL is required to post this information on the Electronic Public Reading Room to be made available to the public. NMED considers the Permit and the agency's associated oversight to be sufficient and appropriate to protect groundwater below the facility.

161) One of the LANL technical experts who attended the DP-1132 hearing indicated (after the hearing proceedings) that rodents had inundated one (or more) of the monitoring wells. The extent and damage of the infestation was not provided. No information on clean-up of the monitoring well or remediation of the monitoring well issue was provided. The LANL representative also indicated that a program is in place for addressing the rodent issue. It is disturbing that the water monitoring wells, which contain sensitive monitoring equipment and/or instrumentation, are not sufficiently robust in configuration to exclude rodents and rodent detritus as well as prevent rodent attack (for example, chewing on cables / cable insulation / other materials). Without any detailed information on the rodent infestation and information on the rodent exclusion program, it is difficult to ascertain the impact on the monitoring well equipment / instrumentation, the validity / integrity of the monitoring well data, or the duration that monitoring well data may have been corrupted. (Note: Redundant monitoring wells may help to offset this concern.) If the monitoring well equipment / instrumentation were properly designed, there would not have been any rodent intrusion / infestation. The same may apply for insect intrusion / infestation. It would appear that NMED, LANL, and DOE need to work jointly on the issue of rodent (insect) intrusion/infestation and work

on amending and updating the monitoring well guidelines to assure that the monitoring well data obtained in the future is accurate.

(Note: My entire reason for attending the DP-1132 Permitting Hearing for the RWLTF was due to my concern about rodent infestation issues in and around Los Alamos County. It is my understanding (from Los Alamos County maintenance personnel working to clean debris out of below-grade water meter enclosures) that the infestation of gophers, ground squirrels, mice, etc. is different in Los Alamos than in White Rock where infestations do not occur. Water released to the Los Alamos ecosystem contributes to the growth of such species as scrub oak which is a nesting material and food for gophers. It appears that ground squirrels are miners who create underground tunnel networks and transfer dirt and tuff substances to below-grade Los Alamos County water meter enclosures. Mice and gophers are nest builders that infest various unprotected enclosures. Mice and gophers are able to squeeze through openings which are smaller than their normal body size. Mice and gophers also vary in size according to their age.)

NMED Response: It is unclear whether the referenced rodent intrusion is associated with a groundwater monitoring well associated with the Permit and NMED is unaware of such an intrusion. NMED ensures that groundwater monitoring data submitted in association with the Permit is representative of that groundwater.

162) Due to a lack of comprehensive and understandable (transparent) information related to the RLWTF (obviously a “complex facility”), the information presented in the DP-1132 hearing is of limited use to the Public. Without detailed information, the Public is unable to do much if any critical thinking and make any reasonable assessment of either the liquid waste management processes, the arrangement of those processes, or the safety of the processes.

NMED Response: NMED considers the information presented at the hearing sufficient to inform the decision makers, i.e., the Hearing Officer and the Cabinet Secretary, sufficient information to determine that the Permit is protective of groundwater for current and foreseeable future use.

163) It is disturbing to hear anything about information being removed from Public records. It was disturbing that witnesses providing testimony supportive of LANL / DOE positions appear to have been coached and their presentations scripted to minimize the amount of information presented at the hearing. It was disturbing to see the tightly knit group of LANL / DOE attorneys and witnesses walking / moving / conversing as a block during and after the hearing. During the DP-1132 hearing proceedings, The LANL/DOE witnesses seemed to be looking at the LANL/DOE attorneys as if the witnesses wanted some kind of guidance or approval on how they should answer questions. For such qualified witnesses, it was disturbing in some instances how little they seemed to know when asked questions about their area of expertise.

Photographic information and diagrams were minimal. (Note: I can get more information in the way of photographs while trying to purchase a \$10 item on eBay than I got at the DP-1132 hearing for a “complex” nuclear facility.)

It was particularly disturbing to hear LANL attorney objections raised about seismic-related issues. The attacks of the LANL attorney on Ms. Arrens (Ehrens?) was particularly disturbing given that most of her testimony seemed to have a considerable credibility. For a witness who is a lawyer and not “a geologist” or “engineer”, Ms. Arrens seemed to convey a good deal of reasonable and useful information about how nuclear facilities need to be constructed (that is, proper anchorage of equipment, secondary containment, drainage sumps, etc.). This is the kind of information which begins to give me some confidence in the safety of a nuclear facility and the processes found in a facility such as the RLWTF.

I have experienced seismic events in both New Mexico and San Francisco. It was momentarily much like being on a boat in a surrounded by turbulent water in a lake or at sea (that is, turbulent water with a vertical and a horizontal impulse or movement). I have also seen video footage of earthquake events in a retail store, shaker table videos of 3- and 5-level building models which resonated at different frequencies. I have read internet documentation on earthquake destruction in California and Japan and read DOE guidance on best practices for seismic design in DOE facilities. I am familiar with the concept and design of both longitudinal and transverse piping supports and also recognize the contribution they make to the safety of facility piping installations. I have retrieved and studied Larry Goen's (LANL Engineering Division Leader who prepared seismic documentation - Seismic Calculations / Diagrams / computer runs for TA-55 systems) seismic reports, repeatedly provided tours and information to LANL / contractor personnel tasked with seismic analysis responsibilities at LANL, and researched LANL records to find specific information to support seismic analysis efforts. Although I am not a qualified structural or seismic engineer, I have been repeatedly involved in seismic-related analysis efforts and understand the need of such efforts in relationship to both reactor and non-reactor nuclear facilities. The LANL and DOE attorney's contention that such information should be removed from DP-1132 hearing records and attacks upon Ms. Arrens' testimony at the DP-1132 hearing leaves me wondering why they would not be more supportive of hearing the witness's comments – particularly if the goal of LANL and DOE is to construct, operate, and maintain a “safe” facility. The same seismic information would also empower NMED in their role to assure the “safety” of RLWTF processes. (Note: I would be unhappy if my post-hearing comments on potential seismic sloshing of effluent in the SET was removed from the hearing testimony.)

After viewing photographs presented at the DP-1132 hearing and listening to Ms. Arrens' testimony, I did not see much evidence of seismically-qualified anchorage of equipment at the RLWTF or piping fitted with either longitudinal or transverse seismic bracing. Additionally, I am at a total loss as to how the evaporator equipment in the Mechanical Evaporator System (MES) and the plastic tent surrounding that equipment is provided with any kind of anchorage feature (that is, anchorage to either a concrete pad or asphalt located below the plastic tent).

NMED Response: Comment noted. It is unclear what the commenter perceives as “attacks” upon Ms. Arrens' testimony without a specific reference or citation. Attorneys from Triad/DOE did not cross examine Ms. Arrens, their sole objection to her testimony was her testimony regarding seismology, which the Hearing Officer agreed was not something for which she was qualified as an expert. Tr. 168:23-169:11.

164) When I worked in the NMT-14 Safety Basis Group, I shared an office with Lance Plater. Lance was assigned to prepare Unreviewed Safety Question Determinations (USQDs) for the RLWTF. Like most people who share an office, we talked about our respective work.

I have received training over a period of many years, have prepared USQDs myself, and recognize the importance of the documentation in preserving the safety envelope for a nuclear facility.

I worked with Lance at a time when LANL was tasked with coming up to speed with acceptable Conduct of Operation (for example, proper process valve line-ups, shift change overs, etc.), Conduct of Maintenance, and Conduct of Engineering practices for LANL nuclear facilities. Lance would often come into the office with some RLWTF issue which required an immediate response. One or more times, an "as-found condition" was discovered where equipment not approved for installation by the DOE had already been installed. This is not unusual in any kind of DOE nuclear facility. Sometimes there were procedural compliance issues which required preparation of a USQD.

Over-all I got the impression from that there were many ongoing safety-related issues for the older RLWTF where processes had continually been upgraded since the facility was originally constructed.

Around the same time frame, I can also recall that there were numerous LANL / DOE discussions about seismic-related issues for the facility, the inadequacy of the RLWTF building to meet current seismic requirements, and the need to construct more modern liquid waste treatment facilities which would meet current and more rigorous seismic requirements (that is, more rigorous requirements than the original requirements when the facility was originally constructed), and the availability of funding (or lack of funding) to construct new liquid waste treatment facilities.

In addition, Lance had a flow diagram of the RLWTF hanging on the wall of our office. The information on the diagram coincided with the testimony provided by Ms. Arrens' at the DP-1132 hearing (that is, there are many tanks in the facility). In addition, the diagram showed the shape of tanks. I can recall approximate length to diameter ratios for the tanks. The diagram also showed a complex piping network associated with the tanks. I have also toured portions of the RLWTF and have some rudimentary understanding of the activities performed there.

NMED Response: Comment noted.

165) Waste Minimization: What I would like to see at LANL and the RLWTF is a gradual decrease in the release of chemicals, radionuclides, and particularly water to the environment. Reducing water to the environment would help to reduce the growth of food available for rodents which in turn may help to reduce the rodent population.

The operation and maintenance of upstream facilities of the RLWTF is extremely important to help reduce the introduction of chemicals, radionuclides, and water to the environment as well as reduce the burden of solid wastes sent to WIPP. Minimizing the

potential for fires and preventing water leaks in upstream facilities is extremely important. Reducing the potential for fires in all radiological facilities reduces the potential for generation of contaminated fire protection water which ultimately goes to the RLWTF for treatment.

Historically, LANL has provided training to employees on Waste Minimization and this is a good practice. LANL also provides Pollution Prevention Awards. However, the over-all waste minimization effort is voluntary and implementation is a personal choice. This is where LANL management at all levels needs to step in and strongly advocate for the waste minimization effort and champion this effort tirelessly.

To minimize water going to the environment, some attention should be given to the issue of landscaping (that is, the planting of trees and shrubs) which may be part of the new construction projects. I see no conflict if LANL chooses to move pre-existing landscaping materials elsewhere from the 44 square mile LANL site to other LANL site locations. This should be accomplished with some discretion as rodents tend to thrive better in the Los Alamos ecosystem than in lower elevation ecosystems such as White Rock.

During WWII, the Japanese did a lot with a little. LANL should do the same if possible. This is primarily the result of dedication and hard work. Americans worked pretty hard during WWII also.

During WWII, Manhattan Project personnel would work night and day to solve tough technical problems. This work ethic carried on after WWII. Rick Hemphill, a supervisor at LANL, recently told me that the expectation has always been that LANL employees would work 50 or more hours per week. He indicated that in recent years LANL employees are good at working 40 hours per week. This takes me back to the issue of dedication and hard work, which is the only way to stay on top of the waste minimization effort.

Following LANL procedures, minimizing process upsets, spending funds wisely, and ensuring facility problems are quickly identified / repaired is very important. This takes dedication, thinking outside the box, and avoiding an attitude of "that is not my problem." If a person works for LANL, then it is their problem. It is also their responsibility to themselves, their families, and the Public.

NMED Response: Comment noted. Waste minimization is outside the scope of a groundwater discharge permit, outside the scope of the associated regulations at 20.6.2 NMAC, and outside the scope of an associated permit hearing.

166) The Hudson River in New York was badly polluted. New York State passed laws that led to positive pollution practices (that is, the quality of water returned to the River after industrial use had to be better than the quality of the water extracted from the river initially).

Assurances and hazard analyses are not a guarantee that chemical, radiological, and water releases will not occur to the environment.

It is recognized that there are issues with high-silica content (water hardness) in water supplied to Los Alamos County residences and businesses. If water hardness adversely affects plumbing in Los Alamos residences and businesses, similar issues may affect the RLWTF (for example, adverse effects on instrumentation and the inability to adequately shut-off / seal facility valves).

In 1994, George Werkema (DOE) came to LANL TA-55 to discuss the Authorization [Safety] Basis. He indicated that LANL personnel should look for "weaknesses" in Plant, Paper, and People. I take this to mean Plant [facilities and processes or Structures / Systems / Components], Paper [Procedures], and People [LANL Managers / LANL Employees, Contract Personnel, DOE Personnel, Regulatory Personnel including EPA and NMED, and the Public].

The only way to eliminate contamination is to totally eliminate the discharge to the environment. Given the problem in Los Alamos County with rodents, part of me wants to completely eliminate all discharges including any discharges of any amount of water. However, this could potentially have adverse impacts on LANL, northern New Mexico, and the Country. The only possible path forward is to steadily decrease the discharge to the environment of any and all chemicals, radionuclides, and water itself as much as possible over a reasonable period of years and/or decades. It is hoped that continued research, improved science and engineering technology, improved operation / maintenance practices, worker training, and attention to optimal waste minimization practices will help to achieve complete or near-complete release of all chemical, radionuclide, and water discharge to the environment. It goes without saying that this also applies to some extent to sanitary waste discharges to the environment.

Any improvements in litter control (food wrappers discarded by LANL employees or which blow out of LANL employee-owned vehicles) would be helpful. A reduction in any of the following: creation of food-related trash / garbage, discard of food-related trash / garbage in LANL-provided receptacles, generation of food scraps from food preparation efforts at LANL, creation of items for food events at LANL (for example, potlucks and charity-related events) would help to minimize rodents issues at LANL and in Los Alamos County. Discarded food items and washing of food containers might be better done at home if LANL employees do not reside in Los Alamos County or live in White Rock where there are fewer rodent issues.

Following the guidance in the Book *The Toyota Way* (Reference 2), (that is, error-proofing processes might help to improve the operation and safety of RLWTF facilities and processes.

Perhaps it is too late at this point in time, but the Solar Evaporation Tank (SET) should not have been designed as a single tank. It should have been designed as a waffle tank (perhaps consisting of 6 to 8 sub-tanks). This would eliminate the need to drain the entire tank if there is a leak, would permit inspections, maintenance, and removal / replacement of individual sub-tank liners as needed. This would also allow for continued operation of the majority of sub-tanks comprising the SET.

Sugary solutions and residues contained beverage containers found in recycle bins at LANL are a source of nutrition for rodents.

Landscaping trimmings from LANL which may or may not be routed to the Los Alamos Ecostation are also a source of nutrition for rodents. Within the past two weeks I noticed a deer at the Ecostation munching on greenery in one of the discard piles. Perhaps rodents are performing their eating and food collection rituals at night.

I would appreciate any techniques which help to effectively manage the rodent population in Los Alamos County as long as such techniques are implemented in a manner which preserves the delicate balance of the Los Alamos County ecosystem.

I appreciate the opportunity that the DP-1132 Permit Hearing for the RLWTF afforded to express my concerns and opinions. Hopefully, my input will have a positive impact on managing the rodent population in Los Alamos County.

NMED Response: Comment noted. Condition 17 establishes stringent constituent concentration limits for the waste water discharged to the SET. Condition 29 requires fluids discharged to the SET undergo quarterly characterization for a comprehensive list of constituents. Note that the concrete tank basin is protected by the SET design which includes two synthetic liners and internal and external leak detection systems.

NMED received the following written comments from Deborah Reade and Citizens for Alternatives to Radioactive Dumping (CARD). Many of these comments are similar and are identified below by a double asterisk (**).

167) The Facility and the Discharge Permit: In 1998, LANL said it would transition the RLWTF to a zero-discharge facility and in 2010, all discharges through Outfall 051 ceased. At that time, LANL began to use a Mechanical Evaporator System (MES). Since then, all waste has been treated by evaporating the liquids and shipping any remaining hazardous, radioactive or mixed waste materials off-site for disposal. Despite NMED's recent release of non-contaminated water, true to NMED's statements in 1998 and 2010, no real discharge through Outfall 051 has occurred in almost ten years. Even the current fact sheet describes the new Solar Evaporative Tank (SET) as a zero-liquid-discharge unit, even though it has yet to begin operations. **

Though the Fact Sheet claims the draft permit authorizes the discharge of treated water "via the Mechanical Evaporator System (MES) and the SET," in fact, the permit actually talks of discharges "to" these units instead of "via" them, as liquids are not expected to come out of them. The MES has been used exclusively for nearly ten years and during that time there has been no discharge from that unit. The current "fake discharge" only points out that such a release is not part of any regular process currently being used at the Facility. **

Thus, DP-1132 is also a "fake permit" because there is no discharge, hasn't been one in nearly ten years and there are no plans to discharge ever again as part of any process currently going on at the Facility. The Facility, the so-called discharge, and the permit are

all extremely controversial and have been for over two decades. As time passes, trying to claim that there is a discharge from the RLWTF becomes less and less viable. Releasing water through Outfall 051 before the permit hearing, only shows how desperate the Applicants (Department of Energy and Triad National Security, LLC) and NMED have become in trying to prove this Facility shouldn't be permitted and regulated under the New Mexico Hazardous Waste Act. Yet, that is really the only viable alternative. This Facility must be regulated under the Resource Conservation and Recovery Act (RCRA) and the Hazardous Waste Act as this is, a storage and treatment facility; there is no discharge. The DP-1132 permit application must be denied and the NMED Secretary must require LANL to apply for a Hazardous Waste Act permit for the Facility instead. **

NMED Response: Comment noted and previously addressed.

168) The Public Process for DP-1132: Unfortunately, the public process for DP-1132 has suffered from many of the same ills as have been evident in other recent (and past) discharge permit processes in the Ground Water Quality Bureau (GWQB). The Public Involvement Plan (PIP) for the permit is inadequate, both public notices are defective and the Fact Sheet, though including some additional information, is more a fact sheet about what is required for permits in the regulations than about what important and vital information is actually in this particular permit. **

This public process has not identified all communities potentially affected by the proposed permit, nor has it accommodated the needs of those communities, statements in the PIP and the public notices notwithstanding. **

NMED Response: The Public Involvement Plan is outside the scope of a discharge permit hearing. Information in the fact sheet meets all requirements of 20.6.2.3108.1 NMAC.

169) Defective Public Involvement Plan (PIP): The PIP states on page 1 that it "implements the "elements set for in the [Public Participation] Policy," but the lack of any public involvement in the Public Involvement Plan has resulted in a defective PIP and misunderstandings about where the affected communities are and those communities' needs and concerns. CARD incorporates the January 19, 2017 Resolution Agreement between NMED and the U.S. Environmental Protection Agency and three implementing policies (public participation, limited English proficiency, and non-employee disability) into these comments. (<https://www.env.nm.gov/general/epa-and-nmed-informal-resolution-agreement-no-09r-02-r6-public-participation-limited-english-proficiency-and-non-employee-disability-policies/>) **

There is also no information for the general public on how to appeal or revise the PIP and no clear path to request corrections, make suggestions, or provide community-based, local input. Thus the public continues to be shut out of any meaningful involvement in the Public Involvement Plans, problems continue, and the PIPs, including this one, are of only limited use. **

NMED Response: The Public Involvement Plan is outside the scope of a discharge permit hearing.

170) Improper use of EJSscreen: The GWQB has arbitrarily and capriciously used a 4-mile radius in this PIP as the limits of where they will look to find the affected community. Use of such a radius has allowed the PIP to state that there are virtually only wealthy, highly educated, White people who speak English well in the affected community. Indeed, Los Alamos County is the wealthiest county in the entire country. At 4 miles the demographic percentages are: **

Percentage minority population	27%
Percentage Hispanic population	17%
Percentage of American Indian population	1%
Percentage of persons speaking English "less than very well"	4%
Percentage of linguistically isolated households	3%
Percentage of households with \$75,000+ income	69%
Percentage of households with less than \$15,000 income	7%
Percentage with Bachelor's Degree or more	64%
Per capita income	\$45,945.00

However, going out to a 30-mile radius shows quite different results **

Percentage minority population	64%	237% increase
Percentage Hispanic population	53%	312% increase
Percentage of American Indian population	7%	700% increase
Percentage of persons speaking English "less than very well"	9%	225% increase
Percentage of linguistically isolated households	4%	133% increase
Percentage of households with \$75,000+ income	37%	54% decrease
Percentage of households with less than \$15,000 income	14%	200% increase
Percentage with Bachelor's Degree or more	38%	59% decrease
Per capita income	\$33,408.00	73% decrease

Going out to just 30 miles massively increases both the Hispanic and Native American populations. The number of potentially affected pueblos increases from one (Pueblo de San Ildefonso) to around eleven and Native American percentages go up 700%. The Hispanic population goes up more than 300%; the percentage of persons speaking English less than very well more than doubles, the percentage of households earning less than \$15,000 per year doubles; and the percentage of people with a BA or more decreases by almost half. The actual affected population is heavily minority, speaks English less well, is less educated and most earn far less money than those living within the 4-mile radius. **

The GWQB has given no justification for choosing only a 4-mile radius in their EJSscreen calculations and indeed there is no justification. Did the Bureau even look to see what the situation was beyond 4 miles? The choice of such a limited radius is shocking since there are many people in the Bureau who have lived in the area for years and are completely aware of the demographic makeup of the population beyond the 4-mile radius. **

In addition, the Bureau cannot argue that the discharge (if there were a discharge) from the Facility could only affect people and the environment within the 4-mile radius. Agricultural land in Española worked by one of the Parties, Tewa Women United, and irrigated traditionally using Rio Grande water, has been highly contaminated because of

discharges from LANL in the past. As the attached study, Red Dust, concludes in its 2013 abstract, **

These findings indicate that LANL has polluted the lands inhabited by Indigenous communities. The nature and high levels of contaminants has also created an area in which health disparities are disproportionately high.

There is even a suggestion in the study that dark leafy greens grown on this land with that water would be better used as soil remediation and then discarded in a hazardous waste dump than eaten. Clearly, discharge from the RLWTF could reach far beyond the 4-mile limit. **

One wonders if GWQB personnel have been properly trained in using EJSCREEN. EPA's EJSCREEN Fact Sheet (attached) describes how EJSCREEN can be used "...to identify areas that may have higher environmental burdens and vulnerable populations..." not to limit investigation only to the wealthiest county in the country. The Fact Sheet specifically states that EJSCREEN shouldn't be used "[a]s the sole basis for ... making a determination regarding the existence or absence of EJ concerns..." (emphasis added), and that EJSCREEN outputs should be supplemented "...with additional information and local knowledge..." Yet using it as the sole basis for making their determination is exactly what the GWQB have done. The Fact Sheet also states that there is "...substantial uncertainty in the EJSCREEN demographic and environmental data, particularly when looking at small geographic areas..." Surely, this is perfectly illustrated by the differences in data found at 4 miles and 30 miles. **

By ignoring the large numbers of people of color in the affected communities, NMED and the GWQB can have no understanding of the needs and concerns of these communities nor can they create adequate planning for public outreach to the communities. The only public outreach NMED has done is the minimum required by the regulations—and there is some question if even this minimum outreach has been achieved. **

Community needs and concerns, including health needs, have not been incorporated into the draft permit nor into the public participation process—indeed they have not been investigated at all even though NMED pledged that they would review community history, demographics, needs and concerns when they signed the Resolution Agreement. And though the PIP states it will include "a description of community/stakeholder groups..." again, the GWQB base this totally on the EJSCREEN preliminary results – preliminary results that have now become final results. There are no community stakeholder groups described in the PIP other than various government entities. The GWQB have made no effort to identify stakeholders in the affected communities nor any effort to create partnerships with private and public entities or to share information with affected communities, with environmental and environmental justice organizations, religious institutions, ditch associations, environmental, law and health departments at colleges and universities, and relevant community service organizations as federal guidance describes and the Resolution Agreement requires. **

NMED Response: *Comments are outside the scope of this discharge permit hearing. However, in the interest of responding to these comments, NMED Policy 07-13 (Public*

Participation) specifies a four mile radius for preliminary screening in EJScreen. Furthermore, the GWQB evaluated the population within a 50-mile radius of the facility and ascertained that the agency's associated public involvement is sufficient.

171) Limitations on LEP and the Disabled: Neither the Public Participation Policy nor the Disability Policy put financial or time limits on what NMED is required to do to make it possible for people with disabilities to have "...the opportunity for full participation in its ... actions," Indeed, the Disability Policy states that "NMED will provide, at no cost to the individual appropriate auxiliary aids and services including, for example, qualified interpreters to individuals who are deaf or hard of hearing..." (emphasis added). Yet the PIP states on page 2 that "accommodations or services for persons with disabilities will be arranged to the extent possible." **

Limitations are also put on language assistance for Low English Proficiency (LEP) speakers as the PIP allows language assistance only "...as resources allow." LEP hearing-impaired callers are not even told that they can use a Spanish version of TDD or TTY systems. Only public comment notices and hearing notices are planned to be translated into Spanish and then only because of LANL's statewide significance. Fortunately, NMED also translated the Fact Sheet into Spanish, but this wasn't planned for in the PIP. **

NMED Response: Comment is outside the scope of a groundwater discharge permit hearing. That said, there were no requests for accommodations related to this hearing.

172) Notification: It is unclear if the notification process described on page 6 of the PIP was carried out adequately for public comment as the description of who will be noticed and how is vague and incomplete. Were Tribes, Pueblos and Sovereign Nations actually mailed notices? What about other government entities? Acequia and ditch associations are not even mentioned in the PIP though they are listed for notification in the regulations. This missed requirement is especially significant as one of the parties is an acequia association, the New Mexico Acequia Association. **

NMED Response: Comment is outside the scope of a discharge permit hearing. However, entities notified in accordance with the PIP are identified in the Permit Administrative Record.

173) Defective and Misleading Public Notices: Unfortunately, both public notices are also defective since information required by either the PIP or the regulations themselves is missing and the public notice continues to make incorrect claims that all communities potentially affected by the permit have been identified and that public participation has been expanded to accommodate community needs. **

NMED Response: Comment is outside the scope of a discharge permit hearing and insufficiently identifies deficiencies.

174) Defective PN-2 - missing & incomplete information: The PIP says there will be a statement on every public notice about the availability of language assistance, however, nothing at all about it has been incorporated into this public notice. And at 20.6.2.3108 (I) NMAC, the regulations require that a description of the procedures to be followed by

the Secretary in making a final determination be included in every PN-2, but that is completely missing also. **

The description of the activities leading to the discharge, contact information, location of the discharge, depth to affected groundwater and TDS are all nicely included in this public notice. However, the description of the quality of the discharge is lacking. Though we are told that the discharge could contain "...contaminants with concentrations above the standards of the regulations and that it may contain toxic pollutants," the public is not given any list of the contaminants or even of the types of contaminants. That is necessary if the public is to understand fully what is involved in this discharge so they can evaluate if the permit will be able to protect our groundwater adequately. **

NMED Response: These comments appear to be based upon the July PN-2, rather than the more recent August PN-2. [AR 14711-14762]. PN-2 is not required to list the contaminants potentially contained in the discharge, PN-2 met all requirements of the Water Quality Act and associated WQCC regulations (i.e. 20.6.2 NMAC).

175) Defective Hearing Notice - missing, incorrect & incomplete information: Despite regulatory requirements to explain hearing procedures (20.6.2.3108 (L) NMAC), and further requirements to let the public know how to submit comments (20.6.2.3108 (F) NMAC), the public is only told they can submit oral or written statements at the permit hearing itself. In fact, written statements or statements of interest are accepted during the 30-day pre-hearing period and until the hearing is closed. However, the public is not told how or to whom we can submit these statements. We are referred to the hearing procedure regulations at least twice in the hearing notice, but this is insufficient as LEP persons can't access them at all and even the general public must have excellent English, good computer skills and excellent online search skills to find this one small statement in the regulations. This is not okay, especially since the Bureau has been told, at length, about this problem during the controversial Waste Control Specialists (WCS) ground water discharge permit (DP- 1817) process. **

In addition, the hearing notice contradicts the PN-2 when it states on page 2 that the discharge "...will meet all numerical groundwater standards identified in 20.6.2. NMAC." In contrast, the PN-2 states "the discharge may contain water contaminants with concentrations above the standards ... and may contain toxic pollutants ..." Which is correct? **

The hearing notice includes good information on the location of the discharge and the activities that contribute to the discharge as well as good information on the volume, depth to groundwater, and TDS concentrations. **

And finally, a partial list of contaminants is provided. However, again the GWQB have left off mentioning all the radionuclides that could be in the discharge. Though NMED claims they don't need to describe anything they don't regulate (like transuranic (TRU) radionuclides, such as plutonium, americium, etc.), there is no such prohibition anywhere in the regulations. Since TRU waste is a primary component of the waste treated at the Facility, it is inappropriate for NMED to eliminate this information from public notices.

Without complete information on everything that could or will be in the waste, the public cannot properly evaluate whether or not the permit is adequately protective. **

NMED Response: The Hearing Notice met all requirements of the Water Quality Act and associated WQCC regulations (i.e. 20.6.2 NMAC). Reference in the Permit to a discharge "may" containing water contaminants with concentrations above the standards ... and "may" containing toxic pollutants is included in the Authorization section of all groundwater discharge permits because it is only these categories of waters that require a permit to protect groundwater.

176) Defective Hearing Notice - inadequate assistance notification: The public notice only makes the barest mention that people can request language assistance. It doesn't copy the language of the PIP that describes the possibility of document translation, so people don't even know that is a possibility. People requesting assistance are told to contact the permit contact. However, all phone voice mail at NMED is English-only. And though information is given about requesting disability assistance, TTY information is also English-only, as once again the notice follows the PIP and leaves out any mention of the TTY Spanish option mentioned in the PN-2. **

NMED Response: The Hearing Notice met all requirements of the Water Quality Act and associated WQCC regulations (i.e. – 20.6.2 NMAC).

177) Defective Fact Sheet: Like many of NMED's permit fact sheets, this one is greatly flawed. Most of the public who participate in the permitting process never read the permit or other documents beyond public notices and, if provided, a fact sheet. The Fact Sheet should summarize and supplement the permit and should contain all vital information in the permit. The permit is far too long to be translated in its entirety, even if NMED were willing to do so. A good fact sheet is one of the best ways to involve the public whether it is the general public, the Minority public, or those needing disability or language assistance. A translated fact sheet is, in fact, the only way to provide enough vital information to the LEP public for them to be able to participate fully and equally in the permitting process, as the minimal information in even expanded public notices is inadequate for this. The English-speaking public can always read the permit itself or the regulations. The LEP public cannot. **

Unfortunately, this Fact Sheet's main problem is the lack of information provided. It was created to provide information about a permit that is over 100 pages long and yet it is only 7 pages long itself – quite a bit shorter than fact sheets meant to summarize permits only one fifth that size. Chunks of information on many conditions – many that are important – are just gone – omitted. The unusual practice of not numbering the permit conditions also makes the information in the Fact Sheet appear vague and confusing. This allows many conditions to be completely ignored without the public knowing they are missing. **

Equally troubling is the habit of stating that "requirements" or "limitations" or "proscribed measures" in a section "meet" or "conform to" the regulations, without telling exactly how the conditions of this permit do that. This is more a fact sheet about the regulations and what's required in any permit than a fact sheet about this particular permit.

Paragraph after paragraph state that the permit conditions conform to the regulations and seem to expect the public to agree without any supporting information from the actual permit. **

NMED Response: The purpose of the fact sheet is to provide a brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record, as provided in 20.6.2.3108.1 NMAC. The fact sheet provided for DP-1132 meets all regulatory requirements.

178) Defective Description of the Proposed Discharge, Facility, and Permit: Information on the discharge and the facility in this section is good, but again, this section needs to be fleshed out as there is only a little more information than would appear in a public notice. A more complete description of the MES and the SET and of the discharge piping, pathways and systems should have been included so the public could understand the influx and outflow and what's going where. Maps would have been helpful here as well. **

And a more complete description of the quality of the discharge should have been included without NMED censoring information about the discharge and deciding what's appropriate and not appropriate for the public to understand. There is no list of contaminants in the Fact Sheet, though one was provided in the hearing notice. Such a list should be included here, as well. **

Though corrective action plans are described in some detail in five or more places in the permit, none of these is described at all in the Fact Sheet. Because of problems experienced by the public with such a "contingency plan" in the WCS permit, the public needs to have more detailed and accurate information on each of these plans so the public can evaluate if they are adequately protective or not. **

Finally, there is no hydrological and geological information about the affected area in the Fact Sheet. In this, it mirrors the permit, but for the public to understand whether this permit is protective of ground and surface water, the public must be able to have at least a basic understanding of the affected geology and hydrology of the area, including seismic issues. These latter are many and serious and are not addressed at all in this permit. **

The Regulatory Framework section is good and is one of the most complete sections in the Fact Sheet. **

NMED Response: It is unclear what the comment is referring to as being defective. It appears that the comment has previously been addressed.

179) Defective Fact Sheet - Operational Plan – Conditions: Conditions are the heart of any discharge permit but the Fact Sheet starts describing them in only sketchily, and continues to do so throughout. And the Fact Sheet does not always copy the language or intent of the permit. Right away in the first paragraph, the permittees are "... required to post appropriate advisory signs at the Facility or at the discharge location." This does not conform to the language of the permit which only describes signs around the Facility –

not around Outfall 051. Expanding where the signs can be posted in the Fact Sheet makes it seem that the discharge location will be more protected than it actually will. **

The second paragraph states what the section requires and says those requirements conform to the regulations without describing how they conform. **

The third paragraph describes other requirements and says they conform to the regulations without describing how they conform. **

The fourth paragraph describes effluent quality limits and limits for toxic pollutants and exemptions for contaminants. Tables and lists are mentioned but not included; they should be. The Corrective Action Plan for effluent exceedances is not even mentioned and, as described above, should be not only mentioned, but detailed. **

The first paragraph on page 5 again states that there are effluent quality limits and says they conform to the regulations without describing how they conform. One must ask: What are the limits? What's in the mentioned table of chemical constituent limits? **

The second paragraph on page 5 refers to requirements in the installation and calibration of flow meters and says those requirements conform to the regulations without describing how they conform. No information is given on the location or number of flow meters. (There are four.) **

NMED Response: The purpose of the fact sheet is to provide a brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record, as provided in 20.6.2.3108.1 NMAC. The fact sheet provided for DP-1132 meets all regulatory requirements.

180) Defective Monitoring and Reporting Conditions: The second paragraph under Monitoring and Reporting describes what is required in the quarterly monitoring reports. However, this section is very sketchy indeed beyond the simple list. Number and locations of monitoring wells are missing (there are seven wells), along with frequency of sampling and analysis of wells, effluent/influent waste streams and a list of analytes. All of this is just minimal information that should have been included. How can the public tell if the monitoring plan is sufficient without even knowing what is going to be monitored, where the monitoring points are and what the analytes are? **

The next paragraph describes a moisture monitoring system to detect unauthorized releases from the SET and to establish baseline conditions. But there is no description of what this system is (neutron moisture probes), how many there are, or where they are located exactly. Again, information on corrective action plans if there are exceedances are completely left out. **

All information on waste stream tracking, personnel and emergency response is also completely missing. **

NMED Response: The comment has previously been addressed.

181) Defective Description of Contingency Plan Conditions: This paragraph addresses spills and states "... standard contingency conditions address the exceedance of groundwater standards, contaminant discharge limits," etc. However, once again, the public is told that the conditions conform to the regulations without describing how they conform. NMED may understand what "standard contingency conditions" are, but the public does not. No details at all about the corrective action plans are given. **

NMED Response: The comment has previously been addressed.

182) Defective Description of Closure Conditions: Again, the first paragraph states that measures and timeframes for closure are described in the permit and that if there is contamination, remediation will be required. But none of this is described in the Fact Sheet. No information from the permit is included on closure requirements or corrective action plans for remediation. **

The following paragraph mentions 6 specific "units" that will be shut down but doesn't say what they are (storage tanks). We're told that "upon cessation of operation of a unit" a stabilization work plan will be submitted when actually, the time frame is 4 months for the plan. **

The third paragraph mentions that there is an overall closure plan for the facility which is attached to the Permit. However, though two years of groundwater monitoring is mentioned, no complete summary of this closure plan is included and no link is given in the Fact Sheet to the closure plan online. However, even such a link wouldn't help LEP persons, since the closure plan, like the permit itself, is English-only, but if the Fact Sheet included a comprehensive and accurate summary of the vital information in the closure plan, that would have solved the information problem for everyone. **

NMED Response: The comment has previously been addressed

183) Incomplete information about the relationship of the 2016 Consent Order and the proposed Discharge Permit. The last paragraph under this section states that certain corrective action must be performed under the 2016 Consent Order between NMED and the Department of Energy, and not under this discharge permit. Again, there is no summary of the Consent Order and no links to it. There is no description of what Solid Waste Management Units (SWMUs) and Areas of Concern (AOCs) are. In fact, this is the first time the Consent Order is mentioned in the Fact Sheet even though many aspects of this discharge permit must relate to it. There is no description of the criteria to determine what corrective action will fall under the discharge permit and what will fall under the Consent Order. The lack of information about the Consent Order and the relationship between it and the discharge permit is a major failure to include important information. *

NMED Response: The comment has previously been addressed.

184) General Terms and Conditions: It is stated in this section that "... these terms and conditions are standard in all discharge permits." Still, that is not an excuse simply to list them with no other information. The condition about complying with all other applicable laws, at least, is an important condition and should have been described in its entirety. **

NMED Response: The comment has previously been addressed.

185) Summary: This is a very controversial discharge permit that shouldn't even exist. It hardly does exist as there is no real discharge to be regulated. The limited information available to the public in the defective public notices and especially in the defective Fact Sheet that is almost completely empty of actual information about the permit, obstructs public participation possibilities and especially so for the LEP public. **

The lack of care to make sure the Public Involvement Plan actually captures the affected communities and the lack of investigation of any of the communities' concerns, needs and history, including health concerns, shows an amazing lack of interest in protecting human health and the environment and an especial lack of interest in involving and protecting the People of Color who surround this DOE site in one of, if not the, highest concentrations of People of Color around any DOE site in the country. In a completely arbitrary way NMED has been able to eliminate any attention to these people by eliminating them from attention even though at least some, if not many of them are already suffering from having been contaminated by past discharges from LANL. Since 2013, the public has asked that NMED require the Applicants to submit a federal RCRA/NM Hazardous Waste permit application for this facility to ensure protection of human health and the environment. **

In the alternative, if real discharges are going to resume after nearly ten years, NMED needs to look at what the effect will be on these Minority residents, make sure that effect is dealt with and incorporated into the permitting analysis, and make sure that a regulatory compliant public process to review and correct the public notices, PIPs, fact sheets, and other documents released to the public, are incorporated into every permitting process in the future. **

Please include these comments, along with the three attachments, in the Administrative Record for DP-1132. **

NMED Response: The comment has previously been addressed.

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO

No. GWB 19-24 (P)

HEARING OFFICER'S REPORT AND PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

The United States Department of Energy ("DOE") and Triad National Security, LLC., ("Triad), as successor to Los Alamos National Security, LLC ("LANS"), ("DOE/Triad" or "Applicants") have applied for a groundwater discharge permit entitled Discharge Permit No. 1132 ("DP-1132") for a radioactive liquid waste treatment facility ("RLWTF") located within the boundaries of Los Alamos National Laboratory ("LANL").

Notices of the public hearing on remand of the Application by the New Mexico Water Quality Control Commission ("WQCC") to the New Mexico Environment Department ("NMED or Department") were published on July 19th, August 23rd and October 9th in the *Los Alamos Monitor*, the *Santa Fe New Mexican* and the *Albuquerque Journal*. In addition, notice was given as provided in the applicable procedural rules of the Department.

A public hearing was conducted on November 14, 2019 as provided in NMED's Permit Procedures regulations found at 20.1.4 New Mexico Administrative Code and NMED's Ground and Surface Water Protection regulations found at 20.6.2, Section 3110 of the New Mexico Administrative Code ("Procedural Rules").

The Procedural Rules as well as the public notices require that any person proposing to submit technical testimony at the public hearing was required to have filed a statement of intent to

do so, together with all exhibits, by November 4, 2019. Three statements of intent were filed: one by the Applicants, one by NMED and one by four citizens groups, including Concerned Citizens for Nuclear Safety, Tewa Women United, Honor Our Pueblo Existence and New Mexico Acequia Association. Tewa Women United have withdrawn from this proceeding. The three remaining citizen groups are collectively referred to herein as “Citizens”. In addition to the technical testimony, public testimony, both orally and in writing was submitted for the record.

In accordance with the Procedural Rules, and the Hearing Officer’s Order Establishing Post-Hearing Schedule dated December 10, 2019, the Applicants, NMED and Citizens submitted on January 10, 2020, Closing Arguments and Proposed Findings of Fact and Conclusions of Law, concerning the issuance of DP-1132.

At the public hearing the Applicants were represented by attorneys Stuart R. Butzier, Christina C. Sheehan, Susan McMichael (Triad) and Silas de Roma (DOE). Robert Beers, Danny Katzman and Karen Armijo presented technical testimony on behalf of the Applicants in support of DP-1132. John Verheul represented the Department, and Mr. Steve Pullen presented technical testimony on behalf of the Ground Water Bureau (“Bureau” of GWB”) of the Department in support of approval of DP-1132. Lindsay Lovejoy, Jr., and Jonathon Block represented Citizens. Joni Arends submitted technical testimony on behalf of Citizens in opposition to issuance of DP-1132.

Emily Arasim, Mark De Volder, Alexa Jaramillo, Kathy Wan Povi Sanchez and Terre Hite submitted public comments at the public hearing. The record was left open until November 18, 2019 to allow for written public comments. Forty-seven (47) persons submitted written post-hearing comments. Some of the written public comments were submitted after the November 18,

2019 deadline established at the public hearing, but have nonetheless been included in the record. Sign in sheets were kept at the public hearing.

The Administrative Record is voluminous and includes over 17,000 pages. The Hearing Record also includes notices of the hearing in English and in Spanish; the notices of intent to present technical testimony from the Applicants, the Bureau, and the Citizens, with exhibits; the sign-in sheets; hearing audiotapes; a two hundred thirty-five page (235) transcript of the hearing; post-hearing submittals from the Applicants, the Bureau, and Citizens; various motions and responses; an updated Index to the Administrative Record and this Hearing Officer's Report ("Report").

The public hearing lasted one full day from approximately 9:00 a.m. to 5:00 p.m., with the customary breaks. The participants in the public hearing were allowed opportunity to call witnesses, present testimony and other evidence and cross-examine witnesses. The public hearing was both audio-recorded by the Hearing Clerk and transcribed by a Court Reporter at the public hearing, Cheryl Arreguin of Kathy Townsend Court Reporting. The Hearing Clerk, Mr. Cody Barnes was present for the entirety of the public hearing to provide interpretation between English and Spanish.

Based on the record, the Hearing Officer's recommendation to the Secretary of the Department ("Secretary") is that the final draft of DP-1132 as presented by the Bureau complies with the applicable law and regulations and should be granted, and that consideration of whether the RLWTF is required to be regulated under the State Hazardous Waste Act, NMSA 1978, §§ 74-4-1 through 74-4-14 ("HWA") is not within the scope of this proceeding, nor is such consideration foreclosed by issuance of DP-1132.

Proposed findings of fact and conclusions of law attached to this Report, are based upon the parties' post-hearing submittals and the transcript of the November 14, 2019 public hearing. All references to the transcript are abbreviated as "Tr." and refer to the November 14, 2019 public hearing, unless otherwise stated.

The following is a discussion of the background of this proceeding and of the issues regarding applicability of the HWA raised by Citizens in a Motion to Dismiss, during the public hearing and in the closing arguments.

BACKGROUND

The following is a brief summary of the history and status of this matter as reflected in the Administrative Record.

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 Applicants that a groundwater discharge permit was required under the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 through 74-6-17 ("WQA"). The Application 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 that were prepared prior to issuance of this DP-1132. On November 1, 2007, the Applicants submitted a Notice of Intent ("NOI") for the discharge of treated effluent water to a facility designated as the Solar Evaporation Tank ("SET"). NMED responded to the NOI requiring a new, and comprehensive application. In December 2015, the Applicants submitted a draft Closure Plan for inclusion in DP-1132.

Public notice associated with draft DP-1132 occurred at three stages of the permitting process: the notification of the Department's receipt of the Application ("Public Notice 1" or "PN1"), the notification of the availability of a draft discharge permit for public comment and for request for 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 occurred multiple times due to changing circumstances.

The notification of the Department's receipt of the Application (PN1) occurred in accordance with 20.6.2.3108(3) 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 the information required of such notices by 20.6.2.3108(F) NMAC. DP-1132 PN1 occurred two times, first in November of 1996 and then in March of 2012.

A public hearing was held on the issuance of DP-1132 on April 19, 2018. Based on that hearing a final DP-1132, dated August 29, 2018, was issued to the original Applicants. In January, 2019, Citizens filed a petition with the WQCC to set aside the Final Order of the Secretary on the grounds of appearance of impropriety of the hearing officer. The WQCC denied the petition, and Citizens filed a writ of mandamus with the New Mexico Supreme Court requesting the court to reverse the decision of the WQCC. On June 18, 2019 the WQCC ruled that the hearing officer's job application and subsequent hiring by one of the parties in that proceeding created an improper appearance of bias potentially affecting the Secretary's deliberation and issuance of DP-1132. The WQCC then ordered that, pursuant to NMSA 1978, NMSA 1978, § 4-6-5(Q), 20.1.3.16(A)(3) NMAC, and 20.1.3.16(F)(3) NMAC, the Secretary's Order from the April 2018 hearing be

vacated, and the matter was remanded to the Department for a new hearing. On July 17, 2019 the Secretary designated the current hearing officer to conduct a new hearing. That hearing was held on November 14, 2019 as previously described in this Report.

On remand, the Department issued a notification of the availability of the draft permit for public comment and for request for a public hearing (PN2) occurred in accordance with 20.6.2.3108(H) NMAC. The Department posted draft DP-1132 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 the information required of such notices in 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 several times and provided the public with the opportunity to review a revised DP-1132, in consideration of comments received during the previous public comment period and to address the remanded draft DP-1132. Initial DP-1132 PN2s occurred in August 2003, April 2005, August 2013, November 2013, May 2017, March 9, 2018, and July 19, 2019.

On August 23, 2019, the Department issued the final PN2 public notice offering the draft DP-1132 that is the subject of this Report.

Upon the Department's determination that a public 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. That hearing notice included information required of such notices in 20.6.2.3108(N) NMAC and described the time and place of the hearing and a brief description of the hearing process. Because of changes in the hearing date and location,

and due to the remand of DP-1132, the final notice of hearing was given on October 11, 2019. The Department provided both English and Spanish versions of the hearing notice.

The final version of DP-1132 proposed by the Department was admitted as NMED Exhibit 1 at the public hearing, as modified pursuant to the changes proposed in NMED Exhibit 3; DOE/Triad Exhibits 7 and 9 3. DOE/Triad Exhibit 7 represents a clean version of draft DP-1132, and DOE/Triad Exhibit 7 represents the changes from the previously issued permit in “track changes” format.

**CITIZENS’ MOTION TO DISMISS AND
APPLICABILITY OF THE HWA**

Citizens filed a Motion to Dismiss this proceeding on October 8, 2019 (“Motion” or “Motion to Dismiss”). NMED and the Applicants filed separate Responses to the Motion on October 23, 2019. Citizens filed a Reply Brief on October 30, 2019.

On November 7, 2019, the Hearing Officer entered an Order Denying the Motion to Dismiss. The Hearing Officer determined that material portions of the Motion cite to and rely on the transcript of the 2018 hearing, which is a significant part of the record on which the vacated 2018 Final Order of the Secretary was based. The Hearing Officer further determined that the purpose of the remand of this proceeding was to conduct a new hearing with a new hearing officer. The Order Denying the Motion to Dismiss concludes that this proceeding will be decided on the Hearing Record [as defined in 2.0.1.4.7A(19) NMAC] of this remand proceeding.

The Order further concludes that Citizens will not be prejudiced by denial of the Motion because Citizens will have an opportunity in the remanded proceeding to assert their position regarding matters addressed in the Motion. Citizens have fully participated in this remand proceeding, submitting evidence and legal argument on the matters that are the subject of the Motion.

The central argument made in the Motion is that the RLWTF treats and stores hazardous waste and does not “discharge” within the meaning of the WQA. Citizens’ argument runs headlong into a decision of the United States Environmental Protection Agency’s Environmental Appeals Board (“EAB”), involving an appeal by Citizens to the EAB of a decision of the Region 6 EPA Administrator on issues involving essentially the same regulatory framework applicable to this proceeding. *See In re Los Alamos National Security, LLC, and the US. Department of Energy*, NPDES Appeal No. 17-05 (EAB Mar. 14, 2018) (attached as Exhibit 1 to NMED’s Response in Opposition to Citizen’s Motion to Dismiss and Exhibit 4 to the Applicants Response to Citizen’s Motion to Dismiss). In that case, the EAB considered whether discharges to Outfall 051 pursuant to the Applicants’ NPDES permit would be necessary in the event that the Mechanical Evaporator and/or Zero Liquid Discharge tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory’s] scope/mission. The EAB held that discharges to Outfall 051 would be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage, and were therefore indeed a possibility. *Id* at 1. Citizens made in that proceeding similar arguments to the arguments it makes in this proceeding - namely that a discharge permit should not be issued when there has not been a discharge since 2010 and no future discharges are planned. *Id* at 6. The EAB found that the EPA’s Region 6 Administrator’s denial of Citizens’ request to terminate the NPDES permit in this context did not constitute error or abuse of discretion. *Id* at 19.

In upholding the issuance of Applicants’ NPDES Permit, the Regional Administrator stated:

In their application for permit coverage, LANS and DOE describe the “no discharge” nature of the RLWTF and specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. The permittees indicated that under certain circumstances, e.g. if one or both

evaporative systems have to be taken off-line, a discharge could occur. Without permit authorization, such discharge could subject the permittees to liability under the CWA for discharging without a permit.

Exhibit 4 to Applicants' Response to Motion to Dismiss, p. 2.

Similarly, discharges to the SET and MET have the potential for failure, a resulting in further discharges. NMED previously made that determination in the "Authorization to Discharge" section of draft DP-1132. AR 13690.

The NMED GWB has long-standing policy that is consistent with the decision of the EAB in Appeal No. 17-08. The Hearing Record establishes NMED has issued more than twenty five (25) permits that limit discharges to lined evaporative impoundments systems, and therefore are designed as "zero discharge" (to surface or groundwater), as a mechanism in which to avoid the impact of the discharge on groundwater. Examples of such permits were provided by NMED witness Pullen in his direct testimony. See NMED Exhibit 3, pp. 50-51. Other examples of discharge permits issued to facilities which only discharge to lined, engineered impoundments similar to the Mechanical Evaporator System ("MES") and SET are part of the Administrative Record in responses to public comments made in 2017 AR 13815-13824. Mr. Pullen explained NMED's authority to regulate such systems for purposes similar to those present in this proceeding. NMED Exhibit 3, pp. 50-51.

NMED has authority under the WQA to issue, or propose to issue, groundwater discharge permits separate from the obligation NMED has under the HWA. Citizens argue that this proceeding should be dismissed because NMED does not have authority to regulate such activities that would fall under the HWA, based on the statutory provisions found in NMSA 1978, § 74-6-12(B). Specifically, NMSA 1978, § 74-6-12(B) states:

"[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste

Act except to abate water pollution or to control the disposal or use of septage and sludge. (emphasis added)”

Citizens misconstrue NMSA 1978, § 74-6-12(B); draft DP-1132 does not propose to regulate an “. . . activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act.” Rather, DP-1132 is proposed to abate water pollution, as DP-1132 regulates actions subject to the WQA and the regulations adopted pursuant to the WQA. WQCC Regulations provide for the regulation of discharges of “effluent or leachate” which “may move directly or indirectly into groundwater”. 20.6.2.3104 NMAC. NMED’s authority to prevent and abate water pollution under the WQA and WQCC implementing regulations requiring a permit for discharges that “may move directly or indirectly into groundwater” provide legal authority to require DP-1132, and the HWA expressly recognizes NMED’s authority to “abate water pollution.”

The Motion and Citizens’ technical testimony are centrally based upon the more stringent regulation of the RLWTF under the HWA. The applicability of the HWA to the RLWTF are not controlling as to the issuance of DP-1132. DP-1132 is proposed to be issued under the WQA. The Motion raises issues concerning the regulation of the RLWTF under the HWA. Those issues are significant issues and are properly addressed through the pending proceedings referred to in the post-hearing submittals. The applicability of the HWA is currently under review by the U.S. Tenth Circuit Court of Appeals in *CCNS v. EPA*, No. 18-95-42. See Citizens Reply Brief, p. 16. Applicants’ current NPDES permit is undergoing a five-year review, and Citizens anticipate raising issues related to the HWA in connection with that review. See Citizens Proposed Findings of Fact, Conclusions of Law and Final Argument, p. 34 fn 13. In addition, Applicants’ reference in their Response to the Motion to Dismiss a pending major modification to LANL’s existing HWA permit. See Applicants Response to Motion to Dismiss, p. 2 and Exhibit 2 to the Response

to Motion to Dismiss. Exhibit 2 to the Response to the Motion to Dismiss is a letter dated September 22, 2017 from one of the members of Citizens. In that letter, the member argues to the Hazardous Waste Bureau of the Department that the HWA applies to the RLWTF and that the permit should be revised accordingly. The record reflects that three different forums are considering the issues raised in this proceeding by Citizens. Thus, the issuance of DP-1132 does not preclude consideration by the appropriate forums of the issues raised by Citizens. The issue in this proceeding is whether a groundwater discharge permit should be issued to the Applicants under the WQA and the regulations issued under that act for the purpose of “preventing or abating pollution of groundwater in the state.” The decision in this case is not intended and does not preclude Citizens from pursuing their legal arguments in the other forums.

PROPOSED FINDINGS OF FACT

A. The RLWTF

1. The RLWTF is a wastewater treatment facility treats radioactive liquid waste wastewaters received from technical areas throughout LANL. NMED Exhibit 3, p. 4; DOE/Triad Exhibit 1, p. 4.

2. The RLWTF includes 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. NMED Exhibit 3, p. 6; DOE/Triad Exhibit 1, p. 4.

3. The RLWTF is situated within the interior of the LANL boundary and is located within the LANL security perimeter, which limits LANL access. Tr. 150:18- 151:1; DOE/Triad Exhibit 14, 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) the SET at TA-52. The primary RLWTF structure at the TA-50 is Building 50-01; the RLWTF 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 3, p. 4.

B. DP-1132

5. Draft DP-1132 addresses potential new releases from the RLWTF. NMED Exhibit 1, pp. 37-38; NMED Exhibit 3, pp. 44-46; DOE/Triad Exhibit 9, pp. 38-39; DOE/Triad Exhibit 11, pp. 12-13.

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 MES, (2) to the synthetically lined SET, (3) and through Outfall 051 that is also the subject of a NPDES Permit issued by Region 6 of the United States Environmental Protection Agency (Permit #NM0028355). Tr. 28:10-16; NMED Exhibit 1, p. 8-9; NMED Exhibit 5, p. 5; DOE/Triad Exhibit 1, p. 5; DOE/Triad Exhibit 9, p. 8-9.

7. On June 18, 2019, following a period of doing water tightness testing on the line that went to Outfall 051, Applicants discharged 80,798 liters of treated effluent through Outfall 051. Tr. 43:17-44:15. LANL has both near-term and long-term plans to conduct routine discharges from Outfall 051. Tr. 43:19-22.

8. The MES was installed and became operational in 2010, and LANL intends to continue discharging to the MES. Tr. 30:5-8, 43:1-11.

9. The SET has been constructed, but has not been placed into service, and LANL intends to discharge to the SET. Tr. 29:5-7, 43:12-16.

10. DP-1132 would authorize DOE/Triad 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; NMED Exhibit 3, p. 5; DOE/Triad Exhibit 9, pp. 9-10.

11. 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 WQA and the regulations adopted under the WQA. NMED Exhibit 1, p. 21-24; NMED Exhibit 3, p. 2-3; DOE/Triad Exhibit 1, p. 5-7; DOE/Triad Exhibit 9, p. 21-23.

12. Draft DP-1132 requires that discharges 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. 35:7-10; NMED Exhibit 1, pp. 21-24; NMED Exhibit 3, pp. 2-3; DOE/Triad Exhibit 1, pp. 5-7; DOE/Triad Exhibit 9, pp. 21-23.

13. Draft DP-1132 includes 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, pp. 11-44; DOE/Triad Exhibit 1, pp. 7-12; DOE/Triad Exhibit 9, pp. 11-44.

14. The Operational Plan set forth in Section VI.A of draft DP-1132 contains 22 conditions with specific requirements for the operation and maintenance of the units identified in DP-1132. 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; requirements for notifying and obtaining NMED approval for proposed changes to the RLWTF; 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, pp. 11-28; DOE/Triad Exhibit 1, pp. 7-8; DOE/Triad Exhibit 9, pp.11-28.

15. The Operational Plan includes a requirement that signage be posted in English and Spanish. NMED Exhibit 1, p. 15; DOE/Triad Exhibit 9, p. 15; DOE/Triad Exhibit 14, p. 3.

16. The Operational Plan includes standards for emergency response procedures, including a written summary of the emergency response procedures that are to be submitted to NMED within one hundred and twenty (120) days of the effective date of DP-1132, but does not specify emergency response procedures or designate requirements related to the Emergency Operations Center (“EOC”). NMED Exhibit 1, pp. 26-27; DOE/Triad Exhibit 9, pp. 26-27; DOE/Triad Exhibit 14, p. 4.

17. Draft DP-1132 contains monitoring and reporting requirements that prescribe how data on both water quality and quantity are reported to NMED. 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, pp. 28-38; DOE/Triad Exhibit 1, pp. 8-9; DOE/Triad Exhibit 9, pp. 28-39.

18. Draft DP-1132 includes contingency plans to mitigate damages, provide

notifications and take corrective actions in the event of spill or unauthorized release. The contingency plans include a requirement for DOE/Triad to notify NMED within 24-hours of a spill or unauthorized release, sets forth requirements for DOE/Triad to submit corrective action plans to address any failure and sets forth conditions for implementing such plans. NMED Exhibit 1, pp. 38-39; DOE/Triad Exhibit 1, p. 9; DOE/Triad Exhibit 9, pp. 39-40.

19. Draft DP-1132 includes 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, pp. 39-43; DOE/Triad Exhibit 1, pp. 9-11; DOE/Triad Exhibit 9, pp. 40-44.

20. 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; DOE/Triad Exhibit 5, p. 5; DOE/Triad Exhibit 9, p. 28.

21. During the previously effective period of DP-1132 (August 28, 2018- June 18, 2019), Triad completed 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. Tr. 126:1-21; NMED Exhibit 1, p. 34; DOE/Triad Exhibit 9, p. 34; DOE/Triad Exhibit 11, p. 7.

22. The two new alluvial groundwater monitoring wells were approved by NMED, and were constructed in accordance with NMED's guidelines. NMED Exhibit 1, p. 34; DOE/Triad Exhibit 11, p. 11.

23. Draft DP-1132 requires that the two 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 list of constituents that includes organic compounds, metals, radioactivity and general inorganic compounds. Tr. 128:4-14; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 9, pp. 36-37; DOE/Triad Exhibit 11, p. 7, 11.

24. 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. Tr. 126:22-127:14; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 11, p. 8, 11; DOE/Triad Exhibit 9, pp. 36-37.

25. Draft DP-1132 requires groundwater monitoring of potential discharges from the MES through four regional groundwater monitoring wells, R-1, R-14, R-46 and R-60, located downgradient of the RLWTF. Tr. 127:15-25; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 11, p. 7,11; DOE/Triad Exhibit 9, pp. 36-37.

26. Existing monitoring wells were 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. 128:16-17; DOE/Triad Exhibit 11, p. 11.

27. Draft DP-1132 requires the installation of two new alluvial groundwater monitoring wells downgradient of Outfall 051, will allow LANL to detect any unpermitted releases from Outfall 051. Tr. 126:5-21; NMED Exhibit 1, p. 34; DOE/Triad Exhibit 11, p. 7; DOE/Triad Exhibit 9, p. 34.

28. The additional groundwater monitoring wells required by draft DP-1132 will be sampled annually for constituents that include organic compounds, metals, radioactivity and general inorganic compounds, including perchlorate. Tr. 128:4-14; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 11, p. 11; DOE/Triad Exhibit 9, pp. 35-37.

29. Triad submitted to NMED and completed a work plan that proposed a moisture monitoring approach for monitoring potential leaks beneath the SET. Tr. 29:16-30:4, 49:25-50:3; NMED Exhibit 1, pp. 31-32; NMED Exhibit 3, p. 10; DOE/Triad Exhibit 1, p. 14; DOE/Triad Exhibit 7 p. 4; DOE/Triad Exhibit 9, p. 32.

30. Draft DP-1132 sets forth requirements and conditions for any future exceedance from non-compliant releases in Condition 37. NMED Exhibit 1, p. 37-38; DOE/Triad Exhibit 9, p. 38; DOE/Triad Exhibit 11, p. 12-13.

31. DOE/LANS submitted supplemental information 2012 permit application submitted in 2012 (“2012 Permit Application”) on June 3, 2016. AR 13272-13355; NMED Exhibit 3, p. 6; DOE/Triad 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. The 2012 Permit Application is the application that led to the issuance of draft DP-1132. NMED Exhibit 3, pp. 6-7.

34. NMED's public notices associated with draft DP-1132 occurred at three stages of the permitting process: the notification of NMED's receipt of the 2012 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. 199:22-200:15; NMED Exhibit 3, p. 7.

35. As a result of public participation in the permitting process, a number of changes were made to DP-1132. Tr. 31:18-33:17.

36. NMED issued the first public notice in association with the 2012 Permit Application in March of 2012. AR 08108-08113; Tr. 28:3-6, 199:25.

37. A public hearing was held on the issuance of DP-1132 on April 19, 2018. Based on that hearing, the Secretary approved a final DP-1132, which was dated August 29, 2018. Tr. 28:1-2; NMED Exhibit 3, p. 7; AR 15900-16168.

38. On June 18, 2019, the WQCC vacated the Secretary's Order approving DP-1132 and remanded the matter to NMED for a new hearing with a newly appointed hearing officer. NMED Exhibit 3, pp. 7-8.

39. NMED issued a second public notice in association with the 2012 Permit Application in August 2013, November 2013, May 2017, March 2018, July 19, 2019, and August 23, 2019. AR 09449-09450; 13481-13494; 14045; 14611-14615; 14717-14746; NMED Exhibit 3, p. 8.

40. NMED issued the hearing notice on October 3, 2019, and the final notice occurred on October 11, 2019. NMED Exhibit 3, pp. 8-9; NMED Exhibit 4.

41. NMED's public notice was given 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; 14611-14615; 14717-14746; 17174-17175; Tr. 200:16-25.

42. Following the August 29, 2018, Order of the Secretary approving issuance of DP-1132 and prior to the June 18, 2019 WQCC Order remanding the proceeding, NMED edited DP-1132 to correct a difference between the discharge permit presented at the April 19, 2018 hearing and the permit issued on August 29, 2018. The edit corrected an error in the August 29, 2018 permit, changing the period of time the Permittee has to post documents voluntarily submitted to NMED on the LANL Electronic Public Reading Room from seven to thirty days. NMED Exhibit 1, p. 46; NMED Exhibit 3, p. 9; DOE/Triad Exhibit 7, p. 2.

43. Following the August 29, 2018, Order of the Secretary approving issuance of DP-1132 ("Prior DP-1132") and prior to the June 18, 2019 WQCC Order remanding the proceeding to NMED, numerous activities took place during the time DP-1132 was in effect, which necessitate changes to draft DP-1132 presented as NMED Exhibit 1. These changes are identified in NMED Exhibit 3. DOE/Triad Exhibit 7; DOE/Triad Exhibit 9, and are described in Finding Nos. 44-55 below. Tr. 33:18-35:10; 194:6-196:17; NMED Exhibit 3, p. 9; DOE/Triad Exhibit 1, p. 12-17; DOE/Triad Exhibit 7; DOE/Triad Exhibit 9.

44. On September 12, 2018, the Applicants submitted a transfer notice for DP-1132 notifying the Department that effective November 1, 2018, Triad replaced LANS as the co-permittee under DP-1132. draft DP-1132 should be altered to replace all references to LANS with

Triad. NMED Exhibit 3, p. 9; DOE/Triad Exhibit 7, p. 1; DOE/Triad Exhibit 9.

45. On October 31, 2018, the Applicants submitted a request for extension of time to complete SET pipeline water tightness testing. The request addresses the requirements in Condition 8 of Prior DP-1132 to perform the testing within 180 days of the effective date of the Prior DP-1132. For good cause shown, NMED approved the request in correspondence dated November 13, 2018. Condition 8 requires changed language to reflect the Applicants' proposed schedule change. NMED Exhibit 3, pp. 9-10; DOE/Triad Exhibit 7, p. 1; DOE/Triad Exhibit 9.

46. On October 31, 2018, the Applicants submitted a workplan for the design of a soil moisture monitoring system for the SET in accordance with Condition 30 in Prior DP-1132. In a letter dated January 30, 2019, the Department approved the Soil Moisture Monitoring System Workplan. Condition 30 requires changed language in draft DP-1132 to reflect the Applicants' submittal of the workplan. NMED Exhibit 3, p. 10; DOE/Triad Exhibit 7, p. 4; DOE/Triad Exhibit 9.

47. On November 19, 2018, the Applicants submitted a workplan for the installation of two alluvial groundwater monitoring wells in accordance with Condition 33 of Prior DP-1132. In a letter dated January 30, 2019, the Department approved the Alluvial Monitoring Wells Workplan. On September 3, 2019 the Applicants submitted the associated construction and lithologic logs for the alluvial monitoring wells. On September 19, 2019 the Applicants submitted the associated well completion report for the alluvial monitoring wells. Condition 33 has been fulfilled and may be removed from the DP-1132. NMED Exhibit 3, p. 10; DOE/Triad Exhibit 7, p. 4; DOE/Triad Exhibit 9.

48. On December 4, 2018, the Applicants submitted workplans in accordance with Condition 41 of Prior DP-1132 for the stabilization of one 100,000-gallon steel influent tank and

Clarifier #1, i.e., units that have ceased operation. In a letter dated December 27, 2018 the Department approved the workplans. Condition 41 may be removed from DP-1132. NMED Exhibit 3, p. 10; DOE/Triad Exhibit 9.

49. On December 18, 2018, the Applicants submitted a summary of emergency response procedures applicable to the RLWTF in accordance with Condition 20 of Prior DP-1132. Condition 20 requires changed language to reflect the Applicants submittal of the procedures. NMED Exhibit 3, p. 10; DOE/Triad Exhibit 7, p. 3; DOE/Triad Exhibit 9.

50. On December 21, 2018, amendments to the WQCC Ground and Surface Water Regulations (20.6.2 NMAC) became effective. The amendments include changes to the groundwater numerical standards at 20.6.2.3103 NMAC and the addition of several regulated contaminants. Thirteen (13) additional contaminants were added to the list of “toxic pollutants” at 20.6.2.7.T NMAC. Conditions 16 and 17 of draft DP-1132 require numerous changes to reflect the amended regulations. NMED Exhibit 3, p. 11; DOE/Triad Exhibit 7, pp. 1-3; DOE/Triad Exhibit 8; DOE/Triad Exhibit 9.

51. On January 25, 2019, the Applicants submitted workplans in accordance with Condition 41 of Prior DP-1132 for the stabilization of four units; Clarifier #2, Gravity Filter, WM2-North/South Tank, and a 75,000-gallon tank. In a letter dated April 25, 2019, the Department approved the workplans. Condition 41 may be removed from draft DP-1132. NMED Exhibit 3, p. 11; DOE/Triad Exhibit 9.

52. On February 4, 2019, NMED performed an inspection of the RLWTF. The inspection consisted of a visual evaluation of the major structures of the RLWTF and verification that the SET was not being utilized. NMED Exhibit 3, p. 11.

53. On April 9, 2019, the Applicants submitted written confirmation that flow meters were installed at four locations in accordance with Condition 21 of Prior DP-1132. The Applicants confirmed that the four associated flow meters were calibrated in accordance with Condition 22. Condition 21 must be revised to reflect the Applicants' installation of the meters. Condition 22 must be revised to reflect the Applicants' initial calibration of the meters. NMED Exhibit 3, p. 11, DOE/Triad Exhibit 7, p. 3, 4; DOE/Triad Exhibit 9.

54. On June 3, 2019, the Applicants submitted documentation verifying that all units intended to convey, store, treat, or dispose of untreated liquid or semi-liquid waste streams meet the requirements of secondary containment in accordance with Condition 7 of Prior DP-1132. Condition 7 has been fulfilled and should be removed from DP-1132. NMED Exhibit 3, p. 11; DOE/Triad Exhibit 7, p. 2; DOE/Triad Exhibit 9.

55. A complete list of all edits and revisions to draft DP-1132 that are warranted as a result of actions DOE/Triad took following the August 29, 2018 Order of the Secretary and issuance of Prior DP-1132 and prior to the June 18, 2019 WQCC Order remanding this proceeding to NMED are described in NMED Exhibit 3 and included in DOE/Triad Exhibit 7. Corresponding revisions to DP-1132 should be made. Tr. 38:14-23.

C. Public Comments Received

56. NMED received public comments from a number of commenters. Those specific comments are addressed in NMED's Proposed Response to Comments, NMED Exhibit 5. Because NMED has received roughly 200 comments at or after the public hearing, NMED did not complete the Proposed Response to Comments at the time proposed Findings of Fact and Conclusions of Law and Closing Argument were due. NMED filed a revised NMED Exhibit 5 on January 21, 2020.

57. NMED received a Request for Hearing on the draft permit from a group representing Concerned Citizens for Nuclear Safety, Amigos Bravos, Tewa Women United, Honor our Pueblo Existence, and Partnership for Earth Spirituality. AR Nos. 13495-13761.

D. Public Hearing

58. The Secretary granted the request for a public hearing on September 18, 2017. Each party was notified of this determination on March 18, 2018. AR Nos. 13811-13814.

59. Following the Order of the WQCC, remanding the proceeding to the Department, the hearing process was re-initiated by the publication of PN2 and subsequent public notices were published. AR 14609-14762.

60. The Department provided the public, including the Applicants, with notice of the proposed DP-1132 in accordance with the WQA and the Procedural Rules. AR 14609-14762.

61. The Department provided the public with notice of the public hearing in accordance with the WQA and the Procedural Rules. AR 17173-17177.

62. On November 4, 2019, the Department, the Applicants, and the Citizens each submitted Statements of Intent to present Technical Testimony (“SOI(s)”). The Department’s SOI included the direct testimony and the resume of Stephen Pullen. The Applicants’ SOI included the direct testimony and the resumes of Robert Beers, Danny Katzman, and Karen Armijo. The Citizens’ SOI included the direct testimony and the resume of Joni Arends. NMED Exhibits 2, 3; DOE/Triad Exhibits 1, 2, 11, 12, 14 and 15; Citizens’ Exhibits 1, 4.

63. A public hearing on DP-1132 was held on November 14, 2019, beginning at 8:58 AM at the Fuller Lodge, Pajarito Room, 2132 Central Avenue, Los Alamos, New Mexico. Tr. 1:17-21.

64. At the public hearing, appearances of counsel named in the Introduction to this Report were entered on behalf of the Applicants, the Department, and Citizens. Tr. 2:8-3:17.

65. At the public hearing, public comment was heard from five persons: Emily Arasim, Mark DeVolder, Alexa Jaramillo, Kathy Wan Povi Sanchez, and Terra Rite. Tr. 92:6- 94:3, 94:9-101:21, 103:1-105:3, 105:11-112:24, 227:9-228:9.

66. At the public hearing, technical testimony was provided by witnesses for the Applicants, Citizens, and the Department. Tr. 21:5-51:3, 114:1-129:12, 136:3-146:18, 158:6-182:17, 190:4-204:7.

67. 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. Mr. Pullen's resume was submitted as NMED Exhibit 2 and sets out his qualifications to submit technical testimony in this proceeding. NMED Exhibit 3, p. 1, lines 2-4; Tr. 190:4-204:7.

68. 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 provided public notice of the hearing and the draft permit, and expressed his opinion that the issuance of the proposed DP-1132 meets the requirements of the applicable law and regulations. NMED Exhibit 3; Tr. 190:4-204:7.

69. Mr. Pullen testified as to certain changes appropriate for the draft permit prior to issuance, and the reasons for those changes. He testified that numerous activities took place during the time DP-1132 was in effect, many of which necessitate changes to draft DP-1132. The activities necessitating a change to the DP-1132 are those principally constituting the Applicants' accomplishment of Permit requirements. NMED Exhibit 3, p. 9, lines 15-11, line 23; Tr. 194:6-196:17.

70. At the public hearing, Mr. Pullen was cross examined by counsel for Citizens as to the likelihood of a discharge from the RLWTF reaching groundwater, the June 2019 discharge through Outfall 051, and Mr. Pullen's understanding of the regulatory basis for issuance of a discharge permit under the WQA. Tr. 204:15-223:19.

71. Witnesses for the Applicants at the hearing included Robert S. Beers, Danny Katzman, and Karen E. Armijo. Tr. 4:3-5:8; DOE/Triad Exhibits 1, 2, 11, 12, 14 and 15.

72. Mr. Beers provided an introduction to the RLWTF and discussed the relevant operations at that facility, including the three discharge pathways identified in draft DP-1132. Mr. Beers discussed the Application and the regulatory background for issuance of DP-1132. 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 certain public comments. Mr. Beers further testified as to changes proposed to draft DP-1132 based on new information and actions taken since issuance of DP-1132 in August 2012. DOE/Triad Exhibits 1, 4, 7, 8, 9; Tr. 21:5-51:3.

73. Mr. Beers was cross examined by counsel for Citizens, and counsel for NMED. Tr. 52:1-80:2; 80:6-81:20.

74. Mr. Katzman provided an introduction to the hydrogeologic setting at LANL and discussed why the hydrogeologic 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, the 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. Katzrnan also testified regarding the requirements of draft DP-1132 and procedures for detecting and addressing noncompliant discharges. He offered testimony about pre-existing conditions at LANL that are relevant to certain conditions in draft DP-1132. DOE/Triad Exhibits 11, 13; Tr. 114:4-129:13.

75. Ms. Armijo addressed certain comments received on draft DP-1132 regarding signage in the vicinity of the RLWTF and the staffing of LANL's EOC. Her testimony explained why the proposed signage requirements of draft DP-1132 are adequate, and why the suggestions regarding signage have been opposed by the 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 off-site response interfaces present an opportunity to have tribal involvement in the delivery of emergency services that is the subject of some comments regarding EOC staffing. Tr. 136:3-146:18.

76. Ms. Arends opposed the issuance of the draft permit on behalf of Citizens. Her testimony addressed the intent of the Applicants to discharge water contaminants from the RLWTF such that they may move into groundwater, seismic issues around the facility, and her opinion that the RLWTF should be regulated under the HWA, pursuant to the Federal Resource Conservation and Recovery Act ("RCRA"). Citizens Pre-filed Testimony of Joni Arends, Attachment 4 to Citizens Statement of Intent to Present Technical Testimony; Tr. 158:6-182:17.

77. Citizens and members of the public cross-examined the Applicants' and NMED's witnesses. Tr. 51:25-81:20, 89:3-90:11, 129:20-135:23, 147:3-157:24, 204:17-226:5.

78. Citizens' cross-examination and re-cross examination of Mr. Beers and Mr. Pullen

was primarily directed to the potential for future discharges at the RLWTF and to attempting to establish the applicability of the HWA, pursuant to RCRA, to the RLWTF. Tr. 57:22-80:2, 89:3-90:12.

79. On cross-examination and redirect 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. 57:22-80:2; 82:3-88:19.

80. 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. 204:17-222:1.

81. The Hearing Officer kept the hearing record open for written comment until Monday, November 18, 2019. Tr. 229:5-8. Forty-seven (47) individuals submitted post-hearing written comments. AR 14897-15188.

E. Motion to Dismiss

82. On October 8, 2019, Citizens filed a Motion to Dismiss DP-1132 Proceeding. In the Motion, Citizens moved for dismissal of the proceeding on the grounds that regulation under the WQA is precluded by the terms of that Act, because the RLWTF is subject to regulation under the HWA, and because the Applicants do not intend to discharge from the RLWTF any water contaminants within the meaning of NMSA 1978, § 74-6-5(A). Motion, pp. 2-3.

83. On October 23, 2019, NMED and the Applicants filed Response Briefs to the Motion, arguing that the discharges to the SET, MES, and through Outfall 051 are discharges under the meaning of the WQA, and therefore the Secretary has authority to issue a discharge permit.

84. On October 30, 2019, Citizens filed its Reply Brief.

85. On November 7, 2019, the Hearing Officer issued an Order denying the Motion to

Dismiss on the grounds that “[t]he transcript of the June 18, 2019 meeting of the WQCC evidences the intent of the WQCC that the transcript of the 2018 Hearing not be considered on remand. Material portions of the Motion cite to and rely on the transcript of the 2018 Hearing. The 2018 Hearing is a significant part of the record on which the now vacated 2018 NMED Decision was based.” Order at ¶¶ 3, 4.

86. Citizens’ witness Joni Arends’ SOI and direct testimony at the public hearing describes the history of regulation of the RLWTF and the regulatory process under the HWA and RCRA and asserts that regulation of the RLWTF under the HWA and RCRA is “more protective” than regulation under the WQA. Citizens SOI, p. 3.

87. Citizens’ witness Joni Arends did not submit additional material evidence at the hearing on remand as to the issues raised in the Motion to Dismiss regarding the nature of the discharges that are regulated by DP-1132. Tr. 158-187.

PROPOSED CONCLUSIONS OF LAW

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

1. The WQCC is required by the WQA to adopt regulations to “prevent and abate water pollution”. NMSA 1978, § 74-6-4(E).

2. Pursuant to the WQA, the WQCC “may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant.” NMSA 1978, § 4-6-5(A).

3. The implementing regulations of the WQA, the New Mexico Ground and Surface Water Protection Regulations (“Regulations”), 20.6.2 NMAC, state that “no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into groundwater

unless he is discharging pursuant to a discharge permit issued by the secretary.” 20.6.2.3 104 NMAC.

4. Applicant DOE is a department of the United States. Applicant Triad is a limited liability company (LLC). The Applicants are both “persons” within the meaning of the Regulations. 20.6.2.7(P)(2) NMAC.

5. 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.

6. The activities described by the Applicants in the Application require a discharge permit under the WQA. 20.6.2.3 104 and 20.6.2.3018 NMAC.

7. The Application complied with the requirements of NMSA 1978, § 4-6-5 and 20.6.2.3.106 NMAC.

8. The WQA provides that the Department shall “either grant the permit, grant the permit subject to conditions, or deny the permit.” NMSA 1978, § 4-6-5(D).

9. The Applicants had the burden of proving that DP-1132 should be approved . 20.1.1.100.A(1) NMAC. The Applicants met their burden of proof.

10. The Department had the burden of proving that the permit conditions it proposed should be adopted. 20.1.4.400.A.(1) NMAC. The Department met its burden of proof.

11. Citizens had the burden of proving that the conditions contained in draft DP-1132 are inadequate, improper or invalid. 20.1.4.400.A.(1) NMAC. Citizens failed to meet their burden of proof.

12. The Department provided the public, including the Applicants, with notice of DP-1132 in accordance with the Procedural Rules at 20.6.2.3 108(H) NMAC.

13. The Department provided the public, including the Applicants, an opportunity to comment on the proposed discharge permit in accordance with the Procedural Rules at 20.6.2.3108(M) NMAC.

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

15. A public hearing was held on proposed DP-1132 in accordance with the WQA and the Procedural Rules.

16. The conditions proposed in draft DP-1132 “are reasonable and necessary to ensure compliance with the [Water Quality Act] and applicable regulations, including site specific conditions.” NMSA 1978, § 4-6-5(D).

17. The discharges described as occurring or planned by DOE/Triad require a groundwater discharge permit. 20.6.2.3104 and 20.6.2.3108 NMAC.

18. Draft DP-1132 for DOE/Triad’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 discharges that are occurring or planned by DOE/Triad. 20.6.2.3109.A NMAC.

19. Ground water with TDS of 10,000 mg/l or less will not be adversely affected by the issuance of DP-1132. 20.6.2.3 109.B NMAC.

20. Approval and issuance of DP-1132 will not result in either concentrations that are in excess of applicable water quality 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.

21. No effluent or nitrogen in effluent will enter the subsurface from any surface impoundment as a result of issuance of DP-1132. 20.6.2.3109.C NMAC.

22. 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.

23. The signage requirements in draft DP-1132 are in compliance with the Regulations. 20.6.2 NMAC.

24. The Regulations do not establish requirements for who should be a part of the LANL EOC that are different from what DOE itself provides for. 20.6.2 NMAC.

25. All other requirements of Part 2 of the WQCC's regulations have been met, all requirements of NMED under Section 3107, and the public notice and participation requirements in Section 3108. 20.6.2.3109.E NMAC.

26. The Application complied with the requirements of NMSA 1978, §74-6-5 and 20.6.2.3100-3109 NMAC.

27. The Motion was fully briefed and decided pursuant 20.1.4.200(D) NMAC, and the discussion of the Motion in the Introduction to this Report is adopted by reference and incorporated into these Conclusions of Law.

28. The applicability of the HWA, pursuant to RCRA to the RLWTF is beyond the scope of this proceeding.

29. The decision in this proceeding is based upon and limited to the WQA and is not intended to address the application of the HWA to other activities at the RLWTF.

CONCLUSION

The Secretary should grant to the Applicants DP-1132 modified as described in NMED Exhibit 3 and as contained in DOE/Triad Exhibits 7 and 9.

A Proposed Final Order is attached to this Report.

DATED: February 10, 2020.

Respectfully Submitted,



Richard L. C. Virtue, Hearing Officer

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

**IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO**

No. GWB 19-24 (P)

PROPOSED FINAL ORDER

This matter comes before the Secretary of the Environment following a hearing before a Hearing Officer on November 14, 2019 in Los Alamos, New Mexico. The United States Department of Energy and Triad National Security, LLC., as successor to Los Alamos National Security, LLC (“DOE/LANL”) have applied for a groundwater discharge permit for the Radioactive Liquid Waste Facility located within the boundaries of LANL. The Radioactive Liquid Waste Facility is more specifically described in DP-1132.

The New Mexico Environment Department Ground Water Bureau supports the issuance of the permit with conditions necessary to protect public health and welfare and the environment.

Having considered the Administrative Record in its entirety, including the hearing transcript, all post-hearing submittals and the Hearing Officer’s Report; and being otherwise fully advised regarding this matter.

THE SECRETARY HEREBY ADOPTS THE HEARING OFFICER’S REPORT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IT IS THEREFORE ORDERED:

The Application for the discharge permit is granted, and DP-1132 shall be issued by the Ground Water Bureau in the form set forth in the final revised Draft Permit as described in NMED Exhibit 3 to the hearing transcript.

JAMES KENNEY, Secretary of Environment

NOTICE OF RIGHT TO REVIEW

Pursuant to NMSA 1978, Section 74-6-5.0, any person who participated in this permitting action and who is adversely affected by the action may file a petition for review by the Water Quality Control Commission, c/o Code Barnes, 1190 St. Francis Drive, Suite 2100 S, Santa Fe, New Mexico 87502. The petition shall be made in writing to the Commission within thirty days from the date notice is given of this action; shall include a statement of the issues to be raised and the relief sought; and shall be provided to all other persons submitting evidence, data, views or arguments in the proceeding.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Hearing Officer's Report** was emailed to all parties on February 10, 2020. The above-mentioned document can be served via first class mail upon request.

Lindsay A. Lovejoy, Jr.
Attorney at Law
3600 Cerrillos Road, Unit 1001A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

Jonathan M. Block, Eric D. Jantz,
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Ste.5
Santa Fe, New Mexico 87507
jblock@nmelc.org
*Counsel for Concerned Citizens for Nuclear Safety,
Tewa Women Untied of Santa Cruz,
Honor Our Pueblo Existence of Espanola, and
New Mexico Acequia Association*

Mr. Stuart R. Butzier and Ms. Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, PA
123 E. Marcy Street, Ste. 201
Santa Fe, New Mexico 87501
sbutzier@modrall.com
ccs@modrall.com

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Ms. Susan L. McMichael
Office of Laboratory Counsel/MS A187
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov
*Counsel for Triad National Security, LLC, and
U.S. Department of Energy/NNSA*

Mr. John Verheul, Assistant General Counsel,
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Harold Runnels Building, Suite N-4050
Albuquerque, New Mexico 87102
john.verheul@state.nm.us
Counsel for the New Mexico Environment Department



Cody Barnes
Hearing Clerk
(505) 827-2428
cody.barnes@state.nm.us

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO

No. GWB 19-24 (P)

**ERRATA NOTICE TO THE HEARING OFFICER'S REPORT
AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Hearing Officer hereby files this Errata Notice to the Hearing Officer's Report filed February 10, 2020 in this matter, with corrected pages in "track changes" format. Clean versions can be provided upon request.

The corrections are to pages 7, 8, 9, 11, 19 and 22 and include references to Exhibits and minor edits.

DATED: February 18, 2020.

Respectfully Submitted,

Richard L. C. Virtue, Hearing Officer

and due to the remand of DP-1132, the final notice of hearing was given on October 11, 2019. The Department provided both English and Spanish versions of the hearing notice.

The final version of DP-1132 proposed by the Department was admitted as NMED Exhibit 1 at the public hearing, as modified pursuant to the changes proposed in NMED Exhibit 3~~7~~ and DOE/Triad Exhibits 7 and 9~~3~~. DOE/Triad Exhibit 7 represents a clean version of proposed edits to draft DP-1132, and DOE/Triad Exhibit ~~97~~ represents the changes from the previously issued permit in “track changes” format.

**CITIZENS’ MOTION TO DISMISS AND
APPLICABILITY OF THE HWA**

Citizens filed a Motion to Dismiss this proceeding on October 8, 2019 (“Motion” or “Motion to Dismiss”). NMED and the Applicants filed separate Responses to the Motion on October 23, 2019. Citizens filed a Reply Brief on October 30, 2019.

On November 7, 2019, the Hearing Officer entered an Order Denying the Motion to Dismiss. The Hearing Officer determined that material portions of the Motion cite to and rely on the transcript of the 2018 hearing, which is a significant part of the record on which the vacated 2018 Final Order of the Secretary was based. The Hearing Officer further determined that the purpose of the remand of this proceeding was to conduct a new hearing with a new hearing officer. The Order Denying the Motion to Dismiss concludes that this proceeding will be decided on the Hearing Record [as defined in 2.0.1.4.7A(19) NMAC] of this remand proceeding.

The Order further concludes that Citizens will not be prejudiced by denial of the Motion because Citizens will have an opportunity in the remanded proceeding to assert their position regarding matters addressed in the Motion. Citizens have fully participated in this remand proceeding, submitting evidence and legal argument on the matters that are the subject of the Motion.

The central argument made in the Motion is that the RLWTF treats and stores hazardous waste and does not “discharge” within the meaning of the WQA. Citizens’ argument runs headlong into a decision of the United States Environmental Protection Agency’s Environmental Appeals Board (“EAB”), involving an appeal by Citizens to the EAB of a decision of the Region 6 EPA Administrator on issues involving essentially the same regulatory framework applicable to this proceeding. *See In re Los Alamos National Security, LLC, and the US. Department of Energy*, NPDES Appeal No. 17-05 (EAB Mar. 14, 2018) (attached as Exhibit 1 to NMED’s Response in Opposition to Citizen’s Motion to Dismiss and Exhibit 4 to the Applicants Response to Citizen’s Motion to Dismiss). In that case, the EAB considered whether discharges to Outfall 051 pursuant to the Applicants’ NPDES permit would be necessary in the event that the Mechanical Evaporator and/or Zero Liquid Discharge tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in {the Laboratory’s} scope/mission. The EAB held that discharges to Outfall 051 would be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage, and were therefore indeed a possibility. *Id* at 1. Citizens made in that proceeding similar arguments to the arguments it makes in this proceeding - namely that a discharge permit should not be issued when there has not been a discharge since 2010 and no future discharges are planned. *Id* at 6. The EAB found that the EPA’s Region 6 Administrator’s denial of Citizens’ request to terminate the NPDES permit in this context did not constitute error or abuse of discretion. *Id* at 19.

In upholding the issuance of Applicants’ NPDES Permit, the Regional Administrator stated:

In their application for permit coverage, LANS and DOE describe the “no discharge” nature of the RLWTF and specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. The permittees indicated that under certain circumstances, e.g. if one or both

evaporative systems have to be taken off-line, a discharge could occur. Without permit authorization, such discharge could subject the permittees to liability under the CWA for discharging without a permit.

Exhibit 4 to Applicants' Response to Motion to Dismiss, p. 2.

Similarly, discharges to the SET and MET have the potential for failure, a resulting in further discharges. NMED previously made that determination in the "Authorization to Discharge" section of draft DP-1132. AR 13690.

The NMED GWB has a long-standing policy that is consistent with the decision of the EAB in Appeal No. 17-08. The Hearing Record establishes NMED has issued more than twenty five (25) permits that limit discharges to lined evaporative impoundments systems, and therefore are designed as "zero discharge" (to surface or groundwater), as a mechanism in which to avoid the impact of the discharge on groundwater. Examples of such permits were provided by NMED witness Pullen in his direct testimony. See NMED Exhibit 3, pp. 50-51. Other examples of discharge permits issued to facilities which only discharge to lined, engineered impoundments similar to the Mechanical Evaporator System ("MES") and SET are part of the Administrative Record in responses to public comments made in 2017 AR 13815-13824. Mr. Pullen explained NMED's authority to regulate such systems for purposes similar to those present in this proceeding. NMED Exhibit 3, pp. 50-51.

NMED has authority under the WQA to issue, or propose to issue, groundwater discharge permits separate from the obligation NMED has under the HWA. Citizens argue that this proceeding should be dismissed because NMED does not have authority to regulate such activities that would fall under the HWA, based on the statutory provisions found in NMSA 1978, § 74-6-12(B). Specifically, NMSA 1978, § 74-6-12(B) states:

"[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste

to Motion to Dismiss. Exhibit 2 to the Response to the Motion to Dismiss is a letter dated September 22, 2017 from one of the members of Citizens. In that letter, the member argues to the Hazardous Waste Bureau of the Department that the HWA applies to the RLWTF and that the permit should be revised accordingly. The record reflects that three different forums are considering the issues raised in this proceeding by Citizens. Thus, the issuance of DP-1132 does not preclude consideration by the appropriate forums of the issues raised by Citizens. The issue in this proceeding is whether a groundwater discharge permit should be issued to the Applicants under the WQA and the regulations issued under that act for the purpose of “preventing or abating pollution of groundwater in the state.” The decision in this case is not intended to and does not preclude Citizens from pursuing their legal arguments in the other forums.

PROPOSED FINDINGS OF FACT

A. The RLWTF

1. The RLWTF is a wastewater treatment facility treats radioactive liquid waste wastewaters received from technical areas throughout LANL. NMED Exhibit 3, p. 4; DOE/Triad Exhibit 1, p. 4.

2. The RLWTF includes 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. NMED Exhibit 3, p. 6; DOE/Triad Exhibit 1, p. 4.

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 the RLWTF. Tr. 150:18- 151:1; DOE/Triad Exhibit 14, p. 3.

40. NMED issued the hearing notice on October 3, 2019, and the final notice occurred on October 11, 2019. NMED Exhibit 3, pp. 8-9; NMED Exhibit 4.

41. NMED's public notice was given 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; 14611-14615; 14717-14746; 17174-17175; Tr. 200:16-25.

42. Following the August 29, 2018, Order of the Secretary approving issuance of DP-1132 and prior to the June 18, 2019 WQCC Order remanding the proceeding, NMED edited DP-1132 to correct a difference between the discharge permit presented at the April 19, 2018 hearing and the permit issued on August 29, 2018. The edit corrected an error in the August 29, 2018 permit, changing the period of time the Permittee has to post documents voluntarily submitted to NMED on the LANL Electronic Public Reading Room from seven to thirty days. NMED Exhibit 1, p. 46; NMED Exhibit 3, p. 9; DOE/Triad Exhibit 7, p. 2.

43. Following the August 29, 2018, Order of the Secretary approving issuance of DP-1132 ("Prior DP-1132") and prior to the June 18, 2019 WQCC Order remanding the proceeding to NMED, numerous activities took place during the time DP-1132 was in effect, which necessitate changes to draft DP-1132 presented as NMED Exhibit 1. These changes are identified in NMED Exhibit 3; and DOE/Triad Exhibits 7 and 9; ~~DOE/Triad Exhibit 9,~~ and are described in Finding Nos. 44-55 below. Tr. 33:18-35:10; 194:6-196:17; NMED Exhibit 3, p. 9; DOE/Triad Exhibit 1, p. 12-17; DOE/Triad Exhibit 7; DOE/Triad Exhibit 9.

44. On September 12, 2018, the Applicants submitted a transfer notice for DP-1132 notifying the Department that effective November 1, 2018, Triad replaced LANS as the co-permittee under DP-1132. draft DP-1132 should be altered to replace all references to LANS with

53. On April 9, 2019, the Applicants submitted written confirmation that flow meters were installed at four locations in accordance with Condition 21 of Prior DP-1132. The Applicants confirmed that the four associated flow meters were calibrated in accordance with Condition 22. Condition 21 must be revised to reflect the Applicants' installation of the meters. Condition 22 must be revised to reflect the Applicants' initial calibration of the meters. NMED Exhibit 3, p. 11, DOE/Triad Exhibit 7, p. 3, 4; DOE/Triad Exhibit 9.

54. On June 3, 2019, the Applicants submitted documentation verifying that all units intended to convey, store, treat, or dispose of untreated liquid or semi-liquid waste streams meet the requirements of secondary containment in accordance with Condition 7 of Prior DP-1132. Condition 7 has been fulfilled and should be removed from DP-1132. NMED Exhibit 3, p. 11; DOE/Triad Exhibit 7, p. 2; DOE/Triad Exhibit 9.

55. A complete list of all edits and revisions to draft DP-1132 that are warranted as a result of actions DOE/Triad took following the August 29, 2018 Order of the Secretary and issuance of Prior DP-1132 and prior to the June 18, 2019 WQCC Order remanding this proceeding to NMED are described in NMED Exhibit 3 and ~~included in~~ DOE/Triad Exhibit 7. The revisions and edits are set out in track changes format in the version of draft DP-1132 which is DOE/Triad Exhibit 9. Corresponding revisions to DP-1132 should be made. Tr. 38:14-23.

C. Public Comments Received

56. NMED received public comments from a number of commenters. Those specific comments are addressed in NMED's Proposed Response to Comments, NMED Exhibit 5. Because NMED has received roughly 200 comments at or after the public hearing, NMED did not complete the Proposed Response to Comments at the time proposed Findings of Fact and Conclusions of Law and Closing Argument were due. NMED filed a revised NMED Exhibit 5 on January 21, 2020.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Errata Notice to Hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law** was emailed to all parties on February 18, 2020. The above-mentioned document can be served via first class mail upon request.

Lindsay A. Lovejoy, Jr.
Attorney at Law
3600 Cerrillos Road, Unit 1001A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

Jonathan M. Block, Eric D. Jantz,
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Ste.5
Santa Fe, New Mexico 87507
jblock@nmelc.org
*Counsel for Concerned Citizens for Nuclear Safety,
Tewa Women Untied of Santa Cruz,
Honor Our Pueblo Existence of Espanola, and
New Mexico Acequia Association*

Mr. Stuart R. Butzier and Ms. Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, PA
123 E. Marcy Street, Ste. 201
Santa Fe, New Mexico 87501
sbutzier@modrall.com
ccs@modrall.com

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Ms. Susan L. McMichael
Office of Laboratory Counsel/MS A187
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov
*Counsel for Triad National Security, LLC, and
U.S. Department of Energy/NNSA*

Mr. John Verheul, Assistant General Counsel,
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Harold Runnels Building, Suite N-4050
Albuquerque, New Mexico 87102
john.verheul@state.nm.us
Counsel for the New Mexico Environment Department



Cody Barnes
Hearing Clerk
(505) 827-2428
cody.barnes@state.nm.us

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

COPY



IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO

No. GWB 19-24 (P)

NEW MEXICO ENVIRONMENT DEPARTMENT'S COMMENTS
ON THE HEARING OFFICER'S REPORT AND PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

In accordance with 20.1.4.500(C)(2) NMAC and the Order Establishing Post Hearing Schedule (filed December 6, 2019), the New Mexico Environment Department (NMED) submits these Comments on the Hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law ("Report") (filed February 10, 2020). NMED generally concurs with the content and conclusions of the Report, and the Proposed Final Order.

COMMENTS

1. On pages 1 and 2, the correct name of the relevant NMED bureau is the "Ground Water Quality Bureau", not the "Ground Water Bureau".
2. On page 5, Communities for Clean Water (CCW) filed a "Motion to Vacate Agency Decision and Remand the Petition for Review of DP-1132" in the context of a Permit Review (WQCC No. 18-05(A)) before the Water Quality Control Commission (WQCC).
3. On page 5, in the first sentence of the second paragraph, the citation should be 20.6.2.3108(C) NMAC.
4. On page 7, near the bottom of the page, the citation to the NMAC should be "20.1.4.7(A)(14) NMAC".

5. On page 8, the party who appealed to the EAB was Concerned Citizens for Nuclear Safety (CCNS).
6. On pages 28 through 30, a number of citations to the Water Quality Act were truncated to remove the leading 7. For example, paragraph 2 under Proposed Conclusions of Law should cite to NMSA 1978, § 74-6-5(A), not NMSA 1978, § 4-6-5(A).
7. On pages 29 and 30, a number of citations to Sections 3104, 3108 and 3109 of the NMAC have a space improperly inserted between the 3 and the 1.
8. On page 29, in paragraphs 9, 10 and 11, the correct citation is 20.1.4.400(A)(1) NMAC.
9. On page 2 of the Proposed Final Order, the Applicants should more properly be referred to as “DOE/Triad”, and the full name of the Los Alamos National Laboratory (LANL) should be written out.
10. On page 2 of the Proposed Final Order, the citation to the Water Quality Act should be NMSA 1978, § 74-6-5(O).

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

/s/ John Verheul

John Verheul, Assistant General Counsel
New Mexico Environment Department
121 Tijeras Ave NE, suite 1000
Albuquerque, New Mexico 87102
Phone: (505) 383-2063
Email: John.Verheul@state.nm.us

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 February 25, 2020:

Stuart R. Butzier
Christina Sheehan
Modrall, Sperling, Roehl, Harris & Sisk, PA
P.O. Box 9318
Santa Fe, New Mexico 87504-9318
stuart.butzier@modrall.com
christina.sheehan@modrall.com

Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

and

and

Susan McMichael
Office of Laboratory Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, New Mexico 87545
smcmichael@lanl.gov

Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa St., Ste. 5
Santa Fe, New Mexico 87505
dmeiklejohn@nmelc.org

*Attorneys for Concerned Citizens for
Nuclear Safety, Honor our Pueblo
Existence, and New Mexico Acequia
Association*

Attorneys for Triad National Security, LLC

Silas R. DeRoma
Attorney
U.S. Department of Energy
National Nuclear Security Administration
1900 Diamond Drive
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Attorney for the U.S. Department of Energy

/s/ John Verheul
John Verheul

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO

No. GWB 19-24(P)

**COMMENTS OF UNITED STATES DEPARTMENT OF ENERGY
AND TRIAD NATIONAL SECURITY, LLC ON THE HEARING OFFICER'S
REPORT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The United States Department of Energy (“DOE”) and Triad National Security, LLC (“Triad”), pursuant to 20.1.4.500(C)(2) NMAC, hereby submit the following comments on the Hearing Officer’s Report and Proposed Findings of Fact and Conclusions of Law (“Hearing Officer’s Report”). DOE and Triad (hereafter “DOE/Triad”) fully support the findings and recommendations in the Hearing Officer’s Report and would suggest the Secretary adopt the Hearing Officer’s Report in its entirety, subject to a few non-substantive suggestions made herein in order to clarify certain statements in the Report.

COMMENTS

On February 10, 2020, Hearing Officer Richard Virtue filed the Hearing Officer’s Report in this matter. On February 18, 2020, the Hearing Officer filed an Errata Notice to the Hearing Officer’s Report and Proposed Findings of Fact and Conclusions of Law, which made corrections to pages 7, 8, 9, 11, 19, and 22 of the Hearing Officer’s Report. In accordance with 20.1.4.500(C)(2) NMAC, DOE/Triad offer the following minor comments in order to further clarify the Hearing Officer’s Report, as corrected in the February 18, 2020 Errata Notice:

- Page 1 of the Report states that: “Notices of the public hearing on remand of the Application by the [WQCC] to the [NMED] were published on July 19th, August 23rd and

October 9th...” DOE/Triad suggest adding the year, 2019, following the identified dates of publication.

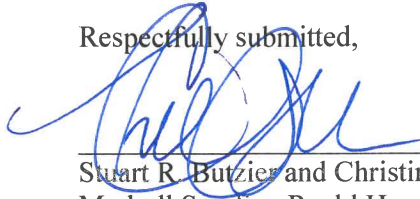
- Page 4 of the Report indicates that Applicants submitted supplemental information to NMED on June 6, 2016. DOE/Triad suggest correcting this date to June 3, 2016.
- Page 5 of the Report references a “display add.” DOE/Triad suggest changing this term to “display advertisement.”
- Finding of Fact 21, on page 16 of the Report, correctly states that Triad completed installation of the two new alluvial groundwater monitoring wells during the previously effective period of DP-1132. Page 17 of the Report, Finding of Fact 27, then provides that: “Draft DP-1132 requires the installation of two new alluvial groundwater monitoring wells downgradient of Outfall 051, will allow LANL to detect unpermitted releases from Outfall 051.” In order to have Finding of Fact 27 be more congruous with Finding of Fact 21, DOE/Triad suggests revising the language in Finding of Fact 27 as follows: “The installation of the two new alluvial groundwater monitoring wells in the canyon downgradient of Outfall 051 will allow LANL to detect any unpermitted releases from Outfall 051. Tr.126: 5-21; NMED Exhibit 1, p. 34; DOE/Triad Exhibit 11, p. 7; DOE/Triad Exhibit 9, p. 34.”
- Finding of Fact 28, on page 27 of the Report, provides in part that: “The additional groundwater monitoring wells required by draft DP-1132 will be sampled annually for constituents....” This statement appears to be repeating Finding of Fact 23, on page 16 of the Report. DOE/Triad suggest modifying the language in Finding of Fact 28 to provide as follows: “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. Tr. 128:4-14; NMED Exhibit 1, p. 35-37; DOE/Triad Exhibit 11, p. 11; DOE/Triad Exhibit 9, p. 35-37.”

CONCLUSION

DOE and Triad fully support the findings of and proposed recommendations in the Hearing Officer’s Report and respectfully request that the Secretary wholly adopt the Hearing Officer’s Report with the minor suggested changes proposed by DOE and Triad as outlined above.

Respectfully submitted,

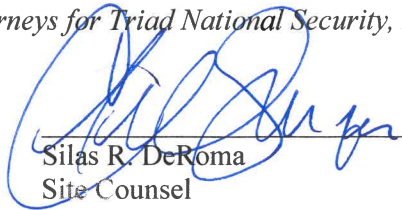


Stuart R. Butzier and Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, P.A.
Post Office Box 9318
Santa Fe, New Mexico 87504-9318
Telephone: 505.983.2020
stuart.butzier@modrall.com
christina.sheehan@modrall.com

and

Susan L. McMichael
Office of Laboratory Counsel
Los Alamos National Laboratory
Post Office Box 1663, MS A187
Los Alamos, NM 87545-0001
Telephone: 505.667.2073
smcmichael@lanl.gov

Attorneys for Triad National Security, LLC



Silas R. DeRoma
Site Counsel
U.S. Department of Energy
National Nuclear Security Administration
Los Alamos Site Office
3747 W. Jemez Rd.
Los Alamos, NM 87544
Telephone: 505.667.4668
Silas.DeRoma@nnsa.doe.gov

Attorney for the U.S. Department of Energy

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2020, a copy of the foregoing was served via electronic and U.S. mail to the following:

Cody Barnes
Hearing Clerk
New Mexico Environment Department
1190 Saint Francis Drive, Suite S-2103
Santa Fe, NM 87502
Cody.Barnes@state.nm.us

John Verheul
New Mexico Environment Department
Office of General Counsel
1190 St. Francis Drive, Suite N-4050
Santa Fe, NM 87505
john.verheul@state.nm.us
*Attorney for New Mexico Environment
Department, Ground Water Quality Bureau*

Lindsay A. Lovejoy Jr., Attorney
3600 Cerrillos Rd., Unit 1001 A
Santa Fe, NM 87507
lindsay@lindsaylovejoy.com
Attorney for Citizens

Charles deSaillan
Eric D. Jantz
Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
cdesaillan@nmelc.com
ejantz@nmelc.org
dmeiklejohn@nmelc.com
(505)989-9022

Modrall Sperling Roshl Harris & Sisk, P.A.


Christina C. Sheehan

W3690983.DOCX



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

IN THE MATTER OF PROPOSED DISCHARGE)
PERMIT 1132 FOR THE RADIOACTIVE LIQUID)
WASTE TREATMENT FACILITY AT THE) **No. GWB-19-24(P)**
LOS ALAMOS NATIONAL LABORATORY,)
LOS ALAMOS, NEW MEXICO)

CITIZENS' COMMENTS ON HEARING OFFICER'S REPORT

The Hearing Officer issued his initial Report (the "Report") on February 10, 2020. The post-hearing schedule (Order, December 6, 2019) calls for submission of parties' comments on the Report by February 25, 2020. The following comments are submitted on behalf of three citizen groups— Concerned Citizens for Nuclear Safety ("CCNS"), Honor Our Pueblo Existence, and the New Mexico Acequia Association (collectively, "Citizens").

INTRODUCTION

1. This Permit Application raises major issues of the scope of the Water Quality Act and its regulations that cannot be avoided by passing them off to other cases or proceedings. These issues are presented *here*; the law applies to *this proceeding*; and they must be decided.
2. Citizens presented its final argument on January 10, 2020, making these contentions:

- a. Neither Applicants (the Department of Energy (“DOE”) and Triad National Security, LLC) nor the New Mexico Environment Department (“NMED”) has established that this proceeding surmounts the jurisdictional barrier of 74-6-12.B NMSA 1978, which states that

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.

- b. NMED is required to deny the Application, since it would violate 74-6-12.B NMSA 1978 of the Water Quality Act (“WQA”). 74-6-5.E(2) NMSA 1978.
- c. There is no intention to discharge, and therefore a WQA permit may not issue. 74-6-5.A NMSA 1978.
- d. The waste water treatment unit exemption, comprising 42 U.S.C. § 6903(27) (National Pollutant Discharge Elimination System (“NPDES”) discharges); 40 C.F.R. §§ 260.10 (*Tank system, Wastewater treatment unit*), 40 C.F.R. §§ 264.1(g)(6) (“WWTU”), does not apply to the Radioactive Liquid Waste Treatment Facility (“RLWTF”), because there is no intention to discharge. The RLWTF is therefore subject to the

- Hazardous Waste Act, 74-4-1 *et seq.* NMSA 1978 (“HWA”), and it cannot be regulated by the WQA.
- e. The RLWTF disposes of waste water to units that are not regulated by the Clean Water Act, 33 U.S.C. § 1342 (“CWA”); therefore, the WWTU exemption does not apply, the RLWTF is subject to the HWA, and it cannot be regulated by the WQA.
 - f. NMED has taken, and now takes, contrary positions on the applicability of the WWTU exemption to the RLWTF. Therefore, its assertion here that the WQA applies to the RLWTF deserves no credence.
 - g. Applicants have not disclosed any supposed plan to discharge waste water for operational readiness purposes; if there is such a plan, its omission is a material nondisclosure, and the Application must be dismissed. 74-6-5.E(4) NMSA 1978.

ARGUMENT

a. Fundamental principles call for application of federal law.

- 3. The Hearing Officer’s Report addresses none of these legal arguments. The fundamental fact remains: The WQA Permit, DP-1132, cannot be issued without a determination by NMED that the HWA does not apply to the facility in issue, the RLWTF, which showing has not been made and could not be made. 74-6-12.B NMSA 1978.

4. The issue has fairly been raised, and it must be answered, or NMED is not doing its job. The Hearing Officer must address this issue, or he is not doing his job.
5. There is no dispute that the RLWTF manages hazardous waste. Los Alamos National Laboratory (“LANL”) has conceded 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[.]” (Comments, Dec. 12, 2013, Encl. 3 at 1) (AR 09794). LANL has expressly stated that, “The RLWTF satisfies each of these conditions[.] The RLWTF receives and treats a small amount of hazardous wastewater[.]” *Id.* 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 [NMED HWA Consent Order for LANL].” (LANL letter to [Jerry] Schoeppner, Head, Groundwater Quality Bureau (Sept. 11, 2014)) (AR 12732).
6. The activity of managing hazardous waste would normally subject the RLWTF to regulation under the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* (“RCRA”). 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), (27), the RLWTF

requires a permit under RCRA or an authorized state program, such as the HWA. 42 U.S.C. § 6925, 40 C.F.R. § 270.1(c).

7. RCRA is a federal law. The WQA is a state law. Federal law is the supreme law of the land. U.S. Const., Art. VI, Cl. 2 (Supremacy Clause). RCRA is enforced in New Mexico by the HWA, which supplants RCRA by the order of the Environmental Protection Agency (“EPA”) and, consequently, has the force of federal law, binding in this proceeding:

Effect of State permit. Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subtitle [42 U.S.C. §§ 6921 et seq.].

42 U.S.C. § 6926(d).

8. Section 74-6-12.B states that the WQA shall not apply to activities and conditions that are regulated by the environmental improvement board under the HWA, thus recognizing that, as a state statute, the WQA must recede in the face of RCRA and HWA, which have the force of federal law, and that the WQA cannot preempt, but must be preempted by, RCRA and HWA.
9. The existence of other proceedings where RCRA and the HWA have come up does not mean that the issues raised by RCRA and HWA need not be considered in this proceeding, where they are relevant. The Report is in error in holding otherwise. (Report 10-11).

10. Nor have the present issues been decided in other venues. The Report says that the EPA Environmental Appeals Board (“EAB”) ruled “headlong” (Report 8) against Citizens’ position here when it declined to terminate a CWA permit for the RLWTF. This is error. The ruling by the Regional Administrator that is quoted at Report 8-9 was *not* affirmed by the EAB. Rather, the EAB expressly refused to decide whether a CWA permit may be issued for a supposed “potential discharge”:

Because we conclude that the Region did not clearly err or abuse its discretion in denying the termination request, *we do not need to address* Concerned Citizens’ argument that EPA lacked the authority under the CWA to issue *a permit for potential discharges*.

Ex. 1 to NMED Response to Motion to Dismiss, at 19 note 19 (*emphasis supplied*).

11. Moreover, the EAB’s decision was under the CWA, not the WQA. The EAB expressly based its decision upon a novel concept of timeliness, interpreting EPA regulations that do not apply here. The EAB decision is on review in the Tenth Circuit, and the CWA permit itself has expired and is now in renewal proceedings, where its validity may again be contested.

12. Decisions that *are* pertinent here are the federal court of appeals decisions, holding that a CWA permit may not issue where there is no intention to discharge. The CWA applies only to a “discharge of any pollutant, or combination of pollutants.” 33 U.S.C. § 1342(a)(1). A discharge is defined

as “[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. Where there is no intention to discharge, there is no basis for a CWA permit.

Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 505 (2d Cir. 2005);

National Pork Producers Council v. U.S. EPA, 635 F.3d 738, 750 (5th Cir.

2011). Here, there is no intention to discharge from Outfall 051; thus, there is no basis for a CWA permit.

13. The only possible exemption from HWA application is the WWTU exemption. But the WWTU exemption requires that discharges from the facility be subject to CWA permitting. 42 U.S.C. § 6903(27) (NPDES); 40 C.F.R. §§ 260.10 (*Tank system, Wastewater treatment unit*), 264.1(g)(6). Such CWA coverage is unavailable where there is no intention to discharge; thus, there can be no WWTU exemption. The HWA must apply.

14. Likewise, the WQA authorizes only a permit for a discharge, not a supposed “possible” discharge, and there is no statutory basis for a WQA permit where there is no intention to discharge, as is the case here. 74-6-5.A NMSA 1978.

b. There is no intention to discharge; no WQA permit may issue.

15. The Report states (Report 9) that NMED’s testimony (NMED Ex. 3 at 50-51) (Pullen) explains why it is lawful to issue DP-1132 to a facility that does

not discharge. This is inaccurate. First, the Application states expressly that discharges will occur only when the Mechanical Evaporative System (“MES”) and the Solar Evaporative Tanks (“SET”) are both inoperative. Applicants filed in this case, in November 2019, statements declaring the specific circumstances in which they intend to discharge through Outfall 051:

Per LANL’s NPDES Permit renewal application, Outfall 051 is NPDES-permitted to allow the RLWTF to “maintain capacity to discharge should the [SET] and/or [MES] become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes to LANL scope/mission.”

Triad/DOE Ex. 5, Preliminary Response to Communities for Clean Water public comments of June 5, 2017, at 2. *See also*: Triad/DOE Ex. 4, Form 2C, at 5, 7, 2012 NPDES Permit Re-Application, Outfall 051 (Feb. 2012). By all testimony, such a situation is a “highly unlikely” circumstance. (Tr. 212 (Pullen); Tr. 90 (Beers)). There is no intention to discharge.

16. Mr. Pullen states that in June 2019 the Applicants discharged treated waste water through Outfall 051. (NMED Ex. 3 at 5, 50). However, that outfall had been dry and dormant since 2010, and Applicants make no claim that such a discharge will recur. (The Report’s statement at Finding 7 that there is a plan for such discharges is incorrect.). (Report 12). NMED must decide this case on the basis of the statements made on the Record by the

Applicants as to their intentions for the future. What Applicants chose to do last year, and do not claim that they intend to do in the future, cannot be relevant to this proceeding.

17. NMED's testimony concerning the supposed authority to issue a permit to a non-discharging facility is based upon regulatory language that includes "unintentional" discharges and discharges that "may" reach groundwater. (NMED Ex. 3 at 50) (Pullen). But these regulations still require a *discharge*. A discharge plan must address an actual "*discharge* of effluent or leachate which may move directly or indirectly into ground water." 20.6.2.7 NMAC. Further, "'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." *Id.* Under any regulation, a *discharge* may not be hypothetical; only whether it ultimately reaches ground water may be uncertain. Most basically, CWA permitting is limited by the CWA itself; the New Mexico Water Quality Control Commission ("WQCC") may authorize agencies, like NMED, only to issue "a permit *for the discharge* of any water contaminant . . ." (74-6-5.B NMSA 1978) (*emphasis supplied*)—not for a "potential discharge"—whatever that may be.

18. The NMED's "long-standing [unwritten] policy" does not determine this case. (Report 9). No decision upholds such practice, which is contrary to

the WQA and its regulations. The fact that NMED may have exceeded its authority in other cases does not justify doing so at the RLWTF.

19. The Report states that DP-1132 “does not propose to regulate an ‘. . . activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act’” (Report 10), but this is plainly incorrect, since DP-1132 contains specific provisions regulating the tank systems where waste water is stored and treated (Conditions, Section VI.A. Operational Plan at 7-9, 11-15, 21-22¹), and those tank systems would be regulated—differently, and more stringently—under a HWA permit. See 40 C.F.R. §§ 264.190-.200. These conflicting rules are exactly the reason that 74-6-12.B NMSA 1978 forbids the exercise of state WQA authority where the HWA, which enforces supreme federal law, applies. The WQA permit may not issue.

¹ For clarity, we cite the titles of the permit conditions found in NMED Exhibit 6 (“clean” version of the draft permit) attached to their Closing Argument, Proposed Findings of Fact and Conclusions of Law, p. 5. Section VI.A:
Condition 7 – Verification of Secondary Containment – proposed to be RESERVED
Condition 8 – Water Tightness Testing
Condition 9 – Actual or Potential Water-Tightness Failure
Condition 11 – Facility Inspections
Condition 12 – Containment
Condition 13 – Maintenance and Repair
Condition 14 – Damage to Structural Integrity
Condition 15 – Freeboard; Freeboard Exceedance
Condition 21 – Operation of Flow Meters
Condition 22 – Calibration of Flow Meters
Condition 22 – Calibration of Flow Meters

c. DP-1132 is not an abatement permit.

20. The WQA bars a permit where the activity in issue is “subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act . . . except to abate water pollution or to control the disposal or use of septage and sludge.” 74-6-12.B NMSA 1978. The Report asserts that DP-1132 is an “abatement” permit, outside the WQA exclusion. (Report 10-11). This is incorrect.

21. This is a discharge permit proceeding, not an abatement permit proceeding. NMED started this proceeding in 1996 to issue a WQA groundwater discharge permit (“DP-1132”) for discharges from Outfall 051. On April 3, 1996, NMED wrote to LANL, calling for a discharge plan:

Our records indicate that TA-50, the [RLWTF] . . . is currently discharging without an approved discharge plan, which is required under Section 3104. “Discharge Plan Required” of the Water Quality Control Commission (WQCC) Regulations, copy enclosed. You are hereby notified that a discharge plan, as defined . . . is required[.]

(Apr. 3, 1996) (AR 00014).

22. The application on which this proceeding is based is captioned Ground Water Discharge Permit Application (Feb. 2012) (AR 05336-08095).

23. The idea that DP-1132 may escape the jurisdictional limitation of 74-6-12.B NMSA 1978 because it supposedly abates water pollution is unsupported and has never been advanced by any party to this proceeding, most

particularly not by NMED. The statement in the Report that DP-1132 “is proposed to abate water pollution” (Report 10) is, quite simply, untrue.

Neither is there any reference given for the statement that “the HWA expressly recognizes NMED’s authority to ‘abate water pollution.’” *Id.*

There is no such recognition.

24. First, even if DP-1132 were considered to contain provisions to abate pollution, it clearly is not *limited* to abatement purposes. Rather, in regulating the configuration and operation of the RLWTF tank systems (Section VI.A. Operational Plan Conditions 7-9, 11-15, 21-22), and in regulating the concentrations of possible discharges (Section VI.A. Operational Plan Conditions 16, 17, 18²), DP-1132 plainly goes far beyond any supposed abatement purposes. The jurisdictional limitation in 74-6-12.B NMSA 1978 contains an exception relating to abatement, namely: “except to abate water pollution” Clearly, the exception is limited to efforts to abate water pollution and does not allow imposition of WQA authority on facility operation and effluent content—matters wholly outside abatement purposes—which are the principal purpose of DP-1132.

² *Id.*

Condition 16 – Effluent Limits: Outfall 051
Condition 17 – Effluent Limits: MES and SET
Condition 18 – Effluent Exceedance

25. Next, NMED's regulatory definitions state that "abate" or "abatement" means "the investigation, containment, removal or other mitigation of water pollution." 20.6.2.7 NMAC. Further,

"abatement plan" means a description of any operational, monitoring, contingency and closure requirements and other conditions for the prevention, investigation, and abatement of water pollution, and includes Stage 1, Stage 2, or Stage 1 and 2 of the abatement plan, as approved by the secretary."

Id. Such elements are absent from the Record or the terms of DP-1132.

26. The draft Permit, DP-1132, has the stated purpose of controlling "the discharge, and potential release, of water contaminants" from the RLWTF so as to protect public health, ground water for future use, and surface water. (NMED Ex. 1, DP-1132, Part III). There is no mention of a purpose to mitigate existing water pollution. There is no finding that ground water or surface water may be polluted so as to require mitigation of water pollution. There is no direction to carry out abatement or mitigation of any ground water or surface water (except as to future incidents of spill or unauthorized release or the detection of a contaminant that is due to a discharge associated with the Facility (NMED Ex. 1, DP-1132, VI.B.37, and VI.C.38³).

³ *Id.*

Condition VI.B.37 – Ground Water Exceedance
Condition VI.C.38 – Spill or Unauthorized Release

27. The witness for Applicants, Danny Katzman, emphasized that the permit does not seek to remedy existing contamination:

As I will describe in later testimony, contamination is known to be present in the alluvial groundwater in Effluent Canyon, in downgradient Mortandad Canyon, and in the perched-intermediate groundwater beneath Mortandad Canyon associated, in part, with past releases from Outfall 051. Draft DP-1132 is not intended to address this legacy contamination and only addresses any potential future noncompliant discharges, as provided by Draft DP-1132, Condition 37 (Condition 35, Triad/DOE Ex. 9).

* * *

Again, Draft DP-1132 only contemplates regulation of future noncompliant discharges and is not intended to regulate pre-existing groundwater conditions at LANL.

* * *

All three groundwater zones that will be monitored under the draft discharge permit currently have contamination (e.g., nitrate) present, including some constituents that are associated with past releases from Outfall 051. The RLWTF permit, Draft DP-1132, is forward-looking, meaning that it only addresses potential new releases from the permitted facilities (MES, Outfall 051, and SET).

Triad/DOE Ex. 11, Katzman testimony at 4, 13.

28. The Report misquotes the applicable statute. WQA Section 74-6-4.E directs the WQCC to issue “regulations to prevent *or* abate water pollution . . .” — not to “prevent *and* abate” pollution (Conclusion of Law 1 (Report 28)) — thus recognizing that prevention and abatement are separate functions. 74-6-4.E NMSA 1978.

29. The issuance of abatement permits is carried out by the Ground Water Quality Bureau, State Cleanup Program, which is separate from the Ground Water Quality Bureau, Pollution Prevention Section, which administers groundwater discharge permits. Groundwater discharge regulations appear at 20.6.2.3000 through .3114 NMAC. Regulations for abatement proceedings are separate and appear at 20.6.2.4000 through .4115 NMAC.
30. The purpose of the abatement regulations is to abate pollution of subsurface water or surface water. 20.6.2.4101.A(1), (2). Pollution of such waters is required to be abated “[i]f the background concentration of any water contaminant exceeds the standard or requirement of Subsections A, B, or C of Section 20.6.2.4103 NMAC . . . ” 20.6.2.4101.B NMAC. There is no finding in the Report or elsewhere that any such concentration exists.
31. The issuance of an abatement permit entails specific procedural stages, none of which has been carried out with respect to the RLWTF or DP-1132: The regulations require any “responsible person” to abate pollution to meet the regulatory standards pursuant to an abatement plan that has been approved by the NMED Secretary. 20.6.2.4104.A NMAC. No such plan exists or has been approved.
32. Should the requirement of an abatement plan apply here, there would have been a notice from the Secretary, requiring the Applicants to submit such a

plan. 20.6.2.4106 NMAC. No such notice was issued. No such plan was submitted.

33.A Stage 1 abatement plan describes an investigation. It must be approved by the NMED Secretary. 20.6.2.4106.C NMAC. No Stage 1 abatement plan exists.

34.A Stage 2 abatement plan describes actions to carry out abatement of contamination. It must be approved by the NMED Secretary. 20.6.2.4106.D NMAC. No Stage 2 abatement plan exists.

35.Upon the filing of a Stage 1 abatement plan, the Secretary shall issue a news release describing the extent of the contamination, advising the public of the plan and sources of further information. 20.6.2.4108.A NMAC. No such news release exists.

36.Upon the filing of a Stage 2 abatement plan, the responsible person shall issue a public notice to specified persons. 20.6.2.4108.B NMAC. No such notice has been issued.

37.If there is significant public interest, the Secretary shall hold a public meeting about the Stage 2 abatement plan. 20.6.2.4108.D NMAC. No such meeting has been held.

38. There are requirements of secretarial approval of a Stage 1 abatement plan proposal, a Stage 2 abatement plan proposal, and other submittals.

20.6.2.4109 NMAC. No such approvals are in the Record.

39. Once the Stage 1 and Stage 2 abatement plans are approved, the responsible party is required to carry them out and to submit a completion report for the Secretary's approval. 20.6.2.4112 NMAC. There is no evidence of such actions or submission in the Record.

40. In sum, none of the parties that might be involved in the adoption and execution of an abatement plan—not DOE, not Triad, and not NMED—has indicated in any way that an abatement plan is wanted or necessary or exists in connection with DP-1132. NMED's Closing Argument, Proposed Findings of Fact and Conclusions of Law (Jan. 10, 2020) makes no mention of any supposed abatement purpose to DP-1132. Applicants' Closing Argument, Proposed Findings of Fact and Conclusions of Law (Jan. 10, 2020) likewise says nothing about any abatement purpose. Clearly, activities governed by DP-1132 do not constitute abatement, nor do they come within the terms of § 74-6-12.B, which refers to "abate[ment of] water pollution."

41. This is not surprising, because DP-1132 is intended, as Mr. Katzman stated, to address possible future releases, not to abate existing contamination.

Moreover, the obligation to abate water pollution is itself subject to exceptions: DP-1132 itself excuses LANL from the obligation to abate, to the extent it is doing so under the NMED Consent Order for LANL. *See* DP-1132, NMED Ex. 1, Sec. 37(c)⁴. DP-1132 is not intended to abate water pollution.

42. The abatement plan requirement of 20.6.2.4104.A NMAC also does not apply to “Discharges subject to an effective and enforceable National Pollutant Discharge Elimination System (NPDES) permit.” 20.6.2.4105.C(1) NMAC. LANL has maintained that its CWA permit is such, and thus must maintain that it is exempt from the duty to obtain an approved abatement plan.

43. The statement in the Report that the activity conducted under DP-1132 constitutes abatement (Report 10) is clearly in error.

d. The attempt to avoid the issue of the application of the HWA is futile.

44. The Report states that the Hearing Officer’s decision, insofar as it addresses the application of the HWA to the RLWTF, shall not determine that issue in a later proceeding. Thus, the Hearing Officer seeks to avoid deciding, or to limit the effect of a decision, whether the HWA applies. (Report 3, 10, Conclusions of Law 28, 29 (Report 31)).

⁴ *Id.*, Condition VI.B.37 – Groundwater Exceedance

45. But whether the HWA applies to the RLWTF is squarely raised here and must be decided. NMED's authority to issue a discharge permit comes from the WQA and nowhere else. The WQA places explicit conditions on that authority. 74-6-12.B NMSA 1978. To issue a WQA permit, NMED (*i.e.*, at this stage, the Hearing Officer) must decide whether the activities and conditions regulated by DP-1132 are subject to the HWA. If they are, DP-1132 may not issue.

46. The Hearing Officer was appointed to "exercise all powers and duties granted under the New Mexico Environment Department Permit Procedures found in 20.1.4 NMAC and *all other applicable law.*" NMED Order, July 17, 2019. (*emphasis supplied*). The WQA and the HWA clearly come within the direction to apply "all other applicable law."

47. Insofar as the Report seeks to limit the effect of a decision concerning the applicability of the HWA, it disregards the holdings of the New Mexico Supreme Court concerning the application of res judicata in administrative proceedings. In *Shovelin v. Central New Mexico Electric Cooperative, Inc.*, 1993-NMSC-015, 115 N.M. 293, 850 P.2d 996, that court held that collateral estoppel is available to preclude relitigation of an issue previously decided by an administrative agency. Thus, NMED's decision in this case would be eligible for collateral estoppel effect.

48. Actions have consequences, and LANL has elected to operate the RLWTF in such a way that the HWA applies to it. The Hearing Officer and NMED have no choice but to recognize the fact and to deal with the consequences. The law does not contemplate that a decisionmaking officer may issue a decision with fingers crossed or sign it in disappearing ink.

49. Nothing would justify limiting the effect of a ruling in this proceeding. DOE has known for decades that the curtailment of discharges from the RLWTF would introduce RCRA and HWA regulation. The 2010 HWA permit for LANL explicitly warns that, if the RLWTF discharges through means other than the CWA-permitted Outfall 051, the WWTU exemption would terminate. (§ 4.6). The nature of the RLWTF's disposal operations, both current and planned, is known and undisputed and calls for ending the exemption.

50. The WWTU exemption is not even discussed in the Report. Yet this is the only possible exemption from the application of the HWA that might make the WQA available here. But the responsible agency, the EPA, has explicitly ruled out its application to a facility like the RLWTF, which disposes of wastewater by means unregulated by the CWA. Letter, E.A. Cosworth, Acting Director, Office of Solid Waste, to S. Pendleton, RO 14262, April 1998. And NMED itself has publicly declared in LANL's

HWA permit that, when the RLWTF is operated in such a manner, the WWTU exemption does not apply, and the facility requires an HWA permit. NMED HWA Permit for LANL § 4.6. Despite these circumstances that obviously disqualify the RLWTF from obtaining a WQA permit, the Report proposes to grant such a permit and refuses to discuss the facts that disqualify the Application. This is clear error.

51.If the DP-1132 permit goes into effect, with numerous provisions governing the operation of the waste treatment facility itself, any subsequent proceeding that directs that the RLWTF be regulated by the HWA, as federal law clearly requires, would bring about conflicts between the HWA permitting requirements in 40 C.F.R. Part 264 and the terms of DP-1132. These are the regulatory clashes that 74-6-12.B NMSA 1978 seeks to prevent by removing WQA jurisdiction where the HWA applies. The course chosen by the Hearing Officer, which disregards 74-6-12.B NMSA 1978 and ignores the federal law, would make such conflicts inevitable.

52.Instead, the law should be followed—and promptly. Citizens have provided comments, negotiated and litigated since 2013 to obtain application of the HWA to the RLWTF. (Dec. 6, 2013) (AR 09631 – 09655) and (AR 09656 – 09679); (Dec. 12, 2013) (AR 09686) and (AR 09690 – 09768). The matter has proceeded through two full hearings, at significant expense. One

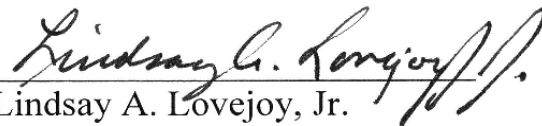
hearing was set at naught by the previous Hearing Officer's disqualification. The 2019 hearing is now threatened to be set aside by a decision that ignores the law and purports to leave the big issues undecided, even though they are squarely presented and cannot be avoided.

53. The Report is one further step in the Applicants' unlawful plan to avoid application of the HWA at the RLWTF. The present attempt to rule that the HWA somehow does not apply, when it clearly does apply, and to pretend that the question is still left open, when it is obviously decided, constitutes the unlawful excusal of noncompliance by a favored facility.

Conclusion

It is not for NMED to block the congressionally-mandated application of federal hazardous waste laws to a facility that admittedly treats and stores hazardous waste and is required under RCRA to adhere to stringent regulations in the handling of such dangerous substances. The permit should be denied, and this proceeding should be dismissed.

Respectfully submitted this 25th day of February 2020:

BY: 
Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
lindsay@lindsaylovejoy.com

/s/

Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 629-4742
dmeiklejohn@nmelc.org
Counsel for Citizens

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February 2020 I caused the foregoing *Citizens' Proposed Findings of Fact, Conclusions of Law and Final Argument* to be electronically served on the parties listed below by email and filed with the Administrator of Boards and Commissions.

Mr. Stuart R. Butzier and Ms. Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, PA
123 E. Marcy Street, Ste. 201
Santa Fe, New Mexico 87501
sbutzier@modrall.com
ccs@modrall.com

Ms. Susan L. McMichael
Office of Laboratory Counsel/MS A187
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov
Triad National Security, LLC, and U.S. Department of Energy/NNSA

Mr. John Verheul, Assistant General Counsel,
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Albuquerque, New Mexico 87102
john.verheul@state.nm.us
Counsel for the New Mexico Environment Department

BY: 
Lindsay A. Lovejoy, Jr.

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO

No. GWB 19-24 (P)



**REVISED HEARING OFFICER'S REPORT AND PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Revised Report incorporates technical revisions identified in the Hearing Officer's Errata Notice filed on February 18, 2020 and incorporates certain technical comments of the New Mexico Environment Department and the Applicants filed on February 25, 2020.

INTRODUCTION

The United States Department of Energy ("DOE") and Triad National Security, LLC., ("Triad), as successor to Los Alamos National Security, LLC ("LANS"), ("DOE/Triad" or "Applicants") have applied for a groundwater discharge permit entitled Discharge Permit No. 1132 ("DP-1132") for a radioactive liquid waste treatment facility ("RLWTF") located within the boundaries of Los Alamos National Laboratory ("LANL").

Notices of the public hearing on remand of the Application by the New Mexico Water Quality Control Commission ("WQCC") to the New Mexico Environment Department ("NMED" or "Department") were published on July 19, 2019, August 23, 2019 and October 9, 2019 in the *Los Alamos Monitor*, the *Santa Fe New Mexican* and the *Albuquerque Journal*. In addition, notice was given as provided in the applicable procedural rules of the Department.

A public hearing was conducted on November 14, 2019 as provided in NMED's Permit Procedures regulations found at 20.1.4 New Mexico Administrative Code and NMED's Ground

and Surface Water Protection regulations found at 20.6.2, Section 3110 of the New Mexico Administrative Code (“Procedural Rules”).

The Procedural Rules as well as the public notices require that any person proposing to submit technical testimony at the public hearing was required to have filed a statement of intent to do so, together with all exhibits, by November 4, 2019. Three statements of intent were filed: one by the Applicants, one by NMED and one by four citizens groups, including Concerned Citizens for Nuclear Safety, Tewa Women United, Honor Our Pueblo Existence and New Mexico Acequia Association. Tewa Women United have withdrawn from this proceeding. The three remaining citizen groups are collectively referred to herein as “Citizens”. In addition to the technical testimony, public testimony, both orally and in writing was submitted for the record.

In accordance with the Procedural Rules, and the Hearing Officer’s Order Establishing Post-Hearing Schedule dated December 10, 2019, the Applicants, NMED and Citizens submitted on January 10, 2020, Closing Arguments and Proposed Findings of Fact and Conclusions of Law, concerning the issuance of DP-1132.

At the public hearing the Applicants were represented by attorneys Stuart R. Butzier, Christina C. Sheehan, Susan McMichael (Triad) and Silas de Roma (DOE). Robert Beers, Danny Katzman and Karen Armijo presented technical testimony on behalf of the Applicants in support of DP-1132. John Verheul represented the Department, and Mr. Steve Pullen presented technical testimony on behalf of the Ground Water Quality Bureau (“Bureau” of GWB”) of the Department in support of approval of DP-1132. Lindsay Lovejoy, Jr., and Jonathon Block represented Citizens. Joni Arends submitted technical testimony on behalf of Citizens in opposition to issuance of DP-1132.

Emily Arasim, Mark De Volder, Alexa Jaramillo, Kathy Wan Povi Sanchez and Terre Hite submitted public comments at the public hearing. The record was left open until November 18, 2019 to allow for written public comments. Forty-seven (47) persons submitted written post-hearing comments. Some of the written public comments were submitted after the November 18, 2019 deadline established at the public hearing, but have nonetheless been included in the record. Sign in sheets were kept at the public hearing.

The Administrative Record is voluminous and includes over 17,000 pages. The Hearing Record also includes notices of the hearing in English and in Spanish; the notices of intent to present technical testimony from the Applicants, the Bureau, and the Citizens, with exhibits; the sign-in sheets; hearing audiotapes; a two hundred thirty-five page (235) transcript of the hearing; post-hearing submittals from the Applicants, the Bureau, and Citizens; various motions and responses; an updated Index to the Administrative Record and this Hearing Officer's Report ("Report").

The public hearing lasted one full day from approximately 9:00 a.m. to 5:00 p.m., with the customary breaks. The participants in the public hearing were allowed opportunity to call witnesses, present testimony and other evidence and cross-examine witnesses. The public hearing was both audio-recorded by the Hearing Clerk and transcribed by a Court Reporter at the public hearing, Cheryl Arreguin of Kathy Townsend Court Reporting. The Hearing Clerk, Mr. Cody Barnes was present for the entirety of the public hearing to provide interpretation between English and Spanish.

Based on the record, the Hearing Officer's recommendation to the Secretary of the Department ("Secretary") is that the final draft of DP-1132 as presented by the Bureau complies with the applicable law and regulations and should be granted, and that consideration of whether

the RLWTF is required to be regulated under the State Hazardous Waste Act, NMSA 1978, §§ 74-4-1 through 74-4-14 (“HWA”) is not within the scope of this proceeding, nor is such consideration foreclosed by issuance of DP-1132.

Proposed findings of fact and conclusions of law attached to this Report, are based upon the parties’ post-hearing submittals and the transcript of the November 14, 2019 public hearing. All references to the transcript are abbreviated as “Tr.” and refer to the November 14, 2019 public hearing, unless otherwise stated.

The following is a discussion of the background of this proceeding and of the issues regarding applicability of the HWA raised by Citizens in a Motion to Dismiss, during the public hearing and in the closing arguments.

BACKGROUND

The following is a brief summary of the history and status of this matter as reflected in the Administrative Record.

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 Applicants that a groundwater discharge permit was required under the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 through 74-6-17 (“WQA”). The Application 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 3, 2016, and materials contained in the Administrative Record that were prepared prior to issuance of this DP-1132. On November 1, 2007, the Applicants submitted a Notice of Intent (“NOI”) for the discharge of treated effluent water to a facility designated as the Solar Evaporation Tank (“SET”). NMED responded to the NOI requiring a new, and

comprehensive application. In December 2015, the Applicants submitted a draft Closure Plan for inclusion in DP-1132.

Public notice associated with draft DP-1132 occurred at three stages of the permitting process: the notification of the Department's receipt of the Application ("Public Notice 1" or "PN1"), the notification of the availability of a draft discharge permit for public comment and for request for 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(C) NMAC and occurred multiple times due to changing circumstances.

The notification of the Department's receipt of the Application (PN1) occurred in accordance with 20.6.2.3108(C) NMAC. The Applicants posted the required signs, provided written notice to nearby property owners, and published the required display advertisement 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 the information required of such notices by 20.6.2.3108(F) NMAC. DP-1132 PN1 occurred two times, first in November of 1996 and then in March of 2012.

A public hearing was held on the issuance of DP-1132 on April 19, 2018. Based on that hearing a final DP-1132, dated August 29, 2018, was issued to the original Applicants. In January, 2019, Communities for Clean Water ("CCW") filed a Motion to Vacate Agency Decision and Remand the Petition for Review of DP-1132 with the WQCC on the grounds of appearance of impropriety of the hearing officer. The WQCC denied the petition, and CCW filed a writ of mandamus with the New Mexico Supreme Court requesting the court to reverse the decision of the WQCC. On June 18, 2019 the WQCC ruled that the hearing officer's job application and subsequent hiring by one of the parties in that proceeding created an improper appearance of bias

potentially affecting the Secretary's deliberation and issuance of DP-1132. The WQCC then ordered that, pursuant to NMSA 1978, NMSA 1978, § 74-6-5(Q), 20.1.3.16(A)(3) NMAC, and 20.1.3.16(F)(3) NMAC, the Secretary's Order from the April 2018 hearing be vacated, and the matter was remanded to the Department for a new hearing. On July 17, 2019 the Secretary designated the current hearing officer to conduct a new hearing. That hearing was held on November 14, 2019 as previously described in this Report.

On remand, the Department issued a notification of the availability of the draft permit for public comment and for request for a public hearing (PN2) occurred in accordance with 20.6.2.3108(H) NMAC. The Department posted draft DP-1132 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 the information required of such notices in 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 several times and provided the public with the opportunity to review a revised DP-1132, in consideration of comments received during the previous public comment period and to address the remanded draft DP-1132. Initial DP-1132 PN2s occurred in August 2003, April 2005, August 2013, November 2013, May 2017, March 9, 2018, and July 19, 2019.

On August 23, 2019, the Department issued the final PN2 public notice offering the draft DP-1132 that is the subject of this Report.

Upon the Department's determination that a public 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. That hearing notice included information required of such notices in 20.6.2.3108(N) NMAC and described the time and place of the hearing and a brief description of the hearing process. Because of changes in the hearing date and location, and due to the remand of DP-1132, the final notice of hearing was given on October 11, 2019. The Department provided both English and Spanish versions of the hearing notice.

The final version of DP-1132 proposed by the Department was admitted as NMED Exhibit 1 at the public hearing, as modified pursuant to the changes proposed in NMED Exhibit 3 and DOE/Triad Exhibits 7 and 9. DOE/Triad Exhibit 7 represents a clean version of proposed edits to draft DP-1132, and DOE/Triad Exhibit 9 represents the changes from the previously issued permit in “track changes” format.

**CITIZENS’ MOTION TO DISMISS AND
APPLICABILITY OF THE HWA**

Citizens filed a Motion to Dismiss this proceeding on October 8, 2019 (“Motion” or “Motion to Dismiss”). NMED and the Applicants filed separate Responses to the Motion on October 23, 2019. Citizens filed a Reply Brief on October 30, 2019.

On November 7, 2019, the Hearing Officer entered an Order Denying the Motion to Dismiss. The Hearing Officer determined that material portions of the Motion cite to and rely on the transcript of the 2018 hearing, which is a significant part of the record on which the vacated 2018 Final Order of the Secretary was based. The Hearing Officer further determined that the purpose of the remand of this proceeding was to conduct a new hearing with a new hearing officer. The Order Denying the Motion to Dismiss concludes that this proceeding will be decided on the Hearing Record [as defined in 20.1.4.7(A)(14) NMAC] of this remand proceeding.

The Order further concludes that Citizens will not be prejudiced by denial of the Motion because Citizens will have an opportunity in the remanded proceeding to assert their position

regarding matters addressed in the Motion. Citizens have fully participated in this remand proceeding, submitting evidence and legal argument on the matters that are the subject of the Motion.

The central argument made in the Motion is that the RLWTF treats and stores hazardous waste and does not “discharge” within the meaning of the WQA. Citizens’ argument runs headlong into a decision of the United States Environmental Protection Agency’s Environmental Appeals Board (“EAB”), involving an appeal by Concerned Citizens for Nuclear Safety to the EAB of a decision of the Region 6 EPA Administrator on issues involving essentially the same regulatory framework applicable to this proceeding. *See In re Los Alamos National Security, LLC, and the US Department of Energy*, NPDES Appeal No. 17-05 (EAB Mar. 14, 2018) (attached as Exhibit 1 to NMED’s Response in Opposition to Citizen’s Motion to Dismiss and Exhibit 4 to the Applicants Response to Citizen’s Motion to Dismiss). In that case, the EAB considered whether discharges to Outfall 051 pursuant to the Applicants’ NPDES permit would be necessary in the event that the Mechanical Evaporator and/or Zero Liquid Discharge tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in the Laboratory’s scope/mission. The EAB held that discharges to Outfall 051 would be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage, and were therefore indeed a possibility. *Id* at 1. Citizens made in that proceeding similar arguments to the arguments it makes in this proceeding - namely that a discharge permit should not be issued when there has not been a discharge since 2010 and no future discharges are planned. *Id* at 6. The EAB found that the EPA’s Region 6 Administrator’s denial of Citizens’ request to terminate the NPDES permit in this context did not constitute error or abuse of discretion. *Id* at 19.

In upholding the issuance of Applicants’ NPDES Permit, the Regional Administrator stated:

In their application for permit coverage, LANS and DOE describe the “no discharge” nature of the RLWTF and specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. The permittees indicated that under certain circumstances, e.g. if one or both evaporative systems have to be taken off-line, a discharge could occur. Without permit authorization, such discharge could subject the permittees to liability under the CWA for discharging without a permit.

Exhibit 4 to Applicants’ Response to Motion to Dismiss, p. 2.

Similarly, discharges to the SET and MET have the potential for failure, a resulting in further discharges. NMED previously made that determination in the “Authorization to Discharge” section of draft DP-1132. AR 13690.

The NMED GWB has a long-standing policy that is consistent with the decision of the EAB in Appeal No. 17-08. The Hearing Record establishes NMED has issued more than twenty five (25) permits that limit discharges to lined evaporative impoundment systems, and therefore are designed as “zero discharge” (to surface or groundwater), as a mechanism in which to avoid the impact of the discharge on groundwater. Examples of such permits were provided by NMED witness Pullen in his direct testimony. See NMED Exhibit 3, pp. 50-51. Other examples of discharge permits issued to facilities which only discharge to lined, engineered impoundments similar to the Mechanical Evaporator System (“MES”) and SET are part of the Administrative Record in responses to public comments made in 2017 AR 13815-13824. Mr. Pullen explained NMED’s authority to regulate such systems for purposes similar to those present in this proceeding. NMED Exhibit 3, pp. 50-51.

NMED has authority under the WQA to issue, or propose to issue, groundwater discharge permits separate from the obligation NMED has under the HWA. Citizens argue that this proceeding should be dismissed because NMED does not have authority to regulate such activities

that would fall under the HWA, based on the statutory provisions found in NMSA 1978, § 74-6-12(B). Specifically, NMSA 1978, § 74-6-12(B) states:

“[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge. (emphasis added)”

Citizens misconstrue NMSA 1978, § 74-6-12(B); draft DP-1132 does not propose to regulate an “. . . activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act.” Rather, DP-1132 is proposed to abate water pollution, as DP-1132 regulates actions subject to the WQA and the regulations adopted pursuant to the WQA. WQCC Regulations provide for the regulation of discharges of “effluent or leachate” which “may move directly or indirectly into groundwater”. 20.6.2.3104 NMAC. NMED’s authority to prevent and abate water pollution under the WQA and WQCC implementing regulations requiring a permit for discharges that “may move directly or indirectly into groundwater” provide legal authority to require DP-1132, and the HWA expressly recognizes NMED’s authority to “abate water pollution.”

The Motion and Citizens’ technical testimony are centrally based upon the more stringent regulation of the RLWTF under the HWA. The applicability of the HWA to the RLWTF are not controlling as to the issuance of DP-1132. DP-1132 is proposed to be issued under the WQA. The Motion raises issues concerning the regulation of the RLWTF under the HWA. Those issues are significant issues and are properly addressed through the pending proceedings referred to in the post-hearing submittals. The applicability of the HWA is currently under review by the U.S. Tenth Circuit Court of Appeals in *CCNS v. EPA*, No. 18-95-42. See Citizens Reply Brief, p. 16. Applicants’ current NPDES permit is undergoing a five-year review, and Citizens anticipate raising issues related to the HWA in connection with that review. See Citizens Proposed Findings

of Fact, Conclusions of Law and Final Argument, p. 34 fn 13. In addition, Applicants' reference in their Response to the Motion to Dismiss a pending major modification to LANL's existing HWA permit. See Applicants Response to Motion to Dismiss, p. 2 and Exhibit 2 to the Response to Motion to Dismiss. Exhibit 2 to the Response to the Motion to Dismiss is a letter dated September 22, 2017 from one of the members of Citizens. In that letter, the member argues to the Hazardous Waste Bureau of the Department that the HWA applies to the RLWTF and that the permit should be revised accordingly. The record reflects that three different forums are considering the issues raised in this proceeding by Citizens. Thus, the issuance of DP-1132 does not preclude consideration by the appropriate forums of the issues raised by Citizens. The issue in this proceeding is whether a groundwater discharge permit should be issued to the Applicants under the WQA and the regulations issued under that act for the purpose of "preventing or abating pollution of groundwater in the state." The decision in this case is not intended to and does not preclude Citizens from pursuing their legal arguments in the other forums.

PROPOSED FINDINGS OF FACT

A. The RLWTF

1. The RLWTF is a wastewater treatment facility treats radioactive liquid waste wastewaters received from technical areas throughout LANL. NMED Exhibit 3, p. 4; DOE/Triad Exhibit 1, p. 4.
2. The RLWTF includes 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. NMED Exhibit 3, p. 6; DOE/Triad Exhibit 1, p. 4.
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 the RLWTF. Tr. 150:18- 151:1; DOE/Triad Exhibit 14, 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) the SET at TA-52. The primary RLWTF structure at the TA-50 is Building 50-01; the RLWTF 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 3, p. 4.

B. DP-1132

5. Draft DP-1132 addresses potential new releases from the RLWTF. NMED Exhibit 1, pp. 37-38; NMED Exhibit 3, pp. 44-46; DOE/Triad Exhibit 9, pp. 38-39; DOE/Triad Exhibit 11, pp. 12-13.

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 MES, (2) to the synthetically lined SET, (3) and through Outfall 051 that is also the subject of a NPDES Permit issued by Region 6 of the United States Environmental Protection Agency (Permit #NM0028355). Tr. 28:10-16; NMED Exhibit 1, p. 8-9; NMED Exhibit 5, p. 5; DOE/Triad Exhibit 1, p. 5; DOE/Triad Exhibit 9, p. 8-9.

7. On June 18, 2019, following a period of doing water tightness testing on the line that went to Outfall 051, Applicants discharged 80,798 liters of treated effluent through Outfall 051. Tr. 43:17-44:15. LANL has both near-term and long-term plans to conduct routine discharges from Outfall 051. Tr. 43:19-22.

8. The MES was installed and became operational in 2010, and LANL intends to continue discharging to the MES. Tr. 30:5-8, 43:1-11.

9. The SET has been constructed, but has not been placed into service, and LANL intends to discharge to the SET. Tr. 29:5-7, 43:12-16.

10. DP-1132 would authorize DOE/Triad 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; NMED Exhibit 3, p. 5; DOE/Triad Exhibit 9, pp. 9-10.

11. 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 WQA and the regulations adopted under the WQA. NMED Exhibit 1, p. 21-24; NMED Exhibit 3, p. 2-3; DOE/Triad Exhibit 1, p. 5-7; DOE/Triad Exhibit 9, p. 21-23.

12. Draft DP-1132 requires that discharges 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. 35:7-10; NMED Exhibit 1, pp. 21-24; NMED Exhibit 3, pp. 2-3; DOE/Triad Exhibit 1, pp. 5-7; DOE/Triad Exhibit 9, pp. 21-23.

13. Draft DP-1132 includes 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, pp. 11-44; DOE/Triad Exhibit 1, pp. 7-12; DOE/Triad Exhibit 9, pp. 11-44.

14. The Operational Plan set forth in Section VI.A of draft DP-1132 contains 22 conditions with specific requirements for the operation and maintenance of the units identified in DP-1132. 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; requirements for notifying and obtaining NMED approval for proposed changes to the RLWTF; 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, pp. 11-28; DOE/Triad Exhibit 1, pp. 7-8; DOE/Triad Exhibit 9, pp.11-28.

15. The Operational Plan includes a requirement that signage be posted in English and Spanish. NMED Exhibit 1, p. 15; DOE/Triad Exhibit 9, p. 15; DOE/Triad Exhibit 14, p. 3.

16. The Operational Plan includes standards for emergency response procedures, including a written summary of the emergency response procedures that are to be submitted to NMED within one hundred and twenty (120) days of the effective date of DP-1132, but does not specify emergency response procedures or designate requirements related to the Emergency Operations Center (“EOC”). NMED Exhibit 1, pp. 26-27; DOE/Triad Exhibit 9, pp. 26-27; DOE/Triad Exhibit 14, p. 4.

17. Draft DP-1132 contains monitoring and reporting requirements that prescribe how data on both water quality and quantity are reported to NMED. 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, pp. 28-38; DOE/Triad

Exhibit 1, pp. 8-9; DOE/Triad Exhibit 9, pp. 28-39.

18. Draft DP-1132 includes contingency plans to mitigate damages, provide notifications and take corrective actions in the event of spill or unauthorized release. The contingency plans include a requirement for DOE/Triad to notify NMED within 24-hours of a spill or unauthorized release, sets forth requirements for DOE/Triad to submit corrective action plans to address any failure and sets forth conditions for implementing such plans. NMED Exhibit 1, pp. 38-39; DOE/Triad Exhibit 1, p. 9; DOE/Triad Exhibit 9, pp. 39-40.

19. Draft DP-1132 includes 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, pp. 39-43; DOE/Triad Exhibit 1, pp. 9-11; DOE/Triad Exhibit 9, pp. 40-44.

20. 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; DOE/Triad Exhibit 5, p. 5; DOE/Triad Exhibit 9, p. 28.

21. During the previously effective period of DP-1132 (August 28, 2018- June 18, 2019), Triad completed 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. Tr. 126:1-21; NMED Exhibit 1, p. 34; DOE/Triad Exhibit 9, p. 34; DOE/Triad Exhibit 11, p. 7.

22. The two new alluvial groundwater monitoring wells were approved by NMED, and were constructed in accordance with NMED’s guidelines. NMED Exhibit 1, p. 34; DOE/Triad Exhibit 11, p. 11.

23. Draft DP-1132 requires that the two 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 list of constituents that includes organic compounds, metals, radioactivity and general inorganic compounds. Tr. 128:4-14; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 9, pp. 36-37; DOE/Triad Exhibit 11, p. 7, 11.

24. 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. Tr. 126:22-127:14; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 11, p. 8, 11; DOE/Triad Exhibit 9, pp. 36-37.

25. Draft DP-1132 requires groundwater monitoring of potential discharges from the MES through four regional groundwater monitoring wells, R-1, R-14, R-46 and R-60, located downgradient of the RLWTF. Tr. 127:15-25; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 11, p. 7,11; DOE/Triad Exhibit 9, pp. 36-37.

26. Existing monitoring wells were 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. 128:16-17; DOE/Triad Exhibit 11, p. 11.

27. The installation of the two new alluvial groundwater monitoring wells in the canyon downgradient of Outfall 051 will allow LANL to detect any unpermitted releases from Outfall 051. Tr. 126: 5-21; NMED Exhibit 1, p. 34; DOE/Triad Exhibit 11, p. 7; DOE/Triad Exhibit 9, p. 34.

28. The regional groundwater monitoring wells will be sampled annually for a suite of constituents that include organic compounds, metals, radioactivity and general inorganic compounds, including perchlorate. Tr. 128:4-14; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 11, p. 11; DOE/Triad Exhibit 9, pp. 35-37.

29. Triad submitted to NMED and completed a work plan that proposed a moisture monitoring approach for monitoring potential leaks beneath the SET. Tr. 29:16-30:4, 49:25-50:3; NMED Exhibit 1, pp. 31-32; NMED Exhibit 3, p. 10; DOE/Triad Exhibit 1, p. 14; DOE/Triad Exhibit 7 p. 4; DOE/Triad Exhibit 9, p. 32.

30. Draft DP-1132 sets forth requirements and conditions for any future exceedance from non-compliant releases in Condition 37. NMED Exhibit 1, p. 37-38; DOE/Triad Exhibit 9, p. 38; DOE/Triad Exhibit 11, p. 12-13.

31. DOE/LANS submitted supplemental information 2012 permit application submitted in 2012 (“2012 Permit Application”) on June 3, 2016. AR 13272-13355; NMED Exhibit 3, p. 6; DOE/Triad 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. The 2012 Permit Application is the application that led to the issuance of draft DP-1132. NMED Exhibit 3, pp. 6-7.

34. NMED's public notices associated with draft DP-1132 occurred at three stages of the permitting process: the notification of NMED's receipt of the 2012 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. 199:22-200:15; NMED Exhibit 3, p. 7.

35. As a result of public participation in the permitting process, a number of changes were made to DP-1132. Tr. 31:18-33:17.

36. NMED issued the first public notice in association with the 2012 Permit Application in March of 2012. AR 08108-08113; Tr. 28:3-6, 199:25.

37. A public hearing was held on the issuance of DP-1132 on April 19, 2018. Based on that hearing, the Secretary approved a final DP-1132, which was dated August 29, 2018. Tr. 28:1-2; NMED Exhibit 3, p. 7; AR 15900-16168.

38. On June 18, 2019, the WQCC vacated the Secretary's Order approving DP-1132 and remanded the matter to NMED for a new hearing with a newly appointed hearing officer. NMED Exhibit 3, pp. 7-8.

39. NMED issued a second public notice in association with the 2012 Permit Application in August 2013, November 2013, May 2017, March 2018, July 19, 2019, and August

23, 2019. AR 09449-09450; 13481-13494; 14045; 14611-14615; 14717-14746; NMED Exhibit 3, p. 8.

40. NMED issued the hearing notice on October 3, 2019, and the final notice occurred on October 11, 2019. NMED Exhibit 3, pp. 8-9; NMED Exhibit 4.

41. NMED's public notice was given 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; 14611-14615; 14717-14746; 17174-17175; Tr. 200:16-25.

42. Following the August 29, 2018, Order of the Secretary approving issuance of DP-1132 and prior to the June 18, 2019 WQCC Order remanding the proceeding, NMED edited DP-1132 to correct a difference between the discharge permit presented at the April 19, 2018 hearing and the permit issued on August 29, 2018. The edit corrected an error in the August 29, 2018 permit, changing the period of time the Permittee has to post documents voluntarily submitted to NMED on the LANL Electronic Public Reading Room from seven to thirty days. NMED Exhibit 1, p. 46; NMED Exhibit 3, p. 9; DOE/Triad Exhibit 7, p. 2.

43. Following the August 29, 2018, Order of the Secretary approving issuance of DP-1132 ("Prior DP-1132") and prior to the June 18, 2019 WQCC Order remanding the proceeding to NMED, numerous activities took place during the time DP-1132 was in effect, which necessitate changes to draft DP-1132 presented as NMED Exhibit 1. These changes are identified in NMED Exhibit 3; and DOE/Triad Exhibits 7 and 9; and are described in Finding Nos. 44-55 below. Tr. 33:18-35:10; 194:6-196:17; NMED Exhibit 3, p. 9; DOE/Triad Exhibit 1, p. 12-17; DOE/Triad Exhibit 7; DOE/Triad Exhibit 9.

44. On September 12, 2018, the Applicants submitted a transfer notice for DP-1132

notifying the Department that effective November 1, 2018, Triad replaced LANS as the co-permittee under DP-1132. draft DP-1132 should be altered to replace all references to LANS with Triad. NMED Exhibit 3, p. 9; DOE/Triad Exhibit 7, p. 1; DOE/Triad Exhibit 9.

45. On October 31, 2018, the Applicants submitted a request for extension of time to complete SET pipeline water tightness testing. The request addresses the requirements in Condition 8 of Prior DP-1132 to perform the testing within 180 days of the effective date of the Prior DP-1132. For good cause shown, NMED approved the request in correspondence dated November 13, 2018. Condition 8 requires changed language to reflect the Applicants' proposed schedule change. NMED Exhibit 3, pp. 9-10; DOE/Triad Exhibit 7, p. 1; DOE/Triad Exhibit 9.

46. On October 31, 2018, the Applicants submitted a workplan for the design of a soil moisture monitoring system for the SET in accordance with Condition 30 in Prior DP-1132. In a letter dated January 30, 2019, the Department approved the Soil Moisture Monitoring System Workplan. Condition 30 requires changed language in draft DP-1132 to reflect the Applicants' submittal of the workplan. NMED Exhibit 3, p. 10; DOE/Triad Exhibit 7, p. 4; DOE/Triad Exhibit 9.

47. On November 19, 2018, the Applicants submitted a workplan for the installation of two alluvial groundwater monitoring wells in accordance with Condition 33 of Prior DP-1132. In a letter dated January 30, 2019, the Department approved the Alluvial Monitoring Wells Workplan. On September 3, 2019 the Applicants submitted the associated construction and lithologic logs for the alluvial monitoring wells. On September 19, 2019 the Applicants submitted the associated well completion report for the alluvial monitoring wells. Condition 33 has been fulfilled and may be removed from the DP-1132. NMED Exhibit 3, p. 10; DOE/Triad Exhibit 7, p. 4; DOE/Triad Exhibit 9.

48. On December 4, 2018, the Applicants submitted workplans in accordance with Condition 41 of Prior DP-1132 for the stabilization of one 100,000-gallon steel influent tank and Clarifier #1, i.e., units that have ceased operation. In a letter dated December 27, 2018 the Department approved the workplans. Condition 41 may be removed from DP-1132. NMED Exhibit 3, p. 10; DOE/Triad Exhibit 9.

49. On December 18, 2018, the Applicants submitted a summary of emergency response procedures applicable to the RLWTF in accordance with Condition 20 of Prior DP-1132. Condition 20 requires changed language to reflect the Applicants submittal of the procedures. NMED Exhibit 3, p. 10; DOE/Triad Exhibit 7, p. 3; DOE/Triad Exhibit 9.

50. On December 21, 2018, amendments to the WQCC Ground and Surface Water Regulations (20.6.2 NMAC) became effective. The amendments include changes to the groundwater numerical standards at 20.6.2.3103 NMAC and the addition of several regulated contaminants. Thirteen (13) additional contaminants were added to the list of “toxic pollutants” at 20.6.2.7.T NMAC. Conditions 16 and 17 of draft DP-1132 require numerous changes to reflect the amended regulations. NMED Exhibit 3, p. 11; DOE/Triad Exhibit 7, pp. 1-3; DOE/Triad Exhibit 8; DOE/Triad Exhibit 9.

51. On January 25, 2019, the Applicants submitted workplans in accordance with Condition 41 of Prior DP-1132 for the stabilization of four units; Clarifier #2, Gravity Filter, WM2-North/South Tank, and a 75,000-gallon tank. In a letter dated April 25, 2019, the Department approved the workplans. Condition 41 may be removed from draft DP-1132. NMED Exhibit 3, p. 11; DOE/Triad Exhibit 9.

52. On February 4, 2019, NMED performed an inspection of the RLWTF. The inspection consisted of a visual evaluation of the major structures of the RLWTF and verification

that the SET was not being utilized. NMED Exhibit 3, p. 11.

53. On April 9, 2019, the Applicants submitted written confirmation that flow meters were installed at four locations in accordance with Condition 21 of Prior DP-1132. The Applicants confirmed that the four associated flow meters were calibrated in accordance with Condition 22. Condition 21 must be revised to reflect the Applicants' installation of the meters. Condition 22 must be revised to reflect the Applicants' initial calibration of the meters. NMED Exhibit 3, p. 11, DOE/Triad Exhibit 7, p. 3, 4; DOE/Triad Exhibit 9.

54. On June 3, 2019, the Applicants submitted documentation verifying that all units intended to convey, store, treat, or dispose of untreated liquid or semi-liquid waste streams meet the requirements of secondary containment in accordance with Condition 7 of Prior DP-1132. Condition 7 has been fulfilled and should be removed from DP-1132. NMED Exhibit 3, p. 11; DOE/Triad Exhibit 7, p. 2; DOE/Triad Exhibit 9.

55. A complete list of all edits and revisions to draft DP-1132 that are warranted as a result of actions DOE/Triad took following the August 29, 2018 Order of the Secretary and issuance of Prior DP-1132 and prior to the June 18, 2019 WQCC Order remanding this proceeding to NMED are described in NMED Exhibit 3 and DOE/Triad Exhibit 7. The revisions and edits are set out in track changes format in the version of draft DP-1132 which is DOE/Triad Exhibit 9. Corresponding revisions to DP-1132 should be made. Tr. 38:14-23.

C. Public Comments Received

56. NMED received public comments from a number of commenters. Those specific comments are addressed in NMED's Proposed Response to Comments, NMED Exhibit 5. Because NMED has received roughly 200 comments at or after the public hearing, NMED did not complete the Proposed Response to Comments at the time proposed Findings of Fact and Conclusions of

Law and Closing Argument were due. NMED filed a revised NMED Exhibit 5 on January 21, 2020.

57. NMED received a Request for Hearing on the draft permit from a group representing Concerned Citizens for Nuclear Safety, Amigos Bravos, Tewa Women United, Honor our Pueblo Existence, and Partnership for Earth Spirituality. AR Nos. 13495-13761.

D. Public Hearing

58. The Secretary granted the request for a public hearing on September 18, 2017. Each party was notified of this determination on March 18, 2018. AR Nos. 13811-13814.

59. Following the Order of the WQCC, remanding the proceeding to the Department, the hearing process was re-initiated by the publication of PN2 and subsequent public notices were published. AR 14609-14762.

60. The Department provided the public, including the Applicants, with notice of the proposed DP-1132 in accordance with the WQA and the Procedural Rules. AR 14609-14762.

61. The Department provided the public with notice of the public hearing in accordance with the WQA and the Procedural Rules. AR 17173-17177.

62. On November 4, 2019, the Department, the Applicants, and the Citizens each submitted Statements of Intent to present Technical Testimony (“SOI(s)”). The Department’s SOI included the direct testimony and the resume of Stephen Pullen. The Applicants’ SOI included the direct testimony and the resumes of Robert Beers, Danny Katzman, and Karen Armijo. The Citizens’ SOI included the direct testimony and the resume of Joni Arends. NMED Exhibits 2, 3; DOE/Triad Exhibits 1, 2, 11, 12, 14 and 15; Citizens’ Exhibits 1, 4.

63. A public hearing on DP-1132 was held on November 14, 2019, beginning at 8:58 AM at the Fuller Lodge, Pajarito Room, 2132 Central Avenue, Los Alamos, New Mexico. Tr. 1:17-21.

64. At the public hearing, appearances of counsel named in the Introduction to this Report were entered on behalf of the Applicants, the Department, and Citizens. Tr. 2:8-3:17.

65. At the public hearing, public comment was heard from five persons: Emily Arasim, Mark DeVolder, Alexa Jaramillo, Kathy Wan Povi Sanchez, and Terra Rite. Tr. 92:6- 94:3, 94:9-101:21, 103:1-105:3, 105:11-112:24, 227:9-228:9.

66. At the public hearing, technical testimony was provided by witnesses for the Applicants, Citizens, and the Department. Tr. 21:5-51:3, 114:1-129:12, 136:3-146:18, 158:6-182:17, 190:4-204:7.

67. 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. Mr. Pullen's resume was submitted as NMED Exhibit 2 and sets out his qualifications to submit technical testimony in this proceeding. NMED Exhibit 3, p. 1, lines 2-4; Tr. 190:4-204:7.

68. 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 provided public notice of the hearing and the draft permit, and expressed his opinion that the issuance of the proposed DP-1132 meets the requirements of the applicable law and regulations. NMED Exhibit 3; Tr. 190:4-204:7.

69. Mr. Pullen testified as to certain changes appropriate for the draft permit prior to issuance, and the reasons for those changes. He testified that numerous activities took place during the time DP-1132 was in effect, many of which necessitate changes to draft DP-1132. The activities necessitating a change to the DP-1132 are those principally constituting the Applicants' accomplishment of Permit requirements. NMED Exhibit 3, p. 9, lines 15-11, line 23; Tr. 194:6-196:17.

70. At the public hearing, Mr. Pullen was cross examined by counsel for Citizens as to the likelihood of a discharge from the RLWTF reaching groundwater, the June 2019 discharge through Outfall 051, and Mr. Pullen's understanding of the regulatory basis for issuance of a discharge permit under the WQA. Tr. 204:15-223:19.

71. Witnesses for the Applicants at the hearing included Robert S. Beers, Danny Katzman, and Karen E. Armijo. Tr. 4:3-5:8; DOE/Triad Exhibits 1, 2, 11, 12, 14 and 15.

72. Mr. Beers provided an introduction to the RLWTF and discussed the relevant operations at that facility, including the three discharge pathways identified in draft DP-1132. Mr. Beers discussed the Application and the regulatory background for issuance of DP-1132. 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 certain public comments. Mr. Beers further testified as to changes proposed to draft DP-1132 based on new information and actions taken since issuance of DP-1132 in August 2012. DOE/Triad Exhibits 1, 4, 7, 8, 9; Tr. 21:5-51:3.

73. Mr. Beers was cross examined by counsel for Citizens, and counsel for NMED. Tr. 52:1-80:2; 80:6-81:20.

74. Mr. Katzman provided an introduction to the hydrogeologic setting at LANL and discussed why the hydrogeologic 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, the 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 the requirements of draft DP-1132 and procedures for detecting and addressing noncompliant discharges. He offered testimony about pre-existing conditions at LANL that are relevant to certain conditions in draft DP-1132. DOE/Triad Exhibits 11, 13; Tr. 114:4-129:13.

75. Ms. Armijo addressed certain comments received on draft DP-1132 regarding signage in the vicinity of the RLWTF and the staffing of LANL's EOC. Her testimony explained why the proposed signage requirements of draft DP-1132 are adequate, and why the suggestions regarding signage have been opposed by the 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 off-site response interfaces present an opportunity to have tribal involvement in the delivery of emergency services that is the subject of some comments regarding EOC staffing. Tr. 136:3-146:18.

76. Ms. Arends opposed the issuance of the draft permit on behalf of Citizens. Her testimony addressed the intent of the Applicants to discharge water contaminants from the RLWTF such that they may move into groundwater, seismic issues around the facility, and her opinion that the RLWTF should be regulated under the HWA, pursuant to the Federal Resource Conservation and Recovery Act ("RCRA"). Citizens Pre-filed Testimony of Joni Arends, Attachment 4 to Citizens Statement of Intent to Present Technical Testimony; Tr. 158:6-182:17.

77. Citizens and members of the public cross-examined the Applicants' and NMED's witnesses. Tr. 51:25-81:20, 89:3-90:11, 129:20-135:23, 147:3-157:24, 204:17-226:5.

78. Citizens' cross-examination and re-cross examination of Mr. Beers and Mr. Pullen

was primarily directed to the potential for future discharges at the RLWTF and to attempting to establish the applicability of the HWA, pursuant to RCRA, to the RLWTF. Tr. 57:22-80:2, 89:3-90:12.

79. On cross-examination and redirect 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. 57:22-80:2; 82:3-88:19.

80. 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. 204:17-222:1.

81. The Hearing Officer kept the hearing record open for written comment until Monday, November 18, 2019. Tr. 229:5-8. Forty-seven (47) individuals submitted post-hearing written comments. AR 14897-15188.

E. Motion to Dismiss

82. On October 8, 2019, Citizens filed a Motion to Dismiss DP-1132 Proceeding. In the Motion, Citizens moved for dismissal of the proceeding on the grounds that regulation under the WQA is precluded by the terms of that Act, because the RLWTF is subject to regulation under the HWA, and because the Applicants do not intend to discharge from the RLWTF any water contaminants within the meaning of NMSA 1978, § 74-6-5(A). Motion, pp. 2-3.

83. On October 23, 2019, NMED and the Applicants filed Response Briefs to the Motion, arguing that the discharges to the SET, MES, and through Outfall 051 are discharges under the meaning of the WQA, and therefore the Secretary has authority to issue a discharge permit.

84. On October 30, 2019, Citizens filed its Reply Brief.

85. On November 7, 2019, the Hearing Officer issued an Order denying the Motion to

Dismiss on the grounds that “[t]he transcript of the June 18, 2019 meeting of the WQCC evidences the intent of the WQCC that the transcript of the 2018 Hearing not be considered on remand. Material portions of the Motion cite to and rely on the transcript of the 2018 Hearing. The 2018 Hearing is a significant part of the record on which the now vacated 2018 NMED Decision was based.” Order at ¶¶ 3, 4.

86. Citizens’ witness Joni Arends’ SOI and direct testimony at the public hearing describes the history of regulation of the RLWTF and the regulatory process under the HWA and RCRA and asserts that regulation of the RLWTF under the HWA and RCRA is “more protective” than regulation under the WQA. Citizens SOI, p. 3.

87. Citizens’ witness Joni Arends did not submit additional material evidence at the hearing on remand as to the issues raised in the Motion to Dismiss regarding the nature of the discharges that are regulated by DP-1132. Tr. 158-187.

PROPOSED CONCLUSIONS OF LAW

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

1. The WQCC is required by the WQA to adopt regulations to “prevent and abate water pollution”. NMSA 1978, § 74-6-4(E).

2. Pursuant to the WQA, the WQCC “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).

3. The implementing regulations of the WQA, the New Mexico Ground and Surface Water Protection Regulations (“Regulations”), 20.6.2 NMAC, state that “no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into groundwater

unless he is discharging pursuant to a discharge permit issued by the secretary.” 20.6.2.3104 NMAC.

4. Applicant DOE is a department of the United States. Applicant Triad is a limited liability company (LLC). The Applicants are both “persons” within the meaning of the Regulations. 20.6.2.7(P)(2) NMAC.

5. The Department is charged by the Regulations with evaluating applications for discharge permits, and recommending approval or disapproval by the Secretary. 20.6.2.3108 NMAC.

6. The activities described by the Applicants in the Application require a discharge permit under the WQA. 20.6.2.3104 and 20.6.2.3108 NMAC.

7. The Application complied with the requirements of NMSA 1978, § 74-6-5 and 20.6.2.3106 NMAC.

8. The WQA provides that the Department shall “either grant the permit, grant the permit subject to conditions, or deny the permit.” NMSA 1978, § 74-6-5(D).

9. The Applicants had the burden of proving that DP-1132 should be approved. 20.1.4.400.A.(1) NMAC. The Applicants met their burden of proof.

10. The Department had the burden of proving that the permit conditions it proposed should be adopted. 20.1.4.400.A.(1) NMAC. The Department met its burden of proof.

11. Citizens had the burden of proving that the conditions contained in draft DP-1132 are inadequate, improper or invalid. 20.1.4.400.A.(1) NMAC. Citizens failed to meet their burden of proof.

12. The Department provided the public, including the Applicants, with notice of DP-1132 in accordance with the Procedural Rules at 20.6.2.3108(H) NMAC.

13. The Department provided the public, including the Applicants, an opportunity to comment on the proposed discharge permit in accordance with the Procedural Rules at 20.6.2.3108(M) NMAC.

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

15. A public hearing was held on proposed DP-1132 in accordance with the WQA and the Procedural Rules.

16. The conditions proposed in draft DP-1132 “are reasonable and necessary to ensure compliance with the [Water Quality Act] and applicable regulations, including site specific conditions.” NMSA 1978, § 74-6-5(D).

17. The discharges described as occurring or planned by DOE/Triad require a groundwater discharge permit. 20.6.2.3104 and 20.6.2.3108 NMAC.

18. Draft DP-1132 for DOE/Triad’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 discharges that are occurring or planned by DOE/Triad. 20.6.2.3109.A NMAC.

19. Ground water with TDS of 10,000 mg/l or less will not be adversely affected by the issuance of DP-1132. 20.6.2.3109.B NMAC.

20. Approval and issuance of DP-1132 will not result in either concentrations that are in excess of applicable water quality 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.

21. No effluent or nitrogen in effluent will enter the subsurface from any surface impoundment as a result of issuance of DP-1132. 20.6.2.3109.C NMAC.

22. 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.

23. The signage requirements in draft DP-1132 are in compliance with the Regulations. 20.6.2 NMAC.

24. The Regulations do not establish requirements for who should be a part of the LANL EOC that are different from what DOE itself provides for. 20.6.2 NMAC.

25. All other requirements of Part 2 of the WQCC's regulations have been met, all requirements of NMED under Section 3107, and the public notice and participation requirements in Section 3108. 20.6.2.3109.E NMAC.

26. The Application complied with the requirements of NMSA 1978, §74-6-5 and 20.6.2.3100-3109 NMAC.

27. The Motion was fully briefed and decided pursuant 20.1.4.200(D) NMAC, and the discussion of the Motion in the Introduction to this Report is adopted by reference and incorporated into these Conclusions of Law.

28. The applicability of the HWA, pursuant to RCRA to the RLWTF is beyond the scope of this proceeding.

29. The decision in this proceeding is based upon and limited to the WQA and is not intended to address the application of the HWA to other activities at the RLWTF.

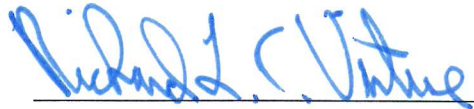
CONCLUSION

The Secretary should grant to the Applicants DP-1132 modified as described in NMED Exhibit 3 and as contained in DOE/Triad Exhibits 7 and 9.

A Proposed Final Order is attached to this Report.

DATED: March 4, 2020.

Respectfully Submitted,



Richard L. C. Virtue, Hearing Officer

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

**IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO**

No. GWB 19-24 (P)

REVISED PROPOSED FINAL ORDER

This matter comes before the Secretary of the Environment following a hearing before a Hearing Officer on November 14, 2019 in Los Alamos, New Mexico. The United States Department of Energy and Triad National Security, LLC., (“DOE/Triad”) as successor to Los Alamos National Security, LLC (“LANS”) have applied for a groundwater discharge permit for the Radioactive Liquid Waste Facility located within the boundaries of Los Alamos National Laboratory (“LANL”). The Radioactive Liquid Waste Facility is more specifically described in DP-1132.

The New Mexico Environment Department Ground Water Quality Bureau supports the issuance of the permit with conditions necessary to protect public health and welfare and the environment.

Having considered the Administrative Record in its entirety, including the hearing transcript, all post-hearing submittals and the Revised Hearing Officer’s Report dated March 4, 2020; and being otherwise fully advised regarding this matter.

**THE SECRETARY HEREBY ADOPTS THE REVISED HEARING OFFICER’S
REPORT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

IT IS THEREFORE ORDERED:

The Application for the discharge permit is granted, and DP-1132 shall be issued by the Ground Water Quality Bureau in the form set forth in the final revised Draft Permit as described in NMED Exhibit 3 to the hearing transcript.

JAMES KENNEY, Secretary of Environment

NOTICE OF RIGHT TO REVIEW

Pursuant to NMSA 1978, Section 74-6-5(O), any person who participated in this permitting action and who is adversely affected by the action may file a petition for review by the Water Quality Control Commission, c/o Cody Barnes, 1190 St. Francis Drive, Suite S-2100, Santa Fe, New Mexico 87505. The petition shall be made in writing to the Commission within thirty days from the date notice is given of this action; shall include a statement of the issues to be raised and the relief sought; and shall be provided to all other persons submitting evidence, data, views or arguments in the proceeding.

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

**IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO**

No. GWB 19-24 (P)

**REVISED HEARING OFFICER'S REPORT AND PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

[This Revised Report incorporates technical revisions identified in the Hearing Officer's Errata Notice filed on February 18, 2020 and incorporates certain technical comments of the New Mexico Environment Department and the Applicants filed on February 25, 2020.](#)

INTRODUCTION

The United States Department of Energy ("DOE") and Triad National Security, LLC., ("Triad), as successor to Los Alamos National Security, LLC ("LANS"), ("DOE/Triad" or "Applicants") have applied for a groundwater discharge permit entitled Discharge Permit No. 1132 ("DP-1132") for a radioactive liquid waste treatment facility ("RLWTF") located within the boundaries of Los Alamos National Laboratory ("LANL").

Notices of the public hearing on remand of the Application by the New Mexico Water Quality Control Commission ("WQCC") to the New Mexico Environment Department ("NMED" or "Department") were published on July 19, 2019th, August 23, 2019rd and October 9, 2019th in the *Los Alamos Monitor*, the *Santa Fe New Mexican* and the *Albuquerque Journal*. In addition, notice was given as provided in the applicable procedural rules of the Department.

A public hearing was conducted on November 14, 2019 as provided in NMED's Permit Procedures regulations found at 20.1.4 New Mexico Administrative Code and NMED's Ground

and Surface Water Protection regulations found at 20.6.2, Section 3110 of the New Mexico Administrative Code (“Procedural Rules”).

The Procedural Rules as well as the public notices require that any person proposing to submit technical testimony at the public hearing was required to have filed a statement of intent to do so, together with all exhibits, by November 4, 2019. Three statements of intent were filed: one by the Applicants, one by NMED and one by four citizens groups, including Concerned Citizens for Nuclear Safety, Tewa Women United, Honor Our Pueblo Existence and New Mexico Acequia Association. Tewa Women United have withdrawn from this proceeding. The three remaining citizen groups are collectively referred to herein as “Citizens”. In addition to the technical testimony, public testimony, both orally and in writing was submitted for the record.

In accordance with the Procedural Rules, and the Hearing Officer’s Order Establishing Post-Hearing Schedule dated December 10, 2019, the Applicants, NMED and Citizens submitted on January 10, 2020, Closing Arguments and Proposed Findings of Fact and Conclusions of Law, concerning the issuance of DP-1132.

At the public hearing the Applicants were represented by attorneys Stuart R. Butzier, Christina C. Sheehan, Susan McMichael (Triad) and Silas de Roma (DOE). Robert Beers, Danny Katzman and Karen Armijo presented technical testimony on behalf of the Applicants in support of DP-1132. John Verheul represented the Department, and Mr. Steve Pullen presented technical testimony on behalf of the Ground Water [Quality](#) Bureau (“Bureau” of GWB”) of the Department in support of approval of DP-1132. Lindsay Lovejoy, Jr., and Jonathon Block represented Citizens. Joni Arends submitted technical testimony on behalf of Citizens in opposition to issuance of DP-1132.

the RLWTF is required to be regulated under the State Hazardous Waste Act, NMSA 1978, §§ 74-4-1 through 74-4-14 (“HWA”) is not within the scope of this proceeding, nor is such consideration foreclosed by issuance of DP-1132.

Proposed findings of fact and conclusions of law attached to this Report, are based upon the parties’ post-hearing submittals and the transcript of the November 14, 2019 public hearing. All references to the transcript are abbreviated as “Tr.” and refer to the November 14, 2019 public hearing, unless otherwise stated.

The following is a discussion of the background of this proceeding and of the issues regarding applicability of the HWA raised by Citizens in a Motion to Dismiss, during the public hearing and in the closing arguments.

BACKGROUND

The following is a brief summary of the history and status of this matter as reflected in the Administrative Record.

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 Applicants that a groundwater discharge permit was required under the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 through 74-6-17 (“WQA”). The Application 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 3~~6~~, 2016, and materials contained in the Administrative Record that were prepared prior to issuance of this DP-1132. On November 1, 2007, the Applicants submitted a Notice of Intent (“NOI”) for the discharge of treated effluent water to a facility designated as the Solar Evaporation Tank (“SET”). NMED responded to the NOI requiring a new,

and comprehensive application. In December 2015, the Applicants submitted a draft Closure Plan for inclusion in DP-1132.

Public notice associated with draft DP-1132 occurred at three stages of the permitting process: the notification of the Department's receipt of the Application ("Public Notice 1" or "PN1"), the notification of the availability of a draft discharge permit for public comment and for request for 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(C) NMAC and occurred multiple times due to changing circumstances.

The notification of the Department's receipt of the Application (PN1) occurred in accordance with 20.6.2.3108(C3) NMAC. The Applicants posted the required signs, provided written notice to nearby property owners, and published the required display ~~advertisement~~ 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 the information required of such notices by 20.6.2.3108(F) NMAC. DP-1132 PN1 occurred two times, first in November of 1996 and then in March of 2012.

A public hearing was held on the issuance of DP-1132 on April 19, 2018. Based on that hearing a final DP-1132, dated August 29, 2018, was issued to the original Applicants. In January, 2019, ~~Citizens filed a petition~~ Communities for Clean Water ("CCW") filed a Motion to Vacate Agency Decision and Remand the Petition for Review of DP-1132 with the WQCC ~~to set aside the Final Order of the Secretary~~ on the grounds of appearance of impropriety of the hearing officer. The WQCC denied the petition, and ~~Citizens~~ CCW filed a writ of mandamus with the New Mexico Supreme Court requesting the court to reverse the decision of the WQCC. On June 18, 2019 the WQCC ruled that the hearing officer's job application and subsequent hiring by one of the parties

in that proceeding created an improper appearance of bias potentially affecting the Secretary's deliberation and issuance of DP-1132. The WQCC then ordered that, pursuant to NMSA 1978, NMSA 1978, § 74-6-5(Q), 20.1.3.16(A)(3) NMAC, and 20.1.3.16(F)(3) NMAC, the Secretary's Order from the April 2018 hearing be vacated, and the matter was remanded to the Department for a new hearing. On July 17, 2019 the Secretary designated the current hearing officer to conduct a new hearing. That hearing was held on November 14, 2019 as previously described in this Report.

On remand, the Department issued a notification of the availability of the draft permit for public comment and for request for a public hearing (PN2) occurred in accordance with 20.6.2.3108(H) NMAC. The Department posted draft DP-1132 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 the information required of such notices in 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 several times and provided the public with the opportunity to review a revised DP-1132, in consideration of comments received during the previous public comment period and to address the remanded draft DP-1132. Initial DP-1132 PN2s occurred in August 2003, April 2005, August 2013, November 2013, May 2017, March 9, 2018, and July 19, 2019.

On August 23, 2019, the Department issued the final PN2 public notice offering the draft DP-1132 that is the subject of this Report.

Upon the Department's determination that a public 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. That hearing notice included information required of such notices in 20.6.2.3108(N) NMAC and described the time and place of the hearing and a brief description of the hearing process. Because of changes in the hearing date and location, and due to the remand of DP-1132, the final notice of hearing was given on October 11, 2019. The Department provided both English and Spanish versions of the hearing notice.

The final version of DP-1132 proposed by the Department was admitted as NMED Exhibit 1 at the public hearing, as modified pursuant to the changes proposed in NMED Exhibit 3; [and](#) DOE/Triad Exhibits 7 and 9-3. DOE/Triad Exhibit 7 represents a clean version of [proposed edits to](#) draft DP-1132, and DOE/Triad Exhibit 97 represents the changes from the previously issued permit in “track changes” format.

CITIZENS’ MOTION TO DISMISS AND APPLICABILITY OF THE HWA

Citizens filed a Motion to Dismiss this proceeding on October 8, 2019 (“Motion” or “Motion to Dismiss”). NMED and the Applicants filed separate Responses to the Motion on October 23, 2019. Citizens filed a Reply Brief on October 30, 2019.

On November 7, 2019, the Hearing Officer entered an Order Denying the Motion to Dismiss. The Hearing Officer determined that material portions of the Motion cite to and rely on the transcript of the 2018 hearing, which is a significant part of the record on which the vacated 2018 Final Order of the Secretary was based. The Hearing Officer further determined that the purpose of the remand of this proceeding was to conduct a new hearing with a new hearing officer. The Order Denying the Motion to Dismiss concludes that this proceeding will be decided on the Hearing Record [as defined in 2-0.1.4.7(A)(~~1419~~) NMAC] of this remand proceeding.

The Order further concludes that Citizens will not be prejudiced by denial of the Motion because Citizens will have an opportunity in the remanded proceeding to assert their position

regarding matters addressed in the Motion. Citizens have fully participated in this remand proceeding, submitting evidence and legal argument on the matters that are the subject of the Motion.

The central argument made in the Motion is that the RLWTF treats and stores hazardous waste and does not “discharge” within the meaning of the WQA. Citizens’ argument runs headlong into a decision of the United States Environmental Protection Agency’s Environmental Appeals Board (“EAB”), involving an appeal by [Concerned Citizens for Nuclear Safety](#) to the EAB of a decision of the Region 6 EPA Administrator on issues involving essentially the same regulatory framework applicable to this proceeding. *See In re Los Alamos National Security, LLC, and the US Department of Energy*, NPDES Appeal No. 17-05 (EAB Mar. 14, 2018) (attached as Exhibit 1 to NMED’s Response in Opposition to Citizen’s Motion to Dismiss and Exhibit 4 to the Applicants Response to Citizen’s Motion to Dismiss). In that case, the EAB considered whether discharges to Outfall 051 pursuant to the Applicants’ NPDES permit would be necessary in the event that the Mechanical Evaporator and/or Zero Liquid Discharge tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in ~~the Laboratory’s~~ scope/mission. The EAB held that discharges to Outfall 051 would be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage, and were therefore indeed a possibility. *Id* at 1. Citizens made in that proceeding similar arguments to the arguments it makes in this proceeding - namely that a discharge permit should not be issued when there has not been a discharge since 2010 and no future discharges are planned. *Id* at 6. The EAB found that the EPA’s Region 6 Administrator’s denial of Citizens’ request to terminate the NPDES permit in this context did not constitute error or abuse of discretion. *Id* at 19.

In upholding the issuance of Applicants' NPDES Permit, the Regional Administrator stated:

In their application for permit coverage, LANS and DOE describe the “no discharge” nature of the RLWTF and specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. The permittees indicated that under certain circumstances, e.g. if one or both evaporative systems have to be taken off-line, a discharge could occur. Without permit authorization, such discharge could subject the permittees to liability under the CWA for discharging without a permit.

Exhibit 4 to Applicants' Response to Motion to Dismiss, p. 2.

Similarly, discharges to the SET and MET have the potential for failure, a resulting in further discharges. NMED previously made that determination in the “Authorization to Discharge” section of draft DP-1132. AR 13690.

The NMED GWB has [a](#) long-standing policy that is consistent with the decision of the EAB in Appeal No. 17-08. The Hearing Record establishes NMED has issued more than twenty five (25) permits that limit discharges to lined evaporative impoundments systems, and therefore are designed as “zero discharge” (to surface or groundwater), as a mechanism in which to avoid the impact of the discharge on groundwater. Examples of such permits were provided by NMED witness Pullen in his direct testimony. See NMED Exhibit 3, pp. 50-51. Other examples of discharge permits issued to facilities which only discharge to lined, engineered impoundments similar to the Mechanical Evaporator System (“MES”) and SET are part of the Administrative Record in responses to public comments made in 2017 AR 13815-13824. Mr. Pullen explained NMED's authority to regulate such systems for purposes similar to those present in this proceeding. NMED Exhibit 3, pp. 50-51.

NMED has authority under the WQA to issue, or propose to issue, groundwater discharge permits separate from the obligation NMED has under the HWA. Citizens argue that this proceeding should be dismissed because NMED does not have authority to regulate such activities

raising issues related to the HWA in connection with that review. See Citizens Proposed Findings of Fact, Conclusions of Law and Final Argument, p. 34 fn 13. In addition, Applicants' reference in their Response to the Motion to Dismiss a pending major modification to LANL's existing HWA permit. See Applicants Response to Motion to Dismiss, p. 2 and Exhibit 2 to the Response to Motion to Dismiss. Exhibit 2 to the Response to the Motion to Dismiss is a letter dated September 22, 2017 from one of the members of Citizens. In that letter, the member argues to the Hazardous Waste Bureau of the Department that the HWA applies to the RLWTF and that the permit should be revised accordingly. The record reflects that three different forums are considering the issues raised in this proceeding by Citizens. Thus, the issuance of DP-1132 does not preclude consideration by the appropriate forums of the issues raised by Citizens. The issue in this proceeding is whether a groundwater discharge permit should be issued to the Applicants under the WQA and the regulations issued under that act for the purpose of "preventing or abating pollution of groundwater in the state." The decision in this case is not intended [to](#) and does not preclude Citizens from pursuing their legal arguments in the other forums.

PROPOSED FINDINGS OF FACT

A. The RLWTF

1. The RLWTF is a wastewater treatment facility treats radioactive liquid waste wastewaters received from technical areas throughout LANL. NMED Exhibit 3, p. 4; DOE/Triad Exhibit 1, p. 4.

2. The RLWTF includes 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. NMED Exhibit 3, p. 6; DOE/Triad Exhibit 1, p. 4.

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 the RLWTF](#). Tr. 150:18- 151:1; DOE/Triad Exhibit 14, 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) the SET at TA-52. The primary RLWTF structure at the TA-50 is Building 50-01; the RLWTF 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 3, p. 4.

B. DP-1132

5. Draft DP-1132 addresses potential new releases from the RLWTF. NMED Exhibit 1, pp. 37-38; NMED Exhibit 3, pp. 44-46; DOE/Triad Exhibit 9, pp. 38-39; DOE/Triad Exhibit 11, pp. 12-13.

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 MES, (2) to the synthetically lined SET, (3) and through Outfall 051 that is also the subject of a NPDES Permit issued by Region 6 of the United States Environmental Protection Agency (Permit #NM0028355). Tr. 28:10-16; NMED Exhibit 1, p. 8-9; NMED Exhibit 5, p. 5; DOE/Triad Exhibit 1, p. 5; DOE/Triad Exhibit 9, p. 8-9.

7. On June 18, 2019, following a period of doing water tightness testing on the line that went to Outfall 051, Applicants discharged 80,798 liters of treated effluent through Outfall 051. Tr. 43:17-44:15. LANL has both near-term and long-term plans to conduct routine discharges

p. 7,11; DOE/Triad Exhibit 9, pp. 36-37.

26. Existing monitoring wells were 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. 128:16-17; DOE/Triad Exhibit 11, p. 11.

27. ~~Draft DP-1132 requires t~~The installation of the two new alluvial groundwater monitoring wells in the canyon downgradient of Outfall 051; will allow LANL to detect any unpermitted releases from Outfall 051. Tr. 126:5-21; NMED Exhibit 1, p. 34; DOE/Triad Exhibit 11, p. 7; DOE/Triad Exhibit 9, p. 34.

28. The ~~additional-regional~~ groundwater monitoring wells ~~required by draft DP-1132~~ will be sampled annually for a suite of constituents that include organic compounds, metals, radioactivity and general inorganic compounds, including perchlorate. Tr. 128:4-14; NMED Exhibit 1, pp. 35-37; DOE/Triad Exhibit 11, p. 11; DOE/Triad Exhibit 9, pp. 35-37.

29. Triad submitted to NMED and completed a work plan that proposed a moisture monitoring approach for monitoring potential leaks beneath the SET. Tr. 29:16-30:4, 49:25-50:3; NMED Exhibit 1, pp. 31-32; NMED Exhibit 3, p. 10; DOE/Triad Exhibit 1, p. 14; DOE/Triad Exhibit 7 p. 4; DOE/Triad Exhibit 9, p. 32.

30. Draft DP-1132 sets forth requirements and conditions for any future exceedance from non-compliant releases in Condition 37. NMED Exhibit 1, p. 37-38; DOE/Triad Exhibit 9, p. 38; DOE/Triad Exhibit 11, p. 12-13.

31. DOE/LANS submitted supplemental information 2012 permit application submitted in 2012 (“2012 Permit Application”) on June 3, 2016. AR 13272-13355; NMED Exhibit 3, p. 6; DOE/Triad Exhibit 1, p. 3.

23, 2019. AR 09449-09450; 13481-13494; 14045; 14611-14615; 14717-14746; NMED Exhibit 3, p. 8.

40. NMED issued the hearing notice on October 3, 2019, and the final notice occurred on October 11, 2019. NMED Exhibit 3, pp. 8-9; NMED Exhibit 4.

41. NMED's public notice was given 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; 14611-14615; 14717-14746; 17174-17175; Tr. 200:16-25.

42. Following the August 29, 2018, Order of the Secretary approving issuance of DP-1132 and prior to the June 18, 2019 WQCC Order remanding the proceeding, NMED edited DP-1132 to correct a difference between the discharge permit presented at the April 19, 2018 hearing and the permit issued on August 29, 2018. The edit corrected an error in the August 29, 2018 permit, changing the period of time the Permittee has to post documents voluntarily submitted to NMED on the LANL Electronic Public Reading Room from seven to thirty days. NMED Exhibit 1, p. 46; NMED Exhibit 3, p. 9; DOE/Triad Exhibit 7, p. 2.

43. Following the August 29, 2018, Order of the Secretary approving issuance of DP-1132 ("Prior DP-1132") and prior to the June 18, 2019 WQCC Order remanding the proceeding to NMED, numerous activities took place during the time DP-1132 was in effect, which necessitate changes to draft DP-1132 presented as NMED Exhibit 1. These changes are identified in NMED Exhibit 3; [and](#); DOE/Triad Exhibits [7](#) [and](#) [9](#); ~~DOE/Triad Exhibit 9~~, and are described in Finding Nos. 44-55 below. Tr. 33:18-35:10; 194:6-196:17; NMED Exhibit 3, p. 9; DOE/Triad Exhibit 1, p. 12-17; DOE/Triad Exhibit 7; DOE/Triad Exhibit 9.

44. On September 12, 2018, the Applicants submitted a transfer notice for DP-1132

that the SET was not being utilized. NMED Exhibit 3, p. 11.

53. On April 9, 2019, the Applicants submitted written confirmation that flow meters were installed at four locations in accordance with Condition 21 of Prior DP-1132. The Applicants confirmed that the four associated flow meters were calibrated in accordance with Condition 22. Condition 21 must be revised to reflect the Applicants' installation of the meters. Condition 22 must be revised to reflect the Applicants' initial calibration of the meters. NMED Exhibit 3, p. 11, DOE/Triad Exhibit 7, p. 3, 4; DOE/Triad Exhibit 9.

54. On June 3, 2019, the Applicants submitted documentation verifying that all units intended to convey, store, treat, or dispose of untreated liquid or semi-liquid waste streams meet the requirements of secondary containment in accordance with Condition 7 of Prior DP-1132. Condition 7 has been fulfilled and should be removed from DP-1132. NMED Exhibit 3, p. 11; DOE/Triad Exhibit 7, p. 2; DOE/Triad Exhibit 9.

55. A complete list of all edits and revisions to draft DP-1132 that are warranted as a result of actions DOE/Triad took following the August 29, 2018 Order of the Secretary and issuance of Prior DP-1132 and prior to the June 18, 2019 WQCC Order remanding this proceeding to NMED are described in NMED Exhibit 3 and ~~included in~~ DOE/Triad Exhibit 7. [The revisions and edits are set out in track changes format in the version of draft DP-1132 which is DOE/Triad Exhibit 9.](#) Corresponding revisions to DP-1132 should be made. Tr. 38:14-23.

C. Public Comments Received

56. NMED received public comments from a number of commenters. Those specific comments are addressed in NMED's Proposed Response to Comments, NMED Exhibit 5. Because NMED has received roughly 200 comments at or after the public hearing, NMED did not complete the Proposed Response to Comments at the time proposed Findings of Fact and Conclusions of

Dismiss on the grounds that “[t]he transcript of the June 18, 2019 meeting of the WQCC evidences the intent of the WQCC that the transcript of the 2018 Hearing not be considered on remand. Material portions of the Motion cite to and rely on the transcript of the 2018 Hearing. The 2018 Hearing is a significant part of the record on which the now vacated 2018 NMED Decision was based.” Order at ¶¶ 3, 4.

86. Citizens’ witness Joni Arends’ SOI and direct testimony at the public hearing describes the history of regulation of the RLWTF and the regulatory process under the HWA and RCRA and asserts that regulation of the RLWTF under the HWA and RCRA is “more protective” than regulation under the WQA. Citizens SOI, p. 3.

87. Citizens’ witness Joni Arends did not submit additional material evidence at the hearing on remand as to the issues raised in the Motion to Dismiss regarding the nature of the discharges that are regulated by DP-1132. Tr. 158-187.

PROPOSED CONCLUSIONS OF LAW

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

1. The WQCC is required by the WQA to adopt regulations to “prevent and abate water pollution”. NMSA 1978, § 74-6-4(E).

2. Pursuant to the WQA, the WQCC “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).

3. The implementing regulations of the WQA, the New Mexico Ground and Surface Water Protection Regulations (“Regulations”), 20.6.2 NMAC, state that “no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into groundwater

unless he is discharging pursuant to a discharge permit issued by the secretary.” 20.6.2.3-104 NMAC.

4. Applicant DOE is a department of the United States. Applicant Triad is a limited liability company (LLC). The Applicants are both “persons” within the meaning of the Regulations. 20.6.2.7(P)(2) NMAC.

5. The Department is charged by the Regulations with evaluating applications for discharge permits, and recommending approval or disapproval by the Secretary. 20.6.2.31083018 NMAC.

6. The activities described by the Applicants in the Application require a discharge permit under the WQA. 20.6.2.3-104 and 20.6.2.31083018 NMAC.

7. The Application complied with the requirements of NMSA 1978, § 74-6-5 and 20.6.2.31063-106 NMAC.

8. The WQA provides that the Department shall “either grant the permit, grant the permit subject to conditions, or deny the permit.” NMSA 1978, § 74-6-5(D).

9. The Applicants had the burden of proving that DP-1132 should be approved-. 20.1.4.400.A.(1)20.1.1.100.A.(1) NMAC. The Applicants met their burden of proof.

10. The Department had the burden of proving that the permit conditions it proposed should be adopted. 20.1.4.400.A.(1)20.1.4.400.A.(1) NMAC. The Department met its burden of proof.

11. Citizens had the burden of proving that the conditions contained in draft DP-1132 are inadequate, improper or invalid. 20.1.4.400.A.(1)20.1.4.400.A.(1) NMAC. Citizens failed to meet their burden of proof.

12. The Department provided the public, including the Applicants, with notice of DP-1132 in accordance with the Procedural Rules at 20.6.2.3-108(H) NMAC.

13. The Department provided the public, including the Applicants, an opportunity to comment on the proposed discharge permit in accordance with the Procedural Rules at 20.6.2.3108(M) NMAC.

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

15. A public hearing was held on proposed DP-1132 in accordance with the WQA and the Procedural Rules.

16. The conditions proposed in draft DP-1132 “are reasonable and necessary to ensure compliance with the [Water Quality Act] and applicable regulations, including site specific conditions.” NMSA 1978, § [24-6-5\(D\)](#).

17. The discharges described as occurring or planned by DOE/Triad require a groundwater discharge permit. 20.6.2.3104 and 20.6.2.3108 NMAC.

18. Draft DP-1132 for DOE/Triad’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 discharges that are occurring or planned by DOE/Triad. 20.6.2.3109.A NMAC.

19. Ground water with TDS of 10,000 mg/l or less will not be adversely affected by the issuance of DP-1132. 20.6.2.3-109.B NMAC.

29. The decision in this proceeding is based upon and limited to the WQA and is not intended to address the application of the HWA to other activities at the RLWTF.

CONCLUSION

The Secretary should grant to the Applicants DP-1132 modified as described in NMED Exhibit 3 and as contained in DOE/Triad Exhibits 7 and 9.

A Proposed Final Order is attached to this Report.

DATED: ~~February 10, 2020~~ [March 4, 2020](#).

Respectfully Submitted,

Richard L. C. Virtue, Hearing Officer

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

**IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO**

No. GWB 19-24 (P)

REVISED PROPOSED FINAL ORDER

This matter comes before the Secretary of the Environment following a hearing before a Hearing Officer on November 14, 2019 in Los Alamos, New Mexico. The United States Department of Energy and Triad National Security, LLC., ([“DOE/Triad”](#)) as successor to Los Alamos National Security, LLC ([“~~DOE/LANL~~LANS”](#)) have applied for a groundwater discharge permit for the Radioactive Liquid Waste Facility located within the boundaries of [LANL.Los Alamos National Laboratory \(“LANL”\)](#). The Radioactive Liquid Waste Facility is more specifically described in DP-1132.

The New Mexico Environment Department Ground Water [Quality](#) Bureau supports the issuance of the permit with conditions necessary to protect public health and welfare and the environment.

Having considered the Administrative Record in its entirety, including the hearing transcript, all post-hearing submittals and the [Revised](#) Hearing Officer’s Report [dated March 4, 2020](#); and being otherwise fully advised regarding this matter.

THE SECRETARY HEREBY ADOPTS THE [REVISED](#) HEARING OFFICER’S REPORT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IT IS THEREFORE ORDERED:

The Application for the discharge permit is granted, and DP-1132 shall be issued by the Ground Water [Quality](#) Bureau in the form set forth in the final revised Draft Permit as described in NMED Exhibit 3 to the hearing transcript.

JAMES KENNEY, Secretary of Environment

NOTICE OF RIGHT TO REVIEW

Pursuant to NMSA 1978, Section 74-6-5.0, ~~(O)~~, any person who participated in this permitting action and who is adversely affected by the action may file a petition for review by the Water Quality Control Commission, c/o Cody Barnes, 1190 St. Francis Drive, Suite S-2100, Santa Fe, New Mexico 87505. The petition shall be made in writing to the Commission within thirty days from the date notice is given of this action; shall include a statement of the issues to be raised and the relief sought; and shall be provided to all other persons submitting evidence, data, views or arguments in the proceeding.

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

IN THE MATTER OF PROPOSED DISCHARGE)
PERMIT 1132 FOR THE RADIOACTIVE LIQUID)
WASTE TREATMENT FACILITY AT THE) **No. GWB-19-24(P)**
LOS ALAMOS NATIONAL LABORATORY,)
LOS ALAMOS, NEW MEXICO)

CITIZENS’ MOTION TO VACATE HEARING OFFICER’S REPORT

This motion is presented on behalf of Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and New Mexico Acequia Association, three citizen groups that have appeared and presented evidence in opposition to the proposed discharge plan, DP-1132 (collectively, the “Citizens”).

Citizens contend in this case that the permit may not be issued because the Radioactive Liquid Waste Treatment Facility (“RLWTF”) must, under the law, be regulated by the Hazardous Waste Act and not the Clean Water Act, and that the Clean Water Act permit confers an unlawful exemption from the Hazardous Waste Act. These matters are fully set forth in our comments on the Hearing Officer’s Report.

Citizens now urge another matter bearing upon the Hearing Officer’s Report: Documents produced by NMED on Monday, two days ago, show that the Hearing Officer, Richard L.C. Virtue, Esq., is disqualified from participating in this proceeding.

The Hearing Officer has acted in that capacity under a four-year contract with NMED, entered into in 2018. (#19 667 1210 0003). The contract is an ongoing agreement, under which Mr. Virtue is compensated at the rate of \$150.00 per hour, to a maximum of \$200,000, for acting as a hearing officer. He is not an employee of the Department but an independent attorney, to whom cases are individually referred in the discretion of the Department. Various provisions in the contract are inconsistent with the role of an impartial adjudicator. For instance, the contract obligates the Hearing Officer to advise the Secretary on legal issues (par. 1.E) and to keep information confidential (par. 10).

The 2018 contract is an outstanding arrangement under which the Hearing Officer agrees to accept referrals, and no doubt desires to do so, and under which he is compensated at an hourly rate for the time spent on each individual matter. Under this arrangement, Mr. Virtue has an incentive to perform in a case assigned to him in such a way as to prove himself satisfactory to the Department, so that the Department will be inclined to assign him further cases. There is, thus, an incentive to uphold the Department's position in the matters assigned, thereby to encourage further assignments. Under the contract, Mr. Virtue has been assigned several matters.

Such a system denies the litigants the impartial tribunal and due process of law that the Constitution requires. Thus, in *Haas v. County of San Bernardino*, 27 Cal. 4th 1017 (2002), the California Supreme Court held that a hearing officer's retention for a specific case, where additional future such assignments would be available at the discretion of the county that was a party to the proceedings, was a due process violation:

The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill. We conclude the answer is yes.

27 Cal. 4th at 1024. The court explained the logic requiring disqualification:

To summarize the governing principles, due process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.

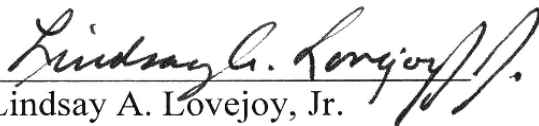
27 Cal. 4th at 1024-25. The facts of this case clearly come within that holding.

Under the Constitution, it is not necessary to demonstrate that a hearing officer, in fact, favored a particular party. In any case, Mr. Virtue has done nothing as Hearing Officer to displease the Department, which selected him and determines his compensation.

Conclusion

Citizens request that the Secretary vacate the Hearing Officer's Report and remand the matter for further proceedings before a properly qualified hearing officer.

Respectfully submitted this 25th day of March 2020:

BY: 
Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
lindsay@lindsaylovejoy.com

/s/ _____
Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 629-4742
dmeiklejohn@nmelc.org
Counsel for Citizens

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 2020 I caused the foregoing *Citizens' Motion to Vacate Hearing Officer's Report* to be electronically served on the parties listed below by email and filed with the Administrator of Boards and Commissions.

Mr. Stuart R. Butzier and Ms. Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, PA
123 E. Marcy Street, Ste. 201
Santa Fe, New Mexico 87501
sbutzier@modrall.com
ccs@modrall.com

Ms. Susan L. McMichael
Office of Laboratory Counsel/MS A187
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov
Triad National Security, LLC, and U.S. Department of Energy/NNSA

Mr. John Verheul, Assistant General Counsel,
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Albuquerque, New Mexico 87102
john.verheul@state.nm.us
Counsel for the New Mexico Environment Department

BY: 
Lindsay A. Lovejoy, Jr.

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

**IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO**

No. GWB 19-24 (P)

**THE NEW MEXICO ENVIRONMENT DEPARTMENT GROUND WATER
QUALITY BUREAU'S RESPONSE IN OPPOSITION TO CITIZENS'
MOTION TO VACATE HEARING OFFICER'S REPORT**

Pursuant to 20.1.4.200(D) NMAC, the New Mexico Environment Department (the "Department" or "NMED") Ground Water Quality Bureau (the "Bureau" or "GWQB") submits this response in opposition to Concerned Citizens for Nuclear Safety, Honor our Pueblo Existence, and New Mexico Acequia Association's ("Citizens") Motion to Vacate Hearing Officer's Report ("Motion"). The Motion is without merit and should be denied for the reasons set forth below.

BACKGROUND

On April 19, 2018, a public hearing was held regarding the issuance of DP-1132 (GWB 17-20 (P)), eventually resulting in issuance of DP-1132 on August 29, 2018. That proceeding was reviewed by the Water Quality Control Commission ("WQCC") in proceeding No. WQCC 18-05 (A). On June 18, 2019 the WQCC vacated the Final Order of the Secretary of Environment and remanded the matter to NMED for a new hearing. [AR 14602-14606].

On July 17, 2019, the Cabinet Secretary of the Department ("Secretary") James Kenney issued a *Notice of Hearing Determination & Hearing Officer Appointment* for the present proceeding, GWB 19-24 (P). Richard Virtue was appointed to serve as Hearing Officer to "exercise all powers and duties granted under the New Mexico Environment Department Permit Procedures found in 20.1.4 NMAC and all other applicable law." Mr. Virtue was retained pursuant to a

Professional Services Contract (#19 667 1210 0003) executed on August 14, 2018 by Butch Tongate, then Secretary of the Department, and Marlene Cordova, the Chief Financial Officer of the Department. The Contract was approved “for legal sufficiency” by Jennifer Hower, General Counsel of the Department. The Department currently has three such contracts in place, as there is not at present a full-time employee hearing officer.¹

On November 14, 2019, a second public hearing public hearing was held regarding the issuance of DP-1132. The hearing transcript was filed on December 3, 2019, and proposed findings of fact and conclusions of law were filed by all parties on January 10, 2010. The Hearing Officer issued his Hearing Officer’s Report on February 10, 2020, all parties filed comments on this report on February 25, 2020, and the Hearing Officer issued his Revised Hearing Officer’s Report and Proposed Findings of Fact and Conclusions of Law on March 4, 2020.

On March 9, 2020, a records request was submitted to the Department by Concerned Citizens for Nuclear Safety pursuant to the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (“IPRA”). The request sought, among other records, “[t]he contract or other agreement under which Richard L. C. Virtue acted as Hearing Officer for NMED in 2019 hearings about Water Quality Act permit DP-1132.” The request was fulfilled in its entirety on March 23, 2020. The next day, on March 24, 2020, Counsel for Citizens sent a letter addressed to the Secretary to all parties, copying the Hearing Officer and the Hearing Clerk, requesting that the letter be brought to the attention of the Secretary. Citizens filed the present Motion on March 25, 2020.

STANDARD OF DECISION

Article II, Section 18 of the New Mexico Constitution, and the Fourteenth Amendment of the United States Constitution guarantee every citizen the right to procedural due process in state

¹ Even when there has been a full-time employee hearing officer, the Department has historically contracted with additional hearing officers as the need arose.

proceedings. Article VI, Section 18 of the New Mexico Constitution further provides that no judge of any court shall hear any case in which he or she has an interest, except by consent of all parties.

New Mexico courts have ruled that procedural due process under both the State and Federal constitutions “requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or prejudice regarding the outcome of the case.” *N.M. Bd. Of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 27, 142 N.M. 248, 164 P.3d 947 (quoting *Reid v. New Mexico Bd. of Examiners of Optometry*, 1979-NMSC-005, 92 N.M. 414, 589 P.2d 198, 200). These due process principles are applicable in quasi-judicial administrative proceedings. *See Los Chavez Cmty. Ass’n v. Valencia Cnty.*, 2012-NMCA-44, ¶ 23, 277 P.3d 475 (citing *Schweiker v. McClure*, 456 U.S. 188 (1982) for the statement that “due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities”).

However, in New Mexico when a party seeks to recuse an administrative decision maker for due process violations due to bias, that party must present evidence of actual bias, substantive prejudgment or self interest. *New Mexico Interstate Stream Commission, Petitioner, v. Honorable Raymond L. Romero, in his Official Capacity as Judge for the Fifth Judicial District Court, Respondent, Scott A. Verhines, in his official capacity as New Mexico State Engineer, Gregory Ranch, Gregory Rockhouse Ranch, Inc., Norman Scott Gregory, Larry Lee Gregory and Henry Terpening, Real Parties in Interest.*, 2013 WL 9888061 (N.M.) 17 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Nat’l Labor Relations Bd. v. Donnelly Garment Co.*, 330 U.S. 219, 236-37 (1947)). Administrative decision makers “are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” *United States v. Morgan*, 313 U.S. 409, 421 (1941).

ARGUMENT

Without raising the matter previously in this proceeding, Citizens now assert that the Hearing Officer “is disqualified from participating in this proceeding.” [3-25-20 MOT 1]. Citizens go on to describe several of the provisions in the Professional Services Contract entered into between the Department and the Hearing Officer in 2018. [3-25-20 MOT 2]. Citizens rely exclusively on a California state court ruling, *Haas v. County of San Bernardino*, 27 Cal. 4th 1017 (2002), for the proposition that retaining a hearing officer under such an arrangement violates procedural due process. [3-25-20 MOT 3]. Citizens then erroneously claim that “[t]he facts of this case clearly come within that holding.” [3-25-20 MOT 3].

Citizens’ exclusive reliance upon *Haas* is misplaced, as the decisions of other states are persuasive but not binding on New Mexico. *Sec. Ins. Co. of Hartford v. Chapman*, 1975-NMSC-052, ¶ 19, 88 N.M. 292, 298-99, 540 P.2d 222, 228-29; *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 11, 140 N.M. 879, 888, 149 P.3d 976, 985.

Additionally, the facts of the present case do not fall within the *Haas* holding. Citizens assume a monolithic “Department” and conflate the actions of the Secretary with the position of the Bureau. In the present case, as in all administrative hearings before the Secretary, the Secretary appoints an unbiased hearing officer and it is pursuant to that authority under which the hearing officer fulfills his duties. *Notice of Hearing Determination & Hearing Officer Appointment*, July 19, 2019; 20.6.2.3110(A) NMAC; 20.1.4.7(A)(13) NMAC. The Secretary approves the Professional Services Contract pursuant to which the hearing officer is compensated. The Secretary is the final decision maker with respect to issuance of a groundwater discharge permit for which a public hearing has been held. 20.6.2.3109(B) NMAC; 20.6.2.3110(L) NMAC; 20.1.4.500(D) NMAC.

In contrast, the Bureau functions as a party in this proceeding, providing technical testimony in support of issuance, issuance with conditions, or denial of the issuance of the proposed discharge permit. 20.6.2.3110(G)(2) NMAC; *Entry of Appearance – John Verheul*, GWB 17-20 (P), filed March 19, 2018.² This function is distinct from that of the Secretary. The procedural rules state that a hearing officer “may be a department employee other than an employee of the bureau evaluating the application.” 20.6.2.3110(A) NMAC. The Bureau has no function in contracting with prospective hearing officers, no function in selection of hearing officers for various administrative proceedings, and no function in compensating such hearing officers for their work. Therefore, the allegation that the Hearing Officer is somehow incentivized to issue rulings favorable to the Bureau is false. There is no incentive for the Hearing Officer to favor the Bureau when all contracting, compensation, and selection of hearing officers is done by the Secretary, and the Bureau plays no role in that process.

In *Haas*, a county advocating for revocation of a county-issued license unilaterally selected and compensated a temporary hearing officer to hear the administrative appeal of the licensee. There was no separation within the county between those doing the selecting, contracting, and compensating of the hearing officer, and those within the county advocating for revocation of the license in question. This is distinct from the Department’s clear separation of roles whereby the Bureau acts as a party to the proceeding, advocating for issuance of the discharge permit with conditions in the present case, while the final decisionmaker, the Secretary, contracts with, selects, and compensates the hearing officer. Further distinguishing the present case, in *Haas* hearing officers were selected on an *ad hoc* basis, paid according to the time spent and amount of work

² The Bureau admittedly sometimes abbreviates “New Mexico Environment Department Ground Water Quality Bureau” as simply “NMED” or “Department”, but it is the Bureau, not the entire Department, which is a party to this proceeding.

performed, and selected for future work based entirely on the government's goodwill. 27 Cal. 4th at 1020. This differs from the present case, whereby hearing officers such as Mr. Virtue enter into four-year professional services contracts with a maximum amount payable of \$200,000. Even the *Haas* case itself acknowledges that due process does not forbid the government to pay an adjudicator when it must provide someone with a hearing. Indeed, the government must ordinarily pay the adjudicator in such cases to avoid burdening the affected person's right to a hearing. 27 Cal. 4th at 1031.

Other state courts have previously distinguished *Haas*. Absent evidence that hearing officers have a direct, personal, substantial pecuniary interest in rendering decisions favorable to the public entity that hires and selects them, a licensee's due process rights are not violated when such hearing officers preside over licensing hearings. *In re Khan*, 804 N.W.2d 132 (Minn. Ct. App. 2011). The *Haas* court clearly distinguished between a hearing officer's "slight" pecuniary interest and a "direct, personal, substantial, and pecuniary interest." *Buchanan v. City of Minneapolis, Dept. of Regulatory Services*, 2011 WL 2982621, at *8 (Minn. Ct. App. July 25, 2011) (quoting *Haas*, 27 Cal. 4th at 1030). The hearing officer in *Buchanan* was compensated substantially, but it was spread over three years and many cases, and the city was contractually obligated to pay him for those three years regardless of whether he rendered decisions favorable to the city. An arrangement that does not offend due process. *Id.*

Finally, Citizens' Motion asserts "it is not necessary to demonstrate that a hearing officer, in fact, favored a particular party." [3-25-20 MOT 4]. While this may be the law in California under the *Haas* ruling, it directly contradicts the New Mexico Supreme Court as cited in *New Mexico Interstate Stream Commission*: ("[w]hen a party seeks to recuse an administrative decision maker for due process violations due to bias, that party must present evidence of actual bias,

substantive prejudgment or self interest.”). 2013 WL 9888061 (N.M.) at 17. Having failed to present any evidence of bias or substantive self interest on the part of the Hearing Officer besides the vague assertion that “Mr. Virtue has done nothing as Hearing Officer to displease the Department” [3-25-20 MOT 4], Citizens fail to meet their burden.

CONCLUSION

The facts of the present case are distinctly different from those in *Haas*, and no evidence of actual bias, substantive prejudgment or self-interest has been presented by Citizens as required by New Mexico law. The procedural due process rights of the parties to the present proceeding have therefore not been violated. For the foregoing reasons, the Citizen’ Motion should be denied.

Respectfully submitted,

**NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL**

By: /s/ John Verheul
John Verheul
Assistant General Counsel
121 Tijeras Avenue NE, Ste 1000
Albuquerque, New Mexico 87102
Phone: (505) 383-2063
Email: john.verheul@state.nm.us

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 April 6, 2020:

Stuart R. Butzier
Christina Sheehan
Modrall, Sperling, Roehl, Harris & Sisk, PA
P.O. Box 9318
Santa Fe, New Mexico 87504-9318
stuart.butzier@modrall.com
christina.sheehan@modrall.com

and

Susan McMichael
Office of Laboratory Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, New Mexico 87545
smcmichael@lanl.gov

Attorneys for Triad National Security, LLC

Silas R. DeRoma
Attorney
U.S. Department of Energy
National Nuclear Security Administration
1900 Diamond Drive
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Attorney for the U.S. Department of Energy

Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

and

Douglas Mieklejohn
New Mexico Environmental Law Center
1405 Luisa St., Ste. 5
Santa Fe, New Mexico 87505
dmeiklejohn@nmelc.org

*Attorneys for Concerned Citizens for
Nuclear Safety, Honor our Pueblo
Existence, and New Mexico Acequia,
Association*

/s/ John Verheul
John Verheul

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

**IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO**

No. GWB 19-24(P)

**RESPONSE OF THE UNITED STATES DEPARTMENT OF ENERGY
AND TRIAD NATIONAL SECURITY, LLC
TO CITIZENS' MOTION TO VACATE HEARING OFFICER'S REPORT**

The United States Department of Energy (“DOE”) and Triad National Security, LLC (“Triad”), pursuant to 20.1.4.200.D(4) NMAC, hereby submit their response in opposition to Concerned Citizens for Nuclear Safety, Honor our Pueblo Existence, and New Mexico Acequia Association’s (“Citizens”) Motion to Vacate Hearing Officer’s Report (“Motion”) and join in the New Mexico Environment Department’s (“NMED”) Response to the Motion, which was filed in this proceeding on April 6, 2020. In addition to the reasons set forth in NMED’s response, the Motion should be denied for the additional reasons discussed in detail herein.

Argument¹

A. The Citizens’ Eleventh Hour Motion is Untimely and Procedurally Inappropriate

Presented in the guise of a Motion to Vacate on literally the last day before the Secretary’s permitting decision was due in this proceeding under 20.1.4.500.D(1) NMAC, the Citizens argue that the replacement hearing officer assigned to preside over the hearing on remand should be disqualified. Although styled as a Motion to Vacate, in substance it is directed at disqualifying

¹ As part of their joinder in NMED’s response to the Motion, DOE and Triad join the “Background” and “Standard of Decision” sections set forth in NMED’s response. NMED Response, pp. 1-3. DOE and Triad submit this response to the Motion in order to elaborate on arguments addressed in NMED’s response to the Motion and to address additional arguments that were not included in NMED’s response.

Hearing Officer Richard Virtue on the unsupported and patently absurd innuendo that his report may have gone against the Citizens in order to please NMED so he will get more hearing officer assignments. Properly viewed as a motion to disqualify Hearing Officer Virtue, the motion must meet the requirements of 20.1.4.100.E(3)(b)(i) NMAC. That procedural rule only allows for motions seeking to disqualify a hearing officer “at any time *prior to* the hearing” (emphasis added). It decidedly does not allow for a motion to disqualify *after* the hearing has been completed, and for quite obvious reasons it does not allow for a motion to disqualify after a party waits to see how the movant’s positions are addressed in the hearing officer report. The Citizens’ Motion should be denied as it is untimely and fails to comport with the regulations governing this proceeding. The Motion is not only completely unfounded substantively, as effectively discussed in NMED’s Response, it is also untimely and procedurally inappropriate.

The Citizens’ position that it was prevented from seeking to disqualify Hearing Officer Virtue until the eleventh hour of this proceeding, and well after its deadline under 20.1.4.100.E(3)(b)(i) NMAC, is likewise disingenuous. The regulations governing permit proceedings before the Environment Department expressly provide that a hearing officer “shall not perform any function provided for in this Part regarding any matter in which the [hearing officer] has a financial interest in the proceeding or facility that is the subject of the proceeding....” 20.1.4.100.E(3)(a)(ii) NMAC. That counsel for Citizens has been well aware of this provision cannot be disputed since this is the very provision relied upon by counsel to challenge the previous issuance of DP-1132 based upon different facts.

Nor can Citizens’ counsel credibly claim ignorance of the fact that hearing officers in permitting proceedings before the Environment Department are selected by the Secretary and financially compensated for their service. The regulations governing permit proceedings before

the Environment Department, at 20.1.4.100.E.2 NMAC, as well as the regulations governing discharge permits, at 20.6.2.3110.A NMAC, prescribe the method by which the Secretary appoints a hearing officer, and even state that the appointed hearing officer “may be a department employee other than an employee of the bureau evaluating the application.” The Citizens’ argument to the effect that hearing officers selected and compensated at the behest of the Secretary create a financial incentive for hearing officers to want to please NMED would appear to apply equally to hearing officers employed by NMED as employees, or employed by NMED as independent contractors. The Citizens’ tactical ploy of making an Inspection of Public Records Act (“IPRA”) request after digesting the hearing officer report, but in time to rely upon NMED’s IPRA response as a ruse to seek the untimely disqualification of Mr. Virtue should in no way be countenanced.

Here, the Citizens’ Motion was filed on March 25, 2020, approximately eight months after the Secretary appointed Mr. Virtue on July 17, 2019, and approximately four months after the November 12, 2019 hearing in this matter. The delinquency of the Citizens’ eleventh hour effort to disqualify Mr. Virtue plainly was by design, is inexcusably untimely under 20.1.4.100.E(3)(b)(i) NMAC, and should be denied.

B. The Motion Seeks a Remedy that is Outside of the Scope of this Proceeding

In addition to seeking an untimely and procedurally inappropriate disqualification of a plainly well-qualified and impartial hearing officer, the Citizens by their Motion fundamentally challenge long- and well-established regulatory requirements and provisions governing the appointment of hearing officers in proceedings involving Environment Department permits. While the Citizens may desire a regulatory change in these provisions, this is neither the time nor forum in which to lodge such a request.

The Motion requests that the Hearing Officer's Report be vacated based on the fact that the Hearing Officer presiding over this proceeding is a contract employee with the NMED. As already discussed in another context above, the regulations governing permit proceedings before the Environment Department as well as the regulations governing discharge permits prescribe the method by which the Secretary appoints a hearing officer. In addition to the 20.1.4.100.E NMAC provisions, 20.6.2.3110.A NMAC states that the Secretary "may appoint an impartial hearing officer to preside over the hearing. The hearing officer may be a department employee other than an employee of the bureau evaluating the application." The regulations provide the Secretary great flexibility and autonomy in designating hearing officers. In this instance, in accordance with the regulatory provisions, the Secretary appointed a hearing officer who was a contract employee of the department and was not an employee of the Ground Water Bureau to preside over this proceeding.

In addition to seeking to disqualify Hearing Officer Virtue, the Citizens' Motion amounts to a collateral challenge to the Environment Department's hearing officer selection process under the regulations. The Motion's primary argument concerns the language of the contract between the Secretary and the hearing officer. This contract language and the provisions governing Hearing Officer Virtue's employment terms are broadly provided for within the regulations. The Citizens' Motion therefore is entirely misplaced, and this adjudicatory hearing is not the correct forum to challenge the rulemaking that long since established the hearing officer selection process that the Citizens and its counsel have abided by in this and other administrative proceedings (including the earlier round of this very proceeding prior to remand). The Citizens make no showing whatsoever why it failed to exhaust the administrative remedy of appealing the rulemaking at the time of its adoption, or why it could not have by now, or may not hereafter, petition for a change in the

rulemaking that it suddenly finds unacceptable in the context of taking scorched earth positions in this proceeding when the Hearing Officer's Report did not come out to their liking. For this additional procedural reason, the Citizens' Motion should be denied.

Conclusion

Based upon the foregoing procedural grounds, in addition to the compelling substantive grounds set forth in NMED's Response to the Motion joined here, DOE and Triad respectfully request that the Citizens' Motion be denied, and that the Secretary proceed to a determination on the requested permit, DP-1132.

Respectfully submitted,

/s/ Stuart R. Butzier

Stuart R. Butzier and Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, P.A.
Post Office Box 9318
Santa Fe, New Mexico 87504-9318
Telephone: 505.983.2020
stuart.butzier@modrall.com
christina.sheehan@modrall.com

and

Susan L. McMichael
Office of Laboratory Counsel
Los Alamos National Laboratory
Post Office Box 1663, MS A187
Los Alamos, NM 87545-0001
Telephone: 505.667.2073
smcmichael@lanl.gov
Attorneys for Triad National Security, LLC

/s/ Silas R. DeRoma

Silas R. DeRoma, Site Counsel
U.S. Department of Energy
National Nuclear Security Administration
Los Alamos Site Office
3747 W. Jemez Rd.
Los Alamos, NM 87544
Telephone: 505.667.4668
Silas.DeRoma@nnsa.doe.gov
Attorney for the U.S. Department of Energy

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2020, a copy of the foregoing was served via electronic and U.S. mail to the following:

Cody Barnes
Hearing Clerk
New Mexico Environment Department
1190 Saint Francis Drive, Suite S-2103
Santa Fe, NM 87502
Cody.Barnes@state.nm.us

John Verheul
New Mexico Environment Department
Office of General Counsel
1190 St. Francis Drive, Suite N-4050
Santa Fe, NM 87505
john.verheul@state.nm.us
*Attorney for New Mexico Environment
Department, Ground Water Quality Bureau*

Lindsay A. Lovejoy Jr., Attorney
3600 Cerrillos Rd., Unit 1001 A
Santa Fe, NM 87507
lindsay@lindsaylovejoy.com
Attorney for Citizens

Charles deSaillan
Eric D. Jantz
Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
cdesaillan@nmelc.com
ejantz@nmelc.org
dmeiklejohn@nmelc.com
(505)989-9022

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

IN THE MATTER OF PROPOSED DISCHARGE)
PERMIT 1132 FOR THE RADIOACTIVE LIQUID)
WASTE TREATMENT FACILITY AT THE) **No. GWB-19-24(P)**
LOS ALAMOS NATIONAL LABORATORY,)
LOS ALAMOS, NEW MEXICO)

**CITIZENS’ REPLY ON MOTION TO VACATE
HEARING OFFICER’S REPORT**

This memorandum is submitted on behalf of Citizens in support of their Motion to Vacate Hearing Officer’s Report and in reply to arguments contained in the Responses filed by the Environment Department (“NMED”) on April 6, 2020, and by the Department of Energy and Triad National Security LLC (the “Permittees”) on April 7, 2020.

a. A wealth of authority requires disqualification of the hearing officer.

1. It is urged that *Haas v. County of San Bernardino*, 27 Cal. 4th 1017 (2002), a decision by the California Supreme Court, is Citizens’ “exclusive” authority. NMED Br. 4. *Haas* is strong recent authority, and it rests upon extensive precedent. The *Haas* court capsulized the rule of disqualification:

[A] judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge’s income from judging depends on the number of cases handled.

27 Cal. 4th at 1024-25. That rule fits this case, under the terms of the retention agreement between Mr. Virtue and NMED¹. It has been held several times that a system under which a party may select the adjudicator, who is then compensated based on the volume of work, denies due process:

Another example of outcome-dependent compensation factually closer to the case before us was identified and condemned in the so-called fee system cases. The now obsolete fee system gave magistrates a pecuniary incentive to favor frequent litigants by allowing plaintiffs and prosecutors to pick their magistrate and by compensating magistrates according to the number of cases they decided. The leading case is *Brown v. Vance*, supra, 637 F.2d 272 (Brown). In that decision by Judge Wisdom, the Fifth Circuit Court of Appeals held unconstitutional Mississippi's system for compensating justices of the peace. The highest courts of West Virginia and South Carolina had already reached the same conclusion (see *State ex rel. Shrewsbury v. Poteet*, supra, 157 W. Va. 540, 202 S.E.2d 628, 631-632; *State ex rel. McLeod v. Crowe*, supra, 272 S.C. 41, 249 S.E.2d 772, 776-777, 778), and the federal district court would soon thereafter do likewise for the State of Georgia (*Doss v. Long*, supra, 629 F. Supp. 127, 129).

27 Cal. 4th at 1028.

2. The *Haas* court made plain that the system in effect in California denied due process for the reasons set forth in the “fee-system” cases:

Here, as there, the prosecuting authority may select its adjudicator at will, the only formal restriction here being that the person selected must have been licensed to practice law for at least five years. (Gov. Code, § 27724.) Here, as there, while the adjudicator’s pay is not formally dependent on the outcome of the litigation, his or her future

¹ The hearing officer’s proposal and the resulting contract, which were produced to Citizens from NMED’s files, are attached hereto so that they may be part of the public record. Exhibit A is the proposal, and Exhibit B is the resulting contract.

income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings. Finally, adjudicators selected and paid in this manner, for the same reason here as there, have a "possible temptation . . . not to hold the balance nice, clear and true." (Tumey, supra, 273 U.S. 510, 532 [47 S. Ct. 437, 444]; see Ward, supra, 409 U.S. 57, 60, and Brown, supra, 637 F.2d at p. 280.)

27 Cal. 4th at 1029. The identical defects are clearly present in the NMED contract, enabling the Department to select the hearing officer who "tend[s] to issue favorable rulings." This is a defect of constitutional dimensions.

3. The hearing officer's intent to obtain future employment by NMED is established by his submission of a bulky 17-page proposal and entry into a four-year contract with NMED. The hearing officer was in the same situation as the judge in *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), or, closer to home, the previous hearing officer in this very case, specifically: presiding over a case while seeking employment by a party to that case. This is a situation addressed by the precedents, and the answer is clear: The hearing officer may not proceed. He is disqualified.
4. Cases cited by NMED do not disagree. In *In re Khan*, 804 N.W. 2d 132, 137-38 (Minn. App. 2011), and *Buchanan v. City of Minneapolis*, 2011 Minn. App. Unpub. LEXIS 715 (June 25, 2011), the hearing officer was

subject to a right of removal by the defendant, a right not accorded by NMED.

5. NMED has other ways to conduct hearings. The State might make available hearing officers who do not answer to the NMED Secretary. If an outside hearing officer is needed, he or she could be employed under a one-time contract stipulating that no other cases would be handled by the hearing officer for a period of several years.

b. “Actual bias” need not be shown when there is financial bias.

6. NMED contends that “actual bias” must be shown to disqualify a hearing officer. NMED Br. 3, 6. This is clearly incorrect, where the issue involves financial bias. The *Haas* court stated:

Thus, while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality (*Withrow v. Larkin*, supra, 421 U.S. 35, 47 [95 S. Ct. 1456, 1464-1465]; see *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 820 [106 S. Ct. 1580, 1584-1585, 89 L. Ed. 2d 823] (*Aetna*)), adjudicators challenged for financial interest have not. Indeed, the law is emphatically to the contrary. The high court has "ma[de] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator challenged for financial interest] was influenced, but only whether sitting on the case . . . ' "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." ' " (*Aetna*, supra, 475 U.S. at p. 825 [106 S. Ct. at p. 1587], quoting *Ward v. Village of Monroe* (1972) 409 U.S. 57, 60 [93 S. Ct. 80, 83, 34 L. Ed. 2d 267] (*Ward*), and [****17] *Tumey*, supra, 273 U.S. at p. 532 [47 S. Ct. at p. 444].) "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice

could carry it on without danger of injustice." (Tumey, supra, 273 U.S. at p. 532 [47 [***348] S. Ct. at p. 444].)

27 Cal. 4th at 1025. It was strongly argued that the decisionmaker in *Haas* was not swayed by impermissible financial considerations. The court rejected the argument:

But we adopt no such standard by giving full effect to the cases mandating disqualification for financial interest. The appearance of bias that has constitutional significance is not a party's subjective, unilateral perception; it is the objective appearance that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator. A procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias. (Brown, supra, 637 F.2d 272, 284.)

27 Cal. 4th at 1034. The *Haas* court responded at length to the contention that actual bias must be shown, stating emphatically that, to the contrary, presence of a financial bias was a conclusive disqualification under the Due Process Clause. The right to due process under the federal constitution is not a matter on which New Mexico may decide otherwise.

7. New Mexico courts are well-versed in the concept of presumption of bias and enforce it rigorously. *See, e.g., Los Chavez Community Association v. Valencia County*, 2012-NMCA-044, ¶¶ 22-24, 277 P.3d 475. In *Los Chavez* the Court of Appeals held that a county board member was disqualified based on an objective standard of family relationship and rejected the

argument that evidence of bias must be presented. The court explained that certain circumstances create a “presumption of bias” that cannot be disputed. *Los Chavez*, ¶ 23. The contractual relationship of the hearing officer in this case raises a similar presumption of bias under the Due Process Clause.

8. NMED cites a petition filed on behalf of the Interstate Stream Commission as contrary authority (NMED Br. 3), but the document relied upon is not a ruling or any kind of precedent; it is simply an argument presented by a party in a petition and has no precedential value.

c. The interest is direct, personal, substantial, and pecuniary.

9. NMED then urges that, for disqualification, the adjudicator must have a financial interest that is direct, personal, substantial, and pecuniary. NMED Br. 6. Such an interest was apparent in the *Haas* case and is present here:

The County also argues that any financial interest Hyman may have had in the prospect of future employment as a hearing officer was too slight to require disqualification. To be sure, the high court has required disqualification only for financial interests that it has characterized as " ' "direct, personal, substantial, [and] pecuniary" ' " rather than "slight." (*Aetna*, *supra*, 475 U.S. 813, 825-826 [106 S. Ct. 1580, 1587-1588], quoting *Ward*, *supra*, 409 U.S. 57, 60 [93 S. Ct. 80, 83], and *Tumey*, *supra*, 273 U.S. 510, 523 [47 S. Ct. 437, 441].) But the precise teaching of the fee system cases is that a direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions. In this context, when the danger to be avoided is that the desire for more work will offer a possible temptation to the average person to favor the frequent litigant, even fees of \$10 and \$15 per case have been considered

direct, personal, and substantial. (Brown, supra, 637 F.2d 272, 275.) Certainly the amount of money that will induce an attorney to take time away from his or her regular practice of law cannot be dismissed as slight.

27 Cal. 4th at 1031-32.

d. The Secretary has an interest in the outcome of this case.

10. Counsel for NMED asserts that the NMED Secretary and the Ground Water Quality Bureau are separate, so that the Secretary is somehow detached as to the outcome of a case originating in the Bureau and, presumably, the hearing officer would so assume. NMED Br. 5. These claims of fact are made on brief with no evidence to support them and should be disregarded. In fact, it is inconceivable that the Secretary would be uninterested in the positions advanced by the Bureau concerning Clean Water Act licensing. Under the Department of the Environment Act the Secretary is responsible for the enforcement of the State's environmental laws, and all NMED employees answer to the Secretary:

A. The secretary is responsible to the governor for the operation of the department. It is his duty to manage all operations of the department and to administer and enforce the laws with which he or the department is charged.

B. To perform his duties, the secretary has every power expressly enumerated in the laws, whether granted to the secretary, the department or any division of the department, except where authority conferred upon any division is explicitly exempt from the secretary's authority by statute. In accordance with these provisions, the secretary shall:

(1) except as otherwise provided in the Department of Environment Act, exercise general supervisory and appointing authority over all department employees, subject to any applicable personnel laws and regulations;

(2) delegate authority to subordinates as he deems necessary and appropriate, clearly delineating that delegated authority and the limitations thereto;

(3) organize the department into those organizational units he deems will enable it to function most efficiently, subject to any provisions of law requiring or establishing specific organizational units;

(4) within the limitations of available appropriations and applicable laws, employ and fix the compensation of those persons necessary to discharge his duties;

(5) take administrative action by issuing orders and instructions, not inconsistent with the law, to assure implementation of and compliance with the provisions of law for which administration or execution he is responsible and to enforce those orders and instructions by appropriate administrative action or actions in the courts . . .

Department of Environment Act, § 6, 1991 N.M. HB 348. The current NMED organization chart shows the Secretary's broad authority over the Department. <https://www.env.nm.gov/wp-content/uploads/2020/01/2020-01-22-OOTS-OOTS-Org-Chart-final.pdf> (reviewed April 10, 2020). The Secretary has a legal duty to be very much interested in the matters in issue in this case and any other case under the New Mexico environmental laws.

e. Citizens do not challenge a regulation.

11. Permittees argue that Citizens should have challenged the regulations on appointment of hearing officers when they were promulgated. Permittees'

Br. 3-4. But the regulations are not constitutionally defective; the problem is the hearing officer's contract and the relationship it creates. Under the regulations, the Secretary could, if he wished, retain a hearing officer answerable to a different supervisor or an outside contractor on terms that do not violate due process. But under the existing contract with the hearing officer, that officer is encouraged to make rulings that will be satisfactory to NMED, hoping that by such rulings further work will become available—contrary to established due process requirements.


f. The issue of disqualification was raised promptly.

12. Permittees advance the claim that disqualification should have been sought sooner. Permittees' Br. 3-4. But the nature of the hearing officer's contractual relation to NMED was not known until the retention agreement was made available, which was on March 23, 2020. The problem was then immediately raised.

Conclusion

Citizens request that the Secretary vacate the Hearing Officer's Report and remand the matter for further proceedings before a properly qualified hearing officer.

Respectfully submitted this 13th day of April 2020:

BY: 

Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
lindsay@lindsaylovejoy.com

/s/ _____
Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 629-4742
dmeiklejohn@nmelc.org

Counsel for Citizens

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 2020 I caused the foregoing *Citizens' Reply on Motion to Vacate Hearing Officer's Report* to be electronically served on the parties listed below by email and filed with the Administrator of Boards and Commissions.

Mr. Stuart R. Butzier and Ms. Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, PA
123 E. Marcy Street, Ste. 201
Santa Fe, New Mexico 87501
sbutzier@modrall.com
ccs@modrall.com

Ms. Susan L. McMichael
Office of Laboratory Counsel/MS A187
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov
Triad National Security, LLC, and U.S. Department of Energy/NNSA

Mr. John Verheul, Assistant General Counsel,
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Albuquerque, New Mexico 87102
john.verheul@state.nm.us
Counsel for the New Mexico Environment Department

BY: 
Lindsay A. Lovejoy, Jr.

July 16, 2018

**PROPOSAL TO FURNISH
HEARING OFFICER SERVICES FOR THE
GENERAL SERVICES DEPARTMENT
AND
NEW MEXICO ENVIRONMENT DEPARTMENT**

RFP NO. 18 667 1210 0007

of

**RICHARD L.C. VIRTUE, SHAREHOLDER
VIRTUE & NAJJAR, PC**

**2200 Brothers Road
P.O. Box 22249
Santa Fe, New Mexico 87502-2249**

**PHONE: (505) 983-6101 Ext. 57
FAX: (505) 983-8304**

E-MAIL: rvirtue@virtuelaw.com

(Binder 1)

PROPOSAL DUE: Monday, July 16, 2018 at 3:00 P.M. MST

**DUE TO: Joseph Lovato, Procurement Specialist
1190 South St. Francis Dr. Ste S4050
Santa Fe, New Mexico 87502**



COPY

19053

VIRTUE & NAJJAR, PC

LAWYERS

RICHARD L. C. VIRTUE
DANIEL A. NAJJAR
CARLA R. NAJJAR

OF COUNSEL
BOB D. BARBEROUSSE
MARK E. CHAIKEN

2200 BROTHERS ROAD
P.O. BOX 22249
SANTA FE, NEW MEXICO
87502-2249
PHONE: (505) 983-6101
FAX: (505) 983-8304

Letter of Transmittal Form

RFP#: 18 667 1210 007

Offeror Name: Richard L.C. Virtue of Virtue & Najjar, PC FED ID# ██████████6876

Items #1 to #7 EACH MUST BE COMPLETED IN FULL Failure to respond to all seven items WILL RESULT IN THE DISQUALIFICATION OF THE PROPOSAL!

1. Identity (Name) and Mailing Address of the submitting organization:

Richard L.C. Virtue, Shareholder
Virtue & Najjar, PC
2200 Brothers Road
Santa Fe, New Mexico 87502-2249

2. For the person authorized by the organization to contractually obligate on behalf of this Offer:

Name Richard L.C. Virtue
Title Shareholder
E-Mail Address rvirtue@virtuelaw.com
Telephone Number (505) 983-6101 ext. 57

3. For the person authorized by the organization to negotiate on behalf of this Offer:

Name Richard L.C. Virtue
Title Shareholder
E-Mail Address rvirtue@virtuelaw.com
Telephone Number (505) 983-6101 ext. 57

4. For the person authorized by the organization to clarify/respond to queries regarding this Offer:

Name Richard L.C. Virtue
Title Shareholder
E-Mail Address rvirtue@virtuelaw.com
Telephone Number (505) 983-6101 ext. 57

5. Use of Sub-Contractors (Select one)

No sub-contractors will be used in the performance of any resultant contract OR
 The following sub-contractors will be used in the performance of any resultant contract:

(Attach extra sheets, as needed)

6. Please describe any relationship with any entity (other than Subcontractors listed in (5) above) which will be used in the performance of any resultant contract.

N/A

(Attach extra sheets, as needed)

7. On behalf of the submitting organization named in item #1, above, I accept the Conditions Governing the Procurement as required in Section II. C.1.

I concur that submission of our proposal constitutes acceptance of the Evaluation Factors contained in Section V of this RFP.

I acknowledge receipt of any and all amendments to this RFP.



Dated: July 16, 2018

Authorized Signature and Date (Must be signed by the person identified in item #2, above.)

Table of Contents

(Binder 1)

PROPOSAL SUMMARY	1
RESPONSE TO CONTRACT TERMS AND CONDITIONS	2
OFFEROR'S ADDITIONAL TERMS AND CONDITIONS.....	3
RESPONSE TO SPECIFICATIONS	4
A. DETAILED SCOPE OF WORK.....	4
B. TECHNICAL SPECIFICATIONS	5
1. Organizational Experience.....	5
a. Relevant Legal Experience with State Government and Private Sector Clients .	5
b. Prior Administrative or Judicial Hearings Presided Over.....	7
c. Successes/Failures While Presiding Over Administrative or Judicial Hearings .	8
2. Organizational References	9
3. Mandatory Specifications	11
a. Juris Doctor.....	11
b. Legal License	11
c. Good Standing	11
d. Demonstrated Expertise.....	11
C. BUSINESS SPECIFICATIONS.....	14
1. Letter of Transmittal Form.....	14
2. Campaign Contribution Disclosure Form.....	14
3. Cost	14
4. Resident Business or Resident Veterans Preference.....	14
5. Performance Surety Bond.....	14
OTHER SUPPORTING MATERIAL.....	15
ATTACHMENTS	
Legal License and Statement of Good Standing.....	Attachment 1

PROPOSAL SUMMARY

Richard L.C. Virtue, shareholder of Virtue & Najjar, PC (“VN”), offers the following proposal in response to the State Purchasing Division of the General Services Department and the New Mexico Environment Department (“Department”) Request for Proposals for Hearing Officer Services, RFP No. 18 667 1210 0007 published on June 14, 2018 (“RFP”). This proposal is submitted and organized under identical headings used in the RFP at Part III, Section C (Proposal Format).

VN was founded in 1993 by Richard L.C. Virtue and Daniel A. Najjar, to focus on delivering quality, timely legal services to their clients at a fair price. VN is a professional corporation and has had that corporate form since its inception; its shareholders are Mr. Virtue and Mr. Najjar. VN is also staffed by lawyers Bob Barberousse, and Mark E. Chaiken who are “of-counsel”, Carla R. Najjar, who is an associate, Jared Najjar, who is a contract attorney, paralegal Pamela Ortiz and an administrative assistant. VN is located in the city of Santa Fe, at 2200 Brothers Road, and has operated in Santa Fe since its inception.

VN is an “AV” rated firm by *Martindale-Hubbell* and is listed in *Martindale-Hubbell’s* Registry of Pre-Eminent Lawyers. Mr. Virtue is individually rated “AV” by Martindale-Hubbell. VN recently received a “Tier 1” ranking for the Santa Fe metropolitan area in the 2016 Edition of US News and World Report “Best Law Firms”. Mr. Virtue has been listed in The Best Lawyers in America for the past fifteen (15) years and recognized in Southwest Super Lawyers, from time to time.

As demonstrated in this proposal, Mr. Virtue has considerable experience and expertise representing both private and public clients, with emphasis on achieving positive results in complex matters. He has had an active administrative law and regulatory practice, including environmental rulemaking, permitting and compliance matters for over forty (40) years. Mr. Virtue is pleased to submit this proposal to serve the Department.

RESPONSE TO CONTRACT TERMS AND CONDITIONS

Richard Virtue and VN accept the terms and conditions stated in the RFP, and that, if awarded, the contract between the parties will follow the format specified by the Department and containing the terms and conditions as set forth in Appendix C to the RFP.

OFFEROR'S ADDITIONAL TERMS AND CONDITIONS

VN and Mr. Virtue have no additional terms and conditions which they expect to include in any contract negotiated with the Department.

RESPONSE TO SPECIFICATIONS

Mr. Virtue offers the following responses to the Specifications listed in the RFP:

A. DETAILED SCOPE OF WORK

1. Mr. Virtue will conduct hearings, establish hearing dates, issue subpoenas, conduct pre-hearing conferences, accept testimony and written filings, administer oaths and affirmations, rule on motions and objections (both prior to and during the hearing) to assure an impartial hearing, and explain issues and applicable laws to parties involved.

2. Mr. Virtue will ensure that hearings are held in a timely manner and are conducted fairly and in accordance with all applicable procedural rules, statutes and guidelines.

3. Mr. Virtue will assure that all parties due process rights are observed and the public is offered a reasonable opportunity to be heard, when applicable.

4. Mr. Virtue will consider evidence, argument and research and prepare timely hearing officer reports.

5. Mr. Virtue will advise the Secretary or designees or Board or Commission as to evidence presented; and on legal issues applicable to specific proceedings.

6. Mr. Virtue will prepare records upon appeal.

7. During proceedings, Mr. Virtue will manage multiple participants, including the public. Mr. Virtue will also properly manage technical and/or expert testimony and public participation.

8. Mr. Virtue will work with Boards and Commissions Administrator and the Hearing Clerk to ensure proper administration of hearings, filings and other proceedings.

9. Mr. Virtue will manage large caseloads within timelines.

10. Mr. Virtue will provide scripts, orders and other procedural assistance for the Secretary or designees or Board or Commission members designated as Hearing Officers.

Information and supporting materials related to Mr. Virtue's experience and ability to perform the tasks identified in the detailed scope of work are set out in the following sections of this proposal.

B. TECHNICAL SPECIFICATIONS

1. Organizational Experience

a. Relevant Legal Experience with State Government and Private Sector Clients

Mr. Virtue was recently retained as a hearing officer by Santa Fe County for Sustainable Land Development Code matters and has over forty (40) years of experience practicing administrative law, including environmental regulatory matters. He has been lead counsel in a broad variety of administrative and regulatory matters involving appearing before hearing officers and local public bodies, as well as leading settlement negotiations. Mr. Virtue has represented public and private sector clients throughout the State of New Mexico (“State”) during his law practice, including agencies of State government, and local public bodies.

He has represented industrial and municipal clients in adjudicatory hearings before the New Mexico Environment Department, the New Mexico Water Quality Control Commission and the New Mexico Environmental Improvement Board, as well as, the United States Environmental Protection Agency, in connection with several major rulemakings, including adoption of the 1994 Solid Waste Regulations and the New Mexico Surface Water Quality Standards, a proposal to adopt procedural rules governing rulemaking of the New Mexico Water Quality Control Commission, and proposals to amend the state air quality regulations. Mr. Virtue has also handled appeals from decisions of the New Mexico Environment Department to the New Mexico Water Quality Control Commission and the New Mexico Environmental Improvement Board, including related hearings.

Examples of specific projects demonstrating Mr. Virtue’s experience, expertise and knowledge in connection with administrative law matters involving hearings related to environmental regulations are:

- Waste Management of New Mexico, Inc. Counsel in connection with permit applications and renewals over the last twenty (20) years, including applications for solid waste facility permits and permit renewals for the San Juan Regional Landfill; the Rio Rancho Solid Waste Facility; and the Valencia Regional Solid Waste Facility and Recycling Center; and a transfer station permit for the Mountain View Eco-Station. Each of these matters involved being lead counsel for the applicant at adjudicatory hearings, including preparation of expert witnesses, direct examinations and cross-examination of opposing expert witnesses, and preparation of post-hearing submittals, including proposed findings of fact and conclusions of law, proposed orders and memoranda of law. Mr. Virtue has also represented Waste Management of New Mexico, Inc., concerning issues related to municipal franchises and regulation, ongoing compliance matters, responses to and negotiations of notices of violation.
- Los Alamos National Laboratory (“LANL”). Lead counsel in connection with water quality regulatory matters, including representation of LANL before the New Mexico

Water Quality Control Commission in hearings concerning several triennial reviews of State surface water quality standards and before the United States Environmental Protection Agency in connection with issuance of an NPDES Permit. This experience involved preparation and presentation of expert testimony, cross-examination of opposing expert witnesses and preparation of post-hearing briefs and proposed regulations.

- Public Service Company of New Mexico (“PNM”). Lead counsel to PNM in connection with issuance of an air quality permit for its diesel turbine power station in Las Vegas, New Mexico. Experience and expertise involved preparation of expert witness testimony, acting as lead counsel at the public hearing on the permit, including direct and cross-examination of witnesses; and preparation of post-hearing submittals, including legal briefs and proposed finding of fact and conclusions of law and recommended decisions.
- Transwestern Pipeline Company. Lead counsel in connection with the State Hazardous Waste Act and RCRA jurisdiction dispute with New Mexico Environment Department and negotiation of a consent order.
- Rhino Environmental Services. Lead counsel in connection with a permit application for a solid waste facility in Chaparral, New Mexico involving a week long contested hearing. Experience and expertise involved assistance in preparation of expert testimony, presentation of direct examination on expert testimony and cross-examination of opposing expert testimony and public testimony; and preparation of findings of fact and conclusions of law, a proposed order and memoranda of law.
- Sparton Corporation. Counsel in connection with response to a notice of violation of the State Hazardous Waste Act and RCRA for groundwater contamination at an electronics manufacturing facility in Northwest Albuquerque, New Mexico. Experience and expertise involved advising client concerning response.
- P2 Dairy. Lead counsel in connection with response to a compliance order issued by the Ground Water Bureau of the New Mexico Environmental Department. Experience and expertise involved preparation of a response to the compliance order and negotiation of a consent order decree.
- Incorporated County of Los Alamos (“Los Alamos County”). Lead counsel in connection to negotiation of consent order related to remediation of contaminated soil at the Bayo Canyon Sewage Disposal Facility, including analysis of liability of the prior owner of the facility. As outside utilities counsel, he is called upon from time to time for advice concerning environmental laws and regulations. As counsel in connection with the restructuring of ownership of the San Juan Generating Station, he has advised Los Alamos County concerning air quality, mine reclamation and other environmental regulatory matters.

- New Mexico Municipal League. Lead counsel to the New Mexico Municipal League in connection with administrative hearings on adoption of the first groundwater quality regulations and solid waste management regulations (prior to the adoption of the Solid Waste Act) in the State and post-hearing submittals.

In addition to his environmental regulatory experience, Mr. Virtue has been lead lawyer on numerous regulatory cases involving complex adjudicatory matters before a hearing examiner.

- Mountain Bell (now Century Link). Lead lawyer for Mountain Bell in its utility rate case that established the first telephone rates for Mountain Bell after its divestiture from AT&T. The case was precedent setting in that it involved determination of reasonable rates for Mountain Bell as a free-standing telephone company. He also represented Mountain Bell in connection with numerous administrative proceedings involving the deregulation of telecommunications services.
- Albuquerque Ambulance. He represented Albuquerque Ambulance Service and other motor carriers in connection with matters that involved certificates of necessity and rates under the State Motor Carrier Act.
- City of Las Cruces and Large Power Users Coalition (now the New Mexico Industrial Energy Consumers). Mr. Virtue represented the City of Las Cruces and Large Power Users Coalition as intervenors in several rate cases filed by El Paso Electric Company. Those cases were precedent setting in that Mr. Virtue's clients challenged the inclusion of construction work in progress for the Palo Verde Nuclear Generating Station in the rate base of the utility company. Mr. Virtue's clients were successful in keeping construction work in progress out of the utility's rate base in the initial case and in the later cases proposing reasonable alternatives to treatment of expenditures for construction work in progress for rate-making purposes. Each of the cases involved extensive evidentiary hearings involving presentation of expert witnesses and cross-examination of expert witnesses, as well as and submission of complex proposed findings and conclusions of law and post-hearing legal briefs.

Mr. Virtue is a member of the Natural Resources, Energy and Environmental Law Section and the Public Law Section of the New Mexico State Bar. He is a member of the State and Local Government Law Section and the Natural Resources, Energy & Environment Section of the American Bar Association. Mr. Virtue is a former member of the Public Finance Advisory Committee to the New Mexico Department of Finance and Administration; a former member of the Environmental Law Specialization Committee of the New Mexico Bar and Advisory Board of the Santa Fe Council on Environmental Excellence. He is a former member of the Board of Directors of the Public Law Section of the New Mexico State Bar and a former member of the City of Santa Fe Urban Policy Board.

b. Prior Administrative or Judicial Hearings Presided Over

Mr. Virtue was recently retained by Santa Fe County pursuant to a professional services agreement to serve as a hearing officer with respect to matters requiring a hearing under the Santa Fe County Sustainable Land Development Code. He has conducted three (3) hearings as of the date of this proposal. Those hearings involved an application for variance to minimum lot size requirements and two (2) applications for Conditional Use Permits for non-residential uses in residential and agricultural zoning districts.

c. Successes/Failures While Presiding Over Administrative or Judicial Hearings

Having been recently appointed as Land Use Hearing Officer for Santa Fe County, Mr. Virtue has yet to experience particularly significant successes or failures while presiding over administrative or judicial hearings. Nonetheless, he has experienced the following successes and failures as lead counsel for private sector clients in administrative adjudicatory hearings with respect to environmental regulatory matters.

i. Successes

- Mr. Virtue once cross-examined an expert witness in a permit application hearing, whose work experience was outside of the State of New Mexico. The witness' technical testimony did not consider requirements of New Mexico law. Mr. Virtue's cross-examination established that the witness was unfamiliar with State law and the proposal of the witness would not meet State legal requirements. The witness' testimony was given no weight by the hearing officer. Mr. Virtue learned to pay careful attention to the requirements of State law and point out how technical testimony may or may not be consistent with State legal requirements and make that fact part of the record.
- Mr. Virtue once cross-examined an expert witness in a permit application hearing, who used PowerPoint slides to illustrate his testimony. The depiction on the slides represented physical features on the ground proposed by the applicant. The slides were presented in bright colors dissimilar to features on the ground and were disproportional in size to the physical features on the ground. Mr. Virtue established through cross-examination that the depictions on the slides overstated the alteration of terrain proposed by the applicant. Mr. Virtue learned from this experience to analyze carefully all demonstrative exhibits for accuracy.

ii. Failures

- Mr. Virtue once cross-examined a lay witness in a permit application proceeding, where the purpose of whose testimony was to address the perceived impact on the surrounding community of the proposed facility. Although Mr. Virtue established that the witness was not

qualified to testify on the technical aspects of her testimony. The witness nonetheless was able to reiterate her lay testimony. On appeal, the court noted the witness' testimony related to the potential impact of the facility, remanded the matter to the New Mexico Environment Department and required additional testimony on remand on the non-technical matters to which the witness testified. Mr. Virtue learned through this process that cross-examination can sometimes afford a witness the opportunity to expand on his or her testimony, despite the witness' lack of technical qualifications.

- Mr. Virtue once filed a motion for reconsideration of a decision by the Secretary of the New Mexico Environment Department in connection with issuance of a permit. The matter raised in the request for consideration was within the discretion of the Secretary and requested that the Secretary exercise his discretion differently. The request was denied. Mr. Virtue learned that requests for reconsideration of the evidence at the hearing are fruitless, unless there is a strong legal basis for requesting a reversal of the original decision.

2. Organizational References

- i. Client Name: Incorporated County of Los Alamos

Project Description: San Juan Generating Station Mediation Regarding Ownership Restructuring and ongoing matters related to the Los Alamos County Utility System.

Project Dates: December 2013 through the current date.

Technical Environment: Office telephone system, a fully networked computer system with highspeed internet connection and remote access availability, running Windows as the operating system, and Microsoft Office and Adobe Acrobat XI Professional applications to prepare, edit, convert, review, scan and produce documents.

Staff Assigned: Richard L.C. Virtue

Client Project Manager: Timothy Glasco, Utilities Manager; Phone No.: (505) 662-8148; Fax No.: (505) 662-8005; and email address: ta.glasco@lacnm.us.
- ii. Client Name: Waste Management of New Mexico, Inc.

Project Descriptions: Lead Counsel in connection with (1) approval of a solid waste facility permit for the San Juan County Regional

Landfill – SW 05-30 (P); (2) approval of a solid waste facility permit for the Valencia Regional Landfill and Recycling Facility – SW 05-36 (P); (3) approval of a solid waste facility renewal permit and modification for the Rio Rancho Landfill – SW 08-12 (P); (4) approval of a solid waste facility permit for the Mountain View Eco-Station – SW 12-01 (P); and (5) other matters related to regulation of solid waste facilities.

Project Dates: (1) October 2005 through January 2006; (2) January 2006 through November 2006; (3) January 2008 through September 2008; (4) April 2012 through May 2012; and (5) October 2005 through October 2012.

Technical Environment: Office telephone system, a fully networked computer system with highspeed internet connection and remote access availability, running Windows as the operating system, and Microsoft Office and Adobe Acrobat XI Professional applications to prepare, edit, convert, review, scan and produce documents (i.e., expert witness testimony, direct examinations and cross-examination of opposing expert witnesses, and post-hearing submittals, including proposed findings of fact and conclusions of law, proposed orders and memoranda of law).

Staff Assigned: Richard L.C. Virtue and firm paralegal

Client Project Manager: Marlene Feuer, Government and Community Relations Manager (retired); office Phone No.: (505) 891-5004, cell Phone No.: (505) 264-3754; Fax No.: None; and email address: mfeuer@rrnm.gov.

iii. **Client Name:** Waste Management of New Mexico, Inc.

Project Descriptions: (1) approval of a solid waste facility permit for the Valencia Regional Landfill and Recycling Facility – SW 05-36 (P); (2) approval of a solid waste facility permit for the Mountain View Eco-Station – SW 12-01 (P); and (3) renewal and modification of a solid waste facility permit for the San Juan County Regional Landfill – SWB 16-13 (P).

Project Dates: (1) April 2012 through May 2012; (2) January 2006 through November 2006; and (3) June 2016 through October 2016.

Technical Environment: Office telephone system, a fully networked computer system with highspeed internet connection and remote access availability, running Windows as the operating system, and Microsoft Office and Adobe Acrobat XI Professional applications to prepare, edit, convert, review, scan and produce documents (i.e., expert witness testimony, direct examinations and cross-examination of opposing expert witnesses, and post-hearing submittals, including proposed findings of fact and conclusions of law, proposed orders and memoranda of law).

Staff Assigned: Richard L.C. Virtue and firm paralegal

Client Project Manager: I. Keith Gordon, P.E., President of Gordon Environmental, Inc., (now Parkhill, Smith & Cooper) and lead technical witness; Phone No.: (505) 867-6990; Fax No.: (505) 867-6991; and email address: kgordon@team-psc.com.

The required Organization Reference Questionnaires, Appendix F to the RFP, will be returned to the Procurement Manager, by email, as required by the RFP.

3. Mandatory Specifications

a. Juris Doctor

Richard Virtue received his Juris Doctor from the University of Michigan Law School and his B.A. from the University of Oklahoma, cum laude. He is an AV rated attorney by Martindale Hubbell law directory and has been listed in the Best Lawyers in America since 1995.

b. Legal License

Mr. Virtue is licensed to practice law in the State of New Mexico. A copy of the letter of membership for Mr. Virtue from the New Mexico State Bar is attached to this proposal as Attachment 1.

c. Good Standing

A copy of Mr. Virtue's certificate of good standing from the New Mexico Supreme Court is attached to this proposal as Attachment 1.

d. Demonstrated Expertise

1. Administrative Law

Richard Virtue has significant experience and expertise in providing legal advice to and representing State and local public bodies, in administrative and regulatory proceedings. His

experience makes him particularly proficient in assuring compliance with applicable administrative codes, policies, rules, regulations, and procedures. He has been listed in *Best Lawyers in America* in the category of Administrative Law for several years.

He has also represented both public utilities and intervenor/customers in numerous public utility rate case and certification proceeds. His experience includes telecommunications, electric and motor carrier matters. See Section B.1.a., Relevant Legal Experience with State Government and Private Sector Clients, of this proposal, for a list of specific administrative matters for which Mr. Virtue served as lead counsel.

2. Environmental Law

Environmental law has been a significant part of his law practice for over 30 years. He has been listed in the Best Lawyers in America since 1995 in the practice area of Environmental Law. Mr. Virtue is a member of Natural Resources, Energy & Environment and State and Local Government Law Sections of the American Bar Association. He is a former member of the Environmental Law Specialization Committee of the New Mexico Bar and Advisory Board of the Santa Fe Council on Environmental Excellence.

He has represented industrial and municipal clients before the New Mexico Environment Department and the United States Environmental Protection Agency, and in connection with several major rulemakings, including adoption of the New Mexico Mining Act Regulations, 1994 Solid Waste Regulations and the 1995 and 2000 New Mexico Surface Water Quality Standards, a proposal to adopt procedural rules governing rulemaking of the New Mexico Water Quality Control Commission, and proposals to amend the state air quality regulations. Mr. Virtue has also handled appeals from decisions of the New Mexico Environment Department to the New Mexico Water Quality Control Commission and the New Mexico Environmental Improvement Board, including related hearings.

For examples of specific projects and capabilities in connection with environmental matters see Section B.1.a., Relevant Legal Experience with State Government and Private Sector Clients, of this proposal.

In addition to his experience with respect to environmental law adjudicatory proceedings, Mr. Virtue is experienced in advising clients in connection with potential liability for environmental matters in connection with commercial and real estate transactions.

Examples of his recent experience include:

- Los Alamos County – San Juan Generating Station (“SJGS”). Mr. Virtue advised Los Alamos County with respect to an environmental audit prepared in connection with the restructuring of the ownership of the SJGS pursuant to which four (4) owners transferred their ownership interests to the remaining five (5) owners, including Los Alamos County. Mr. Virtue was responsible for analysis of a comprehensive environmental audit of the SJGS conducted by an independent environmental consulting firm and advising Los Alamos County concerning future liability risks of the continuing ownership of the SJGS. His experience included advice regarding the

scope of environmental remediation to be completed prior to the effective date of the ownership restructure and allocation of the risk of potential liability for environmental releases occurring prior to the ownership restructure. The transaction closed on December 31, 2017.

- BNP Paribas – Cyrq Geothermal Project. Mr. Virtue served as local counsel to BNP Paribas (“BNPP”), a French-owned bank as lender in connection with the financing of a geothermal powered electric generation facility location in Animas, New Mexico. As local counsel Mr. Virtue was responsible for advising BNPP concerning the projects compliance with State environmental regulations as well as analysis of a Phase I Environmental Assessment conducted by an independent environmental consulting firm. The transaction closed May 31, 2018.
- Central New Mexico Electric Cooperative, Inc., (“CNMEC”) – USDA Loan to First Choice Community Healthcare, Inc., (“First Choice”). Mr. Virtue currently serves as counsel to CNMEC in connection with a loan to First Choice, a non-profit provider of healthcare services, for the expansion of its clinic in Edgewood, New Mexico. Mr. Virtue’s responsibility includes analysis of a Phase I Environmental Assessment and advising CNMEC of potential liability for environmental release as a result of being the intermediary lender to first choice under a USDA financing program. This transaction is pending and is scheduled to close in July, 2018.

3. Natural Resources Law

Mr. Virtue’s experience as counsel to the applicants and the respondents in the proceedings set out in Section B.1.a., Relevant Legal Experience with State Government and Private Sector Clients, of this proposal, required knowledge of the impact of the construction and operation of the facilities involved in those proceedings on our natural resources. The proceedings set out in Section B.1.a., Relevant Legal Experience with State Government and Private Sector Clients, involved the impact of numerous environmental media on our natural resources and required Mr. Virtue to understand how the environmental regulatory system impacts the development of natural resources.

4. Hearing Procedures (Judicial/Administrative)

Each of the regulatory matters set out in Section B.1.a., Relevant Legal Experience with State Government and Private Sector Clients, of this proposal were conducted pursuant to procedural rules adopted by the Department or one of its constituent agencies. As lead counsel for applicants or respondents in those matters, Mr. Virtue acquired extensive working knowledge of the hearing procedures applicable to the matters that are the subject of this RFP.

Mr. Virtue’s experience includes preparation of Notices of Intent to Submit Technical Testimony, Direct and Cross-Examination of technical and lay witnesses, preparation of demonstrative evidence and exhibits, preparation of post-hearing submittals, including proposed findings of fact and conclusions of law and recommended decisions, briefs and memoranda of law and exceptions to hearing officer reports and recommended decisions.

5. Rules of Evidence

As counsel in the matters set out in Section B.1.a., Relevant Legal Experience with State Government and Private Sector Clients, of this proposal, Mr. Virtue gained extensive knowledge of the rules of evidence customarily applied in the regulatory proceedings that are subject of this RFP. In particular, his experience includes qualifications of expert witnesses to present technical testimony, relevancy, cumulative testimony and analysis of the weight to be given to lay testimony.

6. Rules of Procedure

See the discussion under item 5 above.

C. BUSINESS SPECIFICATIONS

1. Letter of Transmittal Form

Our completed and signed Letter of Transmittal Form, Appendix E to the RFP, is included as the first item of our proposal.

2. Campaign Contribution Disclosure Form

Our completed Campaign Contribution Disclosure Form, Appendix B to the RFP, follows this page of our proposal.

3. Cost

Our completed Cost Response Form, Appendix D to the RFP, is included in our response Binder 2 as required by the RFP.

4. Resident Business or Resident Veterans Preference

VN's principal place of business is located in Santa Fe, New Mexico. Copies of our New Mexico Resident Business Certificate; and Santa Fe County Resident Business Certificate follow this page after our completed Campaign Contribution Disclosure Form.

5. Performance Surety Bond

This item is referred to on page 21, Section C.1.F.4 of the RFP, but does not appear to be applicable to this proposal

Campaign Contribution Disclosure Form

Pursuant to NMSA 1978, § 13-1-191.1 (2006), any person seeking to enter into a contract with any state agency or local public body for professional services, a design and build project delivery system, or the design and installation of measures the primary purpose of which is to conserve natural resources must file this form with that state agency or local public body. This form must be filed even if the contract qualifies as a small purchase or a sole source contract. The prospective contractor must disclose whether they, a family member or a representative of the prospective contractor has made a campaign contribution to an applicable public official of the state or a local public body during the two years prior to the date on which the contractor submits a proposal or, in the case of a sole source or small purchase contract, the two years prior to the date the contractor signs the contract, if the aggregate total of contributions given by the prospective contractor, a family member or a representative of the prospective contractor to the public official exceeds two hundred and fifty dollars (\$250) over the two year period.

Furthermore, the state agency or local public body shall void an executed contract or cancel a solicitation or proposed award for a proposed contract if: 1) a prospective contractor, a family member of the prospective contractor, or a representative of the prospective contractor gives a campaign contribution or other thing of value to an applicable public official or the applicable public official's employees during the pendency of the procurement process or 2) a prospective contractor fails to submit a fully completed disclosure statement pursuant to the law.

THIS FORM MUST BE FILED BY ANY PROSPECTIVE CONTRACTOR WHETHER OR NOT THEY, THEIR FAMILY MEMBER, OR THEIR REPRESENTATIVE HAS MADE ANY CONTRIBUTIONS SUBJECT TO DISCLOSURE.

The following definitions apply:

“Applicable public official” means a person elected to an office or a person appointed to complete a term of an elected office, who has the authority to award or influence the award of the contract for which the prospective contractor is submitting a competitive sealed proposal or who has the authority to negotiate a sole source or small purchase contract that may be awarded without submission of a sealed competitive proposal.

“Campaign Contribution” means a gift, subscription, loan, advance or deposit of money or other thing of value, including the estimated value of an in-kind contribution, that is made to or received by an applicable public official or any person authorized to raise, collect or expend contributions on that official's behalf for the purpose of electing the official to either statewide or local office. “Campaign Contribution” includes the payment of a debt incurred in an election campaign, but does not include the value of services provided without compensation or unreimbursed travel or other personal expenses of individuals who volunteer a portion or all of their time on behalf of a candidate or political committee, nor does it include the administrative or solicitation expenses of a political committee that are paid by an organization that sponsors the committee.

“Family member” means spouse, father, mother, child, father-in-law, mother-in-law, daughter-in-law or son-in-law.

“Pendency of the procurement process” means the time period commencing with the public notice of the request for proposals and ending with the award of the contract or the cancellation of the request for proposals.

“Person” means any corporation, partnership, individual, joint venture, association or any other private legal entity.

“Prospective contractor” means a person who is subject to the competitive sealed proposal process set forth in the Procurement Code or is not required to submit a competitive sealed proposal because that person qualifies for a sole source or a small purchase contract.

“Representative of a prospective contractor” means an officer or director of a corporation, a member or manager of a limited liability corporation, a partner of a partnership or a trustee of a trust of the prospective contractor.

DISCLOSURE OF CONTRIBUTIONS:

Contribution Made By: _____

Relation to Prospective Contractor: _____

Name of Applicable Public Official: _____

Date Contribution(s) Made: _____

Amount(s) of Contribution(s) _____

Nature of Contribution(s) _____

Purpose of Contribution(s) _____

(Attach extra pages if necessary)

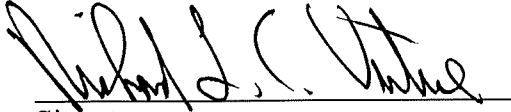
Signature

Date

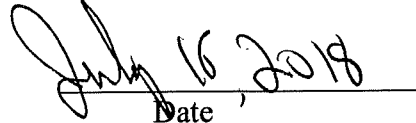
Title (position)

—OR—

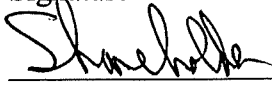
NO CONTRIBUTIONS IN THE AGGREGATE TOTAL OVER TWO HUNDRED FIFTY DOLLARS (\$250) WERE MADE to an applicable public official by me, a family member or representative.



Signature



Date



Title (Position)

STATE OF NEW MEXICO

TAXATION AND REVENUE DEPARTMENT

RESIDENT BUSINESS CERTIFICATE

Issued to: **VIRTUE & NAJJAR, P.C.**

DBA: **VIRTUE & NAJJAR, P.C.**

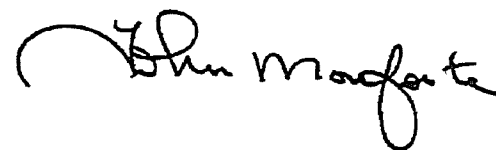
PO BOX 22249

SANTA FE, NM 87502-2249

Expires: **13-Mar-2020**

Certificate Number:

L1539430704



John Monforte, *Acting Cabinet Secretary*

THIS CERTIFICATE IS NOT TRANSFERABLE

**SANTA FE COUNTY
PURCHASING DIVISION**

RESIDENT BUSINESS CERTIFICATE

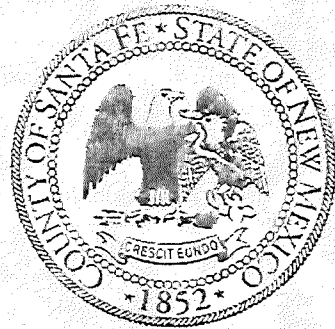
issued to

VIRTUE & NAJJAR, PC

2200 Brothers Road

Santa Fe, NM 87502

Pursuant to Santa Fe County Ordinance No.2012-4, the Person or Business Named Herein has met the requirements and has been awarded a Resident Business Certificate



EXPIRES:

March 28, 2019

Please verify current status of Certificate by
contacting SFC Purchasing Division

A handwritten signature in black ink, appearing to read "Bill Taylor", is written over a horizontal line.

Certificate Number: SFC0077

Bill Taylor- SFC Procurement Manager

OTHER SUPPORTING MATERIAL

In addition to Mr. Virtue's experience, expertise and knowledge in providing legal advice to and representing State and local public-sector clients in administrative and regulatory proceedings, including environmental regulatory matters, as demonstrated in this proposal, he has considerable experience in advising and representing clients in county, municipal or other Government law.

i. New Mexico Municipal League

Mr. Virtue started his legal career as staff attorney for the New Mexico Municipal League and then as general counsel. After he became general counsel, his work included preparing contracts, joint powers agreements and memoranda of understanding; rendering advice and opinions to local governments on transactional matters and municipal officials on matters of municipal law, including general advice on municipal bond matters; municipal tax matters, and election matters; drafting of ordinances and State legislation; and representation of public and private interests before the State legislature and administrative agencies.

In addition to serving as general counsel to the New Mexico Municipal League, Mr. Virtue has served as special counsel to several State municipalities, including Albuquerque, Las Cruces, Hobbs, Tucumcari, Cloudcroft, Ruidoso, Tularosa, Las Vegas, and Lordsburg.

ii. City of Santa Fe

Mr. Virtue served as the principal bond counsel for City of Santa Fe bond matters from 1985-1994. In addition, he served as co-bond counsel and regulatory counsel to the City of Santa Fe in connection with its acquisition of its water system from the Public Service Company of New Mexico. In that role, he had responsibility for structuring of the organization, accounts and covenants of a newly acquired utility system to accomplish the required regulatory approval and marketing of the bonds.

He was retained recently to advise the City of Santa Fe's Public Bank Task Force regarding legal issues involved in creation and ownership by the City of Santa Fe of a public bank. He was principal author of a legal memorandum in those issues. The memorandum was relied on by the Task Force in making its recommendation to the City Council.

iii. Los Alamos County

VN was retained at its inception by Los Alamos County as joint utility system counsel and as special counsel to Los Alamos County in connection with the issuance of several Series of Utility System Revenue Bonds and has continued in that capacity for more than twenty (20) years.

VN serves as outside utilities and public finance counsel to Los Alamos County. As outside public utilities counsel to Los Alamos County Mr. Virtue has drafted, analyzed and negotiated numerous long-term electricity contracts, contracts related to the transmission and

distribution of electricity and gas, and related contracts such as interconnection agreements and short-term supply agreements.

He has provided public finance legal services to the Los Alamos County Council and staff, as well as rendering opinions as issuers' counsel and special counsel. As public finance counsel, Mr. Virtue has analyzed and advised Los Alamos County with respect to various conduit financing proposals and issued opinions in connection with the Sombrillo Nursing Home Facility. As outside utilities counsel, he has negotiated and drafted numerous contracts for the acquisition of interest in electricity generation and power purchase agreements, including its acquisition of an interest in the San Juan Generating Station.

Mr. Virtue currently represents Los Alamos County as a participating owner of the San Juan Generating Station in connection with the restructuring of the ownership of the San Juan Generating Station as well as the decommissioning of the facility and reclamation of the coal mines that supply the facility.

Additionally, Mr. Virtue is lead counsel in connection with our current representation of Los Alamos County in connection with a proposed long-term Power Supply Contract for participation in the Carbon Free Power Project, to be managed by the Utah Associated Municipal Power System, a Utah joint powers agency. Mr. Virtue's representation includes analysis and advice to Los Alamos County concerning New Mexico state law issues related to long-term contracts with out-of-state entities.

iv. New Mexico Finance Authority ("Finance Authority")

From 2004 to 2007, Richard Virtue served as general counsel to the Finance Authority and as special counsel from 2007 to 2011 and as lead and alternate loan counsel since 2011. As general counsel to the Finance Authority, he provided analysis and drafting services in connection with development of Bylaws, Personnel Manual, Investment Policy and Procurement, Contract and Reimbursement Policies of the Finance Authority. Mr. Virtue also provided analysis, advice and drafting services in connection with legislation, and has drafted amendments to both the New Mexico Finance Authority Act and amendments to the Statewide Economic Development Finance Act.

Mr. Virtue also provided program development services to the Finance Authority. He drafted and prepared advice concerning the development of regulations and policies of the Finance Authority, including, regulations and policies governing the Public Project Revolving Loan Fund, Water Trust Board Rules, Primary Care Program, Childcare Facility Program and the Statewide Economic Development Finance Act, including New Market Tax Credit Program.

With Mr. Virtue as lead counsel, VN drafted the conduit bond (i.e. private activity bond) program regulations under the Statewide Economic Development Finance Act by the Finance Authority's Board of Directors. That program, under the Statewide Economic Development Finance Act, provided for the issuance by the Finance Authority of conduit bonds used by for profit businesses for projects providing economic development in New Mexico.

While serving as loan counsel to the Finance Authority, Mr. Virtue was assigned the task of preparing standard forms of loan agreements, as well as checklists and reports for most types of Public Projects Revolving Fund loans and Local Planning Grant and Water and Wastewater grant agreements. Mr. Virtue also developed standard forms of loan agreements for the Drinking Water State Revolving Loan Fund Program.

From 2011 to 2015, Mr. Virtue served as primary loan/grant counsel to the Finance Authority in connection with its Water Trust Board, Colonias Infrastructure Project Fund, and Drinking Water State Revolving Loan Fund programs and alternate counsel for its Public Project Revolving Fund programs. His work as loan/grant counsel and issuer's counsel to the Finance Authority includes drafting and analysis of documents governing hundreds of loans and bond purchases since 2004. He currently serves as alternate loan counsel for the Finance Authority's loan programs.

v. Otero County

Mr. Virtue is currently lead lawyer in VN's representation of Otero County, New Mexico as bond counsel, disclosure counsel and transaction counsel to Otero County, in connection with refinancing of bonds for privately operated jail facilities payable from net system revenues and capital improvement bonds payable from local option gross receipts tax. As Otero County bond counsel, he recently completed an interest rate conversion of approximately \$17,185,000 principal amount of Jail Refunding Project Revenue Bonds, Series 2012 and authorization of up to \$41,500,000 principal amount Hold Harmless Gross Receipts Tax Revenue Bonds, Series 2017A for capital improvements to the County's detention center and county courthouse. He is working on completing refinancing of approximately \$62,305,000 principal amount Jail Project Revenue Bonds, Series 2007.

In addition, Mr. Virtue provided legal advice to Otero County in connection with industrial revenue bonds issued by Otero County on behalf of Burrell Resources, Inc., to construct and operate a garnet mine, and related matters under the Local Economic Development Act.

Attachment 1

Good Standing Certificate from the New Mexico Supreme Court
and
Letter of Membership from the New Mexico State Bar



5121 Masthead NE · P O Box 92860
Albuquerque, NM 87199-2860
(505) 797-6000 · (800) 876-6227
Fax (505) 828-3765 · www.nmbar.org

Wesley O. Pool
President July 12, 2018

**BOARD OF BAR
COMMISSIONERS** Mr. Richard L. Virtue, Jr.
Virtue & Najjar PC
PO Box 22249
Santa Fe, NM 87502-2249

First District
Joshua A. Allison
Aja N. Brooks
Gerald G. Dixon
Hon. Kevin L. Fitzwater (ret.)
Robert Lara
Carla C. Martinez
Clara Moran
Benjamin I. Sherman

Re: State Bar of New Mexico
Bar ID # 2813

Dear Mr. Virtue:

Pursuant to your request for a letter of membership, please be advised that, as of today, our records reflect that you are an active member of the State Bar of New Mexico, and that you were admitted to practice in New Mexico on September 11, 1972.

If you have any questions or if I can be of further assistance, please feel free to contact me.

Sincerely,

Pamela Zimmer
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860
pzimmer@nmbar.org
www.nmbar.org

Second District
Joseph F. Sawyer

Third District
Barry C. Kane
Elizabeth J. Travis
Carolyn A. Wolf

Fourth District
Ernestina R. Cruz

Fifth District
Wesley O. Pool

Sixth District
Erinna M. "Erin" Atkins
Scotty A. Holloman
Jared G. Kallunki

Seventh District
Mick I. R. Gutierrez
David P. Lutz

**Senior Lawyers
Division Delegate**
John P. "Jack" Burton

**Young Lawyers
Division Chair**
Sean M. FitzPatrick

**Paralegal
Division Liaison**
Christina G. Babcock

Scotty A. Holloman
Immediate Past President

Richard B. Spinello
Executive Director
rspinello@nmbar.org

STATE OF NEW MEXICO

ENVIRONMENT DEPARTMENT
PROFESSIONAL SERVICES CONTRACT # 19 667 1210 0003

THIS AGREEMENT is made and entered into by and between the State of New Mexico, **NEW MEXICO ENVIRONMENT DEPARTMENT**, hereinafter referred to as the “**Agency**,” and **Virtue and Najjar, PC**, hereinafter referred to as the “**Contractor**,” and is effective as of the date set forth below upon which it is executed by the Department of Finance and Administration (DFA).

IT IS AGREED BETWEEN THE PARTIES:

1. Scope of Work.

The Contractor shall perform the following work:

Work with the Secretary and Deputy Secretary of the Agency, the Agency Hearing Clerk, and the Boards and Commissions Administrator for the Agency to coordinate and schedule hearings as the need arises. When scheduling the hearing, the contractor will work with the aforementioned Agency contacts to determine the approximate number of hours that will be required for the Hearing Officer to execute his or her duties related to the proceedings. The Contractor shall perform the following work under this Agreement:

- A. Conduct hearings, establish hearing dates, issue subpoenas, conduct pre-hearing conferences, accept testimony and written filings, administer oaths and affirmations, rule on motions and objections (both prior to and during the hearing to assure an impartial hearing, and explain issues and applicable laws to parties involved.
- B. Ensure that hearings are held in a timely manner and are conducted fairly and in accordance with all applicable procedural rules, statutes and guidelines.
- C. Assure all parties due process rights are observed and the public is offered a reasonable opportunity to be heard, when applicable.
- D. Consider evidence, argument and research and prepare timely Hearing Office Reports.
- E. Advise the Secretary or designees or Board or Commission as to evidence presented; it may also be necessary to advise the Secretary on legal issues surrounding specific proceedings, as well.
- F. Prepare records upon appeal.
- G. During proceedings, the Hearing Officer will be expected to be capable of managing multiple participants, including the public. The Hearing Officer will also be expected to properly manage technical and/or expert testimony and public participation.

- H. Work with Boards and Commissions Administrator and the Hearing Clerk to ensure proper administration of hearings, filings and other proceedings.
- I. Timely manage large case loads
- J. Provide scripts and other procedural assistance for Secretary of designees or Board/Commission members designated as Hearing Officers

2. **Compensation.**

A. The Agency shall pay to the Contractor in full payment for services satisfactorily Performed. **See Attachment A for Fee schedule for each term**, such compensation not to exceed **two hundred thousand (\$200,000.00)**, including gross receipts tax. The New Mexico gross receipts tax levied on the amounts payable under this Agreement shall be paid by the Agency to the Contractor. **The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed two hundred thousand dollars (\$200,000.00). This amount is a maximum and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated herein. The parties do not intend for the Contractor to continue to provide services without compensation when the total compensation amount is reached. Contractor is responsible for notifying the Agency when the services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided.**

B. Payment is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work, and to approval by the DFA. All invoices **MUST BE** received by the Agency no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date **WILL NOT BE PAID.**

C. Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the Agency finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services and outlining steps the Contractor may take to provide remedial action. Upon certification by the Agency that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the agency shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

3. **Term.**

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE DFA. This Agreement shall terminate **FOUR (4) YEARS from the date of approval by the DFA** unless terminated pursuant to paragraph 4 (Termination), or paragraph 5 (Appropriations). In accordance with NMSA 1978, § 13-1-150, no contract term for a professional services contract,

including extensions and renewals, shall exceed four years, except as set forth in NMSA 1978, § 13-1-150.

4. Termination.

A. Grounds. The Agency may terminate this Agreement for convenience or cause. The Contractor may only terminate this Agreement based upon the Agency's uncured, material breach of this Agreement.

B. Notice; Agency Opportunity to Cure.

1. Except as otherwise provided in Paragraph (4)(B)(3), the Agency shall give Contractor written notice of termination at least thirty (30) days prior to the intended date of termination.

2. Contractor shall give Agency written notice of termination at least thirty (30) days prior to the intended date of termination, which notice shall (i) identify all the Agency's material breaches of this Agreement upon which the termination is based and (ii) state what the Agency must do to cure such material breaches. Contractor's notice of termination shall only be effective (i) if the Agency does not cure all material breaches within the thirty (30) day notice period or (ii) in the case of material breaches that cannot be cured within thirty (30) days, the Agency does not, within the thirty (30) day notice period, notify the Contractor of its intent to cure and begin with due diligence to cure the material breach.

3. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor (i) if the Contractor becomes unable to perform the services contracted for, as determined by the Agency; (ii) if, during the term of this Agreement, the Contractor is suspended or debarred by the State Purchasing Agent; or (iii) the Agreement is terminated pursuant to Paragraph 5, "Appropriations", of this Agreement.

C. Liability. Except as otherwise expressly allowed or provided under this Agreement, the Agency's sole liability upon termination shall be to pay for acceptable work performed prior to the Contractor's receipt or issuance of a notice of termination; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. *THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE AGENCY'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.*

D. Termination Management. Immediately upon receipt by either the Agency or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the Agency; 2) comply with all directives issued by the Agency in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the Agency shall direct for the protection, preservation, retention or transfer of all property titled to the Agency and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the Agency upon termination and shall be submitted to the agency as soon as practicable.

5. Appropriations.

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the Agency to the Contractor. The Agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

6. Status of Contractor.

The Contractor and its agents and employees are independent contractors performing professional services for the Agency and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

7. Assignment.

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the Agency.

8. Subcontracting.

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Agency. No such subcontract shall relieve the primary Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from the Procuring Agency.

9. Release.

Final payment of the amounts due under this Agreement shall operate as a release of the Agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

10. Confidentiality.

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Agency.

11. Product of Service -- Copyright.

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the Agency no later than the

termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

12. Conflict of Interest; Governmental Conduct Act.

A. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement.

B. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978. Without in anyway limiting the generality of the foregoing, the Contractor specifically represents and warrants that:

1) in accordance with NMSA 1978, § 10-16-4.3, the Contractor does not employ, has not employed, and will not employ during the term of this Agreement any Agency employee while such employee was or is employed by the Agency and participating directly or indirectly in the Agency's contracting process;

2) this Agreement complies with NMSA 1978, § 10-16-7(A) because (i) the Contractor is not a public officer or employee of the State; (ii) the Contractor is not a member of the family of a public officer or employee of the State; (iii) the Contractor is not a business in which a public officer or employee or the family of a public officer or employee has a substantial interest; or (iv) if the Contractor is a public officer or employee of the State, a member of the family of a public officer or employee of the State, or a business in which a public officer or employee of the State or the family of a public officer or employee of the State has a substantial interest, public notice was given as required by NMSA 1978, § 10-16-7(A) and this Agreement was awarded pursuant to a competitive process;

3) in accordance with NMSA 1978, § 10-16-8(A), (i) the Contractor is not, and has not been represented by, a person who has been a public officer or employee of the State within the preceding year and whose official act directly resulted in this Agreement and (ii) the Contractor is not, and has not been assisted in any way regarding this transaction by, a former public officer or employee of the State whose official act, while in State employment, directly resulted in the Agency's making this Agreement;

4) this Agreement complies with NMSA 1978, § 10-16-9(A) because (i) the Contractor is not a legislator; (ii) the Contractor is not a member of a legislator's family; (iii) the Contractor is not a business in which a legislator or a legislator's family has a substantial interest; or (iv) if the Contractor is a legislator, a member of a legislator's family, or a business in which a legislator or a legislator's family has a substantial interest, disclosure has been made as required by NMSA 1978, § 10-16-7(A), this Agreement is not a sole source or small purchase contract, and this Agreement was awarded in accordance with the provisions of the Procurement Code;

5) in accordance with NMSA 1978, § 10-16-13, the Contractor has not directly participated in the preparation of specifications, qualifications or evaluation criteria for this Agreement or any procurement related to this Agreement; and

6) in accordance with NMSA 1978, § 10-16-3 and § 10-16-13.3, the Contractor has not contributed, and during the term of this Agreement shall not contribute, anything of value to a public officer or employee of the Agency.

C. Contractor's representations and warranties in Paragraphs A and B of this Article 12 are material representations of fact upon which the Agency relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to the Agency if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to the Agency and notwithstanding anything in the Agreement to the contrary, the Agency may immediately terminate the Agreement.

D. All terms defined in the Governmental Conduct Act have the same meaning in this Article 12(B).

13. Amendment.

A. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.

B. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Contractor shall, within thirty (30) days of receipt of the proposed Amendment, have the option to terminate the Agreement, pursuant to the termination provisions as set forth in Article 4 herein, or to agree to the reduced funding.

14. Merger.

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

15. Penalties for violation of law.

The Procurement Code, NMSA 1978 §§ 13-1-28 through 13-1-199, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

16. Equal Opportunity Compliance.

The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation,

sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

17. Applicable Law.

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with NMSA 1978, § 38-3-1 (G). By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

18. Workers Compensation.

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Agency.

19. Records and Financial Audit.

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Agency, the Department of Finance and Administration and the State Auditor. The Agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Agency to recover excessive or illegal payments

20. Indemnification.

The Contractor shall defend, indemnify and hold harmless the Agency and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the Agency and the Risk Management Division of the New Mexico General Services Department by certified mail.

21. New Mexico Employees Health Coverage.

A. If Contractor has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the

term of the contract, Contractor certifies, by signing this agreement, to have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.

B. Contractor agrees to maintain a record of the number of employees who have (a) accepted health insurance; (b) declined health insurance due to other health insurance coverage already in place; or (c) declined health insurance for other reasons. These records are subject to review and audit by a representative of the state.

C. Contractor agrees to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information: <http://insurenwnewmexico.state.nm.us/>.

22. Employee Pay Equity Reporting.

Contractor agrees if it has ten (10) or more New Mexico employees OR eight (8) or more employees in the same job classification, at any time during the term of this contract, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. If contractor has (250) or more employees contractor must complete and submit the PE250 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. For contracts that extend beyond one (1) calendar year, or are extended beyond one (1) calendar year, contractor also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within thirty (30) days of the annual contract anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the contract, whichever comes first. Should contractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor agrees to provide the required report within ninety (90 days) of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter. Contractor also agrees to levy this requirement on any subcontractor(s) performing more than 10% of the dollar value of this contract if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Contractor further agrees that, should one or more subcontractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor will submit the required report, for each such subcontractor, within ninety (90 days) of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal. Contractor shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the applicable subcontractor(s) in accordance with the schedule contained in this paragraph. Contractor acknowledges that this subcontractor requirement applies even though contractor itself may not meet the size requirement for reporting and be required to report itself.

Notwithstanding the foregoing, if this Contract was procured pursuant to a solicitation, and if Contractor has already submitted the required report accompanying their response to such solicitation, the report does not need to be re-submitted with this Agreement.

23. Invalid Term or Condition.

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

24. Enforcement of Agreement.

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

25. Notices.

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

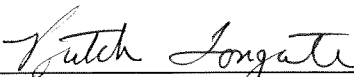
To the Agency:
J.C. Borrego
Deputy Cabinet Secretary
NM Environment Department
P.O. Box 5469
1190 St. Francis Drive Ste N4050
Santa Fe NM 87502
JuanCarlos.Borrego@state.nm.us

To the Contractor:
Richard L.C. Virtue
Virtue & Najjar, PC
2200 Brothers Road
Santa Fe, NM 87502
505-983-6101 ext. 57
rvirtue@virtuelaw.com

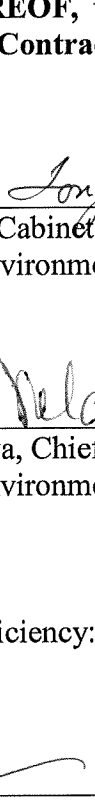
26. Authority.

If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represents and warrants that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of signature by the DFA Contracts Review Bureau below.

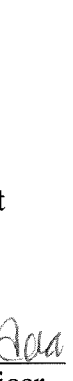
By: 
Butch Tongate, Cabinet Secretary
New Mexico Environment Department

Date: 8/14/18

By: 
Marlene Cordova, Chief Financial Officer,
New Mexico Environment Department


Date: 8/13/18

Approved for legal sufficiency:

By: 
Jennifer Hower, General Counsel
New Mexico Environment Department

Date: 8/13/18

Contractor:

By: 
Richard L.C. Virtue, Shareholder
Virtue & Najjar, PC

Date: August 3, 2018

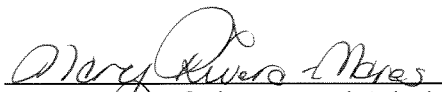
The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes:

CRS ID Number: # 02-239849-00-0

Taxation and Revenue is only verifying the registration and will not confirm or deny taxability statements contained in this contract.

By:  Date: 8/14/18
Taxation & Revenue Department

This Agreement has been approved by the Department of Finance and Administration, Contracts Review Bureau:

By:  Date: 8/15/18
Department of Finance and Administration, Contracts Review Bureau

**Attachment-A Scope of Work
Fee Schedule**

- **\$150.00/hour for all work described in scope of work of contract.**
- **\$75.00/hour for all travel to and from all locations outside of office related to performing the scope of work described in the contract.**
- **Travel expenses (Per diem, Lodging and Mileage) per DFA rules.**
- **Total Compensation not to exceed \$200,000.00 over a four (4) year term.**

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

**IN THE MATTER OF PROPOSED DISCHARGE
PERMIT DP-1132 FOR THE RADIOACTIVE
LIQUID WASTE TREATMENT FACILITY AT
LOS ALAMOS NATIONAL LABORATORY,
LOS ALAMOS, NEW MEXICO**

No. GWB-19-24(P)

**ORDER DENYING MOTION TO VACATE HEARING OFFICER'S REPORT
("MOTION") OF CONCERNED CITIZENS FOR NUCLEAR SAFETY,
HONOR OUR PUEBLO EXISTENCE, AND THE NEW MEXICO
ACEQUIA ASSOCIATION (COLLECTIVELY, "CITIZENS")**

The Secretary of Environment, having considered the Motion and the Hearing Record in this case and being otherwise fully advised, **FINDS:**

1. This case was commenced, and the Hearing Officer was appointed, on July 17, 2019 pursuant to the Notice of Hearing Determination and Hearing Officer Appointment ("Appointment") filed by the Secretary. Citizens counsel were notified of the Appointment pursuant to a Certificate of Service filed by the hearing clerk on the date that the Appointment was filed. The Motion was filed on March 25, 2020 after the hearing in this matter had concluded and after all post-hearing submittals had been filed. The Motion seeks to disqualify the hearing officer by vacating the Hearing Officer's Report on the ground that the hearing officer's contract with the Department provides for payment of the Hearing Officer on an hourly basis, which Citizens assert denies Citizens due process of law.

2. March 25, 2020 is the date that the Hearing Officer's Post-Hearing Scheduling Order, entered on December 6, 2019, established as the due date for issuance of the Final Order of the Secretary in this Case. Citizen's counsel was notified of the March 25, 2020 deadline pursuant to a Certificate of Service filed by the hearing clerk on the same date that the Post-Hearing

Scheduling Order was issued. On March 25, the Secretary extended the deadline for filing the Final Order due to duties of the Secretary required by the spread of COVID-19.

3. Notices of the public hearing were published on July 19, 2019, August 23, 2019 and October 9, 2019 in the *Los Alamos Monitor*, the *Santa Fe New Mexican* and the *Albuquerque Journal* setting the hearing in this case for November 14, 2019. Citizens submitted a notice of intent to submit technical testimony as required by the notices, were represented by counsel at the hearing, presented a technical witness at the hearing, and participated in the post- hearing briefing and comment process established by the notices and the Hearing Officer's Post-Hearing Scheduling Order.

4. The Department's contract with the hearing officer became effective in the fall of 2018 and has been a matter of public record since that time. Citizens had the right and opportunity to obtain a copy of hearing officer's agreement with the Department, including under the New Mexico Inspection of Public Records Act, yet did not do so until after the hearing.

5. The Department's Permit Procedures regulations at NMAC 20.1.4.100.E (3)(b) provide that a motion to disqualify a hearing officer may be filed at any time prior to the hearing. Notwithstanding the requirement in the Department's Permit Procedures regulations, the Motion was not filed prior to the hearing, at the hearing or during the post- hearing submittal process, even though the Department's contract with the hearing officer became effective in the fall of 2018 and has been a matter of public record since that time and Citizens were notified of the appointment of the hearing officer on July 17, 2019.

THEREFORE, THE SECRETARY CONCLUDES:

1. The Motion was untimely filed under NMAC 20.4.1.100.E. (3)(b).

2. Citizens had a reasonable and substantial opportunity prior to the hearing in this case to file the Motion in conformity with NMAC 20.4.1.100.E. (3)(b).

IT IS THEREFORE ORDERED that the Motion is denied.

DATED: April 26, 2020.

 Digitally signed by James Kenney
Date: 2020.04.26 18:59:46 -06'00'

JAMES C. KENNEY, Secretary
New Mexico Department of Environment

Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Order Denying Motion to Vacate Hearing Officer's Report of Concerned Citizens for Nuclear Safety, Hone our Pueblo Existence, and the New Mexico Acaquia Association** was emailed to all parties on April 27, 2020. The above-mentioned document can be served via first class mail upon request.

Lindsay A. Lovejoy, Jr.
Attorney at Law
3600 Cerrillos Road, Unit 1001A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

Jonathan M. Block, Eric D. Jantz,
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Ste.5
Santa Fe, New Mexico 87507
jblock@nmelc.org
*Counsel for Concerned Citizens for Nuclear Safety,
Tewa Women Untied of Santa Cruz,
Honor Our Pueblo Existence of Espanola, and
New Mexico Acequia Association*

Mr. Stuart R. Butzier and Ms. Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, PA
123 E. Marcy Street, Ste. 201
Santa Fe, New Mexico 87501
sbutzier@modrall.com
ccs@modrall.com

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Ms. Susan L. McMichael
Office of Laboratory Counsel/MS A187
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov
*Counsel for Triad National Security, LLC, and
U.S. Department of Energy/NNSA*

Mr. John Verheul, Assistant General Counsel,
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Harold Runnels Building, Suite N-4050
Albuquerque, New Mexico 87102
john.verheul@state.nm.us
Counsel for the New Mexico Environment Department

Richard Virtue
2200 Brothers Rd
Santa Fe, NM 87505
(505) 983-6101
rvirtue@virtuelaw.com
Hearing Officer

Cody
Barnes

Digitally signed by
Cody Barnes
Date: 2020.04.27
10:20:15 -06'00'

Cody Barnes
Hearing Clerk
(505) 827-2428
cody.barnes@state.nm.us

**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**

GWB 19-24 (P)

**ORDER OF THE SECRETARY
REMANDING FOR CONSIDERATION OF FINANCIAL ASSURANCE**

The Secretary of the Environment Department (“Secretary”), having considered the Hearing Record (as defined in 20.1.4.7(A)(14) NMAC), all post-hearing submittals, the Hearing Officer’s Report and the comments on the Hearing Officer’s Report, and being otherwise fully advised, **FINDS:**

1. The urgent duties of the Secretary related to the Executive Order concerning COVID-19 issued by the Governor of the State on March 11, 2020, as revised through June 12, 2020, have delayed the Secretary’s review and consideration of the Hearing Officer’s Report and the Hearing Record in this case.

2. The Application in this proceeding is for a ground water discharge permit (“DP-1132”) under the State Water Quality Act (“WQA”), NMSA 1978, Section 74-6-1 et seq., applicable to certain wastewater discharges that may be made from the radioactive liquid waste treatment facility (“RLWTF”) located at Los Alamos National Laboratory (“LANL”) and may move directly or indirectly into ground water.

3. The technical testimony submitted on behalf of Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, New Mexico Acequia Association and Tewa Women United (collectively, “Citizens”) addresses the history of the RLWTF and includes the opinion of

Citizens' technical witness that the State Hazardous Waste Act ("HWA"), NMSA 1978, Section 74-4-1 et seq., should be applied to the RLWTF. In the opinion of the witness, regulation of the RLWTF under the HWA is more stringent than regulation under the WQA and is thus more protective of the environment. Tr. 11-14-19, pp. 167-173. The technical testimony of the Citizens witness does not address in specific detail how regulation of the RLWTF under the HWA would be more protective of the environment.

4. Numerous persons expressed views similar to those expressed by the Citizens' witness in oral comments made at the public hearing and in written comments submitted for the Hearing Record, including comments made by representatives of Native American communities located in the vicinity of LANL. Tr. 11-14-19, pp. 92-105, 227; AR. 14894-15188.

5. The interplay between the HWA and the WQA is not a relevant consideration in this matter as the construct of the wastewater treatment unit exemption is a construct of the implementing regulations of the Resource Conservation and Recovery Act ("RCRA") and the HWA with relevance to Clean Water Act discharge permits – not WQA groundwater discharge permits. However, the Citizens raise an equitable argument as to whether the RCRA and HWA wastewater treatment unit exemption is practicably enforceable by the Department in the State. The Department cannot issue permits nor assure compliance with either section 402 or 307(b) of the Clean Water Act. The WQA applies to the Application in this case for the purpose of protecting groundwater in the State.

6. The Hearing Record and the public record reveal a longstanding legacy of contamination of soil, surface water and groundwater caused by operations of the Applicants, as evidenced by, among other public documents, the Federal Facility Compliance Order between the Department and the United States Department of Energy dated May 20, 1997, the Compliance

Orders on Consent issued by the Department under the HWA and entered into among the Department, the Applicants and predecessor operators of LANL on March 1, 2005 and in June, 2016.

7. The WQA makes the Applicants responsible for protecting the health of the citizens of New Mexico and the environment in part by eliminating contamination of the State's groundwater in connection with their operations, and the issuance of ground water discharge permits is the primary mechanism authorized under State law for protecting the State's groundwater.

8. The regulations of the Water Quality Control Commission ("WQCC") issued pursuant to the WQA to protect ground water state at 20.6.2.3107(A)(11) NMAC that each ground water discharge permit shall provide, "as the secretary may require", for a closure plan which includes closure measures, maintenance and monitoring plans, post-closure maintenance and monitoring plans and financial assurance.

9. The contingency plans and closure plan contained in the proposed DP-1132 do not include requirements that the Applicants provide financial assurance in connection with corrective action required under contingency plans, in connection with closure of the RLWTF or in connection with post-closure care of the RLWTF.

10. The technical testimony submitted at the public hearing and the non-technical public testimony and comments submitted at and after the public hearing contain no evidence related to financial assurance.

11. The concerns raised by Citizens and other members of the public in this proceeding may potentially be addressed by requiring adequate financial assurance for corrective action, closure, and post-closure care in DP-1132.

THEREFORE, THE SECRETARY CONCLUDES:

1. Given the longstanding legacy of contamination of soil, surface water and groundwater caused by the Applicant's operations, the public interest is served by requiring financial assurance provisions to be included in DP-1132, if the permit is issued as a result of this proceeding.

2. This proceeding should be remanded to the Ground Water Quality Bureau ("GWQB") for the purpose of considering the types and levels of financial assurance that should be applied to DP-1132, if issued as a result of this proceeding, including corrective action, closure and post-closure care of the facilities at the RLWTF that are the subject of DP-1132.

3. The GWQB is directed to publish notice(s) of its financial assurance proposal related to DP-1132 in accordance with 20.6.2 NMAC and 20.1.4 NMAC ("Permit Rules") of the Water Quality Control Commission and the Department and provide for public participation and a hearing, if requested pursuant to the Permit Rules.

4. The Hearing Officer is authorized and directed to rule on any procedural or other matters related to financial assurance for DP1132 and conduct any additional hearings that may be required on remand to the GWQB.

5. Matters related to the appropriate regulatory treatment of the RLWTF under the HWA, including the practicality of enforcement of the applicable HWA permit conditions, are properly raised before the HWB and not in this proceeding.

IT IS THEREFORE ORDERED that this proceeding is remanded to the GWQB for further proceedings consistent with this order and the Hearing Officer is directed to file a revised Hearing Officer's Report after the conduct of the proceedings on remand.

DATED: June 24, 2020.



Digitally signed by James Kenney
Date: 2020.06.24 09:55:57 -06'00'

JAMES C. KENNEY, Secretary
New Mexico Department of Environment

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Corrected **Order of the Secretary Remanding for Consideration of Financial Assurance** was emailed to all parties on June 2, 2020. The above-mentioned document can be served via first class mail upon request.

Lindsay A. Lovejoy, Jr.
Attorney at Law
3600 Cerrillos Road, Unit 1001A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

Jonathan M. Block, Eric D. Jantz,
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Ste.5
Santa Fe, New Mexico 87507
jblock@nmelc.org
*Counsel for Concerned Citizens for Nuclear Safety,
Tewa Women Untied of Santa Cruz,
Honor Our Pueblo Existence of Espanola, and
New Mexico Acequia Association*

Mr. Stuart R. Butzier and Ms. Christina C. Sheehan
Modrall Sperlberg Roehl Harris & Sisk, PA
123 E. Marcy Street, Ste. 201
Santa Fe, New Mexico 87501
sbutzier@modrall.com
ccs@modrall.com

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Ms. Susan L. McMichael
Office of Laboratory Counsel/MS A187
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov
*Counsel for Triad National Security, LLC, and
U.S. Department of Energy/NNSA*

Mr. John Verheul, Assistant General Counsel,
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Harold Runnels Building, Suite N-4050
Albuquerque, New Mexico 87102
john.verheul@state.nm.us
Counsel for the New Mexico Environment Department

Richard Virtue
2200 Brothers Rd
Santa Fe, NM 87505
(505) 983-6101
rvirtue@virtuelaw.com
Hearing Officer

Cody Barnes Digitally signed by Cody
Barnes
Date: 2020.06.24 10:01:40
-06'00'

Cody Barnes
Hearing Clerk
(505) 827-2428
cody.barnes@state.nm.us