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.

and

NEW MEXICO ENVIRONMENT DEPARTMENT and LOS ALAMOS NATIONAL SECURITY, LLC.
Intervenors.

COMMUNITIES FOR CLEAN WATER'S REPLY BRIEF TO THE NEW MEXICO WATER QUALITY CONTROL COMMISSION'S AND THE NEW MEXICO ENVIRONMENT DEPARTMENT'S ANSWER BRIEF

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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 3,724 words, Times New Roman typeface. The word count for this Brief was obtained using Microsoft Word 2007.

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Introduction

The Appellant, Communities for Clean Water, hereby files its *Reply Brief* to the New Mexico Water Quality Control Commission's and the New Mexico Environment Department's *Answer Brief*, in accordance with Rule 12-213(C) NMRA.

I. 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).

II. SUMMARY OF ARGUMENT

The New Mexico Water Quality Control Commission's ("WQCC") decision is not in accordance with the law for three reasons. First, the WQCC applied the wrong standard of review in a Petition for Permit Review proceeding. Second, the WQCC failed to make the required determination regarding whether substantial public interest exists in draft discharge permit 1793 ("DP-1793"). Third, the WQCC's decision is based upon facts and information irrelevant to the issue

before it and not in the record.

The WQCC has also interpreted and applied Section 20.6.2.3108.K NMAC in a manner that prevents the harmonious application of the regulation and conflicts with the Water Quality Act's public participation requirements. Therefore, the WQCC's decision is not entitled to any deference by this Court.

Lastly, the WQCC's decision is not supported by substantial evidence in the record and is an abuse of discretion.

III. ARGUMENT

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 and NMED (through its concurrence)[1] spend several pages discussing the standard of review applied by the WQCC in this matter (a Petition for Permit Review Proceeding), yet once again fail to explain what exactly that standard of review is. **[AB 7-9]** The WQCC fails to state whether the standard of review provided in NMSA 1978, Section 74-6-5(Q) and Section 20.1.3.16(F)(3) NMAC is a de novo standard, a deferential standard, or a hybrid standard of review. The WQCC simply asserts that the correct standard of review was applied and that, "In noting that the Secretary '*appropriately exercised his discretion* in denying the request for a public hearing pursuant to Section 74-6-5(G) and

[1] NMED filed a *Concurrence* with the WQCC's *Answer Brief* on July 25, 2016.

20.6.2.3108.K NMAC' the WQCC was indicating that it weighed the evidence and came to the same conclusion as the Secretary regarding the need for a public hearing." **[AB 8]** (internal citation omitted) (emphasis added). What this statement actually indicates is that the WQCC applied a deferential standard of review, which is the wrong standard of review to be applied in a Petition for Permit Review proceeding. **[4 RP 1822]**

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.

At the December 8, 2015 hearing before the WQCC in this matter, Communities for Clean Water requested that the WQCC clarify the standard of review to be applied for a Petition for Permit Review proceeding. **[4 RP 01708: 18-25]**[2] Communities for Clean Water argued below that if Section 74-6-5(Q)

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[2] 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

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 could not consider 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 interpretation of the standard of review to be applied. **[4 RP 01713:12-16]** Yet the WQCC's *Final Order* is replete with findings regarding the Secretary's exercise of discretion, his determination of no substantial public interest in the draft permit at issue, and whether his permitting actions were an abuse of discretion. **[4 RP 1822]**

The WQCC's *Final Order* does not state, for example, "Just as the Secretary determined there was no need for a public hearing because there was no substantial public interest in the draft permit, we too find that, based on the evidence in the record, no substantial public interested existed and therefore no public hearing needed to be held." Instead, the WQCC clearly defers to the Secretary's decision and finds that the Secretary "appropriately exercised his discretion." *Id.* Based on the WQCC's *Final Order* there can be no question that it applied a deferential

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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]

standard of review in the proceedings below, in violation of Section 74-6-5(Q) and Section 20.1.3.16(F)(3) NMAC.[3]

Furthermore, contrary to the WQCC's argument that, "CCW's interpretation of Section 74-6-5(Q) establishes a standard of review that precludes the possibility that the Secretary's decision was sustainable and thereby ignores the language of the statute," **[AB 8]**, Section 74-6-5(Q) makes clear that 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.

Communities for Clean Water is not arguing that under Section 74-6-5(Q) the WQCC can never sustain the action of a constituent agency and, therefore, only modify or reverse the action of a constituent agency in each and every Petition for Permit Review proceeding. Communities for Clean Water is merely pointing out that because the Secretary failed to make the required determination regarding substantial public interest when denying Communities for Clean Water's request for a public hearing, the WQCC, under Section 74-6-5(Q), cannot sustain the action of the Secretary in this matter.

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[3] Commissioner Tongate also stated, as the reason for his denying Appellant's appeal at the December 8, 2015 hearing, that, "[t]he 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*." **[4 RP 01780: 10-12]** (emphasis added).

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

As discussed above on pages 2- 5 of this *Reply Brief*, 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 pursuant to Section 20.6.2.3108.K NMAC. The Commission's *Final Order* clearly demonstrates that it, too, failed to make this required determination. **[4 RP 01821-01822]** The Commission merely finds that, "[t]he totality of the evidence contained in the record sufficiently supports the conclusion that the Secretary considered the public interest." **[4 RP 01821]** On its face, this language clearly demonstrates that the Commission failed to make its own determination regarding substantial public interest. **[AB 10]**

Although the WQCC claims that it did make a determination regarding substantial public interest, no such determination can be found in its *Final Order*. **[AB 10]** Moreover, the WQCC fails to cite to evidence in the record in support of its claim because it cannot. The WQCC made no such determination. *Id.*; *see also* **[4 RP 01821-01822].**

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

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. **[4 RP 08821]** The first "critical issue" was that, "[t]he 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.*" *Id.* (emphasis added).

The sole issue before the Commission was whether substantial public interest existed in the draft DP-1793 such 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]** The purpose of a permit and whether harm will result in delaying remediation of contaminated groundwater are irrelevant to the sole issue that was before the Commission.

Additionally, facts pertaining to whether "delaying the remediation of contaminated groundwater could therefore be harmful to both public health and the environment" were also not in the record. The WQCC has failed to cite to such facts in the record in its *Final Order* and in its *Answer Brief* because no such facts are in the record. **[4 RP 01821-01822]; [AB 11]**

In fact, 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 in the appeal, and which elicited facts not found in the administrative record. **[4 RP 01763:8-14, 01766:17-23, 01768:12-15]** The Hearing Officer sustained each objection Communities for Clean Water raised on this issue. **[4 RP 01763:15-16, 01766:24-25, 01767:1-4]** Yet, the WQCC ignored the holdings of its Hearing Officer and based its *Final Order* on information irrelevant to the issue before it and upon facts not in the record. **[4 RP 01821]**

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 01821-01822]** However, 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]**, and Hearing Officer Holappa affirmed that the sole issue before the WQCC was whether substantial public interest existed in the draft DP-1793 to warrant holding a public hearing. **[4 RP 01713:12-16]** Again, the WQCC ignored the holding of its Hearing Officer and based its *Final Order* on information its own Hearing Officer determined to be irrelevant to the sole issue before it. **[4 RP 08121-08122]**

By denying a request for a public hearing in violation of Section 74-6-5(G) of the Water Quality Act and its implementing regulations (20.6.2.3108.K NMAC), both the WQCC and the Secretary have deprived Communities for Clean Water of the public participation requirements under the Water Quality Act. In a challenge to the substance of a permit, the challenger and the WQCC are limited to the administrative record – no new evidence may be admitted or considered by the WQCC. Section 74-6-5(Q); Section 20.1.3.16.F(3) NMAC.

A public hearing on a draft permit is the proper means of entering evidence into the record and developing a record for provisions of a draft permit. To deny a public hearing on a draft permit is to prohibit the creation of a complete administrative record, which in turn significantly prejudices anyone who then challenges the substance of a permit issued by NMED.

Communities for Clean Water properly challenged the agency action that precluded it from effectively challenging the substance of DP-1793, and Appellant is not required to challenge the merits of a permit in order to challenge the denial of its request for a public hearing on the permit at issue.

Based on its *Final Order*, the Commission clearly considered information irrelevant to the issue before it 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.

B. By Sustaining The Secretary's Interpretation And Application Of Section 20.6.2.3108.K NMAC, The WQCC's Interpretation And Application Of The Regulation Prevents The Harmonious Application Of The Regulation And Conflicts With The Water Quality Act's Public Participation Requirements.

Contrary to the WQCC's misunderstanding of the rules of statutory and regulatory construction **[AB 13-14]**, "If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes prevail," and not the language of the regulation. *Jones v. Empl. Serv. Div. of Human Serv. Dep't*, 1980-NMSC-120, ¶ 3; 95 N.M. 97, 98. Neither the WQCC's nor the Secretary's discretion trump the Water Quality Act's public participation requirements, as the WQCC would have this Court decide.

As Appellants argued in its *Brief in Chief*, the manner in which the Secretary applied Section 20.6.2.3108.K, and ,therefore, the manner in which the WQCC applied the regulation through sustaining the Secretary's decision, 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. **[BIC 23-24]** *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).

Section 20.6.2.3108.K, which states in pertinent part, that, "A public hearing shall be held if the secretary determines there is substantial public interest," 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).

Therefore, when a coalition of six community organizations, representing scores of interested individuals to be affected by DP-1793, submits three requests for a public hearing on a draft permit to address substantive issues involving the discharge limit calculation and application, the technical basis of treatment standards, the 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 the adverse impacts therefrom, and whether "work plans" constitute modifications of the discharge permit, a public hearing on the draft permit must be held. **[3 RP 01092-01099, 01104-01118, 01121-01126]**

Communities for Clean Water was and is clearly entitled to a public hearing under the Water Quality Act and its implementing regulations when the statute and the regulation are interpreted and applied harmoniously.

The WQCC's assertion that the Secretary's discretion in determining whether substantial public interest exists in a draft permit eclipses the Water Quality Act's

public participation requirements defies the holding in *Jones v. Empl. Servs. Div. of Human Servs. Dep't*, 1980-NMSC-120, ¶ 3; 95 N.M. 97, 98, and is without citation to any supporting authority. **[AB 14]** This Court has stated, in pertinent part, that "where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority." *Doe v. Lee*, 1984-NMSC-024, ¶ 2, 100 N.M. 764.

Furthermore, the WQCC's contention that its decision is entitled to deference is without merit. **[AB 16]** The WQCC's interpretation and application of Section 20.6.2.3108.K NMAC is not entitled to deference when that interpretation violates the cardinal rules of statutory and regulatory construction.[4] The cases cited by the WQCC do not hold that the WQCC's interpretation of a regulation is entitled to deference in all circumstances. ***Id.***

This Court will only defer to the Commission's interpretation of regulations "*as long as it is reasonable*" and "*if it implicates agency expertise.*" *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, 125 N.M. 786 (emphasis added). Also, this Court, "[w]ill not simply defer to the Commission when the exercise of its adjudicatory power results in a dismissal with prejudice based on conclusions that lack support

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[4] The WQCC, in sustaining the Secretary's denial of a public hearing on draft DP-1793, has violated the canons of construction for plain language, absurd or unreasonable results, and for harmonious application. **[BIC 21-24]** Contrary to the WQCC's assertion, the WQCC has violated these rules of statutory and regulatory construction whether this Court finds that the Secretary did or did not make the required substantial public interest determination. **[AB 17]**

in the record and are not adequately supported by expressed factual and legal reasons." *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 36, 138 N.M. 625, 633.

Communities for Clean Water has clearly demonstrated to this Court that the WQCC's *Final Order* sustaining the Secretary's decision to deny a public hearing on draft DP-1793 is unreasonable and is not adequately supported by expressed factual and legal reasons. **[BIC 25-33, 19-21]** The circumstances of this case reveal that determining whether substantial public interest exists in a draft discharge permit so as to require a public hearing is most certainly not an area of this agency's expertise.

C. The WQCC's Decision To Sustain The Secretary's Denial Of A Public Hearing On Draft DP-1793 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.

The record does not show that either the WQCC or the Secretary made a determination regarding substantial public interest in draft DP-1793. **[AB 17]** *See* the WQCC's *Final Order* **[4 RP 01816-01822]**, the "Hearing Determination Memorandum" written by the Ground Water Quality Bureau **[3 RP 01127-01134]** and the denial letter issued to Communities for Clean Water. **[3 RP 01157]**

In the WQCC's *Final Order*, it failed to make its own determination regarding

substantial public interest in draft DP-1793 and erroneously found that the Secretary had made such a determination without any citation to supporting evidence in the record. **[4 RP 01816-01824; *See also* BIC 19-20, 25-26]**

Additionally, contrary to the WQCC's assertion that there is a "complete lack of evidence" **[AB 18]**, overwhelming evidence can be found in the record that there is substantial public interest in draft DP-1793. *See, e.g.,* **[3 RP 01092-01099, 01104-01118, and 01121-01126]**

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, "[i]t 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 because it is unreasonable and without a rational basis when viewed in light of the whole record because overwhelming evidence in the record demonstrates that substantial public interest in draft DP-1793 did indeed exist. **[3 RP 01092-01099, 01104-01118, and 01121-01126]**

The WQCC's finding is also an abuse of discretion under prevailing New Mexico law. In attempting to defend its decision, the WQCC fails to provide this Court with the complete holding of *Republican Party v. N.M. Taxation and Revenue Dept.*, 2012-NMSC-026, ¶ 10, 2012 N.M. LEXIS 248, ¶ 10, in regard to what issues are of substantial public interest. **[AB 20]** As stated in Appellant's *Brief in Chief*, the Court held in *Republican Party*, in pertinent part, 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." 2012-NMSC-026, ¶ 10, 2012 N.M. LEXIS 248, ¶ 10. (emphasis added). Ensuring that community waters -- which are subject to adverse impacts from the activities of the Los Alamos National Laboratory - both its current operations and its unremediated legacy waste - are kept safe for drinking, agriculture, sacred ceremonies and sustainable future use is an issue of fundamental public importance. **[3 RP 01092-01099, 01104-01118, 01121-01126]**

The WQCC argues that, "Based on the small scope of interest, the lack of substantiality in the comments received, *and the inclusion of provisions addressing CCW's concerns in the draft permit*, the WQCC determined that the Secretary's denial of the hearing was appropriate" without any citation to supporting evidence in the record. **[AB 22]** (emphasis added). The WQCC further states, "The fact that the Department made *significant modifications to the permit to address CCW's*

concerns removes or negates the substance of their interest" without any citation to supporting evidence in the record because no such "significant modifications" were made to the permit to address Communities for Clean Water's concerns. **[AB 23]** (emphasis added); *see also***[3 RP 01378-01412]**.

Most egregious is the WQCC's argument **[AB 22]** that, "[t]he Record Proper contains a list of all of CCW's comments, along with the manner in which the comments were addressed by the GWQB in the terms of the discharge permit, to the extent possible," with citation to a document improperly prepared by NMED counsel for the WQCC, attached to its *Answer Brief* as "Exhibit A," in the proceedings below. **[4 RP 01631-01639]** Communities for Clean Water moved to strike this improper document from the record, as it was not properly part of the administrative record in this matter and was prepared by NMED to assist the WQCC in the adjudicatory proceeding below, in violation of the Water Quality Act, the Act's implementing regulations, and the WQCC's rules of adjudicatory procedure. **[4 RP 01673-01674]**

The WQCC fails to cite to any actual evidence properly part of the administrative record, such as the permit now in effect **[3 RP 01378-01412]**, in support of its claims that "significant modifications" and "provisions addressing CCW's concerns" were included in DP-1793. **[AB 22-23]**

IV. CONCLUSION

For the above stated reasons, Communities for Clean Water requests the relief provided in its *Brief in Chief*, pages 34-35.

Dated: August 15, 2016.

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CERTIFICATE OF SERVICE

I, Jaimie Park, hereby certify that a copy of Communities for Clean Water's *Reply Brief to the New Mexico Water Quality Control Commission's and the New Mexico Environment Department's Answer Brief* 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 August 15, 2016:

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