

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

WQCC 15-07 (A)

Communities for Clean Water,
Petitioner

FINAL ORDER PURSUANT TO 20.1.3.16(F)(3) NMAC

On August 24, 2015, Communities for Clean Water ("Petitioner") filed a "First Amended Verified Petition for Review of New Mexico Environment Department Secretary's Denial of Public Hearing and Final Approval of Discharge Permit 1793 ("Petition") with the Administrator for the Water Quality Control Commission ("Commission").¹ On October 13, 2015, the Commission determined that a permit review shall be held and authorized the Chair to appoint a Hearing Officer. The Chair appointed Jeffrey N. Holappa, Administrative Law Judge for the New Mexico Environment Department ("Department"), to serve as Hearing Officer on October 30, 2015.

The Hearing Officer conducted the permit review during the Commission's regularly scheduled meeting on December 8, 2015, at the State Capitol Building in Santa Fe, New Mexico. The Commission Administrator facilitated the timely publishing of the Public Notice of Permit Review in English and Spanish in the *Albuquerque Journal* and *Los Alamos Monitor* on November 6, 2015. The Hearing Officer conducted an efficient, fair and impartial permit review in accordance with the Commission's Adjudicatory Procedures found in 20.1.3 of the New Mexico Administrative Code.

¹ Petitioner earlier filed an "Appeal of New Mexico Environment Department Secretary's Denial of Public Hearing and Approval of Discharge Permit 1793" with the Commission Administrator on August 21, 2015.

The Commission hereby issues the following findings of fact and conclusions of law pursuant to NMSA 1978, Section 74-6-5(Q) (2009), and final order pursuant to 20.1.3.16(F)(3) NMAC.

FINDINGS OF FACT

1. On December 22, 2011, the Department's Ground Water Quality Bureau ("Bureau") received a Discharge Permit Application for the Land Application of Treated Groundwater from a Pumping Test at Well R-28 ("DP-1793") from the United States Department of Energy ("DOE") and Los Alamos National Security ("LANS") associated with remediation of a chromium contaminated groundwater plume within the boundaries of Los Alamos National Laboratory ("LANL"). Administrative Record ("AR") No. 11.
2. On January 8, 2014, the Bureau received an amended application for DP-1793 from DOE and LANS to broaden the scope of the discharge permit. AR No. 102.
3. On December 3, 2014, the Bureau deemed the amended application administratively complete. AR No. 128.
4. On January 22, 2015, the Bureau issued the draft discharge permit for DP-1793. AR No. 132. The permit authorizes DOE to begin remediation of contaminated groundwater at LANL.
5. On January 30, 2015, the Bureau completed public notice of the draft discharge permit. AR No. 143.
6. On March 2, 2015, Petitioner submitted comments on the draft discharge permit and a request for public hearing.² AR No. 134. Petitioner made a number of verbal representations regarding the size of its membership, but ultimately failed to provide any support

² Petitioner's coalition includes 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.

whatsoever, such as a petition (which is routine practice for non-governmental organizations), to substantiate these verbal representations.

7. On April 15, 2015, the Bureau held a technical meeting on the draft discharge permit with the Bureau, DOE, LANS and Petitioner in attendance. AR No. 146.

8. On April 29, 2015, DOE and LANS submitted alternate proposed language for the draft discharge permit. AR No. 135.

9. On April 29, 2015, the Petitioner submitted additional comments on the draft discharge permit and restated its request for a public hearing. AR No. 136.

10. On May 28, 2015, the Bureau issued a revised draft discharge permit. AR No. 148.

11. On June 15, 2015, Petitioner submitted comments on the draft discharge permit from May 28, 2015, and restated its request for a public hearing. AR No. 138.

12. On July 7, 2015, the Secretary of the New Mexico Environment Department (“Secretary”) formally denied the request from Petitioner for a public hearing in the matter of DP-1793 on the final page of a Request for Hearing Determination Memorandum prepared by the Bureau. AR No. 139.

13. On July 24, 2015, the Bureau issued a denial letter to the Petitioner. AR No. 141.

The letter stated in relevant part:

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.

14. On July 27, 2015, the Bureau issued the final discharge permit for DP-1793, which included thirty (30) conditions including limitations on the quality of the discharge. AR No. 142.

15. On August 24, 2015, Petitioner filed its Petition with the Commission Administrator. Record Proper ("RP") 3.

16. On October 13, 2015, during its regularly scheduled meeting, the Commission denied a motion for stay filed with the Petition, authorized the Chair to appoint a Hearing Officer, and scheduled a hearing on the Petition for December 8, 2015. RP 15.

CONCLUSIONS OF LAW

Petitioner filed a timely petition for permit review with the Commission in accordance with the jurisdictional requirements of NMSA 1978, Section 74-6-5(O) (2009) and 20.1.3.16(A)(1) NMAC. Section 74-6-5(Q) and 20.1.3.16(F)(3) NMAC provide the standard of review for a permit review before the Commission.³ The regulation adopted by the Commission essentially mirrors the language of the statute and provides in relevant part:

The commission shall consider and weigh only the evidence contained in the record before the department . . . and shall not be bound by the factual findings or legal conclusions of the department. The commission shall sustain, modify or reverse the action of the department based on a review of the evidence, the arguments of the parties and recommendations of the hearing officer. The commission shall set forth in the final order the reasons for its actions.

20.1.3.16(F)(3) NMAC. Petitioner never challenged the merits of DP-1793 in this permit review.⁴ Petitioner solely challenged the Secretary's decision not to hold a public hearing on DP-1793, which results in a narrow issue for review by the Commission.

³ Petitioner initially cited NMSA 1978, 74-6-7(B) (1993) as the applicable standard of review for the permit review, but that standard applies to the court of appeals review of action by the Commission.

⁴ Petitioner reaffirmed this position during the permit review oral argument. Transcript of Proceedings 37:2-7.

The Water Quality Act provides interested persons the *opportunity for a public hearing* on any application for a permit. NMSA 1978, Section 74-6-5(G) (2009) (emphasis added). The Water Quality Act also provides that the Commission shall adopt regulations establishing procedures for permits. NMSA 1978, Section 74-6-5(B) (2009). The Commission adopted a regulation based on its interpretation of Section 74-6-5(G) to govern the consideration of requests for a public hearing following the public notice of the proposed approval of an application for a discharge permit. 20.6.2.3108(K) NMAC. The regulation provides in relevant part:

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).

Neither the Water Quality Act nor the applicable regulations provide or require the Secretary to consider particular factors in determining substantial public interest. Petitioner asserts that its three substantive requests for a public hearing, three sets of substantive comments and active participation in the permitting process demonstrate a substantial public interest in DP-1793. The Department contends that the Request for Hearing Determination Memorandum prepared by the Bureau reveals the Secretary considered the public interest and properly found a lack of substantial public interest in DP-1793.

The Request for Hearing Determination Memorandum summarized the history of DP-1793 and articulated specific concerns raised by Petitioner in its request for a public hearing. The Request for Hearing Determination Memorandum also included substantive responses to those concerns from the Bureau. The Request for Hearing Determination Memorandum

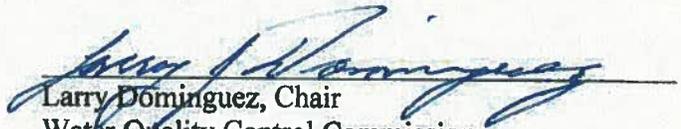
therefore provided the Secretary with the type of relevant information that allowed him to assess the breadth of public interest and determine whether it rose to the level of substantial public interest. The Secretary ultimately determined this information failed to rise to the level of substantial public interest and denied the request for a public hearing on the final page of the Request for Hearing Determination Memorandum.

The Commission considered and weighed only the evidence contained in the record before the Department. The Commission was not bound by the factual findings or legal conclusions of the Department, and did not afford the Secretary's decision to deny the request for hearing any deference. Nevertheless, the totality of the evidence contained in the record sufficiently supports the conclusion that the Secretary considered the public interest, which included issues raised by a sole participant whose concerns had been repeatedly addressed by the Bureau, DOE and LANS throughout the permitting process. Two critical issues were raised during the oral argument that factored heavily into the Commission's decision to sustain the Secretary's decision. First, the permit at issue in this matter, DP 1793, will allow DOE to begin to remediate contaminated groundwater plume within the boundaries of LANL. Delaying the remediation of contaminated groundwater could therefore be harmful to both public health and the environment. Second, Petitioner never challenged the merits of DP-1793 in this permit review. Petitioner solely challenged the Secretary's denial of their request for a public hearing on DP-1793. The fact that Petitioner did not challenge the permit itself lends support to the Secretary's decision to deny a hearing as Petitioner did not offer any substantive objections to the actual permit. Petitioner's only interest in this matter appears to be manufacturing an artificial, legal dispute because it is unhappy with how the Secretary exercised his discretion in this matter. The Commission will not endanger public health and the environment by delaying

the remediation of contaminated groundwater where there are no credible objections to the groundwater discharge permit issued by the Department. The totality of the evidence contained in the record sufficiently supports the conclusion that the Secretary properly determined any remaining concerns of that sole participant failed to rise to the level of substantial public interest. Accordingly, the Commission finds the Secretary appropriately applied his discretion in denying the request for a public hearing pursuant to Section 74-6-5(G) and 20.6.2.3108(K) NMAC.

FINAL ORDER

Upon consideration of the record before the Department and the oral arguments of the parties in this permit review, the Commission **SUSTAINS** the actions of the Secretary in denying the request for a public hearing and granting final approval of DP-1793.


Larry Dominguez, Chair
Water Quality Control Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Final Order Pursuant to 20.1.3(F)(3) NMAC** was sent via email to the following parties on February 10, 2016, and via First Class mail on February 11, 2016:

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