

**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION**



**WQCC 15-07(A)**

**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.**

**NEW MEXICO ENVIRONMENT DEPARTMENT'S  
ANSWER BRIEF**

Pursuant to 20.1.3.16.A(4)(b) NMAC, Respondent the New Mexico Environment Department ("NMED" or "the Department") respectfully submits this answer brief to Petitioner Communities for Clean Water's ("CCW" or "Petitioner") opening brief to its Petition for Permit Review of Discharge Permit ("DP") 1793, which was filed with the Water Quality Control Commission ("WQCC" or "the Commission") on October 2, 2015.

**I. SUMMARY OF THE PROCEEDINGS**

1. On December 20, 2011, the U.S. Department of Energy ("DOE") and Los Alamos National Security, Inc. ("LANS") submitted a discharge permit application for the discharge of treated groundwater from pumping tests at monitoring wells at Los Alamos National Laboratory ("LANL") (DP-1793), in accordance with 20.6.2.3106 NMAC. Administrative Record ("AR") No. 11.

2. For good cause shown, temporary permission to discharge was granted to DOE and LANS on January 13, 2012 for discharges of treated groundwater related to treated well development and pump tests at well R-28, in accordance with 20.6.2.3106.B NMAC. AR No. 12.

3. After several months of additional information collection by the Department's Ground Water Quality Bureau ("GWQB" or "the Bureau"), including an administrative incompleteness determination on May 23, 2012, the DP-1793 application was deemed administratively complete on August 22, 2012, pursuant to 20.6.2.3108.A NMAC. AR No. 32.

4. On September 7, 2012, the Public Notice 1 ("PN-1") was completed, pursuant to 20.6.2.3108 B, C and E NMAC. AR No. 35.

5. On October 12, 2012, the Public Notice 2 ("PN-2") was completed, pursuant to 20.6.2.3108.H NMAC. AR No. 38-41.

6. For good cause shown, temporary permission to discharge was granted to DOE and LANS on May 2, 2013 for discharges of treated groundwater related to treated well development and pump tests at wells R-28 and R-42, in accordance with 20.6.2.3106.B NMAC. AR No. 63; AR No. 64.

7. For good cause shown, temporary permission to discharge was granted to DOE and LANS on August 19, 2013 for discharges of treated groundwater related to treated well development and pump tests of well CdV-16-4ip, in accordance with 20.6.2.3106.B NMAC. AR No. 85.

8. For good cause shown, on October 4, 2013 the temporary permission to discharge was revised for discharges of treated groundwater related to treated well development and pump tests at wells R-28 and CdV-16-4ip, in accordance with 20.6.2.3106.B NMAC. AR No. 92; AR No. 93.

9. On January 7, 2014, after an evaluation of the pump test results and treated well development, an amended application for DP-1793 was submitted by DOE and LANS. AR No. 101.

10. For good cause shown, temporary permission to discharge was granted to DOE and LANS on March 14, 2014 for discharges of treated groundwater related to aquifer testing at wells R-28, R-42, R-62, R-43 and SCI-2, in accordance with 20.6.2.3106.B NMAC. AR No. 107.

11. For good cause shown, temporary permission to discharge was granted to DOE and LANS on August 7, 2014 for discharges of treated groundwater related to aquifer testing at wells R-28, R-42, R-62 and R-43, in accordance with 20.6.2.3106.B NMAC. AR No. 115.

12. For good cause shown, temporary permission to discharge was granted to DOE and LANS on August 8, 2014 for discharges of treated groundwater related to aquifer testing at pilot well CrEX-1, in accordance with 20.6.2.3106.B NMAC. AR No. 116.

13. For good cause shown, temporary permission to discharge was granted to DOE and LANS on October 20, 2014 for discharges related to aquifer testing at wells R-28, R-42, R-62, R-43 and SCI-2, in accordance with 20.6.2.3106.B NMAC. AR No. 127.

14. On December 3, 2014, the amended application was deemed administratively complete by the GWQB, pursuant to 20.6.2.3108.A NMAC. AR No. 128.

15. On December 5, 2014, the PN-1 for the amended application was completed, pursuant to 20.6.2.3108.B, C and E NMAC. AR No. 131.

16. On January 22, 2015, the draft discharge permit for DP-1793 was issued, pursuant to 20.6.2.3108.H NMAC. AR 132.

17. On January 30, 2015, the PN-2 for the amended application was completed, pursuant to 20.6.2.3108.H NMAC. AR No. 143.

18. On February 25, 2015, comments on the draft permit and a request for hearing were submitted by DOE and LANS, pursuant to 20.6.2.3108.K NMAC. AR No. 133.

19. On March 2, 2015, comments on the draft permit and a request for hearing were submitted by the Petitioner, pursuant to 20.6.2.3108.K NMAC. AR No. 134.
20. On April 15, 2015, a technical meeting on the draft discharge permit was held, with the GWQB, DOE, LANS and the Petitioner in attendance. AR No. 146.
21. On April 29, 2015, the GWQB allowed DOE and LANS to submit alternate proposed language for the draft discharge permit. AR No. 135.
22. On April 29, 2015, the GWQB allowed the Petitioner to submit additional comments on the draft discharge permit and renewed its request for hearing. AR No. 136.
23. On May 28, 2015, a revised draft discharge permit was issued by the GWQB. AR No. 148.
24. On June 9, 2015, the GWQB allowed DOE and LANS to submit comments on the May 28, 2015 draft discharge permit. AR No. 137.
25. On June 15, 2015, the GWQB allowed the Petitioner to submit comments on the May 28, 2015 draft discharge permit and renewed its request for hearing. AR No. 138.
26. On July 7, 2015, the Secretary of Environment (“Secretary”) denied the request for hearing in the matter of DP-1793 in accordance with 20.6.2.3108.K NMAC. AR No. 139.
27. On July 9, 2015, DOE and LANS withdrew their request for hearing. AR No. 140.
28. On July 24, 2015, the GWQB issued a hearing denial letter to the Petitioner pursuant to 20.6.2.3108.K NMAC. AR No. 141.
29. On July 27, 2015, a final discharge permit for DP-1793 was approved with conditions pursuant to 20.6.2.3109.B NMAC. AR No. 142.

## II. STANDARD OF REVIEW

The Petitioner has erroneously, and contrary to the requirements of 20.1.3.16.A(4)(a) NMAC, cited to a standard of review, and one that is not applicable to this Permit Review. Specifically, the Petitioner cites to NMSA 1978, Section 74-6-7(B) of the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17, (“WQA”), as the standard of review for this proceeding, stating that “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.” Petitioner’s Brief at P. 4.

Section 74-6-7(B) states that, “[u]pon appeal, *the court of appeals shall set aside the commission’s action* only if it is found to be: 1) arbitrary, capricious or an abuse of discretion; 2) not supported by substantial evidence in the record; or 3) otherwise not in accordance with law.” (emphasis added). Section 74-6-7(B) applies only to actions taken by the Commission, not the Department, that have been appealed to the New Mexico court of appeals. It is inapplicable to Permit Reviews before the Commission, the decisions of which are guided by NMSA 1978, Section 74-6-5(Q) (“...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...””) and 20.1.3.16.F(3) NMAC (“The commission shall consider and weigh only the evidence contained in the record before the department and the recommended decision of the hearing officer, if any, 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.”). The WQCC should not humor the mis- application of the law and should instead adhere to its adjudicatory regulations in formulating a final decision in this matter, which do not require that an additional standard of review be proffered in the briefing.

Additionally, Petitioner unnecessarily emphasizes in its review recitation that it is “not required to challenge the merits of the final permit issued by NMED.” Petitioner’s Brief at P. 4. While a party does not have to “challenge the merits” of a final permit in a Permit Review, it is contemplated that a Petitioner will bring its outstanding issues with a permit before the Commission through this process. *See* 20.1.3.16.A(1)(d) NMAC. The Court of Appeals noted in *Phelps Dodge Tyrone v. WQCC* that “NMED’s imposition of conditions is not final. An aggrieved party can always appeal to the Commission and to our appellate courts.” *Phelps Dodge Tyrone v. WQCC*, 2006-NMCA-115, ¶ 24, 140 N.M. 464. If a permit is issued, the next administrative step to be exhausted is to bring issues with a permit before the Commission, who then reviews and makes a final determination under the Permit Review process. If no issues with the permit itself are enumerated during a Permit Review, it must be assumed that issues do not exist, and the right to contest such issues have arguably been waived. *See Romero v. Pueblo of Sandia*, 2003-NMCA-137, ¶ 17, 134 N.M. 553 (The Court of Appeals declined to address an issue that had not been preserved before the trial court.).

It is clear that the Petitioner believes that there are still issues with the permit, as it states that “[t]he April 15, 2015 meeting and subsequent May 28, 2015 final draft DP-1793 failed to adequately address CCW’s concerns.” Petitioner’s Brief at P. 8. However, the Petitioner chose not to take advantage of the full administrative remedies available to it by not bringing its actual

permit concerns before the WQCC. Further, Petitioner refrained from requesting a remand to the Department simultaneously with the filing of its Petition for Review under 20.1.3.16.A(3) NMAC, which is afforded by the Commission if “a party shows to the satisfaction of the [C]ommission that there was no reasonable opportunity to submit comment or evidence on an issue being challenged.”

### **III. ARGUMENT**

#### ***A. Petitioner CCW Was Not Entitled to a Public Hearing Under the Water Quality Act and the Ground and Surface Water Protection Regulations***

##### **1. The Water Quality Control Commission has Promulgated Regulations to Allow for Public Hearings**

Petitioner argues that the legislature intended through its language in NMSA 1978, Section 74-6-5(G) that “[n]o ruling shall be made on any application for a permit without opportunity for a public hearing...” should be interpreted to 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.” Petitioner’s Brief at P. 6. Petitioner offers no support for this argument besides its own reading of the statutory language.

Fortunately, the WQCC has promulgated regulations based upon Section 74-6-5(G) to accommodate public hearing opportunities related to permitting actions, as can be found in 20.6.2.3108.K NMAC:

Following the public notice of the proposed approval or disapproval of an application for a discharge permit, modification or renewal, and prior to a final decision by the secretary, there shall be a period of at least 30 days during which written comments may be submitted to the department and/or a public hearing may be requested in writing. The 30-day comment period shall begin on the date of publication of notice in the newspaper. All comments will be considered by the department. 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.

The regulations provide that if the Secretary makes a determination that there is substantial public interest, a public hearing shall be held. As the Court of Appeals held in *Phelps Dodge Tyrone v. WQCC*, “although we are not bound by an agency's interpretation of statutes and rules because it is the function of the courts to interpret the law, we afford administrative agencies considerable discretion to carry out the purposes of their enabling legislation, and we give deference to an agency's interpretation of its own regulations.” *Phelps Dodge Tyrone*, 2006-NMCA-115, ¶ 25. If Petitioner is dissatisfied with the WQCC’s existing regulations pertaining to permit hearings, it has the ability to petition the Commission to amend the language in accordance with NMSA 1978, Section 74-6-6(B) and the Guidelines for Water Quality Control Commission Regulation Hearings.

## **2. The Water Quality Control commission Regulations Afford the Secretary Discretion in Granting Public Hearings**

As stated previously, 20.6.2.3108.K NMAC provides the Secretary with discretion in granting permit hearings (“A public hearing shall be held if the Secretary determines there is substantial public interest.”). The Petitioner attempts to alter the language by arguing that “[t]he applicable regulation requires an opportunity for a hearing unless the Secretary determines there is no substantial public interest in the permit.” Petitioner’s Brief P. 7. The difference between the actual regulatory language and the Petitioner’s assertion is glaring. The regulations require the Secretary to determine whether there is substantial public interest, and if he determines that there is, a public hearing is held. The Petitioner would like you to believe that a public hearing is held unless the Secretary makes a determination of substantial public interest. A hearing is not the default under 20.6.2.3108.K NMAC. A hearing is only granted if, after receipt of public

comments and requests for hearing that set forth the reasons a hearing shall be held, the Secretary makes a determination that there is substantial public interest.

In contrast, the Department does have controlling statutory and regulatory authorities in other programs that mandate permit hearings. *See* NMSA 1978, § 74-9-24(A) of the Solid Waste Act, NMSA 1978, §§ 74-9-1 to -43 (“The director, within one hundred eighty days after the application is deemed complete and after a public hearing, shall issue a permit, issue a permit with terms and conditions or deny a permit application.”); 20.9.3.16.B NMAC (“A permit shall be issued only after a public hearing as required by NMSA 1978 Section 74-9-24 A of the Solid Waste Act.”). In the mandatory provisions crafted by the legislature, there is no agency discretion. If a valid permit application has been submitted, a hearing must be held before an action may be taken on that permit.

In sum, the WQA allows for the opportunity for public hearings related to discharge permits, and the Commission has promulgated regulations that afford the Secretary the discretion to determine whether a public hearing should be held based upon a determination of substantial public interest. No party is entitled to a public hearing under the WQA or its correlated regulations, but instead the Secretary determines if a hearing is warranted based upon 20.6.2.3108.K NMAC.

***B. The Secretary’s Denial of Petitioner CCW’s Request for a Public Hearing Was in Accordance With Law, and Was Not Arbitrary and Capricious, Nor Was it an Abuse of the Secretary’s Discretion Unsupported by Substantial Evidence on the Record***

**1. Petitioner Erroneously Relies on NMSA 1978, Section 74-6-7(B)**

As discussed in NMED’s response to Petitioner’s Standard of Review, NMSA 1978, Section 74-6-7(B) is not applicable to this proceeding. Section 74-6-7(B) states that, “[u]pon appeal, *the court of appeals shall set aside the commission’s action* only if it is found to be: 1)

arbitrary, capricious or an abuse of discretion; 2) not supported by substantial evidence in the record; or 3) otherwise not in accordance with law.” (emphasis added). Section 74-6-7(B) applies only to actions taken by the Commission, not the Department, that have been appealed to the New Mexico Court of Appeals. It is inapplicable to Permit Reviews before the Commission, the decisions of which, as stated previously, are guided by NMSA 1978, Section 74-6-5(Q) (“...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...”)) and 20.1.3.16.F(3) NMAC (“The commission shall consider and weigh only the evidence contained in the record before the department and the recommended decision of the hearing officer, if any, 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.”). The Petitioner cannot randomly assign a standard of review to this Permit Review when the regulations neither call for such an assignment, nor do they adopt such a standard of review.

## **2. The Secretary Evaluated Whether There Was Substantial Public Interest When Determining the Appropriateness of a Public Hearing**

The Petitioner alleges in its argument that the Secretary did not make a determination regarding whether there was substantial public interest when evaluating the need for a public hearing under 20.6.2.3108.K NMAC. Specifically, the Petitioner argues that, based upon the

denial letter received by CCW, the Secretary evaluated “the alleged transparency of the permit, the level of community involvement allowed by NMED in the permitting process, the purpose of the permit, and the issuance of the permit being in the public interest” but not substantial public interest. Petitioners Brief at P. 9.

While the Petitioner may not interpret the GWQB’s letter informing the Petitioner of the Secretary’s denial of its request for hearing, AR No. 141, as evidence that the Secretary evaluated whether there was substantial public interest when making his hearing determination, the Secretary fully executed his grant of authority under 20.6.2.3108.K NMAC. In making his determination as to whether a hearing was appropriate in this matter, he 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. The GWQB summarized the history of the permit proceedings, the comments received, and the substantiality of the comments in its Request for Hearing Determination, AR No. 139.

The Petitioner seems to indicate in its brief that the inclusion of the GWQB’s Request for Hearing Determination memo to the Secretary in the Administrative Record, AR No. 139, was a smoking gun that reflected the lack of a substantial public interest determination by the Secretary. While the Petitioner refers to it as an “internal memorandum,” the implication being that it was erroneously included in the Administrative Record, the Department considers the document to be a public record and fully part of the Administrative Record in this matter, as it ultimately contains the Secretary’s hearing determination, with signature and date. The Petitioner alleges that the Request for Hearing Determination “reveals that the Secretary failed to make the requisite determination under 20.6.2.3108.K NMAC.” Petitioner’s Brief at P. 9. However, the Petitioner does not provide any evidence as to how the Request for Hearing Determination

indicates that the Secretary did not determine if there was substantial public interest. The fact that the Secretary's denial does not explicitly say "I am denying the request for hearing because of lack of substantial public interest" does not mean that the Request did not contain information relevant to the Secretary's determination, or that such an evaluation did not occur.

### **3. The Secretary Found That There Was Not Substantial Public Interest When Determining the Appropriateness of a Public Hearing**

In evaluating the need for a public hearing under 20.6.2.3108.K NMAC before the approval, disapproval or approval with conditions of DP-1793, the Secretary determined that there was not substantial public interest, and therefore denied the Petitioner's request for hearing. The Petitioner is correct in its assessment that neither the WQA nor 20.6.2.3108.K NMAC provide for factors to be considered in the Secretary's determination of whether substantial public interest exists, but that does not mean that the Secretary is unable to make such a determination without specific factors being dictated to him. Citing NMED's Response to Petitioner's Motion to Stay, the Petitioner incorrectly asserts that NMED relies on *Southwest Research v. State*, 2014-NMCA-098, for the factors to be utilized in a substantial public interest determination.

When NMED cited to *Southwest Research & Information Center v. State*, 2003-NMCA-012, 133 N.M. 179,<sup>1</sup> in its response to Petitioner's Motion to Stay DP-1793, it did so to emphasize that, when faced with whether NMED had properly refrained from granting a permit hearing, the New Mexico court of appeals recognized that "[t]he fact that there is great public interest in [a]...facility in general, the original granting of the permit, or various bigger changes that have taken or will take place does not mean that there must be a hearing for every

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<sup>1</sup> NMED cited to the 2003 *Southwest Research* as opposed to the 2014 *Southwest Research*, as alleged by the Petitioner.

administrative detail concerning [a] facility.” *Id.* ¶ 39. It did not allege that the court addressed substantiality or created a rule for a substantiality analysis.

The regulatory provision 20.6.2.3108.K NMAC as written affords the Secretary the flexibility to apply the substantial public interest provision to each specific discharge permit based upon the facts relevant to each matter. To create a rule or enumerate factors that should go into such an evaluation could not capture all potential scenarios that the Department encounters. The process is not so mechanized that a robotic claw could drop a discharge permit into “hearing” or “no hearing” boxes. This is perfectly exhibited by the dispute over substantiality in the current matter before the Commission.

The meaning of the term “substantial” is integral in an evaluation of substantial public interest. According to the Oxford English Dictionary, “substantial” means: 1) of considerable importance, size or worth; 2) concerning the essentials of something; or 3) real and tangible, rather than imaginary. Oxford English (U.S.) Dictionary, [http://www.oxforddictionaries.com/us/definition/american\\_english/substantial](http://www.oxforddictionaries.com/us/definition/american_english/substantial) (last visited October 26, 2015). For example, the New Mexico Supreme Court considers a case to present issues of substantial public interest if it “involves a constitutional question or affects a fundamental right such as voting.” *Republican Party v. N.M. Taxation and Revenue Dept.*, 2012-NMSC-026, ¶ 10. In other words, issues of substantial public interest are very large issues impacting core functions of society. While a Supreme Court determination of whether a case presents issues of substantial public interest in relation to whether it will opine on a moot matter can be distinguished from the Secretary evaluating whether there is substantial public interest when deciding whether or not to grant a permit hearing, it does provide evidence as to the significance of “substantial” in relation to substantial public interest.

Contrary to several assertions made by the Petitioner in regards to the number of hearing requests submitted, the number of hearing requests alone is not indicative of substantiality, as can be deduced from the definitional evaluation above. For example, there could be 100 requests for hearing submitted, but if the requests aren't substantive in the sense that they do not "set forth the reasons why a hearing should be held" or the reasons provided are either not substantive in nature or not within the purview of the Department, the Secretary will likely deny the hearing requests.

In this instance, comments and requests for hearing were received from the Petitioner several times in the draft discharge permit process. *See* AR No. 134; AR No. 136; AR No. 138. After evaluating the comments, meeting with the Petitioner and Permittees, and incorporating any changes into the discharge permit that were appropriate based on the submitted comments, the GWQB drafted the Request for a Hearing Determination that was submitted to the Secretary. AR No. 139. The Request for Hearing Determination contained a history of the permit, a summary of the contents of the permit, a subset of concerns raised by the Petitioner in its hearing request(s) and the GWQB's response to such concerns. The information provided was for the Secretary's use in making his determination as to whether or not to hold a hearing in this matter. The Secretary denied the Petitioner's 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. So that the Commission has a greater understanding of the extent to which the Petitioner's comments were addressed, NMED Answer Brief Exhibit A contains a list of all of the Petitioner's comments, along with the manner in which the comments were addressed by the GWQB in the discharge permit, if possible. The remaining comments not incorporated into the discharge permit are non-substantive in nature.

The Petitioner states in its brief that “[h]ad 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.” Petitioner’s Brief at P. 8. Therefore, the Petitioner apparently agrees that a substantial public interest finding can encompass the manner in which the Department addressed submitted comments regarding a draft discharge permit. In this instance, the GWQB informed the Secretary in its Request for Hearing Determination how it had addressed, to the extent possible, the Petitioner’s concerns expressed in its submitted comments. The fact that the Department made significant modifications to the permit to address the Petitioner’s concerns removes or negates the substance of their interest. To allow a public hearing when the bulk of its concerns have been addressed would only serve to provide a public forum for the Petitioner to air general concerns regarding DOE and LANS that were not germane to the permit and is not what the language in 20.6.2.3108 NMAC is intended to address.

It is important to remember that an interested party still has the opportunity to have any outstanding issues of concern heard even if a request for hearing is denied and a permit is issued. As previously discussed, pursuant to NMSA 1978, Section 74-6-5(O) and 20.1.3.16 NMAC, a Petition for Permit Review can be filed with the WQCC which then allows for the Commission to use its technical expertise to review and evaluate contested provisions of a permit, and to possibly remand the matter back to the Department for additional information gathering, if it feels such a remand is necessary. In this instance, the Petitioner has chosen to not bring the actual contested issues related to the permit before the Commission. Instead, it has opted to solely contest the denial of its hearing request and the subsequent issuance of the permit. It is

unknown what benefit it thinks it will derive from a public hearing being held versus the WQCC reviewing and opining on contested permit conditions through a public process.

#### **4. CCW Misunderstands NMED's Intent in Referencing Southwest Research**

The Petitioner further argues in its brief that NMED's reliance on *Southwest Research* in its response to Petitioner's Motion to Stay was misplaced. Petitioner's Brief at P. 12. NMED notes that it is rare to get the chance to reply in an Answer, but it will take this opportunity to do so without complaint. As previously addressed, when NMED cited to *Southwest Research*, 2003-NMCA-012, 133 N.M. 179, in its response to Petitioner's Motion to Stay DP-1793, it did so to emphasize that, when faced with whether NMED had properly refrained from granting a permit hearing, the New Mexico court of appeals recognized that "[t]he fact that there is great public interest in the...facility in general, the original granting of the permit, or various bigger changes that have taken or will take place does not mean that there must be a hearing for every administrative detail concerning the facility." *Id.* ¶ 39. NMED did not allege that the court addressed substantiality or created a rule for a substantiality analysis.

The Petitioner also misunderstands the discussion related to public meetings and written responses to comments in *Southwest Research*, 2014-NMCA-098. *Southwest Research* (2014) was related to the issuance of a permit issued to the federal Waste Isolation Pilot Plant under the state Hazardous Waste Act ("HWA") and the federal Resource Conservation and Recovery Act ("RCRA"), which are administered by NMED's Hazardous Waste Bureau. Under the HWA and RCRA, there are required public meetings, 20.4.1.901.C(1) NMAC (adopting 40 C.F.R 124.31), and responses to comments, 20.4.1.901.A(9) NMAC<sup>2</sup>, during the issuance of a permit. The WQA and correlated regulations do not follow the RCRA model of public participation. Many of the

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<sup>2</sup> Pursuant to 20.4.1.901.A(9) NMAC, responses to comments are issued at the time a final permit decision is issued.

members of CCW are frequent participants in RCRA matters, so they are likely used to the manner in which RCRA permitting occurs, as opposed to permitting under the ground water regulations.

Under the WQA and correlated regulations, there is no requirement for public meetings in permitting actions. The regulations do provide the opportunity for public comments to be submitted, as referenced in 20.6.2.3108.F(7), G and I NMAC. However, there is no requirement that NMED respond to the comments, but instead “[a]ll comments will be considered by the Department.” 20.6.2.3108.K NMAC. Written notice of the final action taken is provided to the applicant/permittee and any other participant who has requested a copy in writing, but unlike the hazardous waste regulations, there is no requirement that responses to comments be provided upon final action. 20.6.2.3109.B NMAC. Any additional outreach to interested parties taken by the Department such as technical meetings, written correspondence addressing comments, iterations of draft permit changes occurs on a case-by-case basis depending on the permit and the discharging facility.

***C. The Secretary’s Final Approval of DP-1793 Was Not in Violation of the Water Quality Act***

The Petitioner argues that, because the Secretary denied its request for hearing, the subsequent issuance of DP-1793 was in violation of the WQA, and should therefore be vacated. As has been discussed throughout this answer, the Secretary made a determination under 20.6.2.3108.K NMAC that there was not substantial public interest in this matter, and therefore declined to hold a public hearing. The Petitioner may disagree with the outcome, but the Department adhered to both the WQA and correlated regulations in the issuance of this permit. The permit was “approved with conditions” (as opposed to “approved”, as was alleged by Petitioner) in accordance with 20.6.2.3109.B NMAC, AR No. 142, and notice was provided to

interested parties accordingly. As stated previously, if the Petitioner is dissatisfied with the practical execution of the WQCC's regulations, it is able to petition the Commission for a regulatory amendment pursuant to NMSA 1978, Section 74-6-6(B).

#### **IV. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

##### ***A. Findings of Fact***

1. On December 20, 2011, DOE and LANS submitted a discharge permit application for the discharge of treated groundwater from pumping tests at monitoring wells at LANL)(DP-1793), in accordance with 20.6.2.3106 NMAC. AR No. 11.

2. For good cause shown, temporary permission to discharge was granted to DOE and LANS on January 13, 2012 for discharges of treated groundwater related to treated well development and pump tests at well R-28, in accordance with 20.6.2.3106.B NMAC. AR No. 12.

3. After several months of additional information collection by the GWQB", including an administrative incompleteness determination on May 23, 2012, the DP-1793 application was deemed administratively complete on August 22, 2012, pursuant to 20.6.2.3108.A NMAC. AR No. 32.

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development and pump tests at wells R-28 and R-42, in accordance with 20.6.2.3106.B NMAC. AR No. 63; AR No. 64.

7. For good cause shown, temporary permission to discharge was granted to DOE and LANS on August 19, 2013 for discharges of treated groundwater related to treated well development and pump tests of well CdV-16-4ip, in accordance with 20.6.2.3106.B NMAC. AR No. 85.

8. For good cause shown, on October 4, 2013 the temporary permission to discharge was revised for discharges of treated groundwater related to treated well development and pump tests at wells R-28 and CdV-16-4ip, in accordance with 20.6.2.3106.B NMAC. AR No. 92; AR No. 93.

9. On January 7, 2014, after an evaluation of the pump test results and treated well development, an amended application for DP-1793 was submitted by DOE and LANS. AR No. 101.

10. For good cause shown, temporary permission to discharge was granted to DOE and LANS on March 14, 2014 for discharges of treated groundwater related to aquifer testing at wells R-28, R-42, R-62, R-43 and SCI-2, in accordance with 20.6.2.3106.B NMAC. AR No. 107.

11. For good cause shown, temporary permission to discharge was granted to DOE and LANS on August 7, 2014 for discharges of treated groundwater related to aquifer testing at wells R-28, R-42, R-62 and R-43, in accordance with 20.6.2.3106.B NMAC. AR No. 115.

12. For good cause shown, temporary permission to discharge was granted to DOE and LANS on August 8, 2014 for discharges of treated groundwater related to aquifer testing at pilot well CrEX-1, in accordance with 20.6.2.3106.B NMAC. AR No. 116.

13. For good cause shown, temporary permission to discharge was granted to DOE and LANS on October 20, 2014 for discharges related to aquifer testing at wells R-28, R-42, R-62, R-43 and SCI-2, in accordance with 20.6.2.3106.B NMAC. AR No. 127.
14. On December 3, 2014, the amended application was deemed administratively complete by the GWQB, pursuant to 20.6.2.3108.A NMAC. AR No. 128.
15. On December 5, 2014, the PN-1 for the amended application was completed, pursuant to 20.6.2.3108.B, C and E NMAC. AR No. 131.
16. On January 22, 2015, the draft discharge permit for DP-1793 was issued, pursuant to 20.6.2.3108.H NMAC. AR 132.
17. On January 30, 2015, the PN-2 for the amended application was completed, pursuant to 20.6.2.3108.H NMAC. AR No. 143.
18. On February 25, 2015, comments on the draft permit and a request for hearing were submitted by DOE and LANS, pursuant to 20.6.2.3108.K NMAC. AR No. 133.
19. On March 2, 2015, comments on the draft permit and a request for hearing were submitted by the Petitioner, pursuant to 20.6.2.3108.K NMAC. AR No. 134.
20. On April 15, 2015, a technical meeting on the draft discharge permit was held, with the GWQB, DOE, LANS and the Petitioner in attendance. AR No. 146.
21. On April 29, 2015, the GWQB allowed DOE and LANS to submit alternate proposed language for the draft discharge permit. AR No. 135.
22. On April 29, 2015, the GWQB allowed the Petitioner to submit additional comments on the draft discharge permit and renewed its request for hearing. AR No. 136.
23. On May 28, 2015, a revised draft discharge permit was issued by the GWQB. AR No. 148.

24. On June 9, 2015, the GWQB allowed DOE and LANS to submit comments on the May 28, 2015 draft discharge permit. AR No. 137.

25. On June 15, 2015, the GWQB allowed the Petitioner to submit comments on the May 28, 2015 draft discharge permit and renewed its request for hearing. AR No. 138.

26. On July 7, 2015, the Secretary denied the request for hearing in the matter of DP-1793 in accordance with 20.6.2.3108.K NMAC. AR No. 139.

27. Pursuant to 20.6.2.3108.K NMAC, in denying the Petitioner's request for hearing, the Secretary evaluated whether there was substantial public interest in DP-1793.

28. The Secretary found there was not substantial public interest in the matter of DP-1793.

29. On July 9, 2015, DOE and LANS withdrew their request for hearing. AR No. 140.

30. On July 24, 2015, the GWQB issued a hearing denial letter to the Petitioner pursuant to 20.6.2.3108.K NMAC. AR No. 141.

31. On July 27, 2015, a final discharge permit for DP-1793 was approved with conditions pursuant to 20.6.2.3109.B NMAC. AR No. 142.

### ***B. Conclusions of Law***

1. The Department is an agency of the executive branch of the State of New Mexico, created pursuant to NMSA 1978, Section 9-7A-4.

2. The Department is tasked with enforcing and implementing regulations promulgated by the WQCC under the WQA, pursuant to NMSA 1978, Section 74-6-8.

3. Persons are required to have discharge permits for discharges that may allow effluent or leachate to move directly or indirectly into groundwater. NMSA 1978, § 74-6-5; 20.6.2.3104 NMAC.

4. Permittees United States Department of Energy (“DOE”) and Los Alamos National Security, Inc. (“LANS”) are “persons”, as defined by NMSA 1978, 74-6-2.I and 20.6.2.7.JJ NMAC.

5. The discharge permit application for DP-1793 complied with the requirements of NMSA 1978, Section 74-6-5 and 20.6.2.3106 NMAC.

6. The Secretary of Environment properly denied CCW’s hearing request pursuant to NMSA 1978, Section 74-6-5(G) and 20.6.2.3108.K NMAC.

7. The Petitioner CCW was properly informed of the decision to not hold a hearing in accordance with 20.6.2.3108.K NMAC.

8. DP-1793 was properly approved with conditions in accordance with NMSA 1978, 74-6-5 and 20.6.2.3109.B NMAC.

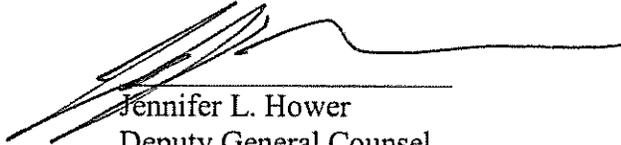
9. Written notice of the approval with conditions was provided to the Permittees and CCW pursuant to 20.6.2.3109.B NMAC.

10. The conditions imposed by the GWQB are reasonable and in accordance with NMSA 1978, Section 74-6-5 and 20.6.2.3109 NMAC.

## **V. CONCLUSION**

NMED respectfully requests that the WQCC find that the Secretary of Environment properly used his discretion under NMSA 1978, Section 74-6-5 and 20.6.2.3108.K NMAC to deny the Petitioner’s hearing request, the approval of the discharge permit with conditions was not in violation of the Water Quality Act and uphold the terms and conditions of DP-1793.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jennifer L. Hower", is written over a horizontal line. The signature is stylized with several overlapping strokes.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the forgoing Answer Brief was sent via electronic mail to all parties and the WQCC counsel on October 27, 2015.

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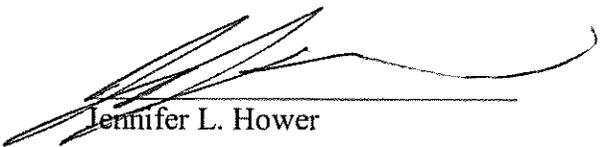
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## Comments from CCW regarding DP-1793 and GWQB Responses

### March 2, 2015 - CCW comments.

*There is no opportunity for public review and comment for the workplans required under Condition 3 describing each individual discharge.*

GWQB Response- GWQB revised the permit language to allow a 30-day public comment period for workplans submitted for discharge.

*There is no mention in the permit about taking care to ensure no run on or run off to or from the monitoring areas (SMAs) in the Individual Stormwater Sites, NPDES permits, groundwater discharge permits, well locations, drinking water wells, surface impoundments, and surface drainage features.*

GWQB Response- GWQB revised the permit language to include these concerns.

*Timely Postings – CW requests that the Draft Permit require (mandatory) posting of 30 specific deliverables and correspondence to the electronic public reading room (EPRR).*

GWQB response- GWQB requested that both the permittee and CCW provide a list of documents that they would agree to mandatory posting and a list of documents they would agree to voluntary posting. Ultimately, it was decided that posting of five specific documents would be mandatory and ten additional documents would be on a voluntary basis.

*CCW requests opportunity for Review and Comment on permittee's workplans.*

GWQB Response- GWQB revised the permit language to address these concerns.

*CCW requests clarification for the proposed 350,000 gallon per day (gpd) discharge.*

GWQB Response- GWQB and DOE/LANS provided clarification to CCW on the methodology for the quantity in response to this request.

*CCW requests clarification on version of the GWQB Risk Assessment Guidance Document referenced (Specifically Table A-1) in the draft permit.*

GWQB Response- GWQB revised the permit language to reference the most recent version of this document.

*CCW objects to the language in the DP that states "The groundwater to be treated and/or discharged may contain water contaminants which may be elevated above the standards of Section 20.6.2.3103 of NMAC and/or Table A-1 of the ... Risk Assessment Guidance for Site Screening Levels."*

GWQB Response- GWQB explained that this language is standard to all permits, and refers to the pre-treatment condition of the discharge. Discharge limits (quality of the discharge) are strictly defined in the permit to be less than 95% of all applicable water quality standards.

*CCW requests clarification of the permit term.*

GWQB Response- GWQB provided clarification that the permit expires five years from the effective date.

*CCW notes that, in their opinion, it is inappropriate to allow the entire site to be available for discharge... Details of land application techniques, calculation of application rates and calculation of water balance for the site should be presented in the workplan.*

GWQB Response- The permit was revised to clarify that the land application techniques and specific discharge locations are to be required in individual workplans. DOE/LANS provided a supplemental map showing greater detail of the discharge locations.

*CCW requests clarification to Section III language regarding the discharge to the 55 separate surface locations listed in tabular format in Attachment 1.*

GWQB Response- DOE/LANS provided a map as an additional Attachment depicting the proposed discharge locations.

*CCW submits that Condition 3 (workplan submittal) should provide a list of applicable water permits and covered sites in the work area as well as those downstream to the Rio Grande.*

GWQB Response- GWQB revised the permit language to include additional requirements to Condition 3 to address this concern.

*CCW notes that the LANS/DOE Standard Operating Procedure (SOP) for Land Application of Groundwater referenced in the draft permit could not be found in the public repository and requests an electronic copy.*

GWQB Response- GWQB requested a copy of that SOP from DOE/LANS in response to this comment. Permittees subsequently withdrew the language referencing that document and provided specific criteria under which the discharges would be conducted. GWQB incorporated those criteria into the discharge permit.

*CCW Suggests that Condition 10 requires LANS/DOE to use the most recently approved version of the Interim Facility-Wide Groundwater Monitoring Plan. CCW further cites Robert Gilkeson statements regarding NAS (National Academy of Science) reports calling into question efficacy of LANS/DOE sampling program.*

GWQB Response- GWQB revised the condition to require the most recently approved version of the Facility-Wide Groundwater Monitoring Plan. CCW and GWQB have had extensive discussion regarding Mr. Gilkeson's statements regarding monitoring well construction and potential influences on groundwater quality sampling. GWQB reviewed the NAS report in question, interviewed knowledgeable experts from GWQB DOE Oversight Bureau and DOE/LANS regarding the findings, and a provided written clarification statement to CCW regarding those issues.

*CCW suggests referencing most recent version of Table A-1 Risk Assessment Guidance.*

GWQB Response- GWQB revised the permit language to require the most recent version of this document.

*CCW suggests that language clarify GWQB's required approval of any future Corrective Action/Remediation Plans.*

GWQB Response- GWQB reviewed the language and believes that it is clear that GWQB would approve Corrective Action Plans.

*CCW suggests permittees be required to keep all records until the completion of the 2005 Order on Consent.*

GWQB Response- GWQB did not make changes to the record retention language. Document retention language in this permit is typical of discharge permits currently being issued.

*CCW expresses concern regarding potential use of tritium or other radioactive materials in permitted tracer studies.*

GWQB Response- GWQB made no modification to the permit language regarding potential use of radioactive materials as a tracer. Should DOE/LANS propose the use of tritium or other radionuclides in a workplan to conduct tracer studies under the term of this discharge permit, the workplan is required to be posted to the EPRR in order for the public to have an opportunity to provide comment on their use during the 30-day period required by the permit.

*CCW expresses concern regarding language in Permit that subcontractors would be responsible for management of treatment solids and disposal of treatment media.*

GWQB Response- GWQB concurs and made changes to the permit to reflect the permittees responsibility for these activities.

#### **April 15, 2015 CCW, DOE/LANS and GWQB have 3-hour meeting regarding the Draft DP-1793**

GWQB Response- CCW and DOE/LANS agreed that the workplans submitted pursuant to Condition 3 should be posted to the electronic public reading room. DOE/LANS proposed a 15-day public comment period, CCW proposed a 30-day public comment period. GWQB revised the Draft permit to require a 30-day public comment period following posting of the workplan to the electronic public reading room. CCW requested a mandatory posting of certain documents (a total of 30) to the public reading room. LANS/DOE agreed to a limited mandatory list. GWQB asked CCW and DOE/LANS to each submit a list of documents that would include mandatory and voluntary postings.

#### **April 29, 2015 CCW Submits Response to April 15 meeting**

*CCW incorporates by reference all March 2, 2015 comments, questions the basis for the permit under the WQA, reserves its right to raise issues under RCRA, and restates its request for public hearing. CCW*

*provides as basis for these requests that a) there is significant public interest, b) the permit fails to address recycling and/or reuse of water, c) does not address increasing seismic risk, and d) does not require mandatory posting of all documents/deliverables.*

*CCW resubmits the list of 30 suggested deliverables to be posted to the public reading room, and states, "GWQB asked that we provide a list of mandatory and voluntary postings (to the public reading room)." CCW describes the proposed discharge area as canyons that flow into the Rio Grande and restates their demand that all 30 documents be mandatory posting to the public reading room.*

GWQB Response- DOE/LANS provided a list of 20 documents that they would agree to voluntary post, with no documents requiring mandatory posting. Considering CCWs unwillingness to compromise from its original position, the GWQB modified the permit to list five (5) documents requiring mandatory publication in the public reading room and 10 documents for voluntary publication in the public reading room (voluntary being not subject to civil or criminal enforcement action).

*CCW states that the applicants have responsibilities to keep the public informed about activities that have the potential to impact. CCW states that there should not only be a 30-day public comment period following posting of the workplan, but that each workplan constitutes a discharge permit modification and would therefore be open for a request for public hearing. CCW cites 20.6.2.3108 NMAC as the basis for this demand.*

GWQB Response- The term "Discharge Permit Modification" is defined by 20.6.2.7.P as a change to the requirements of a discharge permit that result from a change in the location of the discharge a significant increase in the quantity of the discharge, or a significant change in the quality of the discharge, none of which apply to the individual workplans. GWQB holds the position that submittal of individual workplans for discharge activities conducted under the term of this permit do not constitute a permit modification as long as the location, quantity or quality of the discharge are within the limits defined within this permit.

*CCW remains unclear on the methodology that was used to derive the 350,000 gpd discharge limit and asks that the language provided by LANL be incorporated into the permit.*

GWQB Response- GWQB and LANS provided clarification on the methodology of calculation. There is no requirement that permittees provide such methodology in the Discharge Permit, only the proposed total discharge, thus no modifications to the permit were made.

*CCW states that there is no justification for "allowing the discharge to contain water contaminants which may be elevated above 20.6.2.3103 NMAC and/or subsection WW of 20.6.2.7 NMAC. CCW states that they understand that the language is 'boilerplate' permit language, but find it 'disconcerting'. CCW requests that the permit include language that the applicants will be batching the discharge.*

GWQB Response- The description of the batching of effluent streams would serve to further complicate and confuse the permit process and provide no substantial value.

*CCW requests that the permit term be stated as 5 years.*

GWQB Response- The Discharge Permit clearly states the effective date, and the expiration date to be 5-years from the effective date or the date discharge commences.

*CCW expresses concern on the land application, water balance and specific limitations to the application sites and suggests land application strategies, use of topographic map showing slopes, drainages, and other wells be placed into Condition #3. CCW provides concerns that application should protect cultural and historical places and would not occur on lands with slopes greater than 5% grade.*

GWQB Response- GWQB revised Condition #3 of the discharge permit to incorporate many of these concerns. It was GWQB's concern that publication of maps that included the location of cultural and historical places could result in vandalism or other negative consequences. Should the proposed discharges affect these types of resources, concerned members of the public would have an opportunity to object during the 30-day public comment period following the mandatory posting of the workplan on the EPRR.

*CCW comments (multiple comments) that the permit language references LANL SOP document ENV-RRR-OP-010.3 regarding land application to groundwater which is not available to GWQB or the public and questions how the criteria are to be met. CCW also recommends that the condition state the hours of discharge.*

GWQB Response- LANS withdrew the SOP as a guidance document and all references were removed. LANL provided in separate submittals specific conditions which were incorporated into the Discharge Permit and hours of discharge are included in the permit conditions.

*CCW submits 17 additional criteria for the discharge that should be included in the workplans submitted in compliance with Condition 3.*

GWQB Response- GWQB incorporated several of these criteria into the permit language. Others were deemed to not be applicable to the discharge, or already a requirement of the permit.

*CCW provides comments on the use of the Interim Facility-Wide Groundwater Monitoring Plan, and reiterates concerns about the quality of the data provided by the Permittees including excerpts from Robert Gilkeson regarding National Academy of Science reports, suitability of monitoring wells.*

GWQB Response- CCW has identified these same issues repeatedly regarding both DP-1793 and in extensive discussions regarding the Draft Discharge Permit DP-1132 for the Radioactive Nuclear Waste Treatment Facility. GWQB has reviewed the referenced NAS report, interviewed technical staff from LANL and NMED DOE Oversight Bureau regarding the concerns raised, and has provided written position to CCW regarding the issues. In the comments submitted in this letter, CCW states that they "agree to disagree."

*CCW requests that soil sampling should require the use of the most recent Table A-1.*

GWQB Response - GWQB has made this modification.

*CCW requests that the Closure and Post Closure language should reference the 2005 Order on Consent, and reference closure and post-closure activities. CCW also requests a 30-day public comment period for post closure requirements.*

GWQB Response - Closure requirements under this discharge permit are related to equipment, conveyances and appurtenances related to the treatment and application of the treated effluent. Completion of remedial obligations detailed in the 2005 Order on Consent are outside of the regulatory authority of this discharge permit.

*CCW request that the Discharge Permit require permittees to maintain all records until at least such time as the 2005 Order on Consent is completed.*

GWQB Response- GWQB made no modifications to the record retention language, retaining standard language typical of other discharge permits.

*CCW is concerned that permittees may propose use of radionuclides in tracer studies and asks for specific standards might be applied.*

GWQB Response- GWQB made no modifications to the permit language regarding specific tracers. Should DOE/LANS propose the use of radionuclides in tracer studies the public would have ample time to provide comment during the 30-day comment period required by the permit.

*CCW notes that previous concern voiced regarding management of treatment systems solids and media are adequately addressed in the revised permit. CCW also provided comments on permittees submitted comments. CCW also supported GWQB for numerous modifications made in response to comments to the Draft Permit.*

#### **June 15, 2015 – CCW Comments**

*CCW reiterates their position questioning the basis for permit under NM WQA, stating that they believe RCRA might apply to proposed activities and reserve right to raise issues under RCRA. CCW restates their request for a public hearing on the discharge permit “because the permit is too broad, and as a result, violates our procedural due process rights”.*

GWQB Response- When this subject was broached in the technical meeting, GWQB pointed out that even if the activities were conducted under RCRA, a discharge permit would still be required.

*CCW states that the Permit is too broad, citing Condition 3 (workplan) and limited public process for workplan and lack of opportunity to request a public hearing. CCW states that a ‘workplan’ is not defined in 20.6.2 NMAC thus the term is “ambiguous”. CCW further states that the workplan is a “Discharge Permit Modification” and should, therefore, be open to requests for Public Hearing under 20.6.2.3108. CCW continues that the public should be provided with a formal public notice and the final permit should not attempt to shortcut CCW’s 20.6.2.3108 “procedural due process rights”.*

GWQB Response- GWQB response to this has been previously addressed.

*CCW states that all 30 documents proposed in the revised discharge permit should be mandatory postings to the EPRR.*

GWQB Response- GWQB response to this has been previously addressed.

*CCW maintains that the maximum daily discharge should be 150,000 gpd.*

GWQB Response- GWQB and DOE/LANS provided clarification in electronic mail and verbally during the technical meeting on how the discharge quantity was derived. No modification to the discharge permit was made.

*CCW notes that a licensed New Mexico Professional engineer is not required to approve plans and specifications.*

GWQB Response- The permit requires that all specifications regarding liners and liner design, impoundment designs, and facility record drawings are required to be sealed by a licensed New Mexico Professional Engineer.

*CCW requests public comment period for closure and post-closure activities. CCW questions the variance language, and whether the variance would be under the Ground Water Quality regulations or RCRA Consent order.*

GWQB Response- Variance provisions are allowed under Ground Water Quality regulations and are common to all discharge permits. Closure activities are limited to removal of water treatment equipment, impoundments, conveyances and appurtenance for land application of the treated effluent and should not be subject to public comment.

*CCW provides 15 specific comments*

1. *Limit discharges to times when the ground is not frozen as discussed at the April 15, 2015 meeting. See Applicants' February 25, 2014 (or 2015?) Comment No. 14, which stated discharges/land applications would be done from March 16<sup>th</sup> to December 15<sup>th</sup>. Section III Authorization to Discharge.*

GWQB Response- GWQB included these revisions in the permit.

2. *Require full public notice, review and comment and opportunity for a public hearing as required by 20.6.2.3109 NMAC for the Condition 3 workplans.*

GWQB Response- GWQB revised the permit to allow opportunity for public comment.

3. *Condition 3. Require pre- and post- discharge soil sampling in the area used for discharge/land application.*

GWQB Response- The discharge permit allows soil sampling to be required by GWQB as deemed appropriate.

4. *Condition 3. Require notification about whether the proposed area for land application has been used before or is being used concurrently for another project.*

GWQB Response- GWQB has the regulatory authority to approve or disapprove a workplan submitted under Condition 3 if any aspect of it is deemed inappropriate.

5. *Condition 4. It is not clearly stated that GWQB approves the discharge/land application "off LANL property."*

6. GWQB Response- GWQB has the regulatory authority to approve or disapprove workplans submitted under Condition 3. The discharge permit identifies locations within the boundaries of the Laboratory. Proposed discharges outside of Laboratory boundaries would require concurrence of property owner as a condition of approval of the workplan.

7. *Condition 6 states that the "most recent edition" will be used. However (a) states that the "18<sup>th</sup>, 19<sup>th</sup> or current" version may be used. Please clarify.*

GWQB Response- This language is standard to all discharge permits and refers to American Public Health, Standards for Examination of Water and Wastewater. The referenced versions are all acceptable to GWQB.

8. *Condition 6(e) - RCRA is the Resource Conservation and Recovery Act.*

GWQB Response- This was a typographic error in permit templates that will be corrected in future template modifications.

9. *The GWQB Risk Assessment Guidance for Site Investigations and Remediation, December 2014 should be listed in Condition 6.*

NMD Response- the Risk Assessment guidance is referenced in the appropriate locations.

10. *Condition 9. Require soil sampling, if required by GWQB (Condition 8), to be included in the annual monitoring report.*

GWQB Response - GWQB made this revision.

11. *Condition 9. Require influent and effluent concentrations be included in the annual monitoring report.*

GWQB Response- Specific monitoring requirements are set for individual workplans (Condition 3) and required water sampling data are required submittals for the Annual Monitoring Report.

12. *Condition 9. Require annual reporting for areas where land application was done more than once during the reporting period and the cumulative use over the permit term.*

GWQB Response- GWQB has the authority under this discharge permit to require reporting of any appropriate data in the approval process for any workplan submitted under Condition #3.

13. *Condition 10. Add, "approved" in (most recent approved version) the Interim Facility-Wide Groundwater Monitoring Plan.*

GWQB Response- GWQB did not add the suggested language regarding to the most recent Interim Facility-Wide Groundwater Monitoring Plan.

14. *Condition 12. Under protest, CCW submits 12 mandatory posting documents and 2 voluntary posting documents.*

GWQB Response- In the final discharge permit, GWQB selected 5 documents for mandatory posting and 10 documents for voluntary posting.

