

**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'S OPENING BRIEF
IN SUPPORT OF ITS PETITION FOR REVIEW OF DISCHARGE PERMIT 1793**

Communities for Clean Water ("CCW"), pursuant to NMSA 1978, §74-6-5(O) and 20.1.3.16.A(4) NMAC, hereby submits this opening brief in support of its Petition for Review of the Secretary of New Mexico Environment Department's ("Secretary's") denial of a public hearing, issued on July 24, 2015, in the matter of discharge permit 1793 ("DP-1793") for the Los Alamos National Laboratory ("LANL"), and the final approval of DP-1793, issued on July 27, 2015.

CCW is a coalition of six organizations, representing a large number of citizens – many of whom are downwind and downstream of the Los Alamos National Laboratory and within potential areas of adverse environmental impacts from DP-1793. Under the New Mexico Water Quality Act ("Act") and its implementing regulations CCW is entitled to a public hearing in the matter of DP-1793. CCW demonstrated that there is substantial public interest in DP-1793 through three substantive hearing requests, three sets of substantive comments, and CCW's active participation in the permitting process.

Denial of CCW's request for a public hearing was arbitrary and capricious, and an abuse of the Secretary's discretion, not supported by substantial evidence in the record,

and not otherwise in accordance with the law. Therefore, the Secretary's final approval of DP-1793 is in violation of the Water Quality Act. Petitioners set forth the following in support of their right to a hearing in this matter:

I. SUMMARY OF THE PROCEEDINGS BEFORE THE NEW MEXICO ENVIRONMENT DEPARTMENT AND THE COMMISSION.

A. Nature Of The Case.

CCW filed a Petition for Permit Review pursuant to NMSA 1978, §74-6-5(O) and 20.1.3.16.A(1) NMAC. Petitioners respectfully request the Water Quality Control Commission [WQCC] to review both the Secretary's decision denying the CCW requests for a public hearing on DP-1793 and the Secretary's final approval of the permit.

B. Course of the Proceedings.

The following is a sequential account of events in the matter of DP-1793.

1. The United States Department of Energy ("DOE") and Los Alamos National Security, LLC ("LANS") (collectively, "Permittees") submitted an initial application for a discharge permit to New Mexico Environment Department ("NMED") in December of 2011. AR ["AR"] No. 11.

2. Nearly three years later, Permittees submitted a revised application on January 8, 2014, for discharges related to groundwater remediation activities at Los Alamos National Laboratory ("LANL"). AR No. 102.

3. A determination of administrative completeness was made December 3, 2014. AR No. 128. Public Notice for the revised application was issued January 2015. AR No. 143.

4. NMED received a total of four requests for a public hearing. The Permittees requested a public hearing on DP-1793, later withdrawing its request on July 9, 2015. AR No. 140.

5. CCW requested a public hearing on March 2, 2015. AR No. 134.

6. CCW again requested a public hearing for the second time on April 29, 2015, following a technical meeting on April 15, 2015. AR Nos. 135, 146.

7. CCW made a third and final request for a public hearing on June 15, 2015, following the release of the final draft DP-1793 on May 28, 2015. AR Nos. 138, 148.

8. The only response NMED made to the CCW hearing requests was to the third request on June 15, 2014. AR Nos. 139, 141.

C. Disposition Before the Agency and Commission.

The NMED Secretary denied CCW's third public hearing request on July 24, 2015. AR No. 141. The Secretary, through the Acting Chief of the Ground Water Quality Bureau, Michelle Hunter, alleged the following:

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.

AR No. 141. After denying CCW's third request for a public hearing, NMED issued the permit on July 27, 2015. AR No. 142. DP-1793 is now in effect.

CCW filed before the Commission a Petition for Review and Motion to Stay DP-1793 on August 21, 2015, and an Amended Petition for Review and Motion to Stay on August 24, 2015.

II. ISSUES PRESENTED FOR REVIEW.

- A. Petitioner CCW Is Entitled To A Public Hearing On DP-1793 Under The Water Quality Act And Its Implementing Regulations.**
- B. Denial Of CCW's Request For A Public Hearing Was Arbitrary and Capricious And An Abuse Of The Secretary's Discretion, Not Supported By Substantial Evidence In The Record, And Otherwise Not In Accordance With Law.**
- C. The Secretary's Final Approval Of DP-1793 Is In Violation Of The Water Quality Act.**

III. STANDARD OF REVIEW.

The Petitioners challenge the Secretary's decision to deny their request for a public hearing on DP-1793 on the grounds that such decision was arbitrary and capricious and an abuse of discretion. Petitioners are also challenging the Secretary's final decision approving the final permit. In so doing, Petitioners are not required to challenge the merits of the final permit issued by NMED on July 27, 2015. Petitioners are required to make a showing that the Secretary's decision not to hold a public hearing was (1) arbitrary, capricious or an abuse of discretion, or (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. NMSA 1978, § 74-6-7(B).

IV. ARGUMENT.

A. Petitioner CCW Is Entitled To A Public Hearing Under The New Mexico Water Quality Act And Its Implementing Regulations.

1. The Water Quality Act favors public participation in the permitting process through holding a public hearing.

The purpose of the Water Quality Act and its implementing regulations is to prevent and abate water contamination, and specifically to protect groundwater for use as a domestic and agricultural water supply. NMSA 1978 §§ 74-6-1 through 17; NMAC §§ 20.6.2.3000 through 5210; *Bokum Resources Corp. et. al. v. WQCC*, 93 N.M. 546, 555; 603 P.2d 285, 294 (1979). The Act applies to and protects all groundwater within the State of New Mexico. NMSA § 74-6-2(H).

When it comes to public participation in the permitting process, the Act states, in pertinent part:

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.

NMSA 1978 § 74-6-5(G) (emphasis added).

By directing that no ruling shall be made on any permit application without opportunity for a public hearing, the Legislature has clearly indicated its intent to ensure that the public plays a vital role in the permitting process. The Legislature clearly

believes public participation is vital to the success of the Water Quality Act.¹ With this legislative intent in mind, “opportunity for a public hearing” can only mean that when an interested person (or large number of persons as in this case) affected by a proposed permit requests a public hearing, the NMED shall hold a public hearing.

In this case, many interested persons who would potentially be at the receiving end of any adverse environmental impacts from DP-1793 requested a public hearing, through the CCW coalition, on three separate occasions; and filed three sets of substantive comments on the permit drafts. AR Nos. 134, 136, and 138. The CCW coalition includes the following organizations: Concerned Citizens for Nuclear Safety, Amigos Bravos, Honor Our Pueblo Existence, the New Mexico Acequia Association, Partnership for Earth Spirituality, and Tewa Women United. AR No. 134.

CCW organizations have a joint mission of ensuring that community waters which receive adverse impacts from LANL’s current operations, as well as its legacy waste, are kept safe for drinking, agriculture, sacred ceremonies, and a sustainable future. AR NO. 134. CCW has been working as a coalition to address contaminated water from LANL and Los Alamos County since 2006. AR No. 134.

CCW demonstrated to NMED that there are a number of issues requiring a public hearing to achieve clarification and adduce additional information, refute contested points through the creation of a detailed record, and have an opportunity to present and examine

¹ See, generally, *In re Rhino Env'tl. Servs.*, 138 N.M. 133, 139; 2005-NMSC-024, 19-25, for the Supreme Court of New Mexico’s discussion on the importance of public participation in the permitting process.

expert witnesses on the issues that CCW has raised regarding DP-1793. *See generally*, AR Nos. 134, 136, 138, and Exhibit 6 of CCW's Amended Petition for Review (August 24, 2015).

The Secretary's arbitrary and capricious denial of CCW's third hearing request deprived CCW of a "reasonable chance to submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing" pertaining to issues raised by CCW. NMSA 1978 § 74-6-5(G).

2. 20.6.2.3108.K NMAC favors public participation in the permitting process through holding a public hearing.

In regards to public participation in the permitting process, the regulation states, in pertinent part, that:

Requests for a 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 (emphasis added).

The regulation clearly favors public participation in the permitting process through the holding of a public hearing. Public participation on a permit application, through the holding of a public hearing, can only be limited by the Secretary if there is a lack of substantial public interest. The applicable regulation requires an opportunity for a hearing *unless* the Secretary determines that there is no substantial public interest in the permit. This regulation must be applied in harmony with the statutory requirement that an

opportunity for a public hearing be provided before ruling on any application for a permit. NMSA 1978, § 74-6-5(G).

Given that CCW filed several substantive sets of comments accompanied by hearing requests—to address substantive issues with the permit that remained unresolved—there should have been no question as to the substantial public interest in DP-1793. AR at 136, 138.

The fact that the Ground Water Quality Bureau of the NMED met with representatives of LANL, DOE, and CCW on April 15, 2015 in an attempt to reach a compromise on provisions within the draft DP-1793 cannot substitute for CCW's right to an opportunity for a public hearing under the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(G). AR No. 146. Furthermore, participating in a meeting in an attempt to resolve or narrow contested issues on the permit does not negate the showing of substantial public interest demonstrated through CCW's three sets of substantive comments and three substantive hearing requests.

The April 15, 2015 meeting and the subsequent May 28, 2015 final draft DP-1793 failed to adequately address CCW's concerns. *See generally*, AR Nos. 136 and 138, and Exhibit 6 of CCW's Amended Petition for Review (August 24, 2015). Had CCW's concerns been adequately addressed, it is possible that NMED and the Permittees could claim that substantial public interest would have been negated and that a public hearing would not be required. *Southwest Research & Info. Ctr. v. N.M. Env't. Dept.*, 2014-NMCA-098, 78; 336 P. 3d 404, 423-24 ("*Southwest Research*"). Unlike the facts of

Southwest Research, NMED has done nothing to address the substantial public interest in DP-1793. NMED did not hold a public meeting or respond in writing to CCW's three sets of substantive comments and substantive requests for a public hearing.

B. Denial Of CCW's Request For A Public Hearing Was Arbitrary and Capricious And Is An Abuse Of The Secretary's Discretion Unsupported By Substantial Evidence In The Record, And Not Otherwise In Accordance With Law.

1. The Secretary failed to make a determination regarding substantial public interest, as required by law, when denying CCW's request for a public hearing.

NMED's denial letter to CCW demonstrates that the Secretary failed to comply with the regulations when denying CCW's request for a public hearing on DP-1793. The denial letter on its face does not provide any support for the argument that the Secretary made the required determination. AR No. 141. The only determinations made by the Secretary were regarding the alleged transparency of the permit, the level of community involvement allowed by NMED in the permit process, the purpose of the permit, and issuance of the permit being in the public interest. *Id.* None of these "determinations" addresses the sole criterion on which the Secretary must base his determination: the presence or absence of substantial public interest in DP-1793.

NMED submitted an internal memorandum as part of the AR in this matter. AR No. 139. This memorandum--which, significantly, was never provided to CCW in response to its concerns and objections regarding the draft DP-1793--also reveals that the Secretary failed to make the requisite determination under 20.6.2.3108.K NMAC.

2. In the alternative, the Secretary's denial of CCW's request for a public hearing, based on his determination as to a lack of substantial public interest in DP-1793, was arbitrary and capricious, and an abuse of discretion, not supported by substantial evidence in the record, and not in accordance with the law.

The NMED internal memorandum and letter of denial to CCW both contain the following pertinent language:

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.

AR No. 139. This language makes clear that the Secretary's determination was arbitrary and capricious, and an abuse of discretion, not supported by substantial evidence in the record, and not otherwise in accordance with the law.²

First, neither the Water Quality Act nor its implementing regulations provide factors to be considered by the Secretary when determining whether there is substantial public interest. NMED and the Permittees rely upon *Southwest Research* for such factors (NMED Response to Motion to Stay at 4-5, and Permittees' Response to Motion to Stay at 8-10), yet that case also fails to provide any guidance to the WQCC in reviewing this matter. 2014-NMCA-098, 78; 336 P. 3d 404, 423-24. If the Secretary had in fact taken into consideration the factors of transparency and the level of community

² Both NMED and Permittees argue that this language demonstrates that the Secretary did in fact make a determination whether the requisite substantial public interest exists in DP-1793 to justify holding a public hearing on the permit, and the determination of the Secretary was that substantial public interest did not exist in DP-1793. NMED Response to Motion to Stay at 4; Permittees' Response to Motion to Stay at 7.

involvement allowed by NMED in the permit process when determining whether substantial public interest exists in DP-1793, the Secretary would have concluded that substantial public interest does indeed exist in DP-1793. There is no evidence in the record supporting the Secretary's analysis of these factors.

Second, transparency in the permitting process and the existence of substantial public interest in a permit are directly related. A direct relationship also exists between the level of community involvement in a permit and the existence of substantial public interest in the permit. There is no need for the former without the latter. Providing transparency and allowing community involvement through the submission of public comments and participation in an attempt to resolve public issues with the permit highlights rather than dispels the existence of continued substantial public interest in DP-1793. *See* NMSA 1978 § 74-6-5(G) (the requirements of which are consistent with this analysis).

Third, the Secretary's determinations as to the purpose of the permit and whether its issuance is in the public interest are not only abuses of discretion not supported by evidence in the record (*See* AR Nos. 134, 136 and 138), but they are also not in accordance with law. The Water Quality Act and its implementing regulations do not allow the Secretary to exercise his discretion based on the factors of a permit's purpose and whether its issuance is in the public interest. *Compare* NMSA 1978 § 74-6-5 with 20.6.2.3108.K NMAC.

The regulation states, in pertinent part, that:

Requests for a 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 (emphasis added). As stated previously, the absence of substantial public interest is the sole exception to the statutory requirement favoring the holding of a public hearing.

This sole exception is a limitation on the exercise of the Secretary's discretion. The sole criterion for denying a request for a public hearing is a lack of substantial public interest. The regulation does not state that the Secretary's discretion in denying a request for a public hearing may be based on the purpose of the permit itself, or whether issuing the permit is in the public interest. More importantly, substantial public interest can and does exist for permits whose purpose is the remediation of contaminated groundwater, and it exists for permits whose issuance is in the public interest.³

3. NMED's and Permittees' reliance on *Southwest Research* is misplaced.

Southwest Research dealt a decision by NMED to modify the operating permit for the Waste Isolation Pilot Plant ("WIPP"). 2014-NMCA-098, 76; 336 P.3d 404, 422. The issue of whether NMED had abused its discretion by failing to require Class 3 procedures pursuant to 40 C.F.R. § 270.42(b)(6)(i)(C)(1), which provides that "significant public

³ Finally, it is unclear from NMED's internal memorandum and letter of denial exactly how DP-1793's issuance is in the public interest. See AR 139 and 141.

concern about the proposed modification” is a basis upon which NMED may determine that the modification must follow Class 3 procedures. *Id.* The *Southwest Research* Court unfortunately did not address what constitutes a “substantive” request for a public hearing under the Water Quality Act and its implementing regulations. However, the Court did state, in pertinent part, that the “Appellants’ argument...is supported exclusively by the number of letters sent to NMED during the comment period,” and that “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.” *Id.* at 78.

The *Southwest Research* Court never analyzed whether appellants’ requests were substantive in nature, as appellants’ arguments were exclusively supported by the number of letters sent to NMED. *Id.* at 76. That, significantly, is not the case here. In the matter at issue, CCW’s assertion that substantial public interest exists in DP-1793 is supported by more than just the mere number of comments or requests for public hearing submitted to NMED. Substantial public interest is evidenced by the substantive concerns expressed in those three sets of comments and requests for a public hearing - concerns that were not resolved by the final permit. Compare AR No. 148 with AR No. 138. Issues such as the discharge limit calculation and application, and the technical basis of treatment are not insubstantial matters and are in fact, properly the subjects of a public hearing.

The *Southwest Research* Court, however, did analyze whether NMED, in that matter, adequately addressed the public’s specific concerns through NMED’s written responses to submitted public comments, so as to negate the need for a public hearing to

be held. *Id.* at 78. The Court looked to the AR to determine whether NMED held public meetings, *Id.*, and to determine the extent of NMED's responses to submitted public comments. *Id.* at 78. The Court found that NMED had responded adequately through its own written responses to submitted public comments. *Id.*

In this matter, NMED held no public meetings. NMED did hold a single "technical meeting" on April 15, 2015. AR No. 146. Since only Petitioners, NMED and the Permittees were in attendance at this technical meeting, and no other members of the public or "interested persons"⁴ were in attendance, it would be disingenuous at best to call this technical meeting a public meeting. AR No. 144.

NMED also failed to reply, in writing, to CCW's three sets of comments and requests for public hearings. A technical meeting was held after CCW submitted its first set of comments and a request for a public hearing. This meeting, however, resulted in even more confusion and concern. Hence, CCW submitted a second set of comments and another request for a public hearing. These, too, NMED failed to answer. AR No. 136.

Though both NMED and Permittees cite to NMED's internal memorandum dated July 8, 2015 to demonstrate that NMED responded to CCW's concerns in a manner which would negate the need for a public hearing, NMED never sent this document to Petitioners. The responses contained in this document were also not provided in NMED's denial letter to Petitioners. *See* AR 141. Therefore, NMED never adequately addressed

⁴ It is unclear how NMED generated its "Interested Persons List" submitted to the WQCC as AR No. 144.

CCW's concerns in its own written responses to CCW's submitted comments. Thus there is no evidence in the record that negates the need for a public hearing. Permittees' Response to Motion to Stay at 7, and NMED's Response to Motion to Stay at 4.

NMED's actions discussed above fail to address the substantial public interest in DP-1793. They also fail to serve as the functional equivalent of a public hearing. The Act provides interested persons a "reasonable chance 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). Given that NMED never provided any written responses to the comments CCW submitted, the only "responses" of NMED for the WQCC to analyze would be NMED's notes on the technical meeting it hosted.

An examination of the notes on the technical meeting held on April 15, 2015 demonstrates that it did not provide CCW with the statutory reasonable opportunity to submit "evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." AR No. 146. This meeting, as noted above, actually raised more concerns and objections for CCW, NMED and the Permittee, thereby increasing the already substantial public interest in DP-1793. *See generally*, AR No. 136.

C. The Secretary's final approval of DP-1793 is in violation of the Water Quality Act.

As demonstrated above, CCW is entitled to a public hearing under the Water Quality Act and its implementing regulations. The Water Quality Act provides, "No ruling shall be made on any application for a permit without an opportunity for a public hearing." NMSA 1978 § 74-6-5(G). As the Secretary improperly exercised his discretion

in denying CCW's request for a public hearing and then approved DP-1793 without providing the requisite opportunity for a public hearing, the final approval of DP-1793 violates the Water Quality Act and must be vacated.

VI. CONCLUSION

For the reasons set forth above, the WQCC should stay DP-1793, hold a hearing on the Petition for Review, vacate the Secretary's decisions, and remand to NMED to hold a public hearing on DP-1793. CCW requests that the WQCC enter the following findings of fact and conclusions of law, and decision.

A. Facts Relevant to the Issues Presented for Review.

a. Facts relevant to Petitioners' right to an opportunity for a public hearing in the matter of Discharge Permit 1793.

1. The United States Department of Energy ("DOE" and Los Alamos National Security, LLC ("LANS") (collectively, "Permittees") submitted an initial application for a discharge permit related to groundwater remediation activities at Los Alamos National Laboratory ("LANL") to New Mexico Environment Department ("NMED") in December 2011. AR No. 11.
2. Permittees submitted a revised application for a discharge permit on January 8, 2014, discharge permit 1793 ("DP-1793"). AR No. 102.
3. Public Notice for the Permittees' revised application was issued January 2015. AR No. 143.

4. CCW submitted comments on DP-1793 and requested a public hearing on DP-1793 on March 2, 2015, pursuant to NMSA 1978 § 74-6-5(G) and 20.6.2.3108.K NMAC. AR No. 134.
5. NMED did not respond in writing to CCW's comments or request for a public hearing submitted to NMED on March 2, 2015.
6. A technical meeting was held on April 15, 2015, that was attended by representatives from Petitioners, NMED and the Permittees. AR 146.
7. CCW submitted a second set of comments on DP-1793, along with a second request for a public hearing, on April 29, 2015, pursuant to NMSA 1978 § 74-6-5(G) and 20.6.2.3108.K NMAC. AR No. 136.
8. NMED did not respond in writing to CCW's comments or request for a hearing submitted to NMED on April 29, 2015.
9. NMED released a Final Draft DP-1793 for review on May 28, 2015. AR No. 148.
10. CCW submitted a third set of comments on DP-1793, along with a third request for a public hearing, on June 15, 2015, pursuant to NMSA 1978 § 74-6-5(G) and 20.6.2.3108.K NMAC. AR No. 138.
11. NMED responded to CCW's third request for a public hearing in its Letter of Denial issued July 24, 2015. AR No. 141.
12. NMED denied CCW's request for a public hearing on the following grounds:

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.

AR No. 141.

b. Facts relevant to the failure of the NMED Secretary to make a determination regarding substantial public interest when denying Petitioners' request for a public hearing on Discharge Permit 1793.

13. NMED issued a letter denying CCW's request for a public hearing on DP-1793 on July 24, 2015. AR No. 141.

14. NMED denied CCW's request for a public hearing on the following grounds:

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.

AR No. 141.

15. This denial is the only statement by NMED to Petitioners of the reasons why a public hearing was not being held. AR No. 141.

c. Facts relevant to the NMED Secretary's abuse of discretion in the determination of a lack of substantial public interest in Discharge Permit 1793, and his subsequent denial of CCW's request for a public hearing.

16. NMED issued a letter denying CCW's request for a public hearing on DP-1793 on July 24, 2015. AR No. 141.

17. NMED denied CCW's request for a public hearing on the following grounds:

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.

AR No. 141.

18. This denial is the only statement by NMED to Petitioners of the reasons why a public hearing was not being held. AR No. 141.

d. Facts relevant to the Secretary of New Mexico Environment Department's final approval of Discharge Permit 1793, in violation of the Water Quality Act and its implementing regulations.

19. CCW submitted three requests for a public hearing on DP-1793 on the following dates: March 2, 2015 (AR No. 134); April 29, 2015 (AR No. 136); and June 15, 2015 (AR No. 138), pursuant to NMSA 1978 § 74-6-5(G) and 20.6.2.3108.K NMAC.

20. NMED failed to respond to CCW's March 2, 2015 and April 29, 2015 requests for a public hearing on DP-1793.

21. NMED did respond to CCW's June 15, 2015 request for a public hearing on DP-1793. AR No. 141.

22. NMED denied CCW's request for a public hearing on DP-1793 on July 24, 2014. AR No. 141.

23. NMED issued final approval of DP-1793 on July 27, 2015. AR No. 142.

B. Conclusions of Law Relevant to the Issues Presented for Review.

1. The WQCC has the authority to adjudicate appeals of the Secretary's decisions approving, approving subject to condition, or disapproving a ground water discharge permit. 20.6.2.3112 NMAC.
2. The WQCC may apply the standard of review used by the Court of Appeals to set aside the Secretary's decision not to hold a public hearing if it is (1) arbitrary,

- capricious or an abuse of discretion, or (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. NMSA 1978 § 74-6-7(B).
3. The WQCC may set aside a decision of the Secretary approving a groundwater discharge permit if it is (1) arbitrary, capricious or an abuse of discretion, or (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. 20.6.2.3112 NMAC and NMSA 1978 § 74-6-7(B).
 4. CCW was entitled to an opportunity for a public hearing on DP-1793 under the Water Quality Act. NMSA 1978 § 74-6-5(G).
 5. The Water Quality Act provides that the Secretary shall not make a decision on an application for a groundwater discharge permit without providing an 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. NMSA 1978 § 74-6-5(G).
 6. The Secretary violated NMSA 1978 § 74-6-5(G) by denying CCW the opportunity for a public hearing to which it was entitled.
 7. The regulations that implement the Water Quality Act provide that:
 - a. A request for a public hearing shall be in writing and shall explain the reasons why a hearing should be held. 20.6.2.3108.K NMAC.
 - b. A public hearing shall be held if the Secretary determines that there is substantial public interest. 20.6.2.3108.K NMAC.

8. CCW's requests for a public hearing on DP-1973 were in writing and explained the reasons why a hearing should be held in compliance with 20.6.2.3108.K NMAC.
9. The Secretary violated 20.6.2.3108.K NMAC by denying CCW's requests for a public hearing without determining whether there was substantial public interest in DP-1973.
10. Alternatively, the Secretary violated 20.6.2.3108.K NMAC by denying CCW's requests for a public hearing on the basis of his determination that there was not substantial public interest in DP-1973 because the Secretary's determination was:
 - a. Arbitrary, capricious, or an abuse of discretion; or
 - b. Not supported by substantial evidence in the record; or
 - c. Otherwise not in accordance with law.

C. Decision of the WQCC:

1. The NMED Secretary's decision denying Petitioners' request for a public hearing on DP-1793 is vacated.
2. The NMED Secretary's decision approving DP-1793 is vacated.
3. This matter is remanded to the Secretary for the purpose of holding a public hearing concerning DP-1793 pursuant to Petitioners' requests, and for making a new decision about whether to approve the application for DP-1793.

Respectfully submitted on October 2, 2015:

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CERTIFICATE OF SERVICE

I, Jaimie Park, certify that on this 2nd day of October, 2015 the below listed persons were served digitally via email, and that the Administrator for the Water Quality Control Commission was provided with the original of this Reply and the requisite number of copies: Jaimie Park

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