

**STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION**

*In the matter of a petition appealing* )  
The Secretary of the Environment's )  
Denial of a Hearing on DP-1793 )  
 )  
Communities for Clean Water, )  
*Petitioner* )

WQCC- 15-07(A)



**COMMUNITIES FOR CLEAN WATER  
OPPOSED MOTION TO STAY DISCHARGE PERMIT 1793**

Communities for Clean Water ("CCW"), hereby move the Commission for a stay of the effectiveness of discharge permit 1793 ("DP-1793") pending CCW's Petition appealing the Secretary of the New Mexico Environment Department's (Secretary's) denial of a public hearing in the matter of DP-1793 for the Los Alamos National Laboratory ("LANL"), and the final approval of DP-1793, and a hearing on this motion, pursuant to 20.1.3.15 NMAC. Counsel for New Mexico Environment Department ("NMED") and for LANL were contacted regarding this Motion. Both NMED and LANL oppose this Motion. The basis for granting the appeal is set forth in the separately filed Petition which is incorporated herein by reference. For the reasons set forth below, the Commission should grant a hearing on this Motion for Stay and issue a stay pending its decision on the appeal Petition.

**I. THE COMMISSION SHOULD GRANT A STAY OF DP-1793 PENDING  
RESOLUTION OF CCW'S PETITION OF APPEAL.**

**A. The Standard For Granting A Stay of Proceedings.**

The sole indication of the Commission's requirements for issuance of a stay is in a guidance document relating to stays of administrative regulations. *See generally*, "Guidelines for Water Quality Control Commission Regulation Hearings" at Section 502 (Approved November 10, 1992; Amended June 8, 1993). Section 502 requires that there be a written motion and that

the Commission will only grant a stay if a hearing is held on the motion and good cause for granting the stay is shown. *Id.* at 502(A). "Good cause" is defined under Section 502 in a manner consistent with the requirements for granting injunctive relief under the New Mexico Rules of Civil Procedure. Compare *Id.* at 502(B) and Rules of Civil Procedure at 1-066(A).<sup>1</sup>

These requirements for "good cause" are:

- (1) the likelihood that the movant will prevail on the merits of the appeal;
- (2) whether the moving party will suffer irreparable harm if a stay is not granted;
- (3) whether substantial harm will result to other interested persons; and
- (4) whether harm will ensue to the public interest.

"Guidelines for Water Quality Control Commission Regulation Hearings" at Section 502 (Approved November 10, 1992; Amended June 8, 1993). CCW meets each of these criteria, as demonstrated below.

**B. There Is Good Cause To Grant A Stay Of DP-1793.**

A stay of the effectiveness of DP-1793 should be granted pending the resolution of CCW's appeal for the following reasons:

**1. It is likely that CCW will prevail on the merits of the appeal.**

CCW's Petition for Appeal has a fundamental basis: the Water Quality Control Act, NMSA 1978, 74-5-6(G), and its implementing regulation 20.6.2.3108.K NMAC, entitle CCW to a public hearing in the matter of DP-1793 where an interested party requests such a hearing and substantial public interest exists in the matter at issue. CCW demonstrated substantial public interest through three requests for a hearing, three sets of comments submitted to NMED, and

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<sup>1</sup> To obtain a preliminary injunction under Rule 1-066 NMRA, a plaintiff must show that plaintiff will suffer irreparable injury unless the injunction is granted; the threatened injury outweighs any damage the injunction might cause a defendant; the issuance of the injunction will not be adverse to the public's interest; and there is a substantial likelihood plaintiff will prevail on the merits. *LaBalbo v. Hymes*, 115 N.M. 314, 850 P.2d 1017 (Ct. App. 1993), cert. denied, 115 N.M. 359, 851 P.2d 481 (1993).

CCW's participation in the permitting process. Since the Secretary approved DP-1793 without an opportunity for a public hearing, the final approval of DP-1793 violates the Water Quality Act.

**2. CCW will suffer irreparable harm if the stay is not granted.**

In this matter, CCW raised several issues in their Petition Appealing the Secretary's Denial of a Hearing and final Approval of DP-1793 (filed on August 21, 2015), which flow from CCW's submission of three sets of comments on the permit (each of which requested a hearing) and participation in a meeting with the permit applicant ("applicant") and the Ground Water Bureau. CCW was denied the opportunity to "submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." NMSA 1978 § 74-6-5(G). Allowing the permit to become effective during the period in which a Petition for Appeal may be made and heard completely undercuts the intention of the Legislature in allowing such appeals under the New Mexico Water Quality Act. *Id.* at (O). To allow DP-1793 to go into effect while Petitioners' Appeal is pending further denies Petitioners their right to a meaningful hearing under the Act. *Id.* at G. The harm is patent: giving Petitioners a hearing on the permit at issue after allowing the permit to go into effect is to grant a hearing on a matter that is moot. This cannot be what the Legislature intended in providing the public with a very broad right to hearings on permits under the Act. NMSA 1978, 74-6-5(G).

**3. No substantial harm will result to other persons interested in this matter if a stay is granted.**

As a matter of fact, the Applicant first filed its draft permit application nearly three years and nine months (3.75 years) ago. During that time, on information and belief, the Applicant and NMED worked on obtaining a final form for the permit and releasing it to the public. The

permit in its current form was not made available for public comment until the last day of January 2015. That means the Applicant and the NMED had approximately three (3) years and two (2) months in which to work on this permit. The public was provided six (6) months to participate in the permit process. An additional, and foreseen, delay for the Commission to determine whether there has been a violation of the Water Quality Act in denying CCW a hearing on DP-1793 and the subsequent final approval of DP-1793 will not harm the Applicant or NMED, given the amount of time they have had to resolve this issue without doing so. In fact, Applicant submitted a work plan for implementing the permit on August 13, 2015, which has been rejected by NMED. *See Exhibit 1, attached hereto, "Discharge Permit DP-1793, Rejection of Workplan for Treatment and Land Application of Groundwater – Los Alamos National Laboratory"* (August 18, 2015).

**4. There will be no harm to the public interest if a stay is granted.**

Given that the issue in this matter is the apparent violation of the Water Quality Act provisions for public access to hearings on permits, it is the public interest that will be vindicated if a stay is granted. There is no harm – as indicated in relation to whether such exists for the Applicant and the NMED – to anyone in granting a stay. However, there is harm to the public – as CCW is a member of the public and comprised of numerous members of the public represented through each of CCW's constituent organizations – in denying a stay, as set forth above.

**II. CONCLUSION**

For the reasons set forth above, the Commission should hear this motion in oral argument and enter a stay in this matter.

Submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER

BY:   
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**CERTIFICATE OF SERVICE**

I, Jaimie Park, certify that on this 21st day of August, 2015, the below listed persons were served digitally via email and that the requisite original of this Petition and fifteen (15) copies were filed with the Administrator for the Water Quality Control Commission:

Jennifer Hower,  
Deputy General Counsel  
New Mexico Environment Department  
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Albuquerque, NM 87102-3400  
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RYAN FLYNN  
Cabinet Secretary

BUTCH TONGATE  
Deputy Secretary

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

August 18, 2015

Allison Dorries, Division Leader  
Environmental Protection Division  
Los Alamos National Security, LLC (LANS)  
3747 West Jemez Road  
Los Alamos, New Mexico 87545

Christine M. Gelles  
Acting Manager  
Environmental Management  
Los Alamos Field Office  
U.S. Department of Energy  
P.O. Box 1663, K490  
Los Alamos, New Mexico 87545

**RE: Discharge Permit DP-1793, Rejection of Workplan for Treatment and Land Application of Groundwater - Los Alamos National Laboratory**

Dear Ms. Dorries and Ms. Gelles:

On July 27, 2015 the New Mexico Environment Department (NMED) issued Discharge Permit DP-1793 to Los Alamos National Laboratory for the land application of treated groundwater derived from aquifer testing, well development, tracer studies and other activities associated with groundwater remediation activities at the laboratory. On August 13, 2015 the NMED Ground Water Quality Bureau (GWQB) received a workplan as required by Condition 3 of DP-1793, for activities regulated under this Discharge Permit.

The workplan proposes treatment and land application of groundwater derived from wells and piezometers, include aquifer testing, purging and sampling of groundwater, aquifer tracer studies and well back flushing of proposed injection wells, with the discharges to be conducted over a five year period (term of the Discharge Permit).



The workplan, as submitted, fails to meet the requirements of Condition 3, which states:

*Prior to initiating discharge from an individual project, pumping test, aquifer test or tracer study, the permittee shall submit a workplan to NMED for approval...*

The August 12, 2015 workplan provides only general information on the proposed discharges, including generalized locations of discharge, estimated annual volume of discharge from fourteen (14) one-time well and piezometer actions for the period of 2015 and 2016 and discharges from twenty-two (22) ongoing well and piezometer activities over the term of the permit (5 years).

Discharge Permit DP-1793 clearly requires that each **individual** activity (aquifer testing, tracer study, well purging and sampling, etc.) must be described in a workplan that provides specific information related to that discharge including:

- a detailed description of the proposed activity, including a statement of purpose;
- a description of water conservation and reuse options considered;
- a topographic map showing the proposed land application sites and the location of all monitoring wells, Site Monitoring Areas (SMA), Solid Waste Management Units (SWMU), National Pollution Discharge Elimination System (NPDES) outfalls, groundwater discharge permits, Areas of Concern (AOC) identified in the 2005 NMED Order on Consent, drinking water wells, surface impoundments and surface drainage features in the vicinity;
- existing data showing the depth to and general groundwater quality at the proposed discharge location including concentrations of contaminants exceeding regulatory standards;
- estimated groundwater flow direction;
- a detailed description of the on-site treatment system to remove contaminants of concern from the effluent;
- a schematic of treatment system and treatment unit specifications;
- a detailed descriptions of the storage/containment systems associated with the treatment;
- Safety Data Sheets for tracer constituents;
- a maximum estimated daily discharge volume;
- total estimated volume of the proposed discharge;
- a proposed sampling plan to demonstrate treatment efficiency and compliance with regulatory standards; proposed method(s) of land application, application rates and area of application; and
- a project schedule including the date the discharge is to commence and anticipated duration.

The work plan submitted is hereby rejected. Los Alamos National Laboratory must submit a revised workplan fulfilling the requirements of Condition #3 of DP-1793 and post on the electronic public reading room (EPRR, Condition #12) within 7 days. The Department will

Allison Dorries and Christine Gelles

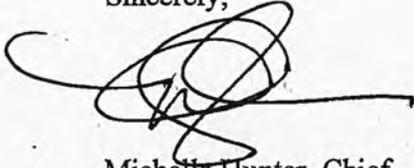
August 18, 2015

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accept public comments for a period of 30 days following posting to the EPRR prior to approving the workplan.

If you have any questions, please contact Steven Huddleson at (505) 827-2936. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to be "Michelle Hunter", with a long horizontal line extending to the right.

Michelle Hunter, Chief  
Ground Water Quality Bureau

MH:SMH

CC: James Hogan, NMED/SWQB (E-file)  
John E. Kieling, NMED/HWB (E-file)  
Stephen Yanicak, NMED/DOE/OB (E-file)  
Gene Turner, NA-LA (E-file)  
Bob Beers, EM-LA (E-file)  
Joni Arends, CCNS (E-file)