

**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)

**ANSWER BRIEF OF THE UNITED STATES DEPARTMENT OF ENERGY
AND LOS ALAMOS NATIONAL SECURITY, LLC**

The United States Department of Energy (“DOE”) and Los Alamos National Security, LLC (“LANS”) (collectively “DOE/LANS”), pursuant to 20.1.3.16.A(4)(b) NMAC, submit this answer brief in response to Petitioner Communities for Clean Water’s (“CCW”) Petition for Review of Discharge Permit, and opening brief in support thereof. For the reasons stated below, the Water Quality Control Commission (“Commission”) should uphold the Secretary of the New Mexico Environment Department’s issuance of Discharge Permit 1793.

FACTUAL AND PROCEDURAL 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”). *See* AR 11 (Discharge Permit Application for the Land Application of Treated Groundwater From a Pumping Test at Well R-28 (Dec. 20, 2011)).

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. *See* AR 24 (Supplemental Information, Discharge Permit DP-1793, On-Site Treatment and Land

Application of Pumping Test Water (March 13, 2012)); AR 46 (Affidavit of Public Notice Completion, Discharge Permit Application DP-1793, On-Site Treatment and Discharge of Groundwater (Nov. 14, 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. On January 7, 2014, DOE/LANS submitted a revised application, and NMED completed public notice on the revised application in January of 2015. *See* AR 102 (Discharge Permit DP-1793 Amended Application (Jan.7, 2014)); AR 131 (Affidavit of Public Notice Completion, Discharge Permit Application DP-1793, On-Site Treatment and Discharge of Groundwater (Jan. 8, 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. *See* AR 132 (Draft Discharge Permit, DP-1793, Los Alamos National Laboratory (Jan. 22, 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* AR 133 (DOE/LANS’s comments); AR 134 (CCW’s comments).

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, DOE/LANS and CCW submitted additional written comments regarding Draft DP-1793. *See* AR 135 (DOE/LANS's comments); AR 136 (CCW's comments).

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. *See* AR 146 (Email from Steve Huddleson to Bob Beers attaching Final Draft Version of DP-1793 (May 28, 2015)).

10. CCW submitted a third set of comments on the revised Draft DP-1793 on June 15, 2015. *See* AR 138.

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 AR 141.

12. The Department issued final Discharge Permit DP-1793 on July 27, 2015. The final Discharge Permit included thirty (30) conditions, including limitations on the quality of the discharge. *See* AR 142.

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 via land application at specified areas on the LANL site 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. It is DP-1793 that authorizes LANL to discharge treated groundwater in connection with preliminary investigations of the extent, location, and migration of the chromium contaminated groundwater plume. These investigations will provide the basis for development and implementation of measures to forestall migration of the plume and remediate the contaminated groundwater.

14. The discharges authorized by DP-1793 are essential to LANL's ability to carry out critical remediation projects intended to protect public health and the environment.

15. 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.

16. 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 to Stay") on August 24, 2015.

17. At its meeting on October 13, 2015, the Commission heard argument on CCW's Motion to Stay, and denied that motion.

ARGUMENT

I. The Secretary Properly Denied a Public Hearing in this Case

The Secretary apparently interpreted "substantial public interest" in 20.6.2.3108.K NMAC 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. The Department's interpretation is reasonable, and is entitled to deference.

II. CCW Had Extensive Input in the Development of the Provisions of DP-1793 Resulting in Multiple Concessions That Are Not Required Under the WQA or Regulations

CCW is the sole stakeholder that requested a public hearing. However, CCW had substantial opportunity to comment on, and participate in the drafting of the permit. As set forth above, DP-1793 was issued as a draft permit on January 21, 2015. A comment period was opened, and CCW submitted comments on or about March 2, 2015. A second draft permit was issued on May 28, 2015. Subsequent to the issuance of the second draft, DOE/LANS, NMED, and CCW met in Santa Fe to discuss the remaining issues. At the meeting, negotiations regarding various permit conditions took place.

At the conclusion of the comment periods and the meeting among DOE/LANS, NMED, and CCW, Steven Huddleson, NMED's permit writer, e-mailed the involved parties stating that "I have incorporated comments provided from all parties to the extent I believe reasonable, and will allow 15 days for further comments . . . I believe through this process that we have crafted a good permit that serves the needs of all parties, respects the public's right to know and desire to provide input, and I am ready to issue it." AR 148 (Email from Steven Huddleson dated May 28, 2015). Petitioner submitted an additional set of written comments on June 15, 2015, and NMED issued the final Permit on July 27, 2015.

The written comments and requests made by CCW at the April meeting regarding the two draft permits were taken and considered by NMED. Indeed, the comments resulted in significant

new conditions which are now included in the Permit. These include a 30-day public comment period on workplans, posting workplans and many other documents to the Electronic Public Reading Room, additional land application criteria, and additional workplan requirements. *Compare* AR 132 (original draft discharge permit DP-1793, issued Jan. 22, 2015) *with* AR 142 (Final Discharge Permit DP-1793, issued July 27, 2015).

The process implemented in developing DP-1793 was transparent and provided CCW extensive opportunity for input regarding the provisions and conditions of the Permit. And indeed, that process resulted in a number of concessions to CCW in the form of conditions that go beyond what is required for approval of discharge permits under the WQA and the WQCC regulations. For instance, the requirements for 30-day public comment periods on workplans submitted under the Permit, the prohibition on land application of treated groundwater during the winter, and the extensive mandatory and voluntary posting requirements on the EPRR are all provisions that were included in DP-1793 as concessions to CCW based on its written comments and participation in the technical meeting. These conditions, among others, are the result of negotiations, and are not required as a legal matter. It should therefore be understood that, far from depriving CCW of an opportunity to participate, the process implemented here resulted in CCW gaining significant concessions that are not mandated by applicable statutes and regulations. Thus, in this instance, CCW was afforded more influence on the terms of the final permit through the negotiated process employed by NMED than if a hearing had been simply held and the permit issued with only those provisions required under the WQA and its implementing regulations.

III. The Discharges Authorized by the Permit Meet the Criteria for Approval Under the WQA and the WQCC Regulations

Under DP-1793, discharges of treated effluent associated with remediation projects at LANL are permitted via land application to 55 sections within the LANL site. Prior to discharge, all groundwater is required to be treated to achieve discharge limits equal to less than 90% of the numeric criteria set forth in 20.6.2.3103 NMAC and less than 90% of the numeric criteria established for tap water in Table A-1 for constituents not listed in 20.6.2.3103 NMAC. *See AR 142.*

These discharges proposed by DOE/LANS and approved by the Secretary meet the substantive criteria for approval of a discharge permit set forth in 20.6.2.3109.C NMAC. Specifically, DOE/LANS's discharge plan demonstrated that the discharges will not result in either concentrations in excess of the standards of 20.6.2.3103 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.C(2) NMAC. CCW does not argue otherwise. Absent a showing that the proposed discharge will cause the standards to be exceeded or the presence of any toxic pollutant, the Secretary is required to approve the proposed discharge and issue the permit. 20.6.2.3109.C(3) NMAC.

CONCLUSION

For the foregoing reasons, the Commission should deny CCW's requested relief and decline to vacate the Secretary's approval of DP-1793. The Commission should enter the following findings and conclusions.

DOE/LANS' PROPOSED FINDINGS AND CONCLUSIONS

I. Findings of Fact

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"). *See* AR 11 (Discharge Permit Application for the Land Application of Treated Groundwater From a Pumping Test at Well R-28 (Dec. 20, 2011)).

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. *See* AR 24 (Supplemental Information, Discharge Permit DP-1793, On-Site Treatment and Land Application of Pumping Test Water (March 13, 2012)); AR 46 (Affidavit of Public Notice Completion, Discharge Permit Application DP-1793, On-Site Treatment and Discharge of Groundwater (Nov. 14, 2012)).

3. On January 7, 2014, DOE/LANS submitted a revised application, and NMED completed public notice on the revised application in January of 2015. *See* AR 102 (Discharge Permit DP-1793 Amended Application (Jan.7, 2014)); AR 131 (Affidavit of Public Notice Completion, Discharge Permit Application DP-1793, On-Site Treatment and Discharge of Groundwater (Jan. 8, 2015)).

4. 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. *See* AR 132 (Draft Discharge Permit, DP-1793, Los Alamos National Laboratory (Jan. 22, 2015)).

5. 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* AR 133 (DOE/LANS’s comments); AR 134 (CCW’s comments).

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

7. Following the April 15, 2015 meeting, both DOE/LANS and CCW submitted additional written comments regarding Draft DP-1793. *See* AR 135 (DOE/LANS’s comments); AR 136 (CCW’s comments).

8. 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. *See* AR 146 (Email from Steve Huddleson to Bob Beers attaching Final Draft Version of DP-1793 (May 28, 2015)).

9. CCW submitted a third set of comments on the revised Draft DP-1793 on June 15, 2015. *See* AR 138.

10. 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 AR 141.

11. The Department issued final Discharge Permit DP-1793 on July 27, 2015. The final Discharge Permit included thirty (30) conditions, including limitations on the quality of the discharge. *See* AR 142.

12. DP-1793 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. The discharges are via land application to 55 sections within the LANL site. *See* AR 142.

13. DP-1793 authorizes LANL to discharge treated groundwater in connection with preliminary investigations of the extent, location, and migration of the chromium contaminated groundwater plume. These investigations will provide the basis for development and implementation of measures to forestall migration of the plume and remediate the contaminated groundwater. *See* AR 142.

14. The discharges authorized by DP-1793 are essential to LANL's ability to carry out critical remediation projects intended to protect public health and the environment.

15. Prior to discharge, all groundwater is required to be treated to achieve discharge limits equal to less than 90% of the numeric criteria set forth in 20.6.2.3103 NMAC and less than 90% of the numeric criteria established for tap water in Table A-1 for constituents not listed in 20.6.2.3103 NMAC. *See* AR 142.

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 to Stay”) on August 24, 2015.

18. At its meeting on October 13, 2015, the Commission heard argument on CCW’s Motion to Stay, and denied that motion.

II. Conclusions of Law

1. The discharges authorized under DP-1793 will not result in either concentrations in excess of the standards of 20.6.2.3103 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.C(2) NMAC.

2. The discharges authorized under DP-1793 meet the substantive criteria for approval of a discharge permit set forth in 20.6.2.3109.C NMAC.

3. CCW had extensive participation in the development of the terms and conditions of DP-1793, resulting in the inclusion of significant conditions in the final permit that are not required under the WQA or the WQCC regulations.

4. The Secretary did not abuse his discretion in denying a public hearing on DP-1793.

III. Decision of the WQCC

1. The Secretary’s decision denying CCW’s request for a public hearing on DP-1793 is upheld.

2. The Secretary’s decision approving DP-1793 is upheld.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By:  _____

Lara Katz
Louis W. Rose
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

Timothy A. Dolan
Office of Laboratory Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, NM 87545
(505) 667-7512

Attorneys for Los Alamos National Security LLC

and

U. S. DEPARTMENT OF ENERGY

By: /s/ Lisa Cummings _____

Lisa Cummings
Staff Attorney
Office of Counsel
Los Alamos Site Office
U. S. Department of Energy
528 35th Street
Los Alamos, NM 87544-2201
(505) 667-4667

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Answer Brief of United States Department of Energy and Los Alamos National Security, LLC* was sent via U.S. mail, and/or hand-delivered on October 27, 2015 to the following:

Jennifer Hower
Deputy General Counsel
Office of General Counsel
New Mexico Environment Department
121 Tijeras Ave. NE, Suite 1000
Albuquerque, New Mexico 87102-3400
Jennifer.Hower@state.nm.us

*Counsel for New Mexico Environment
Department*

Jaimie Park
Jonathan Block
Eric Jantz
Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
jpark@nmeic.org

Counsel for Communities for Clean Water



Lara Katz