

**STATE OF NEW MEXICO
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 No. 15-07(A)

**THE UNITED STATES DEPARTMENT OF ENERGY'S AND
LOS ALAMOS NATIONAL SECURITY, LLC'S
RESPONSE IN OPPOSITION TO COMMUNITIES FOR CLEAN WATER'S
OPPOSED MOTION TO STAY DISCHARGE PERMIT 1793**

The United States Department of Energy ("DOE") and Los Alamos National Security, LLC ("LANS") (collectively "DOE/LANS"), pursuant to 20.1.3.15 NMAC, submit this response in opposition to Petitioner Communities for Clean Water's ("CCW") Opposed Motion to Stay Discharge Permit 1793 (the "Motion"). The Motion is without merit and should be denied for the reasons set forth below.

BACKGROUND

1. In December of 2011, DOE/LANS submitted an application to discharge treated groundwater from a pumping test at a monitoring well associated with remediation of a chromium contaminated groundwater plume within the boundaries of Los Alamos National Laboratory ("LANL").

2. In March 2012, DOE/LANS submitted supplemental information to broaden the scope of the discharge to be permitted. The New Mexico Environment Department ("NMED" or "the Department") completed public notice on the March 2012 application in November 2012.

3. During meetings in July and December of 2013, NMED and DOE/LANS determined that the application for discharge permit DP-1793 (“DP-1793”) was not sufficiently broad and amendments were needed.

4. DOE/LANS submitted a revised application on January 7, 2014, and NMED complete public notice on the revised application in January of 2015.

5. NMED issued Draft Discharge Permit DP-1793 and provided copies of the draft permit to the interested parties identified during the initial public notice upon publication of the second public notice on January 21, 2015.

6. In March of 2015, NMED received comments on Draft DP-1793 from two interested parties: DOE/LANS, and Communities for Clean Water (“CCW”), a non-profit entity representing several other entities, including Concerned Citizens for Nuclear Safety, Amigos Bravos, Tewa Women United, and Honor our Pueblo Existence. *See Exhibit 2 to Communities for Clean Water First Amended Verified Petition for Review of New Mexico Environment Department Secretary’s Denial of Public Hearing and Final Approval of Discharge Permit 1793 (“CCW Petition) (filed Aug. 24, 2015).*

7. On April 15, 2015, NMED held a technical meeting with the interested parties to discuss the terms and conditions of Draft DP-1793.

8. Following the April 15, 2015 meeting, CCW submitted additional written comments regarding Draft DP-1793. *See Exhibit 3 to CCW Petition.* LANS/DOW submitted additional written comments on April 29, 2015.

9. NMED revised Draft DP-1793 based on the comments received from both interested parties and provided the revised permit to DOE/LANS and CCW on May 28, 2015.

10. CCW submitted a third set of comments on the revised Draft DP-1793 on June 15, 2015. *See* Exhibit 4 to CCW Petition. DOE/LANS also submitted a third set of comments on June 11, 2015.

11. On July 24, 2015, NMED sent a letter (the “Denial Letter”) to CCW informing CCW of the Secretary’s decision to deny CCW’s request for a public hearing on Draft DP-1793.

In support of this determination, NMED stated as follows:

It is the opinion of the Department that NMED has drafted a Discharge Permit that provides transparency and opportunity for community involvement at an unprecedented level. The proposed activity by LANL is intended to address historic impacts to groundwater and protect water resources and communities, and issuance of this Discharge Permit is in the public interest.

See Exhibit 5 to CCW Petition.

12. The Department issued final Discharge Permit DP-1793 on July 27, 2015.

13. DP-1793 governs discharges of treated groundwater associated with individual remediation projects at LANL, including activities relating to the control and remediation of a chromium contaminated groundwater plume within the boundaries of LANL, along with various other groundwater monitoring, investigation, and remediation projects. The Permit allows for the discharge of up to 350,000 gallons per day (gpd) of treated groundwater associated with aquifer and pumping tests, well development and rehabilitation, groundwater tracer studies, and groundwater remediation. Discharges of treated effluent associated with such projects are permitted via land application to 55 sections within the LANL site. Prior to discharge, all groundwater is required to be treated to achieve standards equal to less than 90% of the numeric standards set forth in 20.6.2.3103 NMAC and less than 90% of the numeric standards established for tap water in Table A-1 for constituents not listed in 20.6.2.3103 NMAC. *See* DP-1783, attached as Exhibit 1 to CCW Petition.

15. DP-1793 is essential to LANL's ability to carry out critical remediation projects intended to protect public health and the environment.

16. On August 21, 2015, CCW filed its Appeal of New Mexico Environment Department Secretary's Denial of Public Hearing and Approval of Discharge Permit, and an accompanying Opposed Motion to Stay Discharge Permit 1793.

17. CCW filed its First Amended Verified Petition for Review of New Mexico Environment Department Secretary's Denial of Public Hearing and Final Approval of Discharge Permit 1793 ("CCW Petition"), and accompanying Opposed Motion to Stay Discharge Permit 1793 ("Motion") on August 24, 2015.

STANDARD OF DECISION

Neither the WQA nor the regulations governing WQCC adjudicatory procedures, Part 20.1.3 NMAC, address stays of discharge permits pending WQCC review under NMSA 1978, § 74-6-5(O) and 20.1.3.16 NMAC. LANS disagrees with CCW that Section 502 of the "Guidelines for Water Quality Control Commission Regulation Hearings," which sets forth requirements for stays of regulations pending appellate review, governs the requirements for stays of discharge permits pending WQCC review under 20.1.3.16 NMAC. However, LANS nonetheless agrees that the standard articulated by CCW in its Motion is applicable in this instance to determine whether the effectiveness of DP 1783 should be stayed pending the Commission's review under NMSA 1978, § 74-6-5. That standard mirrors both the standard used by appellate courts in determining whether to grant a stay from an order of an administrative agency, *see Tenneco Oil Co. v. New Mexico Water Quality Control Com'n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708, and the standard required for injunctive relief under Rule 1-066 of the New Mexico Rules of Civil Procedure. *See* 20.1.3.8 NMAC (WQCC may look to New Mexico Rules

of Civil Procedure for guidance in the absence of a specific provision in Part 20.1.3 that governs a particular action).

The applicable standard requires that CCW demonstrate the existence of the following four conditions: (1) there is a likelihood that CCW will prevail on the merits of its Petition; (2) CCW will be irreparably harmed unless a stay is granted; (3) no substantial harm will result to the other interested parties if a stay is granted; and (4) no harm will result to the public interest if a stay is granted. *See Tenneco Oil Co. v. New Mexico Water Quality Control Com'n*, 1986-NMCA-033 at ¶ 10. As the petitioner, CCW bears the burden of establishing each and every one of these elements. *See id.* As discussed below, CCW cannot satisfy its burden, and therefore the requested stay should be denied.

ARGUMENT

I. CCW Is Not Likely to Prevail on the Merits of Its Petition

A. CCW Has Not Challenged the Final Permit Itself

CCW brings its Petition under NMSA 1978, § 74-6-5(O) (2009), which govern the Commission's review of NMED's permitting actions. The Petition states that CCW is seeking review of both the Secretary's decision to deny CCW's request for a public hearing on DP 1793, as well as the Secretary's final approval of DP 1793. However, the substance of the Petition addresses only the decision not to hold a public hearing; CCW does not challenge any of the terms or conditions of the permit itself or specify what provisions of the final permit as approved by the Secretary are objectionable. *See* CCW Petition at 7 (challenging only the failure to hold a public hearing prior to final approval of DP-1793 and "the Secretary's failure make the required determination concerning public interest in compliance with required criterion under 20.6.2.3108.K NMAC"). CCW attaches its comments on the January 30, 2015 and May 28, 2015

draft permits, as well as its comments following the April 15, 2015 meeting on the draft permit, and states that the “[t]he April 15, 2015 meeting and the subsequent May 28, 2015 draft DP-1793 failed to adequately address CCW’s concerns.” Petition at 4. However, CCW does not identify what concerns remained unresolved in the final version of DP-1793, or object to any provision in that final permit.

Absent any specific argument regarding how the agency failed to address the concerns raised in the public comment and participation process, or an objection to any particular provisions in the final permit itself, CCW’s complaint that it was denied a public hearing on that permit has no anchor; a public hearing has no purpose if there is no specific objection to the final permit that was issued. By failing to raise any objections to the final permit itself, CCW has effectively rendered moot its claim that a public hearing was required on that permit.

B. Denial of a Public Hearing Was a Proper Exercise of the Secretary’s Discretion

CCW argues that it was entitled to a public hearing on DP-1793 pursuant to the WQA and that Act’s implementing regulations. Section 74-5-6(G) of the WQA provides that “no ruling shall be made on any application for a permit without opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.” The regulations implementing this provision state, in pertinent part, as follows:

Requests for hearing shall be in writing and shall set forth the reasons why a hearing should be held. A public hearing shall be held if the secretary determines there is substantial public interest. The department shall notify the applicant and any person requesting a hearing of the decision whether to hold a hearing and the reasons therefore in writing.

20.6.2.3108.K NMAC. This regulation is presumed to be valid. *See New Mexico Mining Ass'n v. New Mexico Mining Comm'n*, 1996-NMCA-098, ¶ 15, 122 N.M. 332 (“[R]egulations adopted

by an agency are presumed to be valid if they are shown to be reasonably consistent with the statutory purposes of the agency.”).

The question whether CCW was entitled to a hearing turns on the meaning of “substantial public interest” under 20.6.2.3108.K NMAC. CCW appears to interpret this phrase to mean the number of comments submitted in response to a proposed permitting action, and/or the number of persons or organizations expressing opposition to the action. Specifically, CCW asserts that “members of the community organizations comprising CCW demonstrated substantial public interest through three hearing requests, three sets of comments, and CCW’s active participation in the permitting process.” Petition at 6; *see also* Motion at 3 (“It is readily evident that CCW represents a large number of persons who, through their representatives in CCW, have demonstrated an interest in having a public hearing on DP-1793.”).

However, the term “substantial public interest” as used in 20.6.2.3108 is capable of other interpretations besides that advanced by CCW. As indicated in the Denial Letter, the Secretary apparently interpreted “substantial public interest” to embrace the following components: the public importance of the issues raised by the interested parties as balanced against the public interest in having the permitting action finalized; the extent to which interested parties had the opportunity to participate and raise their concerns during the notice and comment period; and the extent to which those concerns were considered and addressed by the Department. That the Department interpreted the regulation in this manner is further illustrated in the Department’s Memorandum dated July 8, 2015 regarding the request for hearing determination (“Determination Memo”).¹ The Department’s interpretation of the phrase “substantial public interest” in 20.6.2.3108.K NMAC is reasonable, and is entitled to deference. *See N.M. Mining*

¹ The Determination Memo is part of the administrative record in this proceeding, but the Department has not yet submitted the bates numbered AR at this point.

Assn. v. N.M. Water Quality Control Comm., 2007-NMCA-010, ¶ 11, 141 N.M. 41 (courts “afford administrative agencies considerable discretion to carry out the purposes of their enabling legislation and . . . give deference to an agency's interpretation of its own regulations” (citing *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, 120 N.M. 579)); see also *Costle v. Pac. Legal Found.*, 445 U.S. 198, 215-16 (1980) (EPA regulations providing for a hearing upon determination of “a significant degree of public interest” upheld as valid implementation of Clean Water Act requirement of “opportunity for public hearing” on NPDES permitting actions).

The decision not to hold a public hearing on DP-1793 based on application of the above interpretation of 20.6.2.3108.K NMAC is reviewable only for an abuse of discretion. See NMSA 1978, § 74-6-7(B) (commission action may only be set aside on appeal if found to be (1) arbitrary, capricious or an abuse of discretion, (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law). In this instance, the Secretary determined that the issues raised by CCW were not of substantial public interest, particularly in light of CCW's substantial participation during the notice and comment period, and the extensive efforts made by the Department to address the concerns raised by CCW during that process. Under these facts, the Secretary was well within his discretion to deny a public hearing prior to final approval of DP-1793.

The New Mexico Court of Appeals recently upheld a similar discretionary decision by the Secretary against a nearly identical attack in *Sw. Research & Info. Ctr. v. New Mexico Env't Dep't*, 2014-NMCA-098, 336 P.3d 404 (“*Southwest Research*”), a case involving a modification of the hazardous waste permit for the Waste Isolation Pilot Plant (“WIPP”). Similar to 20.6.2.3108.K NMAC, the New Mexico Hazardous Waste Act implementing regulations

governing Class 2 modifications provide that the procedures for Class 3 permit modifications must be followed, including an opportunity for a public hearing, where the Department determines that “there is significant public concern about the proposed modification.” 40 C.F.R. § 270.42(b)(6)(i)(C); 20.4.1.900 NMAC (adopting 40 C.F.R. Part 270). In the *Southwest Research* case, the Department determined that the Class 3 procedures did not apply, and the citizens’ group Southwest Research and Information Center (“SWIC”), appealed that determination, arguing that NMED abused its discretion by failing to require Class 3 procedures because there was “significant public concern” regarding the proposed modification. In support of its claim that there was significant public concern warranting Class 3 procedures, SWIC pointed only to the large number of letters sent to NMED during the comment period expressing the need for a public hearing. The Court of Appeals upheld the Department’s decision not to hold a public hearing, explaining as follows:

Although we recognize that issues surrounding WIPP and modifications to the permit are of general public interest and concern owing to the health and environmental implications of waste storage within our state, Appellants have not demonstrated that NMED abused its discretion by acting contrary to or ignoring the public interest and concern in processing the modification request under Class 2 procedures. Short of a generalized reiteration of the issues raised throughout their briefs, and addressed earlier in this Opinion, Appellants do not demonstrate that NMED failed to adequately address the public's specific concerns here by NMED's written responses to the public comments. *N.M. Attorney Gen.*, 2013–NMSC–042, ¶ 9, 309 P.3d 89 (recognizing that it is the appellant's burden to demonstrate that an agency's decision should be reversed). Nor do Appellants demonstrate, by argument, evidence, or authority, what could have or should have been raised and addressed in a public hearing that was not addressed in NMED's written responses to the public's comments. *See Sw. Research & Info. Ctr. v. N.M. Env't Dep't*, 2003–NMCA–012, ¶ 39, 133 N.M. 179, 62 P.3d 270 (recognizing that “there is great public interest in the WIPP facility in general” but holding that this “does not mean that there must be a hearing for every administrative detail concerning the facility”). Under the circumstances of this case, we are unable to conclude on the issue of public concern that NMED abused its discretion by declining to process the modification request under Class 3 rather than Class 2 procedures. *See Oil Transp. Co.*, 1990–NMSC–072, ¶ 25, 110 N.M. 568, 798 P.2d 169 (stating the abuse of discretion standard).

Id. at ¶ 78. In so holding, the Court of Appeals implicitly recognized that “significant public concern” need not be interpreted to mean the number of persons expressing interest, but could also encompass other considerations, such as the substance of the objections, the opportunity for and level of public participation during the notice and comment process, and the extent to which concerns were addressed by the Department during that process.

Like the Appellants in *Southwest Research*, CCW has not demonstrated, short of a generalized assertion, that the Department failed to adequately address the specific concerns raised by CCW in its participation in the development of the Permit. Nor does CCW demonstrate by argument, evidence, or authority, what could have or should have been raised and addressed in a public hearing that was not raised and addressed in the permit development and drafting process. That process, as stated by NMED in the Denial Letter, provided an unprecedented level of transparency and opportunity for community involvement.

In short, the Secretary did not abuse his discretion by denying a public hearing on DP-1793 based on the application of a reasonable interpretation of 20.6.2.3108.K NMAC. Therefore, CCW cannot establish a likelihood that it would prevail on the merits of its claim that it should have been afforded a public hearing.

II. CCW Will Not Suffer Irreparable Harm in the Absence of a Stay

Having failed to raise any objection to the substantive terms of the Permit as issued, CCW cannot claim that it will suffer any irreparable harm in the absence of a stay. As explained above, without any challenge to the terms of the Permit itself, remand for a public hearing just for the sake of holding a hearing, as opposed to presenting particular challenges to the Permit, would be meaningless. In any event, even if CCW could show that it would be harmed in the absence of a stay, CCW cannot establish the other factors required for a stay.

III. DOE/LANS Will Suffer Substantial Harm If a Stay is Granted

The sole basis advanced by CCW for its argument that DOE/LANS and NMED will not be harmed if a stay is granted is the amount of time that was taken to develop the Permit. However, the length of time from submission of a permit application to approval of the final permit has absolutely no bearing on the question whether a stay of the final permit will harm the permittee. Contrary to CCW's groundless and illogical assertions, a stay of DP-1793 will most certainly cause substantial harm to DOE/LANS and NMED by delaying and disrupting the near-term implementation and progression of critical remediation activities at LANL.

For instance, on September 3, 2015, DOE/LANS submitted a Multiple Activities Work Plan for the proposed discharge of treated regional aquifer groundwater from three activities conducted under the Chromium Project. Pursuant to this work plan, discharges from remediation activities are proposed to begin in October 2015 and continue as long as field conditions allow (i.e. until frozen ground conditions prevent land application), up through December 31, 2015. An indefinite stay of the DP-1793 will derail the progress on these critical projects.

IV. The Public Interest Will Be Harmed If a Stay is Granted

Instead of analyzing whether there will be any harm to the public interest if a stay is granted, CCW simply asserts that the public interest will be "vindicated" by a stay because the issue at hand is "the apparent violation of the Water Quality Act provisions for public access to hearings on permits." Motion at 5. While it is true that public participation in permitting actions is important, CCW fails to acknowledge that such interests were not undermined in the instance case; in fact, CCW and its constituent entities were given opportunity for input and participation at an unprecedented level.

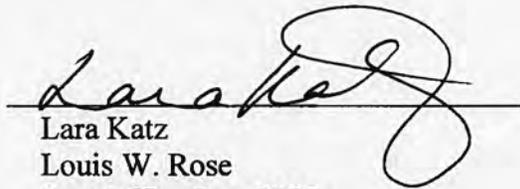
Moreover, the public interest in hearings is not the sole public interest in a given discharge permitting action. The discharge permit in this case is a critical component of a number of remediation projects at LANL, many of which have scheduled actions that need to occur within the next several months. As such, the public has a significant interest in the expeditious implementation of DP-1793. A stay would severely impact these critical projects. This harm significantly outweighs any harm to the public interest based on denial of a hearing on the Permit, particularly given the extensive public participation in the development of DP-1783 and the absence of any challenge to the terms of the Permit itself in CCW's Petition.

CONCLUSION

For the foregoing reasons, the Commission should deny CCW's Motion to Stay Discharge Permit 1793.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Los Alamos National Security, LLC's and the United States Department of Energy's Response in Opposition to Communities for Clean Water's Opposed Motion to Stay Discharge Permit 1793* was sent via U.S. mail, and/or hand-delivered on September 8, 2014, to the following:

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