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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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COMMUNITIES FOR CLEAN WATER
Appellant,

vs. Ct. App. No. 35253

NEW MEXICO WATER QUALITY CONTROL COMMISSION
Appellee.

COMMUNITIES FOR CLEAN WATER'S BRIEF IN CHIEF

Pursuant to NMRA 12-305(F)(4), 12-214(B)(1), and 12-213(A)(6), Communities for Clean Water requests oral argument. Public participation in the permitting process to ensure that community waters which receive adverse impacts from LANL (from its current operations and its legacy waste) are kept safe for drinking, agriculture, sacred ceremonies and a sustainable future is an issue of fundamental public importance.

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Statement of Compliance

Communities for Clean Water certify that this Brief complies with the word limitations of New Mexico Rule of Appellate Procedure 12-213(F)(3). The body of this Brief contains 7,751 words, Times New Roman typeface. The word count for this Brief was obtained using Microsoft Word 2007.

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New Mexico Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n, 2007-NMSC-053 ¶ 20; 142 N.M. 533, 539 21

Paule v. Santa Fe County Bd. of County Comm'rs, 2005-NMSC-021 ¶ 32; 138 N.M. 82, 92 25

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Introduction

The Appellant, Communities for Clean Water, hereby files its Brief in Chief in accordance with Rule 12-213 NMRA.

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case.

This is an appeal from the Water Quality Control Commission's ("WQCC") *Final Order* sustaining the actions of the New Mexico Environment Department ("NMED") Secretary "in denying the request for a public hearing [made by Communities for Clean Water] and granting final approval of DP-1793." *In the Matter of a Petition Appealing the Secretary of the New Mexico Environment Department's Denial of a Hearing on DP-1793, WQCC No. 15-07(A), Final Order Pursuant to 20.1.3.16(F)(3) NMAC* ("*Final Order*"), page 7 (February 10, 2016); **[4 RP 01822]**.

B. The Interests of Communities for Clean Water.

Communities for Clean Water is a coalition of six community organizations representing residents and tribal members, many of whom are downwind and downstream of the Los Alamos National Laboratory ("LANL"), and within the potential areas of adverse environmental impacts from DP-1793. Communities for Clean Water is comprised of the following six community 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. Communities for Clean Water organizations have a joint mission of ensuring that community waters which receive adverse impacts from LANL, its current operations and its legacy waste, are kept safe for drinking, agriculture, sacred ceremonies, and a sustainable future. Communities for Clean Water has been working as a coalition addressing these issues since 2006. **[3 RP 01092-01099, 01104-01118, 01121-01126]** *See also, In the Matter of a Petition Appealing the Secretary of the New Mexico Environment Department's Denial of a Hearing on DP-1793, WQCC No. 15-07(A), Hearing Transcript*, page 8, lines 4-25; page 9: 1-4 (December 8, 2015) **[3 RP 01683:4-25; 01684:1-4]**

Communities for Clean Water's members use and enjoy the natural resources of Los Alamos County, New Mexico, including areas in the vicinity of LANL. For many of the Pueblo and Native American members of Communities for Clean Water, the area in and around the LANL property remains a sacred site and is significant for ceremonial purposes, as well as for gathering clay and water. **[*Id.*]**

Communities for Clean Water's procedural concerns regarding DP-1793 stem from the Secretary of NMED's denial of its request for a public hearing on the draft DP-1793 before the discharge permit was approved by the department.

Under the New Mexico Water Quality Act ("Water Quality Act" or "Act"), "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) (2005). Additionally, under Section 20.6.2.3108.K NMAC, "A public hearing shall be held if the secretary determines there is substantial public interest." *Id.*

The Secretary violated NMSA 1978, Section 74-6-5(G) and Section 20.6.2.3108.K NMAC when he denied its request for a public hearing on the draft DP-1793. *See generally Communities for Clean Water's First Amended Verified Petition for Permit Review of New Mexico Environment Department Secretary's Denial of a Request for a Public Hearing and Final Approval of DP-1793*, pages 2-7 (August 24, 2015) **[3 RP 01305-01310]**; *Communities for Clean Water's Opening Brief in Support of Its Petition for Review of New Mexico Environment Department Secretary's Denial of a Request for a Public Hearing and Final Approval of DP-1793,* pages 15-16 (October 2, 2015). **[3 RP 01487-01488]**

Further, the Secretary deprived Communities for Clean Water of the opportunity to submit evidence, data, views or arguments orally or in writing, and to examine witnesses testifying at a public hearing on the substance of the draft DP-1793. **[*Id.*]** Therefore, NMED did not address Communities for Clean Water's

substantive concerns with the draft DP-1793.

C. Course of Administrative Proceedings and Disposition.

1. NMED Proceedings and Disposition.

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 NMED in December of 2011. **[1 RP 00027-00043]** From January 2012 through October 2014, NMED issued a series of temporary permissions to Permittees for discharges related to various well development and pump tests. **[1 RP 00044-00046, 00346-00349, 00350-00353, 00469-00471, 00482-00485, 00486-00488; 2 RP 00734-00737, 00917-00918, 00919-00927, 00998-01000]** On January 8, 2014, Permittees submitted a revised application for discharges related to groundwater remediation activities at LANL. **[1 RP 00560-00613]** NMED deemed the amended application administratively complete on December 3, 2014 **[2 RP 01001-01004]**, and public notice was completed on January 21, 2015. **[3 RP 01188-01194]**

The Permittees were the first to submit a request for a public hearing on the draft DP-1793 on February 25, 2015. **[3 RP 01055-01091]** Shortly thereafter, Communities for Clean Water submitted its own request for a public hearing, along with comments on the draft DP-1793, on March 2, 2015. **[3 RP 01092-01099]** Communities for Clean Water clearly demonstrated to NMED who it represents.

[***Id.***] NMED, in response to these two requests for a public hearing on the draft DP-1793, held a "technical meeting" on April 15, 2015. No public notice was given for this "technical meeting." **[3 RP 01198-01199]** The "technical meeting" raised new issues and concerns, as a result of which Communities for Clean Water submitted a second request for a public hearing, along with a second set of comments on the draft DP-1793, on April 29, 2015. **[3 RP 01104-01118]**

On May 28, 2015, NMED released a final draft DP-1793. **[3 RP 01202-01221]** The Permittees submitted comments on the final draft DP-1793 on June 9, 2015 **[3 RP 01119-01120]**, and Communities for Clean Water submitted a third request for a public hearing, along with comments on the final draft DP-1793, on June 15, 2015. **[3 RP 01121-01126]**

On July 7, 2015, the Secretary of NMED, in an internal memorandum, informed the Ground Water Quality Bureau ("GWQB") of his decision to deny Communities for Clean Water's June 15, 2015 request for a public hearing on the draft DP-1793. **[3 RP 01127-01134]** Communities for Clean Water was not informed of the Secretary's decision denying its June 15, 2015 request for a public hearing until July 24, 2015. **[3 RP 01157-01158]**

The Permittees withdrew their request for a public hearing on July 9, 2015 **[3 RP 01135-01156]** and on July 24, 2015, the GWQB issued a hearing denial letter to Communities for Clean Water. **[3 RP 01157-01158]** The GWQB

provided the following reason for its denial of Communities for Clean Water's request for a public hearing:

> 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.

[3 RP 01157]

Three days later NMED approved DP-1793. **[3 RP 01159-01187]**

2. WQCC Proceedings and Disposition.

Communities for Clean Water filed a *Petition for Review of the New Mexico Environment Department Secretary's Denial of a Request for a Public Hearing on DP-1793 and Final Approval of DP-1793* **[3 RP 01223-01295]** and *Motion to Stay DP-1793* **[3 RP 01296-01303]** with the WQCC on August 21, 2015. Communities for Clean Water then filed a *First Amended Verified Petition for Review* **[3 RP 01304-01377]** and *Amended Motion to Stay DP-1793* **[3 RP 01378-01412]** with the WQCC on August 24, 2015.

On October 13, 2015, the WQCC heard oral argument on Communities for Clean Water's *Amended Motion to Stay DP-1793*, voted unanimously to deny the *Amended Motion to Stay DP-1793*. *WQCC No. 15-07(A) Hearing Transcript,* page

78: 1-25, page 79: 1-4 (October 13, 2015) **[3 RP 01572: 1-25, 01573: 1-4]**[1] The WQCC then voted unanimously to schedule a hearing on Communities for Clean Water's *Amended Petition for Permit Review* for December 8, 2015 and for the Chairman of the WQCC to appoint a hearing officer. **[3 RP 01577: 1-10, 01579: 3-9]**

On December 8, 2015, oral argument was heard on Communities for Clean Water's *Amended Petition for Review of Secretary's Denial of a Request for a Public Hearing on DP-1793 and Final Approval of DP-1793*, with the WQCC voting 9-2 to "sustain the decision by the Secretary." **[4 RP 01793: 19-23, 01795: 5-6]**

The WQCC issued its *Final Order* on February 10, 2016, sustaining the actions of NMED Secretary "in denying the request for a public hearing and granting final approval of DP-1793." *Final Order*, page 7 (February 10, 2016) **[4 RP 01822]** It is unclear whether the WQCC voted to approve this *Final Order*. The *Final Order* is merely signed by the Chair of the WQCC. **[4 RP 01822]**

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[1] The index for the record proper has mistitled the October 13, 2015 hearing transcript by titling it as the December 8, 2015 hearing transcript. *See Index to the Administrative Record Proper*. The index also provides the wrong date for the October 13, 2015 hearing by stating the hearing took place on October 18, 2015. *Id*.

II. STANDARD OF REVIEW

The Water Quality Act provides that "[u]pon appeal, the court of appeals shall set aside the action only if 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.

NMSA 1978, § 74-6-7(B) (1993).

III. THE ISSUES WERE PROPERLY PRESERVED

Issues regarding the inadequacy of the WQCC's decision to "sustain the decision of the Secretary" first arose when the Commission made its decision; therefore, Communities for Clean Water had no opportunity to preserve this issue. Communities for Clean Water raised the remaining issues in Section IV of this Brief in Chief in its filings with the WQCC. *See generally* Communities for Clean Water's *Petition for Review of the New Mexico Environment Department Secretary's Denial of a Request for a Public Hearing on DP-1793 and Final Approval of DP-1793* **[3 RP 01223-01295]** and *Motion to Stay DP-1793* **[3 RP 01296-01303]**; *Amended Petition for Review* **[3 RP 01304-01377]** and *Amended Motion to Stay DP-1793* **[3 RP 01378-01412]**; *Opening Brief in Support of Petition for Review* **[3 RP 01473-01494]**; *Consolidated Reply Brief in Support of Petition for Review* **[4 RP 01647-01675]**, and in proceedings before the WQCC.

See generally WQCC No. 15-07(A) Hearing Transcript (October 13, 2015) **[3 RP 01495-01593]** and *WQCC No. 15-07(A) Hearing Transcript* (December 8, 2015). **[4 RP 01676-01815]**

In the alternative, if any of the issues raised in this *Brief in Chief* were not properly preserved pursuant to Rule 12-216(A) NMRA, Communities for Clean Water request this Court to consider such issues pursuant to the general public interest exception found in Rule 12-216(B)(1). *See Rivera v. Am. Gen. Fin. Servs.*, 2011-NMSC-033, 150 N.M. 398; *State v. Pacheco*, 2007-NMSC-009, 141 N.M. 340. Ensuring that community waters which receive adverse impacts from LANL (from its current operations and its legacy waste) are kept safe for drinking, agriculture, sacred ceremonies and a sustainable future is an issue of fundamental public interest.

IV. ARGUMENT

The Commission's decision to sustain the actions of the Secretary denying Communities for Clean Water's request for a public hearing on draft DP-1793 is not in accordance with the law for four reasons. First, the WQCC applied the wrong standard of review in a Petition for Permit Review proceeding. Second, neither the WQCC nor the Secretary made the required determination on whether substantial public interest existed in draft DP-1793. Third, the WQCC's *Final Order* is based upon facts and information irrelevant to the issue before the

Commission and not in the record. Finally, the WQCC failed to cite to the record in support of its decision.

Furthermore, the WQCC's and the Secretary's interpretation of Section 20.6.2.3108.K NMAC violates the plain language of the regulation, leads to an absurd or unreasonable result, and conflicts with the Water Quality Act's public participation requirements.

The WQCC's and the Secretary's decisions are also not supported by substantial evidence in the record, and are an abuse of discretion when viewed in light of the whole record and in light of New Mexico Supreme Court precedent.

A. The WQCC's Decision Is Not In Accordance With the Law.

1. The WQCC applied the wrong standard of review in a Petition for Permit Review proceeding.

The WQCC's *Final Order* states that NMSA 1978, Section 74-6-5(Q) and Section 20.1.3.16(F)(3) NMAC "provide the standard of review for a permit review before the Commission," yet fails to explain what the standard of review is. **[4 RP 01819]** Section 74-6-5(Q) (2005) 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.

Id. The WQCC's rules of adjudicatory procedure mirror the language found in

NMSA 1978, Section 74-6-5(Q). *See* Section 20.1.3.16.F(3) NMAC.

In the proceedings below, Communities for Clean Water requested that the WQCC clarify the standard of review to be applied for a Petition for Permit Review proceeding at the December 8, 2015 hearing. **[4 RP 01708: 18-25]**[2] Communities for Clean Water argued below that if Section 74-6-5(Q) does provide the standard of review to be applied by the Commission, then under Section 74-6-5(Q) the only question before the Commission is whether substantial public interest existed in the draft DP-1793 **[4 RP 01709:14-19]** and that the Commission would not consider issues pertaining to the Secretary's discretion, his abuse of that discretion, and whether his permitting actions were arbitrary and capricious. **[4 RP 01709:20-25, 01710: 1-3, 01712:2-7]** Hearing Officer Holappa affirmed that the only issue before the Commission under the standard of review provided in Section 74-6-5(Q) was the issue of substantial public interest in the draft DP-1793. **[4 RP 01713:12-16]**

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[2] Counsel for Communities for Clean Water stated to the WQCC at the December 8, 2015 hearing the following:

> Permittees are correct to say that Petitioners have provided the Commission with a more deferential standard of review. The reason for having done so is because we currently find the standard contained in 74-6-5(Q) to be a bit unclear, but however, we welcome this opportunity for the Commission to actually clarify what that standard is and how it's to be applied.

[4 RP 01708:18-25]

Under Section 74-6-5(Q) the Commission was required to either 1) make the required determination regarding substantial public interest itself, or 2) reverse the Secretary's decision because the Secretary failed to make this required determination. Section 74-6-5(Q) gives the Commission three choices: "sustain, modify or reverse the action of the constituent agency." Therefore, the Commission could only have legitimately made the choice to either 1) modify the Secretary's decision (by making the required determination regarding substantial public interest itself), or 2) reverse the Secretary's decision. The WQCC made neither of these choices.

Significantly, the Commission's *Final Order* concludes with, "... the Commission finds the Secretary *appropriately applied his discretion* in denying the request for a public hearing..." (emphasis added).[3] **[4 RP 01822]** This clearly demonstrates that the standard of review actually applied by the WQCC was a deferential standard and not the standard provided in Section 74-6-5(Q). Therefore Communities for Clean Water requests this Court to remand this matter back to the WQCC for a review consistent with the standard of review provided in Section 74-6-5(Q).

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[3] Commissioner Tongate also stated that, "...the decision by the Secretary to deny the permit hearing was based on the record and is not arbitrary or capricious or an abuse of discretion," as the reason for his denying Appellant's appeal at the December 8, 2015 hearing. **[4 RP 01780: 10-12]**

2. Neither the WQCC nor the Secretary made the required determination on whether substantial public interest existed in the draft DP-1793.

a. The WQCC failed to make the required determination regarding substantial public interest in the draft DP-1793.

In addressing public participation in the permitting process, the Water Quality Act, NMSA 1978, Section 74-6-5(G) provides that:

> 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.*"

Id. (Emphasis added.)

The Act's implementing regulations require the Secretary to make a determination regarding whether substantial public interest exists in a permit so that a public hearing "shall be held." Section 20.6.2.3108.K NMAC provides that:

> Requests for a public 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."

Id. (Emphasis added.)

As discussed above on pages 10-12 of this *Brief in Chief*, the standard of review provided in Section 74-6-5(Q) requires the WQCC to make its own determination on whether substantial public interest existed in draft DP-1793 because the Secretary failed to make this required determination. The

Commission's *Final Order* clearly demonstrates that it failed to make this required determination. Therefore, Communities for Clean Water request this Court to remand this matter to the Commission for a determination regarding whether substantial public interest existed in draft DP-1793.

b. The Secretary failed to make the required determination regarding substantial public interest in draft DP-1793.

Communities for Clean Water submitted its first request for a public hearing on draft DP-1793 on March 2, 2015 **[3 RP 01092-01099]** and received no response from NMED. Communities for Clean Water submitted its second request for a public hearing on draft DP-1793 on April 29, 2015 **[3 RP 01104-01118]** and received no response from NMED. Communities for Clean Water submitted its third request for a public hearing on draft DP-1793 on June 15, 2015 **[3 RP 01121-01126]** and finally received a response from NMED. On July 24, 2015, the Secretary (acting through GWQB's Acting Chief, Michelle Hunter) issued a denial letter in response to Community for Clean Water's third request for a public hearing on draft DP-1793. **[3 RP 01157-01158]**

The GWQB provided the following reason for its denial of Community for Clean Water's request for a public hearing:

> 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.

[3 RP 01157]

The denial letter to Communities for Clean Water demonstrates that the Secretary failed to comply with the regulations when denying Communities for Clean Water's request for a public hearing on the draft DP-1793. The denial letter on its face does not provide any support for the argument that the Secretary made the required determination regarding substantial public interest. **[*Id.*]**

The only determinations made by the Secretary were those regarding the alleged transparency of the permit, the level of community involvement NMED allowed in the permit process, the purpose of the permit, and the issuance of the permit being "in the public interest." **[*Id.*]** None of these "determinations" addresses the sole criterion on which the Secretary must base his determination for holding a public hearing: the presence or absence of substantial public interest in the draft DP-1793.

A memorandum prepared by the GWQB on July 8, 2015 also demonstrates that the Secretary failed to make the required determination regarding substantial public interest. This memorandum merely provides the opinion of the Pollution Prevention Section ("PPS") of the GWQB that:

> After discussion with both parties, 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 GWQB recommends that the request for hearing be denied.

[3 RP 01127-01134]

The Secretary merely signed off on the GWQB's recommendation to deny the request for a public hearing in this memorandum and did not make the required determination regarding substantial public interest. Nowhere in the record can a determination regarding substantial public interest in draft DP-1793 by the Secretary be found.

The WQCC issued a *Final Order* of its December 8, 2015 decision on February 10, 2016. The *Final Order* states "...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," without any citation to supporting evidence in the record. **[4 RP 01821]**

The WQCC clearly erred in finding that, based on the record, the Secretary made the required determination regarding substantial public interest in draft DP-1793 when denying Communities for Clean Water's request for a public hearing.

3. The WQCC's *Final Order* is based upon facts and information irrelevant to the issue before the Commission and not in the record.

Tribunals are ordinarily limited to the facts in the record, so that absent supporting record evidence, findings are clearly erroneous. *United States v. Boyd*, 289 F.3d 1254, 1258 (10th Cir. 2002). The Water Quality Act and its implementing regulations also provide that the WQCC, in a Petition for Permit Review proceeding, is limited to the facts in the record:

> 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."

NMSA 1978, § 74-6-5(Q).

Section 20.1.3.16.F(1) NMAC also states, "No new evidence will be admitted during oral argument." Finally, Section 20.1.3.16.F(3) NMAC provides that:

> The commission shall consider and weigh only the evidence contained in the record for 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.

Id.

The WQCC's *Final Order* expressly states that the Commission's decision was based on two "critical issues" raised during oral argument at the December 8, 2015 hearing. The first "critical issue" was that "...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." **[4 RP 01821]** The purpose of a permit and whether harm will result in delaying remediation of contaminated groundwater are irrelevant to the issue that was before the Commission. The sole issue before the Commission was whether substantial public interest existed in the draft DP-1793 so that a public hearing should have been held. At the December 8, 2015 hearing, Hearing Officer Holappa affirmed that this was the sole issue before the Commission. **[4 RP 01713: 14-16]**

Additionally, Communities for Clean Water raised several objections to questions asked by Commissioners Dawson, Tongate, Dominguez and DeRose-Bamman pertaining to remediation activities of DP-1793 and the migration and clean up of a chromium plume - issues not before the WQCC and which elicited facts not found in the administrative record. **[4 RP 01763:8-14, 01766:17-23, 01768:12-15]** Each objection raised by Communities for Clean Water on this matter was sustained by the Hearing Officer. **[4 RP 01763:15-16, 01766:24-25, 01767:1-4]**

The second "critical issue" raised during oral argument "that factored heavily into the Commission's decision to sustain the Secretary's decision" was

that the Appellant never challenged the merits of DP-1793. **[4 RP 01713:14-16]** Communities for Clean Water stated at the December 8, 2015 hearing that such an issue was irrelevant and not before the Commission. **[4 RP 01712:2-7]** Again, the sole issue before the WQCC was whether substantial public interest existed in the draft DP-1793 to warrant holding a public hearing.

The Commission clearly considered and weighed evidence not in the record, in violation of *United States v. Boyd,* 289 F.3d 1254, 1258 (10th Cir. 2002); NMSA 1978, Section 74-6-5(Q); Section 20.1.3.16.F(1) NMAC and Section 20.1.3.16.F(3) NMAC.

4. The WQCC failed to cite to evidence in the record in support of the Commission's conclusion that "...the Secretary considered the public interest" and that "...the Secretary properly determined any remaining concerns...failed to rise to the level of substantial public interest."

New Mexico courts have held on several occasions that administrative agencies must explain the reasons for their decisions so that reviewing courts may be able to conduct a meaningful review. *See Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 19; 125 N.M. 786, 792. Moreover, the agency's explanation must be based on the record before the agency. *See Fasken v. Oil Conservation Commission*, 1975-NMSC-009, ¶ 8; 87 N.M. 292, 294; *Roswell v. N.M. Water Quality Control Comm'n*, 1972-NMCA-160, ¶ 14; 84 N.M. 561, 565.

Several provisions of the New Mexico Water Quality Act, and its implementing regulations, provide that the WQCC must explain the reasons for its decisions. NMSA 1978, Section 74-6-5(Q) states, "The commission shall enter ultimate findings of fact and conclusions of law and keep a record of the review," and NMSA 1978, Section 74-6-5(S) (2005) states, "The commission shall notify the petitioner and all other participants in the review proceeding of the action taken by the commission and the reasons for that action." Finally, Section 20.1.3.16.F(3) NMAC states, "The commission shall set forth in the final order the reasons for its actions."

Though the WQCC's *Final Order* provides various reasons for its decision, the Commission fails to provide any citations to the record in support of its reasoning and conclusions. For example, the *Final Order* states "...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," without any citation to supporting evidence in the record. **[4 RP 01821]** The *Final Order* also failed to provide citations to supporting evidence in the record for its statement that, "...the Secretary properly determined any remaining concerns of that sole participant failed to rise to the level of substantial public interest." **[*Id.*]**

For the above reasons, Communities for Clean Water request this Court to remand this matter to the WQCC for the Commission to issue a decision in accordance with the law.

B. The WQCC's and the Secretary's Interpretation of Section 20.6.2.3108.K NMAC Violates the Plain Language of the Regulation, Leads to an Absurd or Unreasonable Result, and Conflicts with the Water Quality Act's Public Participation Requirements.

New Mexico courts have provided substantial guidance on statutory and regulatory construction. The New Mexico Supreme Court has held, "When construing statutes, [the] guiding principle is to determine and give effect to legislative intent." *New Mexico Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053 ¶ 20; 142 N.M. 533, 539. To determine legislative intent, courts "first [look] to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* This Court has also held that if "there is no ambiguity in the plain language of a statute, and where no absurd or unreasonable result will occur," the courts "apply the plain meaning rule and refrain from further statutory construction." *Martinez v. Cornejo*, 2009-NMCA-011 ¶ 11; 146 N.M. 223, 227.

The canons of statutory construction are also applied to regulatory construction by the courts. *Albuquerque Bernalillo Co. Water Util. Auth v. N.M. Public Regulation Comm'n*, 2010-NMSC-013, ¶ 51; 148 N.M. 21, 39 (*citing Johnson v. N.M. Oil & Conservation Comm'n,* 1999-NMSC-021; 127 N.M. 120).

See also, *State v. Juan*, 2010-NMSC-041, ¶39, 148 N.M. 747, 759 (*quoting State v. Javier M.*, 2001-NMSC-030; 131 N.M. 1) (holding that interpretations that lead to absurd or unreasonable results or render any of the regulatory language extraneous or mere surplusage must be avoided); *Pueblo of Picuris v. N.M. Energy, Minerals and Nat. Res. Dept.*, 2001-NMCA-084 ¶ 14; 131 N.M. 166, 169 (holding that a court must consider the entire regulatory and statutory scheme and interpret each part harmoniously with the whole to effectuate the statute's purpose).

1. The Secretary's interpretation of Section 20.6.2.3108.K NMAC violates the plain language of the regulation.

The Secretary's interpretation of 20.6.2.3108.K NMAC clearly 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 clearly supports the existence of substantial public interest in DP-1793. **[3 RP 01092-01099, 01104-01118, 01121-01126]**

The plain language of the regulation does not allow the Secretary to base his decision whether or not to hold a public hearing on such factors as the transparency of a permit, the level of community involvement allowed by NMED, the purpose of the permit, and the issuance of the permit being in the public interest. The

Secretary's interpretation clearly violates the plain language canon of regulatory construction.

2. The Secretary's interpretation of Section 20.6.2.3108.K NMAC leads to an absurd and unreasonable result.

The Secretary's interpretation of this regulation also led to an absurd and unreasonable result – his alleged finding that substantial public interest did not exist in DP-1793. Under the Secretary's interpretation of "substantial public interest" a coalition of six organizations (representing 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. The Secretary's interpretation of the regulation clearly violates the "absurd or unreasonable result" canon of regulatory construction.

3. The Secretary's interpretation of Section 20.6.2.3108.K NMAC conflicts with the Water Quality Act's public participation requirements.

The New Mexico Supreme Court has provided that, "If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail." *Jones v. Empl. Servs. Div. of Human Servs. Dep't*, 1980-NMSC-120, ¶ 3; 95 N.M. 97, 98. The manner in which the Secretary applied Section 20.6.2.3108.K NMAC conflicts with the Water Quality Act

because it seriously undermines the Act's public participation requirements, thereby violating the "harmonious application" canon of regulatory construction.

Section 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 permit in order to give full meaning and effect to the Act's public participation requirements. *See* NMSA 1978, § 74-6-5(G). Because the Secretary's application of Section 20.6.2.3108.K NMAC conflicts with NMSA 1978, Section 74-6-5(G), the language of the statute prevails in this matter. Therefore, a public hearing on the draft DP-1793 should have been held.

In conclusion, by sustaining the Secretary's interpretation and application of Section 20.6.2.3108.K NMAC, the WQCC therefore has applied Section 20.6.2.3108.K NMAC in a manner which violates the plain language of the regulation, leads to an absurd and unreasonable result, and conflicts with the Water Quality Act's public participation requirements.

C. The WQCC's Conclusion that the Secretary "Considered the Public Interest" and "Properly Determined Any Remaining Concerns...Failed to Rise to the Level of Substantial Public Interest" is Not Supported by Substantial Evidence in the Record and is an Abuse of Discretion.

1. The WQCC's conclusion that the Secretary "considered the public interest" and "properly determined any remaining concerns...failed to rise to the level of substantial public interest" is not supported by substantial evidence in the record.

This Court, in *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, has provided that agency decisions must be supported by substantial evidence in the record:

> For administrative appeals, the substantial evidence rule is supplemented with the whole record standard for judicial review of findings of fact made by administrative agencies. In a whole record review, the review is 'not...limited to those findings most favorable to the agency order.' The reviewing court must also look to evidence that is contrary to the findings and then decide whether, on balance, the agency's decision was supported by substantial evidence. When the agency's decision is supported by substantial evidence the reviewing court does not reweigh evidence to reach a contrary result; however, when the evidence as a whole does not support the agency's decision, that decision cannot be upheld.

1987-NMCA-153 ¶39; 107 N.M. 469, 477 (internal citations omitted).

The New Mexico Supreme Court further elaborated that, "Substantial evidence means relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *Paule v. Santa Fe County Bd. of County Comm'rs*, 2005-NMSC-021 ¶ 32; 138 N.M. 82, 92.

In the WQCC's *Final Order*, it erroneously found that the Secretary did

make a determination regarding substantial public interest in draft DP-1793. **[4 RP 01821**, stating that, "The Secretary ultimately determined this information failed to rise to the level of substantial public interest," and that, "...the totality of the evidence contained in the record sufficiently supports the conclusion that the Secretary considered the public interest." ***[Id.]*** As discussed above on pages 19-20, the Commission failed to cite to evidence in the record in support of these findings. **[4 RP 01816-01824]** In fact, substantial evidence in the record actually demonstrates that the Secretary failed to make the required determination regarding substantial public interest in the draft DP-1793, as explained above on pages 14 - 16 of this *Brief in Chief*.

2. The WQCC's conclusion that the Secretary "considered the public interest" and "properly determined any remaining concerns...failed to rise to the level of substantial public interest" is an abuse of discretion.

An agency's exercise of discretion becomes an abuse of discretion when, "... it is unreasonable or without a rational basis, when viewed in light of the whole record." *Citizen Action v. Sandia Corp. (In re Request for a Class 3 Permit Modification for Corrective Measures for the Mixed Waste Landfill Sandia Nat'l Labs.)*, 2008-NMCA-031 ¶ 18; 143 N.M. 620, 625. The WQCC's decision that the Secretary "considered the public interest" and "properly determined any remaining concerns...failed to rise to the level of substantial public interest" is an abuse of discretion when viewed in light of the whole record and when viewed in light of

New Mexico Supreme Court precedent.

The WQCC's decision that the Secretary "considered the public interest" and "properly determined any remaining concerns...failed to rise to the level of substantial public interest," when viewed in light of the whole record, is unreasonable and without a rational basis. Again, as previously discussed above, the Commission failed to cite to evidence in the record in support of this finding. Substantial evidence in the record demonstrates that the Secretary failed to make the required determination regarding substantial public interest in the draft DP-1793. Communities for Clean Water therefore request this Court to vacate the Commission's decision and remand this matter to the Commission for a decision which is supported by substantial evidence in the record and is not an abuse of discretion.

D. In the Alternative, if this Court Finds That the Secretary Did Make the Required Determination Regarding Substantial Public Interest in the Draft DP-1793, the Secretary's Decision is Not Supported by Substantial Evidence in the Record and is an Abuse of Discretion.

1. The WQCC's and the Secretary's determination that substantial public interest did not exist in the draft DP-1793 is not supported by substantial evidence in the record.

As previously stated, *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n* has provided that agency decisions must be supported by substantial evidence in the record. 1987-NMCA-153 ¶39; 107 N.M. 469, 477. The Secretary, in his denial letter to Communities for Clean Water, failed to cite to

evidence in the record in support of his conclusion that substantial public interest did not exist in the draft DP-1793. **[3 RP 01157-01158]** In fact, substantial evidence in the record actually demonstrates that substantial public interest did exist in the draft DP-1793, as explained below.

2. **The WQCC's and the Secretary's determination that substantial public interest did not exist in the draft DP-1793 is an abuse of discretion.**

   a. **The Secretary's determination that substantial public interest did not exist in the draft DP-1793 is an abuse of discretion when viewed in the light of the whole record.**

As previously stated, *Citizen Action* provides that an agency's exercise of discretion becomes an abuse of discretion when, "... it is unreasonable or without a rational basis, when viewed in light of the whole record." 2008-NMCA-031 ¶ 18; 143 N.M. 620, 625. The NMED internal memorandum and letter of denial to Communities for Clean Water 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.

[3 RP 01127-01134 and 3 RP 01157-01158, respectively] This language makes clear that the Secretary's determination was an abuse of discretion in three ways.

First, neither the Water Quality Act nor its implementing regulations provide factors to be considered by the Secretary when determining whether there

is substantial public interest. 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).

Lastly, 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 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 important, 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.

b. The Secretary's determination that substantial public interest did not exist in the draft DP-1793 is an abuse of discretion when viewed in light of New Mexico Supreme Court precedent.

What constitutes "substantial public interest" has been addressed by the New Mexico Supreme Court in the case of *Republican Party v. N.M. Taxation and Revenue Dept.*, 2012-NMSC-026, ¶ 10; 2012 N.M. LEXIS 248, ¶ 10. The Court held that a case presents 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." *Id.*

Communities for Clean Water argued in the proceedings below that the right to a reasonable opportunity to submit evidence, data, views, arguments orally or in writing, and cross-examine any experts testifying at a hearing constitutes an "issue of public importance" under *Republican Party*. **[4 RP 01716: 10-15]** More importantly, the issues raised by Communities for Clean Water in its three sets of substantive comments and requests for a public hearing on the draft DP-1793 demonstrate substantial public interest under the principles enunciated in *Republican Party* because such issues are fundamentally important to the public and the communities affected by DP-1793. **[3 RP 01092-01099, 01104-01118,**

01121-01126] Ensuring that community waters which receive adverse impacts from LANL (from its current operations and its legacy waste) are kept safe for drinking, agriculture, sacred ceremonies and a sustainable future is an issue of fundamental public importance.

The New Mexico Supreme Court has also addressed the issue of public participation in the permitting process. In *Colonias Development Council v. Rhino Environmental Services, Inc.*, 2005-NMSC-24; 138 N.M. 133, the Court reasoned that the public participation provisions in the Solid Waste Act evinced the Legislature's intent that the public play a vital role in the permitting process. *Id.* at ¶ 21. Similarly, the Legislature intended that the public play a vital role in the permitting process under the Water Quality Act.

The purpose of the Water Quality 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 (1993, as amended through 2009); §§ 20.6.2.3000 through 5210 NMAC; *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) (2003).

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 believed public participation is vital to the success of the Act. 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.[4]

Communities for Clean Water, a coalition of six community organizations representing a significant number of interested persons in the affected area, raised several substantive issues with draft DP-1793. 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

[4] Communities for Clean Water presented this argument in the proceedings below. **[4 RP 01687: 2-10, 01655-01657]**

of the discharge permit which would require an opportunity for public comments, as well as an opportunity for a public hearing to be held. **[3 RP 01092-01099, 01104-01118, 01121-01126]** The Legislature clearly intended for these fundamental issues of great public importance to be addressed at a public hearing.

For the above reasons, the Secretary's decision denying Appellant's request for a public hearing on the draft DP-1793 is an abuse of discretion when viewed in light of New Mexico Supreme Court precedent. Communities for Clean Water is clearly entitled to a public hearing on DP-1793 because it demonstrated the requisite substantial public interest in the permit. Communities for Clean Water therefore respectfully request this Court to restore integrity to the public participation procedures of the Water Quality Act and vacate the Commission's *Final Order* sustaining the Secretary's decision denying Appellant's request for a public hearing on the draft DP-1793, stay DP-1793 currently in effect, and remand this matter back to NMED so that a public hearing may be held on the substance of the permit.

V. CONCLUSION

The Commission's decision to sustain the actions of the Secretary denying Communities for Clean Water's request for a public hearing on draft DP-1793and approving DP-1793 is not in accordance with the law for the reasons discussed above. The decisions of the Commission and the Secretary are also not supported

by substantial evidence in the record and are an abuse of discretion.

Communities for Clean Water request this Court to vacate the WQCC's decision and remand this matter to the WQCC to issue a decision in accordance with the law if this Court finds any of the following:

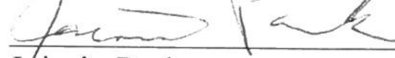
1. The Commission failed to apply the appropriate standard of review and failed to make the required determination regarding substantial public interest in the draft DP-1793;
2. The Commission erroneously found that the Secretary had made the required determination regarding substantial public interest in the draft DP-1793;
3. The Commission's decision inappropriately relied upon facts and information irrelevant to the issue before the WQCC and not in the record;
4. The Commission, by sustaining the Secretary's decision, applied Section 20.6.2.3108.K NMAC in a manner which violates the plain language of the regulation, leads to an absurd or unreasonable result, and conflicts with the public participation requirements of the Water Quality Act; and/or
5. The Commission's decision failed to properly cite to the record in support of its decision.

Communities for Clean Water also request this Court to vacate the WQCC's decision and remand this matter to the WQCC if this Court finds that the Commission's decision is not supported by substantial evidence in the record and is an abuse of discretion.

In the alternative, Communities for Clean Water request this Court to vacate the WQCC's decision, stay DP-1793, and remand this matter to NMED for a public hearing to be held on the draft DP-1793 if this Court finds that the Secretary did make the required determination regarding substantial public interest in the draft DP-1793, but his decision was not supported by substantial evidence in the record and was an abuse of discretion.

Dated: June 10, 2016.

NEW MEXICO ENVIRONMENTAL LAW CENTER



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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COMMUNITIES FOR CLEAN WATER,
Appellant,

vs. Ct. App. No. 35253

NEW MEXICO WATER QUALITY CONTROL COMMISSION
Appellee.

CERTIFICATE OF SERVICE

I, Jaimie Park, hereby certify that a copy of Community for Clean Water's Unopposed Motion to Amend Docketing Statement and For Extension of Time to File Amended Docketing Statement has been sent via U.S. Postal Service First Class Mail, postage pre-paid, and via email, by the undersigned counsel to the following parties and counsel on June 10, 2016:

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