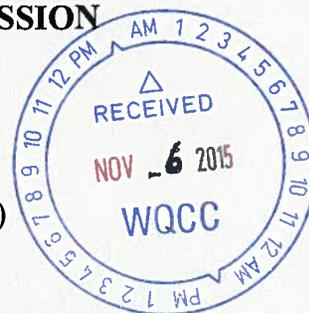


STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION



*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 CONSOLIDATED REPLY BRIEF**  
**IN SUPPORT OF ITS PETITION FOR REVIEW OF NEW MEXICO**  
**ENVIRONMENT DEPARTMENT SECRETARY'S DENIAL OF A REQUEST**  
**FOR PUBLIC HEARING AND FINAL APPROVAL OF DISCHARGE PERMIT**  
**1793**

Communities for Clean Water ("CCW"), pursuant to NMSA 1978, §74-6-5(O) and 20.1.3.16.A.4.c NMAC, hereby submits this consolidated reply 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,<sup>1</sup> representing a large number of citizens and Tribal members – many of whom are downwind and downstream of LANL and

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<sup>1</sup> Contrary to what Permittees assert, *see* Permittees' Answer Brief, Factual and Procedural Background ¶ 6, page 2 (October 27, 2015), CCW is comprised of the following six organizations: Concerned Citizens for Nuclear Safety, Amigos Bravos, Honor Our Pueblo Existence, the New Mexico Acequia Association, the Partnership for Earth Spirituality, and Tewa Women United. *See* 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.

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 because substantial public interest exists in DP-1793. CCW demonstrated that there is substantial public interest in DP-1793 through the submission of three substantive hearing requests, three sets of substantive comments, and CCW’s active participation in the permitting process.

Denial of CCW’s requests 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 Act. NMSA 1978 § 74-6-5(E)(2) (“The constituent agency shall deny any application for a permit... if...any provision of the Water Quality Act...would be violated.”).

Petitioners set forth the following consolidated response to both New Mexico Environment Department’s (“NMED’s”) Answer Brief and Permittees’ (Department of Energy and Los Alamos National Security, LLC) Answer Brief filed on October 27, 2015. Section I provides a summary of the proceedings before the New Mexico Environment Department and the Commission. Section II conveys the issues presented for review. Section III provides the Commission with the standard of review to apply in a petition for permit review proceeding. Section IV contains the body of CCW’s reply argument. Section V provides CCW’s response to NMED’s highly inappropriate “Exhibit A” attachment to its Answer Brief. And Section VI contains CCW’s conclusory remarks.

**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 (“Commission” or “WQCC”) to review both the Secretary’s decision denying CCW’s three requests for a public hearing on DP-1793<sup>2</sup> 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. Administrative Record (“AR”) No. 11.

2. Nearly three years later, after receiving a number of 120-day temporary permits from NMED, 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.

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<sup>2</sup> NMED failed to comply with the regulations by not responding to CCW’s first and second requests for a public hearing on DP-1793 (submitted March 2, 2015 and April 29, 2015, respectively). *See generally*, 20.6.2.3108.K NMAC; *see also* AR No. 141, which only addressed CCW’s third request for a public hearing (submitted on June 15, 2015). By failing to respond to CCW’s first and second requests, NMED effectively denied them.

3. A determination of administrative completeness was made December 3, 2014. AR No. 128. Public Notice for the revised application was issued January 21, 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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup> AR Nos. 138, 148.

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<sup>3</sup> Permittees have provided a misstatement of fact to the Commission, stating that CCW only submitted public comments on DP-1793 in March 2015. *See* Permittees' Answer Brief, Factual and Procedural Background ¶ 6, page 2 (October 27, 2015).

Permittees have provided a misstatement of fact to the Commission, stating that CCW only submitted public comments on DP-1793 following the April 15, 2015 technical meeting. *See* Permittees' Answer Brief, Factual and Procedural Background ¶ 8, page 2 (October 27, 2015).

NMED has also provided a misstatement of fact to the Commission, stating that CCW "renewed" its request for a public hearing. *See* NMED's Answer Brief, Summary of the Proceedings ¶ 22, page 4 (October 27, 2015). CCW never withdrew its first request for a public hearing submitted on March 2, 2015 and NMED failed to respond to such request pursuant to 20.6.2.3108.K NMAC.

<sup>5</sup> Permittees have provided a misstatement of fact to the Commission, stating that CCW only submitted a third set of comments on June 15, 2015. *See* Permittees' Answer Brief, Factual and Procedural Background ¶ 10, page 3 (October 27, 2015). NMED has also provided a misstatement of fact to the Commission, stating that CCW "renewed" its request for a public hearing. *See* NMED's Answer Brief, Summary of the Proceedings ¶ 25, page 4 (October 27, 2015). CCW never withdrew its first request for a public hearing submitted on March 2, 2015 and CCW never withdrew its second request for a public hearing submitted on April 29, 2015. NMED failed to respond to each request, as required by 20.6.2.3108.K NMAC.

8. The only response NMED made to the CCW hearing requests was to the third request submitted 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. Oral argument was heard on the Motion to Stay DP-1793 on October 13, 2015, with the Commission voting unanimously to oppose the Motion to Stay DP-1793. A hearing officer was then appointed and a hearing set for December 8, 2015 to hear oral argument on CCW's Petition for Permit Review.

## **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 standard of review under NMSA 1978, § 74-6-7(B) is used by the Court of Appeals when adjudicating appeals from a Commission action. The standard provided by § 74-6-7(B) is a reasonable standard. It would require the Petitioners 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). CCW requests the Commission to apply this standard of review in this matter.<sup>6</sup> When the Commission's adjudicatory procedures are silent on a specific matter, such as a standard of review to be applied to Permit Review proceedings, 20.1.3.8 NMAC allows the Commission to seek guidance from other sources of law.<sup>7</sup> Thus, CCW has provided the

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<sup>6</sup> CCW complied with the requirements of 20.1.3.16.A.4.a NMAC in the opening brief by citing to a standard of review found at NMSA 1978, § 74-6-7(B) that the Commission may apply in this matter. See NMED's Answer Brief at page 5 (October 27, 2015).

<sup>7</sup> Even though 20.1.3.8 states "...the commission may look to the New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102 and the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-1102 for guidance" this does not mean the Commission is limited to seeking guidance from only the New Mexico Rules of Civil Procedure and New Mexico Rules of

Commission with a reasonable standard of review under § 74-6-7(B) of the Act, the governing statute in this matter.

NMED asserts that Petitioners have erroneously applied a standard of review not applicable to this proceeding. NMED's Answer Brief at page 5 (October 27, 2015). NMED cites to NMSA 1978 § 74-6-5(Q) and 20.1.3.16.F.3 NMAC as providing the standard of review for the Commission to apply, yet failed to identify what the standard actually is and how it is to be applied. *Id.* at 5-6.

NMSA 1978 § 74-6-5(Q) states the following:

The commission shall consider and weigh only the evidence contained in the record before the constituent agency and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the constituent agency. Based on the review of the evidence, the arguments of the parties and recommendations of the hearing officer, the commission shall sustain, modify or reverse the action of the constituent agency.

This is not a standard of review. This merely provides a process of review for the Commission. For example, the Commission may not consider evidence outside of the administrative record and may appoint a Hearing Officer. That is a process of review, not a standard of review. If § 74-6-5(Q) were actually a standard of review, NMED would have explained that standard of review and how the Commission is to apply it. NMED did not do so.

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Evidence. 20.1.3.9 provides that Part 3 (Adjudicatory Procedures of the Commission) "shall be liberally construed to carry out its purpose." This means that the Commission may look to many sources of law for guidance in determining a standard of review to apply in Permit Review proceedings, in order for the Commission to carry out its purpose of reviewing permits issued under the Act.

Unfortunately, 20.1.3.16.F.3 NMAC mirrors § 74-6-5(Q), also failing to provide a standard of review for the Commission to apply in this matter. Again, this implementing regulation of the Act merely provides a process of review.

CCW is challenging the Secretary's decision to deny their request for a public hearing on DP-1793 on the grounds that the decision was arbitrary and capricious and an abuse of discretion. CCW is also challenging the Secretary's final decision approving the final permit because of the Secretary's failure to hold a public hearing. In so doing, CCW is not required to challenge the merits of the final permit issued by NMED on July 27, 2015.

Furthermore, CCW will not be bringing "its outstanding issues" with the substance of the permit now in effect before the Commission through its Petition for Permit Review. NMED's Answer Brief at page 6 (October 27, 2015). A Petition for Review of the Secretary's decisions denying CCW's requests for a public hearing and the final approval of DP-1793 is limited to a review of just that: the Secretary's denial of CCW's requests for a public hearing and the Secretary's final approval of DP-1793.

CCW has not challenged the substance of the permit now in effect in any of its filings with the Commission in this matter and did not do so at the October 13, 2015 Oral Argument on its Motion to Stay DP-1793. Any issues with the substance of DP-1793 (as opposed to the permitting process which resulted in the final approval of DP-1793) raised by CCW are to demonstrate that CCW's requests for a public hearing and comments submitted to NMED were substantive in nature, and thereby warranting a public hearing be held, and not to challenge the substance of the permit now in effect.

#### 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 Act and its implementing regulations is to prevent and abate water contamination, and specifically to protect groundwater for present and foreseeable future 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*, 1979-NMSC-090, 93 N.M. 546, 555. The Act applies to and protects groundwater throughout 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. Plainly the Legislature

believes public participation is vital to the success of the Act.<sup>8</sup> With this legislative intent in mind, “opportunity for a public hearing” can only mean that when an interested person (or large number of interested 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.

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 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).

Some of these substantive issues involve the discharge limit calculation and application, technical basis of treatment standards, quality of data to be provided by permittees in support of permit activities, soil sampling requirements, the use of radioactive materials in tracer studies and impacts therefrom, and whether “work plans” constitute modifications of the discharge permit which would require an opportunity for public comments, as well as an opportunity for a public hearing to be held. CCW was

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<sup>8</sup> *See, generally, In re Rhino Env'tl. Servs.*, 2005-NMSC-024, 19-25; 138 N.M. 133, 139, for the Supreme Court of New Mexico’s discussion on the importance of public participation in the permitting process.

clearly entitled to a public hearing on DP-1793 because it demonstrated the requisite substantial public interest in the permit.

The Secretary's 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 substantive issues raised by CCW, in violation of 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 regard 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 plain language of the regulation clearly favors public participation in the permitting process through the holding of a public hearing. Public participation in the permit process, 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 provision for an opportunity to obtain a public hearing before a final ruling on a permit in order to give

full meaning and effect to the Act's public participation requirements. *Compare* NMSA 1978, § 74-6-5(G) with *Pueblo of Picuris v. N.M. Energy, Minerals and Nat. Res. Dept.*, 2001-NMCA-084, ¶ 14, 131 N.M. 166, 169 (A court must consider the entire regulatory and statutory scheme and interpret each part harmoniously with the whole to effectuate the statute's purpose). Given that CCW filed several requests for a public hearing 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 New Mexico Supreme Court considers a case to present an issue of substantial public interest if it "involves a constitutional question or affects a fundamental right such as voting" or is "an issue of public importance" such as "the right to inspect public documents." *Republican Party v. N.M. Taxation and Revenue Dept.*, 2012-NMSC-026, ¶ 10 (citing to *State ex. Rel. Newsome v. Alarid*, 90 N.M. 790, 793, 568 P.2d 1236, 1239 (1977)).<sup>9</sup> The right to a "reasonable chance to submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing" in a permit process under the WQA is "an issue of public importance." *See generally, In re Rhino Env'tl. Servs.*, 2005-NMSC-024, 19-25; 138 N.M. 133, 139, for the New Mexico Supreme Court's discussion on the importance of public participation in the permitting process. Therefore, the way the Secretary has chosen to interpret the regulation undermines the Act's public participation requirements. It cannot be viewed as being in harmony with NMSA 1978, § 74-6-5(G).

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<sup>9</sup> NMED provided the Commission with an incomplete and inaccurate finding of the New Mexico Supreme Court. *See* NMED's Answer Brief at page 13 (October 27, 2015).

**3. A “Technical Meeting” is not a “public hearing” under the Water Quality Act and its implementing regulations.**

The fact that the Ground Water Quality Bureau of the NMED met with representatives of LANL, DOE, and CCW on April 15, 2015 at a technical meeting on the draft DP-1793 cannot substitute for CCW’s right to an opportunity for a public hearing under the Act, NMSA 1978, § 74-6-5(G). *See* AR No. 146. Permittees’ have erroneously described the technical meeting as a “negotiation” that resulted in “a number of concessions” to CCW.<sup>10</sup> Permittees’ Answer Brief at pages 5-6 (October 27, 2015).<sup>11</sup> Permittees have failed to cite to the administrative record in support of their claim that the technical meeting functioned as a negotiation between Petitioners, Permittees, and NMED. *Id.*

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<sup>10</sup> Permittees assert that such “significant concessions” made to CCW include: “A 30-day public comment period on workplans [sic], posting workplans [sic] and many other documents on the Electronic Public Reading Room, additional land application criteria, and additional workplan [sic] requirements,” citing to the original draft permit (AR 132) and the final permit now in effect (AR 142). Permittees’ Answer Brief at page 6 (October 27, 2015). A 30-day public comment period on work plans submitted by Permittees under DP-1793 is hardly a significant concession when the primary concern of CCW’s was that work plans were the functional equivalent of a permit modification, which require under the regulations that both public comments and an opportunity for a public hearing be allowed. *See* AR No. 136 at 01107-01109 and *see* AR No. 138 at 01122-01123. The final permit in effect does not permit the public an opportunity for a public hearing regarding work plans submitted by Permittees under DP-1793. *See* AR No. 149. Permittees also fail to identify which specific land application criteria and other work plan requirements contained in the final permit are “significant concessions” to CCW.

<sup>11</sup> Permittees claim that “the prohibition on land application of treated groundwater during the winter” was a major concession to CCW. Permittees’ Answer Brief at page 6 (October 27, 2015). How could this possibly be a concession of any kind to CCW when Permittees’ standard operating procedures for land application of groundwater provide that land application will be stopped if “rain, snow or hail occurs?” LANL Standard Operating Procedure, ENV-RCRA-OP-010.3, entitled “Land Application of Ground Water” at page 14 (July 12, 2012).

Moreover, whether negotiations and concessions took place at a technical meeting is ultimately irrelevant. A technical meeting is not the functional equivalent of a public hearing. The administrative record neither reflects that public notice was given of this technical meeting, nor does it reveal that all interested persons in DP-1793 were in attendance at this technical meeting. Furthermore, the record does not reflect that CCW or other interested persons were able to “submit evidence, data, views or arguments...and to examine witnesses testifying.” NMSA 1978, § 76-6-5(G). To hold a technical meeting instead of a requested public hearing violates the Act and its implementing regulations.

Participating in a technical meeting does not negate the showing of substantial public interest demonstrated through CCW’s three sets of substantive comments and three substantive hearing requests. Contrary to NMED’s assertion that “the bulk of [CCW’s] concerns have been addressed,” NMED’s Answer Brief at page 15 (October 27, 2015), the April 15, 2015 technical 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).

It is significant that when the technical meeting took place (April 15, 2015) NMED had failed to comply with the regulations by responding to CCW’s first request for a public hearing (submitted on March 2, 2015). *See* 20.6.2.3108.K NMAC (NMED must send a written response to a hearing request). CCW then submitted a second request for a public hearing (April 29, 2015) because the technical meeting resulted in further confusion and failed to address CCW’s concerns with the draft DP-1793. AR No.

136. The second request was also made because the technical meeting did not constitute a public hearing wherein they were afforded a “reasonable chance to submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.” § 74-6-5(G). Unfortunately, and in violation of 20.6.2.3108.K NMAC, NMED also failed to respond to Petitioners’ second request for a public hearing.

**4. The Secretary’s interpretation of 20.6.2.3108.K NMAC is not entitled to deference by the Commission.**

The Secretary’s interpretation of a regulation is not entitled to deference when that interpretation violates the rules of regulatory construction. The cases cited by NMED and Permittees do not provide a rule that the Secretary’s interpretation of a regulation is entitled to deference in all circumstances.<sup>12</sup> Agency regulations, like statutes, are subject to rules of interpretation. NMSA 1978, § 12-2A-1; *Albuquerque Bernalillo Co. Water Util. Auth v. N.M. Public Regulation Comm’n*, 2010-NMSC-013, ¶ 51, 148 N.M. 21, 39, (N.M. 2010), *citing Johnson v. N.M. Oil & Conservation Comm’n*, 127 N.M. 120, 978 P.2d 327. When interpreting agency regulations, courts follow the canons of statutory interpretation. *Id.*; *Alliance Health of Santa Teresa, Inc. v. Nat’l Presto Indus.*, 2007-NMCA-157, ¶ 18, 143 N.M. 133, 139 (Ct. App. 2007).

Regulatory interpretation, as with statutory interpretation, is based on a rule’s *plain language*. If the plain language of the regulation is clear, the Court simply applies the regulation as written. Interpretations that lead to absurd or unreasonable results or

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<sup>12</sup> See NMED’s Answer Brief at page 8 (October 27, 2015) citing to *Phelps Dodge Tyrone*, 2006-NMCA-115, ¶ 25; and see Permittees’ Response in Opposition to CCW’s Opposed Motion to Stay Discharge Permit DP-1793 at page 7-8, citing to *N.M. Mining Assn. v. N.M. Water Quality Control Comm.*, 2007-NMCA-010, ¶ 11, 141 N.M. 41.

render any of the regulatory language extraneous or mere surplusage must be avoided. *State v. Juan*, 2010-NMSC-041, ¶39, 148 N.M. 747, 759 (N.M. 2010), quoting *State v. Javier M.*, 131 N.M. 1, 33 P.3d 1; § 12-2A-18(A)(3); *Espinosa v. Rowell Tower, Inc.*, 1996-NMCA-006, ¶ 19, 121 N.M. 306, 312 (Ct. App. 1995), citing, *Dona Ana Sav. & Loan Ass'n v. Dofflemeyer*, 115 N.M. 590, 592-93, 855 P.2d 1054, 1056-57 (1993). A court must consider the entire regulatory and statutory scheme and interpret each part harmoniously with the whole to effectuate the statute's purpose. *Pueblo of Picuris v. N.M. Energy, Minerals and Nat. Res. Dept.*, 2001-NMCA-084, ¶ 14, 131 N.M. 166, 169 (Ct. App. 2001); §§ 12-2A-18(A)(1),(2).

As discussed above, the Secretary's interpretation of 20.6.2.3108.K NMAC violates the plain language of the regulation. "*A public hearing shall be held if the secretary determines there is substantial public interest.*" 20.6.2.3108.K NMAC (emphasis added). The regulation requires an opportunity for a hearing *unless* the Secretary determines that there is no substantial public interest in the permit. Evidence in the record supports the existence of substantial public interest in DP-1793. The plain language of the regulation does not allow the Secretary to consider the factors of transparency of a permit, level of community involvement allowed by NMED, the purpose of the permit, and issuance of the permit being in the public interest.

The plain language of the regulation does not permit the Secretary to evaluate whether public comments submitted, in conjunction with a request for a public hearing, are substantial or not. There are no criteria in the regulations to guide such a decision. That is a significant absence. Rather than unbridled discretion, it is a plain language

limitation of the exercise of discretion. The criterion is whether public interest in a permit is substantial, not whether public comments submitted are substantial. As the Secretary's interpretation of the regulation violates the plain language canon of regulatory construction, his interpretation is not entitled to deference.

The Secretary's interpretation of this regulation also led to an absurd or unreasonable result – his alleged finding that substantial public interest did not exist in DP-1793.<sup>13</sup> Under the Secretary's interpretation of "substantial public interest" a coalition of six organizations ( representing thousands of citizens and Tribal members in the impacted area of LANL's operations), which submitted three sets of substantive comments and requests for a public hearing on DP-1793 (totaling 29 pages, with each set of comments containing general substantive comments and an average of 17 specific substantive comments), ultimately did not demonstrate substantial public interest because of "the small scope of interest, the lack of substantiality in the comments received, and the inclusion of addressable comments in the draft permit." NMED's Answer Brief at page 14 (October 27, 2015). Again, the analysis required by the regulation is not whether public comments submitted are substantial, *but whether public interest in the permit is substantial.*<sup>14</sup>

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<sup>13</sup> CCW still maintains that the Secretary failed to make a determination regarding substantial public interest when denying CCW's third request for a public hearing on DP-1793. CCW is arguing, in the alternative, that if the WQCC finds that the Secretary did in fact make the requisite determination regarding substantial public interest, his determination that no substantial public interest in the permit exists is an absurd or unreasonable result of his interpretation of 20.6.2.3108.K NMAC.

<sup>14</sup> Comments submitted by CCW are substantial comments under the definition provided by NMED. The comments raised issues of "considerable importance, size or worth," concerned the

Both the Secretary's interpretation of "substantial public interest" and his interpretation of the regulation's requirement that he respond in writing to a request for a public hearing lead to an absurd or unreasonable result. The Secretary's interpretation of 20.6.2.3108.K NMAC is not entitled to deference for such interpretation violates the "absurd or unreasonable result" canon of regulatory construction.<sup>15</sup>

Finally, as discussed at Section IV(A)(2) of this Reply Brief, the Secretary's application of 20.6.2.3108.K NMAC seriously undermines the Act's public participation requirements, thereby violating the "harmonious application" canon of regulatory construction. 20.6.2.3108.K NMAC must be applied in harmony with the statutory requirement that an opportunity for a public hearing be provided before ruling on any a permit in order to give full meaning and effect to the Act's public participation requirements. *See* NMSA 1978, § 74-6-5(G). Thus, the Secretary's application of 20.6.2.3108.K NMAC is not entitled to deference because it violates the "harmonious application" canon of regulatory construction.

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"essentials" of the permit, and were "real and tangible, rather than imaginary." *See* NMED's Answer Brief at page 13 (October 27, 2015).

<sup>15</sup> The regulations at 20.6.2.3108.K NMAC require the Secretary to respond to a request for a public hearing in writing, with reasons supporting his decision to grant or deny the request. Petitioners submitted three requests for a public hearing to NMED and NMED responded to only one of those requests – the third request. AR No. 141. This action of the Secretary is very concerning. The Commission has an opportunity in this matter to correct this abuse of process.

**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 those regarding alleged transparency of the permit, level of community involvement NMED allowed in the permit process, the purpose of the permit, and issuance of the permit being "in the public interest."<sup>16</sup> *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 administrative record in this matter. AR No. 139. This document was prepared by the Ground Water Quality Bureau to assist the Secretary's determination whether to grant CCW's third request for a

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<sup>16</sup> The denial letter does not support NMED's assertion that the Secretary "evaluated whether there was substantial public interest by evaluating whether comments and requests for hearing had been received, and the breadth of such comments and requests for hearing." NMED's Answer Brief at page 11 (October 27, 2015). The denial letter also does not support NMED's statement that "The Secretary denied the Petitioner's [sic] hearing requests because of the small scope of interest, the lack of substantiality in the comments received, and the inclusion of addressable comments in the draft permit." *Id.* at page 14.

public hearing.<sup>17</sup> 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.<sup>18</sup> CCW only learned of the internal memorandum when reviewing the administrative record in this matter.

- 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 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. As explained below, 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.<sup>19</sup>

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<sup>17</sup> This document was not created to address CCW's first or second request for a public hearing.

<sup>18</sup> Contrary to what NMED has stated in its Answer Brief, Petitioners do not view the inclusion of this document in the administrative record as a "smoking gun" and do not consider this document as having been "erroneously included" in the AR in this matter. NMED's Answer Brief at page 11 (October 27, 2015). Petitioners have referred to the Request for Hearing Determination prepared by the GWQB for the Secretary as an "internal document" to demonstrate that this document, and the responses to Petitioners' comments submitted to NMED on DP-1793 contained therein, were not provided to Petitioners or any other member of the public.

<sup>19</sup> 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

First, neither the Act nor its implementing regulations provides factors to be considered by the Secretary when determining whether there is substantial public interest.<sup>20</sup> If the Secretary had in fact taken into consideration the factors of transparency and the level of community 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 limited participation in a technical meeting 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 is not only an abuse of discretion not supported by evidence in the record (*See* AR Nos. 134, 136 and 138), but they are also not in

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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.

<sup>20</sup> Permittees rely upon *Southwest Research* for such factors (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.

accordance with law. The 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.<sup>21</sup>

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<sup>21</sup> 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.

### 3. Permittees' reliance on *Southwest Research* is misplaced.

*Southwest Research* dealt with 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 Court addressed 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 concern* about the proposed modification" is a basis upon which NMED may determine that the modification must follow Class 3 procedures. *Id.* (emphasis added).

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.

Contrary to NMED's claim that CCW contended that the number of hearing requests alone is indicative of substantiality,<sup>22</sup> CCW's assertion that substantial public interest exists in DP-1793 is supported by more than just the mere number of comments

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<sup>22</sup> See NMED's Answer Brief at page 14 (October 27, 2015).

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 whether work plans submitted under the permit are the functional equivalent of a permit modification, 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 administrative record to determine whether NMED held public meetings<sup>23</sup>, *id.*, and to determine the extent of NMED's responses to submitted public comments. *Id.* at 78. The Court found that NMED had responded in a way which negated the substantial public interest. *Id.*

In this matter, NMED held no public meetings. NMED did hold a single "technical meeting" on April 15, 2015. AR No. 146. No public notice was given for this technical meeting. As only Petitioners, NMED and the Permittees were in attendance at

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<sup>23</sup> NMED rightly points out that under the Hazardous Waste Act NMED is required to respond to public comments. See NMED's Answer Brief at page 16 (October 27, 2015). That is why the Court proceeded to evaluate the extent of NMED's required responses to submitted public comments and whether such responses adequately addressed the public comments, thereby negating the substantial public interest in the permit. The distinction NMED is making between the HWA's requirement that NMED respond to public comments and the WQA's lack of such requirement is ultimately meaningless, for the analysis involves whether NMED's responses to public comments were adequate enough to dispel substantial public interest. In the matter of DP-1793, NMED did not respond to CCW's public comments in a manner which negated the substantial public interest in the permit.

this technical meeting, and no other members of the public or “interested persons”<sup>24</sup> 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. and AR No. 141.

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 CCW. The responses contained in this document were also not provided in NMED’s denial letter to CCW. *See* AR 141. Therefore, NMED never adequately addressed 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

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<sup>24</sup> It is unclear how NMED generated its “Interested Persons List” submitted to the WQCC as AR No. 144.

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.**

It is irrelevant whether the discharges authorized by DP-1793 “meet the criteria for approval under the WQA and the WQCC regulations.” Permittees’ Answer Brief at 7 (October 27, 2015). That is not at issue in this matter and has not been raised by Petitioners and its Petition for Permit Review. What is at issue in this matter is whether Petitioners were improperly denied a public hearing on DP-1793.

As demonstrated above, CCW is entitled to a public hearing under the WQA and its implementing regulations because it properly demonstrated substantial public interest in DP-1793. The WQA 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 WQA and must be vacated. See NMSA 1978 § 74-6-5(E)(2) (“The constituent agency shall deny any application for a permit...if...any provision of the Water Quality Act...would be violated.”).<sup>25</sup>

**V. THE COMMISSION MUST STRIKE NMED’S “EXHIBIT A” OF ITS ANSWER BRIEF AS IT VIOLATES THE ACT, ITS IMPLEMENTING REGULATIONS, AND RULES OF ADJUDICATORY PROCEDURE.**

NMED has improperly provided to the Commission an exhibit which it prepared “So that the Commission has a greater understanding of the extent to which the Petitioners [sic] comments were addressed.” NMED’s Answer Brief at page 14 (October 27, 2015) (attached as “Exhibit A” to its Answer Brief). The Act, its implementing regulations, and the Commission’s rules of adjudicatory procedures do not allow NMED to create such a document for the Commission. See NMSA 1978, § 74-6-5(Q) and 20.1.3.16.F.3 NMAC. NMED has not cited to any authority permitting them to do so.

NMED is not legal counsel for the Commission. The document prepared by NMED, which is not part of the administrative record in this matter, should not be considered by the Commission or the Hearing Officer appointed in this matter. Petitioners request the Hearing Officer and the Commission to strike this exhibit as

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<sup>25</sup> Permittees’ assert that “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.” Permittees’ Answer Brief at page 7 (October 27, 2015). In point of fact, the Act provides that “The constituent agency shall deny any application for a permit...if...any provision of the Water Quality Act...would be violated.” NMSA 1978, § 74-6-5(E)(2). Where a statute and a regulation are inconsistent, the statute will prevail. *Jones v. Employment Servs. Div.*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980) (“If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail.”).

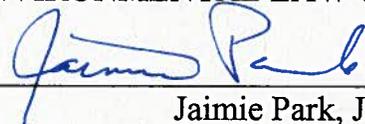
consideration of this document violates NMSA 1978, § 74-6-5(Q) and 20.1.3.16.F.3 NMAC.

## VI. CONCLUSION

For the reasons set forth above, the Commission should strike NMED's Exhibit A of its Answer Brief, vacate the Secretary's decisions, and remand to NMED to hold a public hearing on DP-1793.

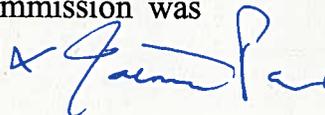
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## CERTIFICATE OF SERVICE

I, Jaimie Park, certify that on this 6<sup>th</sup> day of November, 2015 the below listed persons were served digitally via email, via U.S. Postal Service First Class Mail, postage pre-paid, and that the Administrator for the Water Quality Control Commission was provided with the original of this Reply and the requisite number of copies: 

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