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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,

and

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

Intervenors.

ANSWER BRIEF OF THE NEW MEXICO WATER QUALITY CONTROL COMMISSION

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SUMMARY OF PROCEEDINGS

I. Nature of the Case.

This matter is an appeal from the New Mexico Water Quality Control Commission's ("WQCC") Final Order of February 10, 2016, sustaining ground water discharge permit DP-1793 ("DP-1793") and the New Mexico Environment Department Secretary's ("Secretary") formal denial of Appellant, Communities for Clean Water's ("CCW"), request for a public hearing in the matter of DP-1793. **[4 RP 01816-01824]**. At issue is whether the WQCC was correct in sustaining the Secretary's determination that there was not substantial public interest in DP-1793, and, therefore, no public hearing was required prior to the issuance of DP-1793.

II. Summary of Facts.

The discharges authorized under DP-1793 are components of ongoing remediation activities to address legacy contamination at the Los Alamos National Laboratory ("LANL"), including cleanup of a chromium-contaminated groundwater plume within the boundaries of the LANL site. **[4 RP 01817]**. The United States Department of Energy ("DOE") and Los Alamos National Security, LLC. ("LANS") (collectively "DOE/LANS") submitted the initial permit application on December 20, 2011, in accordance with 20.6.2.3106 NMAC. That application requested a permit for the discharge of treated ground water from pumping tests at monitoring wells at LANL. **[1 RP 00027-00043]**. After several

months of additional information collection by the New Mexico Environment Department's ("Department") Ground Water Quality Bureau ("GWQB" or "Bureau"), including an administrative incompleteness determination on May 23, 2012, the Bureau deemed DP-1793 administratively complete on August 22, 2012, pursuant to 20.6.2.3108.A NMAC. **[1 RP 00132-00136]**. Between May 2013 and October 2014, the Bureau granted, for good cause shown, temporary permissions to discharge treated ground water related to well development and pump tests at wells R-28, R-42, R-62, R-43, SCI-2, CdV-16-4ip, and pilot well CrEX-1 pursuant to 20.6.2.3106.B NMAC. **[1 RP 00346-00353, 2 RP 00469-00471, 00482-00485, 00734-00737, 00919-00927, 00998-01000]**.

On January 7, 2014, after evaluating the pump test results and well development authorized under the temporary permissions, DOE/LANS submitted an amended application to broaden the scope of DP-1793. **[2 RP 00560-00613]**. The Bureau deemed the amended application administratively complete on December 3, 2014, pursuant to 20.6.2.3108.A NMAC. **[2 RP 01001-01004]**. The first required public notice for the amended application was completed on January 6, 2015, pursuant to 20.6.2.3108.B, C, and E NMAC. **[2 RP 01005-01035]**.

The Bureau issued a draft ground water discharge permit on January 22, 2015, pursuant to 20.6.2.3108.H NMAC. **[3 RP 01036-01054]**. On January 30, 2015, the second required public notice for DP-1793 was completed, pursuant to

20.6.2.3108.H NMAC. **[3 RP 01188-01194]**. DOE/LANS submitted comments on the draft permit as well as a hearing request on February 25, 2015. **[3 RP 01055-01091]**. CCW submitted comments and a request for hearing on March 2, 2015. **[3 RP 01092-01099]**.

The Bureau held a technical meeting on the draft discharge permit on April 15, 2015, with representatives from the Bureau, DOE/LANS, and CCW in attendance. **[3 RP 01104-01118]**. On April 29, 2015, the Bureau allowed CCW to submit additional comments on the draft discharge permit and renew its request for a public hearing. The Bureau also allowed DOE/LANS to submit alternate proposed language for the draft discharge permit. **[3 RP 01100-01103]**.

The Bureau issued a revised draft discharge permit on May 28, 2015. **[3 RP 01202-01221]**. On June 9, 2015, the Bureau allowed DOE/LANS to submit comments on the revised draft discharge permit. The Bureau also allowed CCW to submit comments and a renewed request for public hearing on the revised draft discharge permit on June 15, 2015. **[3 RP 01119-01126]**.

The Secretary denied the request for hearing in the matter of DP-1793 on July 7, 2015, in accordance with 20.6.2.3108.K NMAC. **[3 RP 01127-01134]**. DOE/LANS withdrew their hearing request on July 9, 2015. **[3 RP 01135-01156]**. The Bureau communicated the Secretary's hearing request denial to CCW in a letter dated July 24, 2015, pursuant to 20.6.2.3108.K NMAC. **[3 RP 01157-01158]**.

On July 27, 2015, the Department issued the final discharge permit for DP-1793 with conditions, pursuant to 20.6.2.3109.B NMAC. **[3 RP 01159-01187]**.

III. Course of the Proceedings.

On August 21, 2015, CCW filed a Petition for Review of the Secretary's Denial of a Request for a Public Hearing on DP-1793 and Final Approval of DP-1793 and Motion to Stay DP-1793 with the WQCC. **[3 RP 01223-01295]**. CCW then filed a First Amended Verified Petition for Review and an Amended Motion to Stay with the WQCC on August 24, 2015. **[3 RP 01304-01377]**.

The WQCC held oral argument on CCW's Motion to Stay on October 13, 2015, ultimately voting unanimously to deny the motion. **[3 RP 01495-01593]**. The WQCC also voted 9-1 to schedule a hearing on CCW's Amended Petition for Permit Review for December 8, 2015. **[3 RP 01495-01593]**. The WQCC held the scheduled hearing on December 8, 2015, and voted 9-2 to sustain the Secretary's decision. **[4 RP 01676-01815]**. The WQCC issued a Final Order outlining its findings and conclusions as well as the support for its decision on February 10, 2016. **[4 RP 01816-01824]**.

STANDARD OF REVIEW

Under the Water Quality Act, an action of the WQCC should be set aside only if it is "(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). "An action is arbitrary or capricious if it is unreasonable, irrational, willful, and does not result from a sifting process or if there is no rational connection between the facts found and the choices made." *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 10, 140 N.M. 464 (internal quotation marks and citations omitted). In reviewing administrative decisions, this court "review[s] the whole record, viewing both the favorable and unfavorable evidence in the light most favorable to the administrative decision." *San Pedro Neighborhood Assn. v. Bd. of County Comm'rs*, 2009-NMCA-045, ¶ 11, 146 N.M. 106. The Court does not substitute its judgment for that of the agency and "only evaluate[s] whether the record supports the result reached, not whether a different result could have been reached." *Id.* "Substantial evidence means relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *Id.* (Internal quotation marks and citation omitted). As the appellant, CCW bears the burden on appeal of showing that the requested relief is warranted. *Doña Ana Mut. Domestic Water Consumers Ass'n v. New Mexico Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 9, 140 N.M. 6.

ARGUMENT

I. Summary of Argument.

The WQCC's decision in this matter was made in accordance with law. The WQCC applied the correct standard of review pursuant to NMSA 1978, Section 74-6-5(Q) (2009) in reviewing and upholding the Secretary's determination of no substantial public interest. Further, the WQCC's reasoning is supported both by the record and by law.

The WQCC properly found that CCW was not entitled to a public hearing in this matter under the Water Quality Act, NMSA 1978, Sections 74-6-1 to -17, or the Ground and Surface Water Protection regulations, 20.6.2 NMAC. The WQCC's regulations promulgated under the Water Quality Act provide discretion to the Secretary in granting public hearings in discharge permit proceedings. The Secretary's determination that there was not substantial public interest to warrant a hearing in this matter is in accordance with those regulations.

The WQCC did not abuse its discretion in sustaining the Secretary's decision. The record shows that the Secretary considered the public interest and determined that there was not substantial public interest to warrant a public hearing. Further the WQCC's decision is supported by substantial evidence in the record demonstrating that the Secretary properly determined there was not

substantial public interest. Thus, the WQCC's decision upholding the Secretary's determination that no hearing was required on DP-1793 should be affirmed.

II. The WQCC's Decision Is In Accordance With The Law.

A. The WQCC applied the correct standard of review for a permit review.

Permit reviews before the WQCC are guided by NMSA 1978, Section 74-6-5(Q), which provides in pertinent part:

> 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.

The WQCC's regulations at 20.1.3.16.F(3) NMAC mirror the language of Section 74-6-5(Q). The WQCC's Final Order cites to both provisions. **[4 RP 01817]**.

CCW alleges that the Secretary did not make the required determination regarding substantial public interest, and therefore the WQCC's only options under Section 74-6-5(Q) and 20.1.3.16.F(3) NMAC were to modify or reverse the Secretary's decision. **[BIC 12]**. This argument assumes that a finding of substantial public interest was established, and uses this as the basis for the WQCC's standard of review. As will be shown *infra* however, the Secretary determined there was not substantial public interest warranting a public hearing, and therefore the WQCC's

action in upholding the Secretary's decision to deny a hearing was in accord with Section 74-6-5(Q).

CCW further argues that the WQCC improperly applied a deferential standard in considering the Secretary's exercise of the discretion he is afforded under 20.6.2.3108.K NMAC. **[BIC 12]**. However, the Final Order states clearly that the WQCC independently considered and weighed the evidence in the record, and did not afford the Secretary's decision any deference. **[4 RP 1821]**. 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 20.6.2.3108(K) NMAC" **[4 RP 1822]**, 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.

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. Such an interpretation is not in accordance with the principles of construction found in NMSA 1978, Section 12-2A-18 (1997). Contrary to the principles of construction, such an interpretation ignores language from Section 74-6-5(Q) by eliminating the option of sustaining the Secretary's decision. "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." NMSA 1978, §74-6-5(Q) (emphasis added).

B. Both the Secretary and the WQCC made a determination that there was not substantial public interest in DP-1793 warranting a hearing.

CCW alleges in its argument that the Secretary did not make a determination regarding whether there was substantial public interest when evaluating the need for a public hearing under 20.6.2.3108.K NMAC. Specifically, CCW argues that, based upon the denial letter received by CCW, the Secretary evaluated "the alleged transparency of the permit, the level of community involvement allowed by NMED in the permitting process, the purpose of the permit, and the issuance of the permit being in the public interest" but not substantial public interest. **[BIC 15]**.

While CCW may not interpret the letter informing CCW of the Secretary's denial of its request for hearing as evidence that the Secretary evaluated whether there was substantial public interest when making his hearing determination, the Secretary fully executed his grant of authority under 20.6.2.3108.K NMAC. **[3 RP 01157-01158]**. In making his determination as to whether a hearing was appropriate in this matter, the Secretary evaluated whether there was substantial public interest by reviewing whether comments and requests for hearing had been received, and the breadth of such comments and requests for hearing. The GWQB summarized the history of the permit proceedings, the comments received, and the substantiality of the comments in its Request for Hearing Determination

memorandum. **[3 RP 01127-01134]**. The Secretary ultimately adopted the reasoning of the Bureau in making his determination to deny the request for hearing.

In its independent review of the record and the Secretary's determination, the WQCC found that there was not substantial public interest warranting a hearing on DP-1793, stating that "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." **[4 RP 01821]**.

The Appellant suggests in its brief that the inclusion of the GWQB's Request for Hearing Determination memo to the Secretary in the Administrative Record, **[3 RP 01127-01134]**, was a smoking gun that reflected the lack of a substantial public interest determination by the Secretary. While the Appellant refers to it as an "internal memorandum," **[BIC 5, 28]** the implication being that it was erroneously included in the Administrative Record, the WQCC considers the document to be a public record and fully part of the Administrative Record in this matter, as it ultimately contains the Secretary's hearing determination, with signature and date. In signing the document, the Secretary adopted the reasoning of the GWQB as to whether to grant or deny the hearing request.

CCW does not explain or point to any evidence demonstrating how the Bureau's Request for Hearing Determination indicates that the Secretary failed to determine whether there was substantial public interest, as is its burden pursuant to *Doña Ana MDWCA*. The fact that the Secretary's denial does not explicitly say "I am denying the request for hearing because of lack of substantial public interest" does not mean that the Request for Hearing Determination did not contain information relevant to the Secretary's determination, or that such an evaluation did not occur.

C. The WQCC's Final Order is based upon the record and the law.

CCW argues that the WQCC's consideration of two "critical issues" raised at oral argument indicate the WQCC considered "facts and information irrelevant to the issue before the WQCC and not in the record". **[BIC 17]**. The first of these issues is that DP-1793 allows the Permittee to begin to remediate contaminated groundwater within the boundaries of LANL. Yet, the purpose of DP-1793 was clearly in the record, both in the initial application, **[1 RP 00032]**, as well as on the very first page of the permit itself, **[1 RP 01038]**. The statutory language of Section 74-6-5(Q) invoked by CCW in requesting a permit review states that the "[WQCC] shall review the record compiled before the constituent agency." It is therefore unclear how the purpose of the permit under review, clearly contained in

the record (which includes the permit itself), is irrelevant to the permit review or the WQCC's decision.

The second issue CCW claims was improperly considered by the WQCC is CCW's failure to challenge the substantive provisions of DP-1793. **[BIC 18-19]**. Again, this fact is necessarily part of the record, and was even contained in CCW's own briefing before the WQCC. **[4 RP 01473-01494, 01647-01675]**. Further, that issue is relevant to the WQCC's determination of what remedy it may grant a petitioner in a permit review. If there are no issues with the merits of the permit in question, then the purpose of granting a public hearing is no longer to develop the best discharge permit possible (ostensibly the main purpose of the Water Quality Act and its implementing regulations). Instead, a hearing would be granted simply for the sake of having a public hearing. CCW cites to no authority supporting the proposition that simply holding a public hearing, when CCW was unwilling to raise any particular substantive issues with DP-1793 before the WQCC as part of the permit review process, is a valid end unto itself or a legitimate expenditure of the state's resources.

III. CCW Was Not Entitled to a Public Hearing Under the Water Quality Act and the Ground and Surface Water Protection Regulations.

A. The WQCC's regulations promulgated under the Water Quality Act afford the Secretary discretion in granting public hearings on discharge permits.

CCW argues that the language in Section 74-6-5(G) providing that "[n]o ruling shall be made on any application for a permit without opportunity for a public hearing..." should be interpreted to mean that when an interested person affected by a proposed permit requests a public hearing, NMED is required to hold a public hearing.**[BIC 32]**. CCW offers no support for this argument besides its own reading of the statutory language. This Court has long assumed 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. Fortunately, the WQCC has promulgated regulations based upon Section 74-6-5(G) to accommodate public hearing opportunities related to permitting actions. Specifically, Subsection 20.6.2.3108.K NMAC provides:

> Following the public notice of the proposed approval or disapproval of an application for a discharge permit, modification or renewal, and prior to a final decision by the secretary, there shall be a period of at least 30 days during which written comments may be submitted to the department and/or a public hearing may be requested in writing. The 30-day comment period shall begin on the date of publication of notice in the newspaper. All comments will be considered by the department. Requests for a hearing shall be in writing and shall set forth the reasons why a hearing should be held. A public hearing shall be held if the secretary determines there is substantial public interest. The department shall notify the applicant and any person requesting a

hearing of the decision whether to hold a hearing and the reasons therefore in writing.

This provision allows the Secretary discretion in granting permit hearings by specifying that "a public hearing shall be held if the Secretary determines there is substantial public interest."

CCW attempts to alter the language of the regulation, arguing that "[t]he regulation requires an opportunity for a hearing *unless* the Secretary determines that there is no substantial public interest in the permit." **[BIC 22, 29-30]**. The difference between the actual regulatory language and CCW's assertion is significant. The regulations require the Secretary to determine whether there is substantial public interest, and if he determines that there is, a public hearing is held. Under CCW's flawed articulation, a public hearing is the default, unless the Secretary proves that there was no substantial public interest. However, as stated, a hearing is not the default under 20.6.2.3108.K NMAC. Instead, a hearing is only granted if, after receipt of public comments and requests for hearing that set forth the reasons a hearing shall be held, the Secretary makes a determination that there is substantial public interest.

In contrast, other programs administered by the Department have controlling statutory and regulatory authorities that do mandate public hearings. For instance, Section 74-9-24(A) of the Solid Waste Act, NMSA 1978, Sections 74-9-1 to -43, provides that "[t]he director, within one hundred eighty days after the application is

deemed complete ***and after a public hearing***, shall issue a permit, issue a permit with terms and conditions or deny a permit application." (Emphasis added). *See also* 20.9.3.16.B NMAC ("A permit shall be issued only after a public hearing as required by NMSA 1978 Section 74-9-24 A of the Solid Waste Act.") These mandatory provisions crafted by the Legislature provide no agency discretion regarding whether to hold a hearing; if a valid permit application is submitted, a hearing must be held before an action may be taken on that permit. The mandatory public hearing requirement in the Solid Waste Act requires no determination by the Secretary. Thus, the reasoning cited by CCW from *Colonias Development Council v. Rhino Environmental Services, Inc.*, 2005-NMSC-24, 138 N.M. 133, that public participation provisions in the Solid Waste Act, including mandatory public hearings, indicate the Legislature's intent that the Department consider broader implications than purely technical impacts in a permitting decision, is inapposite to the Water Quality Act's discretionary public hearing language. If the Legislature intended public hearings to be mandatory (or even the default) in the issuance of discharge permits, it would have penned the Water Quality Act in a similar manner as the Solid Waste Act, without the degree of agency discretion that exists now with respect to public hearings.

In sum, the Water Quality Act does not mandate a public hearing, nor does it establish public hearings as the default. Instead, Section 74-6-5(G) allows for the

opportunity for public hearings related to discharge permits, and the WQCC's regulations implementing that statute afford the Secretary discretion in deciding whether a public hearing should be held on a given discharge permit. This discretion is exercised through an evaluation of whether there is substantial public interest in the permit. As this Court stated in *Phelps Dodge Tyrone v. WQCC*, "we afford administrative agencies considerable discretion to carry out the purposes of their enabling legislation, and we give deference to an agency's interpretation of its own regulations." *Phelps Dodge Tyrone*, 2006-NMCA-115, ¶ 25, 140 N.M. 464. Further, our Supreme Court has stated that it "will generally defer to the [WQCC's] reasonable interpretation of its own ambiguous regulations." *Gila Res. Info. Project v. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 16, 138 N.M. 625 (citing *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-05, ¶ 17, 133 N.M. 97). If CCW is dissatisfied with the WQCC's existing regulations pertaining to permit hearings, the proper remedy is to petition the WQCC to amend the language in accordance with NMSA 1978, Section 74-6-6(B) and the Guidelines for Water Quality Control Commission Regulation Hearings.

B. Because the Secretary determined there was not substantial public interest, his denial of the CCW's request for hearing was in accordance with 20.6.2.3108.K NMAC and the Water Quality Act.

As explained above, the Secretary made the determination that substantial public interest did not exist, and therefore no public hearing was warranted. In

making this determination, and in denying the request for hearing, the Secretary acted in accordance with 20.6.2.3108.K NMAC and the public participation requirements of Section 74-6-5(G). CCW's argument that the Secretary's interpretation of 20.6.2.3108.K NMAC "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" **[BIC 22-24]** is premised solely upon CCW's incorrect assumption that the Secretary did not make the requisite substantial public interest determination. Because the Secretary did in fact make that determination, CCW's argument fails.

IV. The WQCC Did Not Abuse It's Discretion in Upholding the Secretary's Denial of a Public Hearing.

A. The record shows that the Secretary considered the public interest in DP-1793 and properly determined that any remaining concerns did not constitute substantial public interest.

The Hearing Determination Memorandum and the denial letter to CCW memorialize the Secretary's reasoning (adopting the reasoning and recommendation of the GWQB) and his determination regarding substantial public interest. **[3 RP 01127-01134, 01157-01158]**. CCW's claim that these documents do not constitute substantial evidence is based on its own erroneous conclusion, discussed above, that the Secretary must provide evidentiary proof there is not substantial interest in order to decline to hold a hearing. **[BIC 22, 29-30]**. Given

the complete lack of evidence in the record that there was substantial public interest, there was nothing for the Secretary or the WQCC to disprove.

B. The WQCC did not abuse its discretion when it found that the Secretary considered the public interest and properly determined that any remaining concerns did not constitute substantial public interest.

In reaching its conclusion that the Secretary properly determined that there was not substantial public interest in DP-1793 to warrant a public hearing, the WQCC found that CCW "made a number of verbal representations regarding the size of its membership, but ultimately failed to provide any support whatsoever…to substantiate these verbal representations." **[4 RP 01817-01818]**. Indeed, the closest CCW comes to quantifying the size of its membership is the representation that it is "a coalition of six organizations." **[BIC 23]**. The record is conspicuously absent of any other effort to identify the extent and nature of its membership, as one would expect from a non-governmental organization in asserting that its interests are "substantial."

Further, the CCW claims that the WQCC's conclusion represents an abuse of discretion because the WQCC "failed to cite evidence in the record in support of this finding." **[BIC 27]**. To the contrary, the WQCC cites both the Hearing Determination Memorandum as well as the denial letter to CCW. **[4 RP 01818]**. These documents memorialize the Secretary's reasoning (adopting the reasoning and recommendation of the GWQB) and his determination regarding substantial

public interest. **[3 RP 01127-01134, 01157-01158]**. CCW's claim that these documents do not constitute substantial evidence is based on its own determination that the Secretary (and subsequently the WQCC) must provide evidentiary proof that there is ***not*** substantial interest in order to deny a hearing request. **[BIC 22, 29-30]**. Because CCW failed to provide evidence regarding the substantial nature of the public interest, neither the Secretary nor the WQCC had evidence with which to support a determination in CCW's favor. Without evidence, there was nothing to disprove.

V. Substantial Evidence in the Record Supports the Secretary's and the WQCC's Determination That There Was Not Substantial Public Interest in DP-1793.

CCW argues, in the alternative, that even if the Secretary did make the requisite determination regarding substantial public interest, his determination is not supported by the record and is therefore an abuse of discretion. **[BIC 27]**.

A. Substantial evidence in the record shows the Secretary properly determined that there was not substantial public interest in DP-1793.

CCW correctly observes that neither the Water Quality Act nor 20.6.2.3108.K NMAC provide factors to be considered in the Secretary's determination of whether substantial public interest exists. **[BIC 28-29]**. However, the absence of such explicit guidelines does not mean that the Secretary is unable to make a determination regarding the existence of substantial public interest. *See* NMSA 1978, § 9-7A-6(B) (1991). Instead, the contours of that determination are

left to the Secretary's discretion, taking into account the facts and circumstances relevant to each particular permit application, and within the constraints that he may not act arbitrarily or capriciously or otherwise not in accordance with law. There is nothing in the record in this proceeding indicating that the Secretary acted outside the proper bounds of his discretion in determining that there was not substantial public interest in DP-1793.

The meaning of the term "substantial" is integral in an evaluation of substantial public interest. According to the Oxford English Dictionary, "substantial" means: 1) of considerable importance, size or worth; 2) concerning the essentials of something; or 3) real and tangible, rather than imaginary. Oxford English (U.S.) Dictionary, http://www.oxforddictionaries.com/us/definition/american_english/substantial (last visited July 19, 2016). For example, the New Mexico Supreme Court considers a case to present issues of substantial public interest if it "involves a constitutional question or affects a fundamental right such as voting." *Republican Party v. N.M. Taxation and Revenue Dept.*, 2012-NMSC-026, ¶ 10, 283 P.3d 853, 858. In other words, issues of substantial public interest are of high consequence, impacting core functions of society. While a Supreme Court determination of whether a case presents issues of substantial public interest in relation to whether it will opine on a moot matter can be distinguished from the Secretary evaluating whether there is

substantial public interest when deciding whether or not to grant a permit hearing, it does provide evidence as to the significance of "substantial" in relation to substantial public interest.

CCW makes much of the fact that it submitted multiple requests for a hearing in this matter. **[BIC 5, 14, 23]**. Its initial request and subsequent renewed requests were made in connection with each set of comments submitted by CCW throughout the extensive process the Department employed, in this instance, to engage with CCW and respond to its concerns prior to issuing the final discharge permit. The Department did not act upon the first hearing request and first renewed request because it was still attempting to accommodate CCWs' concerns. Thus, the number of hearing requests submitted by CCW is not indicative of any substantial public interest in this matter. Rather, it is indicative that the Department was extensively involving CCW in the development of the terms of the permit, and attempting to respond to CCW's concerns.

Further, the number of hearing requests alone is not indicative of the substantive nature of the public interest. For example, there could be 100 requests for hearing submitted, but if the requests are not substantive in the sense that they do not "set forth the reasons why a hearing should be held" or the reasons provided are either not substantive in nature or not within the purview of the Department, the Secretary will likely deny those requests.

In this instance, the Bureau received comments from CCW several times in the draft discharge permit process as well as renewed requests for public hearings. **[3 RP 01092-01099, 01104-01118, 01121-01126]**. After evaluating the comments, meeting with CCW and DOE/LANS, and incorporating any changes into the discharge permit that were appropriate based on the submitted comments, the GWQB drafted the Request for a Hearing Determination that was submitted to the Secretary. **[3 RP 01127-01134]**. The Request for Hearing Determination contained a history of the permit, a summary of the contents of the permit, a subset of the concerns raised by CCW in its hearing request(s), and the GWQB's response to such concerns. The information provided was for the Secretary's use in making his determination as to whether or not to hold a hearing in this matter. 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. So that the Court has a greater understanding of the extent to which CCW's comments were addressed, the 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 discharge permit, to the extent possible. **[4 RP 01631-01639]**. The remaining comments not incorporated into the discharge permit are non-substantive in nature.

As stated, the GWQB informed the Secretary in its Request for Hearing Determination how it had addressed, to the extent possible, CCW's concerns expressed in its submitted comments. The fact that the Department made significant modifications to the permit to address CCW's concerns removes or negates the substance of their interest. To allow a public hearing when the bulk of its concerns have been addressed would only serve to provide a public forum for CCW to air general concerns regarding LANL and DOE/LANS that were not germane to the permit and is not what the language in 20.6.2.3108.K NMAC is intended to address, which is the permit itself.

Importantly, an interested party still has the opportunity to have any outstanding issues of concern heard even if a request for hearing is denied and a permit is issued, as was the case here. Pursuant to NMSA 1978, Section 74-6-5(O) and 20.1.3.16 NMAC, CCW had the option to file a Petition for Permit Review with the WQCC which then allows for the WQCC to use its technical expertise to review and evaluate contested provisions of a permit and to possibly remand the matter back to the Department for additional information gathering, if the WQCC feels such a remand is necessary. In this instance, CCW chose to not bring any contested issues related to the substantive provisions of the permit before the WQCC. Instead, CCW opted to solely contest the denial of its hearing request and the subsequent issuance of the permit. It is unknown what benefit CCW believes it

will derive from a public hearing when it had the opportunity to have the WQCC review and opine on contested permit conditions through the public permit review process.

B. Neither the Secretary nor the WQCC abused their discretion in determining that there was not substantial public interest in DP-1793.

The Secretary made his determination that substantial public interest did not exist to warrant a public hearing, and the WQCC upheld that decision based on an independent review of the record and without affording the Secretary's decision any deference. CCW is not only incorrect in its interpretation of the public participation envisioned by the Water Quality Act and its implementing regulations, it is also incorrect as to the evidence presented to and reviewed by the WQCC. Essentially, CCW disagrees with the Secretary's determination, and therefore disagrees with the WQCC's upholding of that decision. **[BIC 29]** ("If the Secretary had in fact taken into consideration the factors of transparency and the level of community involvement allowed by NMED in the permitting 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.") CCW's logic appears to be that if it disagrees with a decision of the Secretary, then it cannot possibly be correct for the WQCC to uphold that decision. However, the Water Quality Act and its implementing regulations provide the

Secretary with discretion in making a hearing determination, and Section 74-6-5(Q) provides the WQCC with the authority to sustain that determination based on its review of the record.

It is telling that the basis of CCW's argument presumes that "substantial public interest can and does exist for permits whose purpose is the remediation of contaminated groundwater." **[BIC 30]**. Under this reasoning, any permit for remediation must automatically go through the public hearing process, as does a solid waste permit. If this were correct, there would be no need for review and determination by the Secretary, and Section 74-6-5(G) should be read to mean that a public hearing shall be held no matter what. As discussed previously, the public participation provisions of the Water Quality Act are not the same as those of the Solid Waste Act, and so cannot be interpreted to effectively be the same.

Here, the WQCC sustained the Secretary's decision not to hold a public hearing on DP-1793 based on substantial evidence in the record. The WQCC's decision was not arbitrary and capricious, or otherwise not in accordance with law. Thus, the decision should be upheld.

CONCLUSION

Based on the record and the arguments submitted herein, the WQCC respectfully requests that the Court affirm the WQCC's Final Order. CCW has not met its burden of showing the requested relief (remand to either the WQCC or

NMED) is warranted, or that the WQCC's Final Order is arbitrary or capricious. The record indicates that the WQCC applied the correct standard of review in its permit review. The WQCC was correct in sustaining the Secretary's determination of no substantial public interest. These determinations were properly made and supported by consideration of the evidence in the record. This appeal is a request for the Court to reweigh the evidence and agree with CCW's incorrect interpretation of both statutory and regulatory law. CCW has cited no law supporting a departure from well-established administrative review because such authority does not exist.

Submitted by,

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CERTIFICATE OF SERVICE

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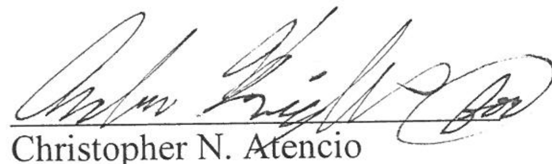

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