IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COMMUNITIES FOR CLEAN WATER,

Appellant,

vs. No. 35,253

NEW MEXICO WATER QUALITY CONTROL COMMISSION,

Appellee,

and

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

Intervenors.

LOS ALAMOS NATIONAL SECURITY, LLC'S ANSWER BRIEF

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I. NATURE OF THE CASE

Intervenor Los Alamos National Security, LLC ("LANS") concurs with Appellant Communities for Clean Water's ("CCW") Nature of the Case.

II. SUMMARY OF FACTS AND COURSE OF PROCEEDINGS

A. Summary of Facts

The United States Department of Energy ("DOE") and LANS (collectively "DOE/LANS")[1] applied for and were issued a ground water discharge permit ("DP-1793") to discharge treated groundwater derived from individual investigation, monitoring, and remediation projects conducted by Los Alamos National Laboratory ("LANL").[2] **[2 RP 00581; 3 RP 01163]**. In issuing DP-1793, NMED determined that DOE/LANS' proposed discharges satisfy the statutory criteria, NMSA 1978 § 74-6-6 (1993), and the Water Quality Control Commission's ("Commission") regulations, 20.6.2.3109 NMAC, for permitting groundwater discharges. **[3 RP 01161]**. The final permit includes 30 conditions, which impose stringent controls on the quality of discharged water, the cumulative

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[1] DOE owns the Los Alamos National Laboratory; LANS manages LANL under contract with DOE.

[2] Projects under the Permit include (1) pumping tests, aquifer tests, and tracer studies to characterize groundwater quality and aquifer properties; (2) well development during construction of new monitoring and pilot pumping wells; and (3) the rehabilitation of existing wells that are no longer providing representative data. [2 RP 00560-00613]

volume of water that may be discharged per day, rigorous land application restrictions, and extensive monitoring and reporting requirements, many of which are beyond what is required by law. **[3 RP 01161-01176]**.

Prior to discharge, all groundwater must be treated to achieve concentrations equal to or less than 90% of the numeric ground water standards set forth in 20.6.2.3103 NMAC and less than 90% of the numeric levels for tap water in Table A-1 of NMED's *Risk Assessment Guidance for Site Investigations and Remediation,* dated July 2015, for contaminants not listed in 20.6.2.3103 NMAC. . DP-1793 prohibits run-off and pooling of land applied water. **[3 RP 01165]**. Land application is allowed only on appropriate terrain and only during favorable conditions. **[3 RP 01165]**. DP-1793 complies with the monitoring and reporting required under 20.6.2.3107 NMAC and authorizes NMED to request additional monitoring and reporting when needed to ensure that all land application is fully protective of human health and the environment. **[3 RP 01166-01167]**.

B. Course of Proceedings

DOE/LANS submitted the amended application for DP-1793 to NMED on January 7, 2014.[3] **[2 RP 00560-00561]**. DOE/LANS provided public notice as required by 20.6.2.3108(C), (F) NMAC. **[2 RP 00585-00586]**. NMED issued a

[3] The original DP-1793 application was submitted in December of 2011 and was specific to land application of treated groundwater from one pumping test well. [1 RP 00027-00043].

draft discharge permit ("Draft DP-1793") on January 30, 2015, and provided a period for interested persons to submit comments and recommended changes and/or requests for public hearing, **[3 RP 01036-01054; 01060-01061]**. DOE/LANS and CCW each submitted comments on NMED's draft and requested a public hearing. **[3 RP 01055-01091; 01092-01099]**.

In response to DOE/LANS' and CCW's comments and requests for hearing, NMED held a meeting on April 15, 2015 to discuss Draft DP-1793 and seek further input on the proposed terms and conditions. **[3 RP 01104]**. Fifteen representatives from NMED, DOE/LANS, and CCW attended and participated in the meeting. **[3 RP 01199]**. During the meeting NMED asked DOE/LANS to offer proposed language to address the issues raised by CCW at the meeting and in its comments, which included (1) posting documents to the Electronic Public Reading Room; (2) public review of work plans; and (3) land application criteria. **[3 RP 01100]**.

DOE/LANS subsequently submitted language to NMED proposing voluntary posting by DOE/LANS of most permit-related documentation to the Laboratory's Electronic Public Reading Room, **[3 RP-01102]**; a public comment period on each work plan submitted by DOE/LANS, **[3 RP 01103]**; and heightened restrictions on land application location and criteria, **[3 RP 01101]**. Importantly, the submitted changes were offered for the sole purpose of trying to reach a

compromise with CCW and were not required by the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (1967, as amended through 2013), or its implementing regulations for issuance of a discharge permit, 20.6.2.3000 to .3114 NMAC. **[3 RP 01100; 01092-01099]**. CCW also submitted a written response to the meeting to provide its "understanding of the resolution of the issues during the April 15 meeting"; and "in some cases to provide additional information" on its comments or understanding of the proposed resolution. **[3 RP 01105]**.

Based on the discussion at the meeting, DOE/LANS' proposed language, and CCW's written response to the meeting, NMED issued a revised Draft DP-1793 ("final draft"), **[3 RP 01202-01220]**, and stated:

> [T]he 'final' draft of DP-1793 . . . incorporated comments provided from all parties to the extent . . . reasonable and [NMED] will allow 15 days for further comments related to typography, grammar, logic dead ends or other minor issues. [T]hrough this process [] we have crafted a good permit that serves the needs of all parties, respects the public's right to know and desire to provide input.

[3 RP 01202]. NMED requested that at the end of the fifteen day comment period, parties either "withdraw previous requests for a public hearing, or formally request such in writing including the reasons why a hearing should be held." **[3 RP 01202]**.

DOE/LANS submitted minor comments on the final draft and withdrew their request for a hearing. **[3 RP 01119-01120]**. CCW submitted comments on the final draft and "restate[d] [its] request for a public hearing about the draft

permit." **[3 RP 01121]**. CCW's comments reiterated its previous comments, including its assertion that "there is substantial public interest in this permit... [and] a public hearing should be held because the permit is too broad..." **[3 RP 01121]**. CCW did not specifically explain why a hearing was necessary. **[3 RP 01121-01126]**.

On July 24, 2015, NMED sent CCW a letter informing CCW that the NMED Secretary ("Secretary") had denied its request for a hearing and intended to issue DP-1793 "in the very near future." **[3 RP 01157-01158]**. On July 27, 2015, NMED issued DP-1793. **[3 RP 01159-01187]**.

III. DISPOSITION BELOW

On August 21, 2015, CCW filed a petition with the Commission, pursuant to NMSA 1978, Section 74-6-5(O) (2009), requesting review of the Secretary's decision to deny CCW's request for public hearing and issue the final approval of DP-1793. **[3 RP 01304-01377]**. Under the Commission's rules, CCW was required to "identify the permitting action to be reviewed" and "specify the portions of the permitting action to which petitioner objects." 20.1.3.16(A)(1)(c), (d) NMAC. Notably, CCW did not specify those portions of DP-1793 to which it objected and failed to state objections to the merits of DP-1793. **[3RP 01304-01305]**. Moreover, CCW's petition for review did not assert that the only challenged portion of the permitting action- the decision to deny the request for

public hearing- had or could have had any impact on the final agency action of issuing DP-1793. **[3 RP 01304-01312]**.

Following submission of the petition, NMED filed the administrative record, **[3 RP 01434-01435]**, CCW submitted its brief in chief, **[3 RP 01473-01494]**, and NMED and DOE/LANS submitted answer briefs to the Commission, **[4 RP 001594-01639]**. The Commission appointed a Hearing Officer **[4 RP 01640-01643]**, published timely public notice of the permit review, **[4 RP 01682 at 3-9]**, and allowed oral argument prior to its deliberations, **[4 RP 01679-01792]**. After deliberation and discussion, considering and weighing only the evidence contained in the record before NMED and not affording any deference to the Secretary's decision or limiting itself in any way to the Secretary's factual findings or legal conclusions, the Commission voted to sustain the Secretary's denial of CCW's request for a public hearing and final approval of DP-1793. **[4 RP 01821]**. *See generally* NMSA 1978, § 74-6-5(Q).

As required by the Water Quality Act and regulations, the Commission issued a final order setting forth the reasons for its action to sustain the Secretary's decision and its ultimate findings of fact and conclusions of law. *See* § 74-6-5(Q); 20.1.3 NMAC. In that order, the Commission explained that "[n]either the Water Quality Act nor the applicable regulations provide or require the Secretary to consider particular factors in determining substantial public interest." **[4 RP**

01820]. The Commission acknowledged CCW's argument that "three substantive requests for a public hearing, three sets of substantive comments and active participation in the permitting process" may demonstrate interest, but determined that "the totality of the evidence contained in the record sufficiently supports the conclusion that the Secretary considered [that] public interest" and properly determined that it did not rise to the level of "substantial" public interest. **[4 RP 01821- 01822]**.

The final order cites to the NMED staff's Request for Hearing Determination Memorandum provided to the Secretary (the "memo") as evidentiary support of the Commission's decision, stating that the memo "provided the Secretary with the type of relevant information that allowed him to assess the breadth of public interest and determine whether it rose to the level of substantial public interest." **[4 RP 01820-01821]**. Most persuasive to the Commission, however, was the evidence in the record and argument provided during the permit review establishing that CCW did not object to the substance of the permit. **[4 RP 01819, 01821]**.

The Commission stated that it would not delay the remediation of contaminated groundwater to require a hearing when there are "no credible objections to the groundwater discharge permit issued by the Department." **[4 RP 01821-01822]**. In fact, because CCW did not challenge any condition in the final

permit and instead only challenged the Secretary's decision to deny a hearing on the draft permit, the Commission concluded that CCW's only interest in the matter "appears to be manufacturing an artificial, legal dispute because it is unhappy with how the Secretary exercised his discretion...." **[4 RP 01821]**.

CCW subsequently filed a Notice of Appeal in this Court, requesting review of the Commission's action to sustain the decision of the Secretary denying CCW's request for a public hearing on draft DP-1793 and granting final approval of DP-1793. LANS intervened as a party-appellee pursuant to Rule 12-601(D)(1) NMRA.

ARGUMENT

The Water Quality Act authorizes judicial review of certain actions by the Commission when (1) a person is "adversely affected" by the commission's action and (2) that person takes an appeal within thirty (30) days of the action. NMSA 1978, Section 74-6-7(A) (1993) (A person who participated in a permitting action and who is adversely affected by such action may appeal to the court of appeals for further relief). "All such appeals shall be upon the record made before the commission and shall be taken to the court of appeals within thirty days after the...permitting action...that is being appealed occurred." *Id.*

I. CCW HAS NOT SATISFIED THE STATUTORY PREREQUISITES FOR APPEALING THE DENIAL OF ITS REQUEST FOR PUBLIC HEARING ON DRAFT DP-1793

The decision to deny CCW's request for a public hearing was an interim action taken as part of NMED's permitting authority. CCW argues that this action was improper, but fails to explain how reversing that decision could plausibly alter the final permitting action to issue DP-1793. CCW has not asserted any objections to the merits of DP-1793 and has not challenged the Commission's findings that it did not challenge DP-1793. Thus, CCW requests review of an interlocutory decision that, even if reversed, will not alter the final permitting action by the Commission. For the following reasons, Section 74-6-7 cannot be interpreted to allow this review.

A. CCW Was Not Adversely Affected

By the plain language of the statute, in order for CCW to have standing to appeal the Commission's action sustaining the decision of the Secretary, CCW must establish that (1) it participated in the subject permitting action and (2) it was adversely affected by such action. *See* § 74-6-7(A). LANS does not dispute the fact that CCW's submission of comments on and requests for public hearing on draft DP-1793 establish that CCW participated in the subject action. CCW, however, was not "adversely affected" by the interlocutory decision denying its request for public hearing on the draft permit

In *Cattle Growers' Ass'n v. New Mexico Water Quality Control Comm'n*, 2013-NMCA-046, ¶¶ 8-13, 299 P.3d 436, this Court held that the "operation of the adversely affected requirement in Section 74-6-7" is a mandatory prerequisite to appeal akin to the threshold issue of standing and thus requires a party to show "injury or a real risk of future injury." In that case, the Court determined that the Association failed to allege any harm that would befall its members from the implementation of the regulation at issue, and thus, held that the association did not have a right to appeal the action. *Id.* ¶¶ 12-13.

Here, like in *Cattle Growers,* CCW has failed to set forth how "any harm that would befall its members" from the decision to deny the hearing. Again, CCW has not asserted any objections to the merits of DP-1793 and has not challenged the Commission's findings that it did not challenge DP-1793. Those findings are now deemed conclusive. See Rule 12-213(A)(4) (The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive). *See also* NMSA 1978, Section 74-6-7(A) (the Commission's actions that are not raised in the brief in chief are not subject to judicial review).

CCW has not, and in fact cannot, establish actual injury from not being able to present testimony or question witnesses in response to the draft permit because CCW did not and does not object to the final permit. There can be no harm from the denial of the request for public hearing when reversing the denial of the hearing

will have no impact on the final Permitting Action. Thus, CCW was not injured by the decision to deny the hearing and cannot bring this appeal.

B. The Issue Raised In This Appeal Is Moot

In addition to CCW's lack of standing, the interlocutory decision to deny the hearing was moot once the Commission issued the final permit and CCW did not appeal or object to any conditions. This Court has repeatedly stated that "an appeal should not be entertained when the issues have become moot." *United Nuclear Corp. v. State ex rel. Martinez*, 1994-NMCA-031, ¶ 10, 117 N.M. 232; *State ex rel. Blanchard v. City Comm'rs of Clovis*, 1988-NMCA-008, ¶ 5, 106 N.M. 769. "An appeal is moot when no actual controversy exists, and an appellate ruling will not grant the appellant any actual relief." *State v. Jose S.*, 2007-NMCA-146, ¶ 23, 142 N.M. 829.

There is no objection to the final permit so CCW's request for hearing on draft DP-1793 no longer presents an actual controversy. Likewise, while remanding to require a hearing may be within this Court's authority, requiring the Secretary to hold a public hearing on the Draft Permit would not grant "actual relief" because the final permit is already issued with no objection. CCW did not appeal any conditions of the final permit issued within 30 days as required under Section 74-6-7 (A). As a result, the permit is final and no changes to DP-1793 may be made even if a hearing were to be held. Thus, the interlocutory

Thus, the issue raised by CCW in this appeal is moot.

C. The Decision to Deny the Hearing is Harmless Error

Even if the Water Quality Act required the Secretary to grant every request for hearing, as CCW appears to allege, and that decision were reviewable by this Court, denying the request in this case would be at most harmless error. The New Mexico Supreme Court stated in *AA Oilfield Serv., Inc. v. New Mexico State Corp. Comm'n*, that:

> [G]enerally, if the Commission enters an order without providing notice and hearing as required, such orders are void and subject to collateral attack. However, for a party to have standing to attack such an order, that party must first show that it has been prejudiced by the lack of notice and hearing.

1994-NMSC-085, ¶ 14, 118 N.M. 273. In that case, there was no evidence in the record establishing that the "Commission's order granting Broom's voluntary suspension had [any] impact on the business of other carriers." *Id.* The Court stated that, "Counsel for AA Oilfield conceded that it could not provide evidence of injury." *Id.* Thus the Court held that "the Commission's error in failing to provide AA Oilfield with notice and hearing was harmless." *Id.*

Similarly, here, CCW challenges the interlocutory decision to deny a request for hearing without any assertion, much less evidence establishing that it was harmed by that decision. Thus, even if there was a procedural error in denying the

hearing, CCW was not prejudiced by the failure to hold such a hearing rendering that error harmless.

II. THERE IS NO BASIS FOR THIS COURT TO SET ASIDE THE COMMISSION'S ACTION SUSTAINING THE DECISION BY THE SECRETARY

Under the Water Quality Act, the Court will only set aside an action by the Commission if the Court finds such action was (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise in accordance with law. Section 74-6-7(B).

A. The Commission's Decision Was in Accordance With the Law

i. The Commission's Final Order is the "Permitting Action" Subject to Review

CCW's brief in chief directly attacks the Secretary's decision and the Secretary's interpretation of the Water Quality Act and implementing regulations. **[BIC at 14-16; 22-24; 28-33]** However, the Secretary's actions are not within the subject of this appeal for at least three reasons.

First, the Water Quality Act itself limits judicial review to actions by the Commission. See § 74-6-7 (A) ("a person…who participated in a permitting action before the ***commission*** and who is adversely affected by such action may appeal to the court of appeals for further relief")(emphasis added); § 74-6-7 (B) ("Upon appeal, the court of appeals shall set aside the ***commission's*** action only if…") (emphasis added). Because the legislature specifically identified actions by the

Commission as subject to review and did not include actions by the Secretary or the constituent agency, the only proper construction of the statute is that the legislature did not intend to authorize judicial review of a Secretary's permitting action.

Second, the Secretary's decision is not a final action and cannot be subject to judicial review. *See Harris v. Revenue Div. of Taxation & Revenue*, 1987-NMCA-034, ¶ 10, 105 N.M. 721 ("In genera, an appellate court will not review the proceedings of an administrative agency until the agency has taken final action."). Under the Water Quality Act, the Secretary is authorized to deny, terminate, modify, or grant a permit subject to conditions. *See* § 74-6-5(N). However, Section 74-6-5(O) of the Water Quality Act allows any participant in a permitting action that was adversely affected by the Secretary's decision to petition the Commission to review that permitting action. *See* § 74-6-5(O); 20.1.3.16 NMAC. Pursuant to the exhaustion of remedies doctrine, this administrative process must be complete before the agency's action is considered final and ripe for judicial review. *See Smith v. City of Santa Fe*, 2007–NMSC–055, ¶ 26, 142 N.M. 786, ("Under the exhaustion of administrative remedies doctrine, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts") (alteration, internal quotation marks, and citation omitted).

Finally, as explained below, the Commission's "final order" is the result of the Commission's independent review of the permitting action that was originally brought before the Secretary. When that final order is entered, it necessarily takes the place of the Secretary's decision as the final permitting action of the agency and thus renders any decision made by the Secretary or reasons for making that decision irrelevant to the final action except to the extent they are adopted by the Commission.

Despite the fact that the statutory provision refers to the Commission's review process as an "appeal[] to the commission," the substance of the statute authorizing review by the Commission makes clear that the Commission's review is a de novo determination based on the record that was before the Secretary and does not rely on or afford any deference to the Secretary's decision that is under review. *See* § 74-6-5(Q) (requiring the Commission to "review the record compiled before the constituent agency… consider and weigh only the evidence contained in the record before the constituent agency… and shall ***not be bound by the factual findings or legal conclusions of the constituent agency***") (emphasis added). The Commission, based on its independent review of the evidence and arguments of the parties, is required to "sustain, modify or reverse the action of the constituent agency [and] enter ultimate findings of fact and conclusions of law." *Id.* The resulting "final order" of the Commission, including the written reasons for its

determination and "ultimate findings of fact and conclusions of law," replaces the initial determination of the Secretary and becomes the final permitting action subject to review.

Although not a direct parallel, the Commission's review of the constituent agency's decision is similar to a district court's de novo review of a metropolitan court's decision. While that review is also characterized as an "appeal," it is well established in our case law that the district court gives no deference to the metropolitan court's decision and is instead required to issue an independent "de novo" determination including findings and conclusions and the reasons for that determination. *See State v. Hoffman*, 1992-NMCA-098, ¶ 4, 114 N.M 445.

> [O]n a de novo appeal, the district court is not reviewing the correctness of proceedings in the lower court. Instead, the district court is required to make an independent determination of the issue before the court. Accordingly, as a general rule, the findings of fact and conclusions of the court below are not binding when the case is appealed and heard de novo.

Id. (internal quotation marks and citations omitted).

The district court's review in that context differs from the Commission's review here in that the district court, unlike the Commission, is authorized to hear new evidence. *See Southern Union Gas Co. v. Taylor*, 1971-NMSC-067, ¶ 5, 82 N.M. 670. However, under both types of review, the resulting "de novo determination" becomes the final decision and necessarily renders any decisions made by the initial decision maker irrelevant. *See Contrearas v. Miller Bonded,*

Inc., 2014-NMCA-011, ¶ 32, 316 P.3d 202 ("When a case is heard de novo, it is as if no trial had been held in the matter below"); *Pointer v. Lewis*, 1919-NMSC-020, ¶ 3, 25 N.M. 260 (stating that when a case is tried de novo on appeal to the district court "judgment may be rendered in it as if such case had originated in the district court").

For the reasons stated, the Secretary's decision is not at issue in this appeal. Thus, CCW's arguments attacking the Secretary's determination or his interpretation of the Water Quality Act and implementing regulations should be disregarded, and the Court should confine its review to the Final Order issued by the Commission.

ii. The Commission Applied the Correct Standard of Review

CCW asserts that the Commission applied the incorrect standard of review by impermissibly deferring to the Secretary's decision. This argument is without merit for at least two reasons.

First, CCW's assertion directly contradicts the Commission's statement that it was "not bound by factual findings or legal conclusions of [NMED] and did not afford the Secretary's decision to deny the request for hearing any deference." **[4 RP 01821]**.

Second, CCW's argument is contrary to our Supreme Court's holding in *Application of Carlsbad Irr. Dist. v. Carlsbad Irr. Dist.*, 1974-NMSC-082, ¶¶ 15-

19, 87 N.M. 149. In *Application of Carlsbad Irr. Dist.,* the Appellant asserted that the district court impermissibly deferred to the state engineer based on the district court's conclusion that "the state Engineer did not act fraudulently, arbitrarily or capriciously in rendering his decision" and that the district court "affirmed the findings and order of the State Engineer." *Id.*, ¶ 18. Although the Supreme Court agreed that "the court could and should have recited the substance of its judgment, rather than merely affirming the findings and decision of the Engineer," the Court ultimately determined that the district court's conclusion did not establish that the court did not apply the correct de novo standard of review. *Id.* In support of its decision, the Court stated that:

> The fact that many of the district court's findings are very similar to the findings of the Engineer in no way establishes that the district court did not consider the evidence anew. After all, the ultimate issues to be decided and the ultimate facts to be determined by the district court were the same as those decided and determined by the Engineer.

Id., ¶ 17.

Here, as was the case in *Application of Carlsbad Irr. Dist.*, CCW's assertion is solely based on the conclusion of the Commission's final order stating "the Commission finds the Secretary appropriately applied his discretion in denying the request for a public hearing." **[BIC at 12** (stating "the final order concludes with...***clearly demonstrates that the standard of review actually applied by the [Commission] was a deferential standard and not the standard provided in***

Section 74-6-5(Q)") (emphasis added)]. As was held in that case, a conclusion affirming the findings and decision of the Commission does not establish that the Commission deferred to the Secretary. Thus, CCW's argument must be disregarded.

CCW also appears to argue that the Commission did not affirmatively state in its final order that a public hearing is not required because the demonstrated interest in draft DP-1793 did not rise to the level of substantial public interest. CCW's argument is without merit because the order clearly states "the totality of the evidence contained in the record sufficiently supports the conclusion that the Secretary considered the public interest" and determined that it did not rise to the level of "substantial" public interest. **[4 RP 01821]** To the extent that CCW argues this statement defers to the Secretary's decision and does not provide an independent determination, this argument is again contrary to *Application of Carlsbad Irr. Dis.* and must be disregarded.

The Commission made an independent determination that there was not substantial public interest in draft DP-1793 and a public hearing was therefore not required. In accordance with Section 74-6-7, that determination by the Commission is the only action that that the Court may review in this appeal.

B. CCW Fails To Establish That Sustaining The Decision Of The Secretary Was Arbitrary And Capricious And Constituted An Abuse Of Discretion.

In determining whether an agency's decision is arbitrary, unlawful, unreasonable, or capricious, "the court in its review, is limited to the record made before the administrative tribunal." *Swisher v. Darden*, 1955-NMSC-071 ¶ 9, 59 N.M. 511, 287 P.2d 73 *superseded by statute on other grounds as stated in Aguilera v. Bd. Of Educ.*, 2006-NMSC-015, 139 N.M. 330. The appellate courts defer to the agency's decision when reviewing decisions requiring expertise in highly technical areas. *Southwest Research & Info. Ctr. v. N.M. Env't Dep't*, 2014-NMCA-098 ¶ 10, 336 P.3d. 404. Their judgment will not be substituted for that of the agency. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005 ¶ 18, 133 N.M. 97 (This standard is a narrow one, under which the Court is "not to substitute its judgment for that of [an administrative agency]").

CCW does not argue that the Commission's decision was arbitrary and capricious. CCW instead asserts that failing to cite to evidence in the record to support the Commission's decision establishes an abuse of discretion. **[BIC at 26-27]**. CCW has offered no authority for its proposition and neither the statute nor the regulations contain such requirement. Instead, it appears that CCW is misconstruing the requirements set forth in Section 74-6-5(Q) and 20.1.3.16(F)(3) NMAC and inserting a requirement that the Commission include evidentiary

support and record citations as part of its reasons for its action. CCW's argument is without authority. To the extent that CCW instead meant that the Commission's action is not supported by sufficient evidence, this argument is addressed below.

C. CCW Has Not Satisfied Its Burden In Challenging The Sufficiency Of The Evidence.

"Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Regents of University of Cal. v. New Mexico Water Quality Control Comm'n*, 2004-NMCA-073, ¶ 29. 136 N.M. 45. The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Gila Resources Information Project v. New Mexico Water Quality Control Comm'n*, 2015-NMCA-076, ¶ 58. The Court will not reweigh the evidence but will "decide, on balance, whether there was substantial evidence in the record to support the agency's decision." *Regents of University of Cal.*, 2004-NMCA-073, ¶ 29.

It is CCW's "burden in challenging the sufficiency of the evidence to set out all of the evidence bearing on a proposition and to specifically attack contested findings." *Gila Resources Information Project*, 2015-NMCA-076, ¶ 58. "A contention that a finding of fact is not supported by substantial evidence shall be deemed waived unless (1) the summary of proceedings includes the substance of the evidence bearing upon the proposition [and] (2) the argument identifies with

particularity the fact or facts that are not supported by substantial evidence." NMRA 12-213(A)(3), (4).

CCW has not met its burden for at least two reasons. First, CCW's arguments address the Secretary's decision and not the Commission's decision and corresponding eight page written final order. As established above, the Commission's permitting action, as set forth it its final order, was based on the Commission's independent review of the record. Once the Commission entered its final order, that order became the final agency decision and thus replaced the previous decision by the Secretary. Moreover, as discussed above, the Commission stated it did not afford any deference to the Secretary's decision and conducted its own independent review of the record. Thus, even if CCW were correct in alleging that the Secretary's decision was not supported by substantial evidence that decision has no relevance to the issue before this Court.

Second, to the extent that CCW argues the Commission's decision was unsupported, CCW ignores all the evidence contained in the record and the Commission's order showing that the public interest in DP-1793 was not substantial. Moreover, CCW fails to offer any evidence to attack the Commission's findings that CCW's interest was not substantial. **[4 RP 01821]** *See also Southwest Research and Information Center v. New Mexico Environment Department*, 2003-NMCA-012, ¶ 39, 133 N.M. 179 ("the fact that there is great

public interest in the [project] in general... 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"). CCW offers many assertions, but does not provide factual support. *See Citizen Action New Mexico v. New Mexico Env't Dept.*, 2015-NMCA-058, 350 P.3d 1178, 1184 ("the appellate court has no duty to review an argument that is not adequately developed and is unsupported by citation to the record).

Notably, CCW does not offer evidence attacking the Commission's finding that there was "no credible objections to the groundwater discharge permit issued by the Department." **[4 RP 01822].** CCW instead dismisses the finding, stating that challenges to the merits of DP-1793 are "irrelevant and not before the Commission." **[BIC at 19].** CCW also failed to offer evidence attacking the Commission's finding that the memo to the Secretary "provided the Secretary with the type of relevant information that allowed him to assess the breadth of public interest and determine whether it rose to the level of substantial public interest." **[4 RP 01821]**. Instead, CCW merely accused the Secretary of "sign[ing' off on [NMED's] recommendations to deny the request for a public hearing." **[BIC at 16]**.

The Court cannot reverse the decision of the Commission as CCW has not established the Commission's decision was an abuse of discretion and has not satisfied its burden in challenging the sufficiency of the evidence.

III. THE COMMISSION'S REGULATIONS ADOPTED TO IMPLEMENT THE WATER QUALITY ACT ARE NOT SUBJECT TO REVIEW BY THIS COURT

CCW's failure to attack the substance of the Permit suggests that the purpose of this appeal is to collaterally attack the validity of 20.6.2.3108(K), the Commission's regulation implementing Section 74-6-5. **[4 RP 01821** (stating "[CCW's] only interest in the matter appears to be manufacturing an artificial, legal dispute because it is unhappy with how the Secretary exercised his discretion")]. For the reasons set forth below, this collateral attack is outside the authority granted to this Court under Section 74-6-7 and must be dismissed. *See* N.M. Const. art. VI, § 29 (limiting the Court of Appeals authority to directly review decisions of an administrative agency to the authorization granted under the applicable statute).

The current language of 20.6.2.3108(K) NMAC was adopted by the Commission over 10 years ago. XVIII N.M. Reg. 652 (June 30, 2006). However, Section 74-6-7, only authorizes this Court to review an adoption of a regulation within 30 days of the filing date for that regulation. Thus, to the extent that CCW, in this appeal, is attempting to challenge the Commission's adoption of

20.6.2.3108(K) NMAC, CCW did not bring the appeal within the statutory 30 day period and the Court does not have authority to review adoption of that regulation now.

CCW is not, however, without a proper means to challenge the validity of a regulation. CCW may, pursuant to Section 74-6-6 of the Water Quality Act, submit a written petition to the Commission requesting an amendment to 20.6.2.3108(K) NMAC. *See* NMSA 1978, § 74-6-6 (allowing any person to petition in writing to have the commission amend a regulation or water quality standard). Yet, no such petition has been filed. CCW may also be able to file a declaratory judgment action in the appropriate district court if CCW wishes to challenge the validity of the regulation or the Commission's authority to issue the regulation. *See Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 19, 142 N.M. 786. *See also State v. N.M. ex. rel. Hanosh v. N.M. Environmental Impr. Bd.*, 2008-NMCA-156, ¶8, 145 N.M. 269. CCW may not, however, bring a challenge to the validity of the Commission's regulations in this appeal.

Moreover, to the extent that CCW is requesting a declaration from this Court as to how the Commission should interpret Section 74-6-5(G) or 20.6.2.3108(K) NMAC, such relief is also outside the authority granted under Section 74-6-7. As a result, CCW's argument that the regulation or the Commission's interpretation of that regulation is invalid is not properly before this Court and must be dismissed.

CONCLUSION

In sum, CCW has not demonstrated any basis for reversal of the Commission's Order. LANS, therefore, requests this Court sustain the action by the Commission to issue DP-1793 and dismiss this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, a true and correct copy of the foregoing Los Alamos National Security, LLC's Answer Brief was served by first class and electronic mail to the following:

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