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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COMMUNITIES FOR CLEAN WATER
Appellant,

vs. Ct. App. No. 35253

NEW MEXICO WATER QUALITY CONTROL COMMISSION
Appellee,

and

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

Intervenors.

COMMUNITIES FOR CLEAN WATER'S REPLY BRIEF TO LOS ALAMOS NATIONAL SECURITY, LLC'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 3,973 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 ("CCW"), hereby files its *Reply Brief* to Los Alamos National Security, LLC'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 PROCEEDINGS AND DISPOSITION BELOW

Intervenor Los Alamos National Security, LLC ("LANS") has provided several misstatements of fact and incorrect citations to the record in regards to the proceedings and disposition below. Communities for Clean Water hereby provide the following corrections:

1. On April 15, 2015, the New Mexico Environment Department held a technical meeting, with no public notice, on the draft discharge permit 1793 ("DP-1793"). **[3 RP 01198]** Representatives from NMED, the

Permittees (LANS and the United States Department of Energy), and Communities for Clean Water attended this meeting. **[3 RP 01199]** LANS incorrectly cites to **3 RP 01199**, which is Communities for Clean Water's March 2, 2015 comments and request for a public hearing. This document does not reflect LANS's assertion that the April 15, 2015 meeting was held to "address the issues raised by CCW." **[AB 3]** There are no minutes for this meeting in the record.

2. LANS cites to **3 RP 01100** as supporting evidence that NMED "asked DOE/LANS to offer proposed language to address the issues raised by CCW at the meeting and in its comments." **[AB 3]** This document is an email from Bob Beers, Permittees LANS's representative, sent to Steve Huddleson with NMED. It does not support LANS's assertion that alternative language proposals submitted were for the purpose of addressing Communities for Clean Water's concerns.
3. LANS claims that "[t]he 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…or its implementing regulations for issuance of a discharge permit," with supporting citation to **3 RP 01100, 01092-01099**. Again, **3 RP 01100** is an email between Steve Huddleson, NMED representative, and Bob Beers, Permittees LANS's

representative, and does not support LANS's claim. Communities for Clean Water's first set of comments and request for a public hearing on draft DP-1793 also does not support LANS's claim. *See generally* **[3 RP 01092-01099]**. Communities for Clean Water submitted two more sets of comments and requests for public hearing because its concerns were not being addressed by NMED and by the Permittees, and there remained significant substantive issues with the draft permit. Communities for Clean Water was not involved in the actual drafting of permit conditions and requirements. *See generally* **[3 RP 01104-01118, 01121-01126, 01159-01187]**.

4. Again, there is no evidence in the record that reflects what actually occurred at the April 15, 2015 technical meeting. Only one document in the record verify that the meeting actually took place and who attended the meeting. **[3 RP 01198-01199]** LANS cites to Communities for Clean Water's set of comments submitted in response to this meeting in support of its argument that the meeting "resolved issues." **[AB 4]** In fact, this meeting raised new issues and concerns, as a result of which Communities for Clean Water submitted its second request for a public hearing, along with a second set of comments on the draft DP-1793. **[3 RP 01104-01118]**

5. LANS incorrectly states that "CCW did not specifically explain why a hearing was necessary." **[AB 5]** CCW did in fact specifically explain why a hearing was necessary in each of its requests for a public hearing on draft DP-1793 **[3 RP 01092-01099, 01104-01118, 01121-01126]**, in its *Amended Petition for Review* **[3 RP 01304-01377]**, in its *Opening Brief in Support of Petition for Review* **[3 RP 01473-01494]**; in its *Consolidated Reply Brief in Support of Petition for Review* **[4 RP 01647-01675]**, and in the proceedings before the WQCC. **[4 RP 01726: 17-25, 01727: 1-10]**; *see generally* **[3 RP 01495-01593; 4 RP 01676-01815]**.

6. LANS incorrectly states that, "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." **[AB 5-6]** *See* **[3 RP 01306, 3 RP 01473-01494; 4 RP 01647-01675, 4 RP 01726: 17-25, 01727: 1-10[1]]**.

7. LANS has made several statements of mere opinion that inject legal interpretations into alleged statements of fact in its summary of

[1] At the December 8, 2015 WQCC hearing on Communities for Clean Water's Petition for Permit Review, Commissioner Hutchinson asked CCW counsel, "So does CCW believe that a permit would have been different had there been a hearing?" To which CCW counsel replied, "Yes, Commissioner Hutchinson, we do," and proceeded to explain why.

proceedings and disposition below. **[AB 1-8]** These statements do not reflect the actual facts but offer LANS's opinions on the proceedings as if they were facts. For example, LANS states:

> 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.

[AB 6] This statement has no relation to reality and is merely a rhetorical attempt to insert LANS's legal conclusions regarding the intentions of the Commission as if they were facts. The Court should ignore each one of LANS's legal conclusions disguised as facts.

III. SUMMARY OF ARGUMENT

Communities for Clean Water has satisfied the statutory prerequisites for appealing the New Mexico Water Quality Control Commission's ("WQCC") decision to sustain the Secretary of the New Mexico Environment Department's ("Secretary" or "NMED") denial of Communities for Clean Water's request for a public hearing on draft discharge permit 1793 ("DP-1793"), and approving the permit. Communities for Clean Water has been adversely affected by the WQCC's decision (and the Secretary's decision), has set forth how these decisions harm its members, and has established actual injury from these decisions.

The issues raised by Communities for Clean Water are not moot and the

Secretary's failure to hold a public hearing is not harmless error. Public participation requirements were denied to Communities for Clean Water's members and a permit that is in violation of the Water Quality Act and its implementing regulations is now in effect, causing injury to Communities for Clean Water and its members.

The WQCC's decision is not in accordance with the law, not supported by substantial evidence in the record, and is an abuse of discretion. Therefore, the WQCC's decision is not entitled to deference by this Court.

Lastly, the WQCC's interpretation and application of the Water Quality Act's implementing regulations is most certainly subject to judicial review.

IV. ARGUMENT

A. Communities For Clean Water Has Satisfied The Statutory Prerequisites For Appealing The WQCC's Decision.

1. Communities for Clean Water has been adversely affected by the WQCC's decision.

The New Mexico Water Quality Act provides, in pertinent part, that, "A person who has participated in a permitting action and who is adversely affected by such action may appeal to the court of appeals for further relief." NMSA 1978, Section 74-6-7(A) (1993). Communities for Clean Water participated in the permit proceedings below and presented argument to the WQCC on how it has been adversely affected by the decision of the Secretary and the permit now in effect.

See generally the portions of the record cited above in Section II(5); *see also* **[4 RP 01687: 11-25, 01688: 1-17, 01690: 6-11, 01710: 6-25, 01711: 1-2, 01726: 17-25, 01727: 1-10[2], 01746: 5-23, 01753: 16-19, 01757: 8-23[3], 01762: 11-14[4], 01773: 24-25, 01774: 1-12[5]]**

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[2] At the December 8, 2015 hearing, Commissioner Hutchinson asked Communities for Clean Water, "So does CCW believe that a permit would have been different had there been a hearing?" To which, Communities for Clean Water replied, "Yes, Commissioner Hutchinson, we do," and proceeded to explain why.

[3] Communities for Clean Water stated at the December 8, 2015 hearing:

> [w]e are not required to challenge the merits of the permit. We felt it was of primary importance to first petition for review the permitting actions of the Secretary denying the request for a public hearing. And as we have previously stated, we believe that the Administrative Record is incomplete, to the point of extreme prejudice to Petitioners; that even if we were to have filed a Petition for Permit Review based on the substance of the permit, we would have been significantly prejudiced in regard to arguments that we would be able to make, because, again, the standard of review…says that you cannot go beyond the Administrative Record.

[4] Communities for Clean Water stated at the December 8, 2015 hearing, "Petitioners are affected by the denial of the Secretary…of its request for a public hearing and they are affected by the permit now in place."

[5] Communities for Clean Water stated at the December 8, 2015 hearing:

> We have stated that that's an issue that was raised and that is properly addressed at the holding of a public hearing in which the Petitioners would have been given the opportunity to cross-examine any experts that the Department would have put forth to discuss whether [there is] authority that permits the use of work plans in a discharge permit…so the Department would have had an expert testify to the usage of that, and Petitioners would have had the opportunity to cross-examine and to present evidence…regarding that this is actually the functional equivalent of a permit modification.

Communities for Clean Water has also sufficiently averred that it has been adversely affected by the WQCC's decision to sustain the Secretary's denial of its request for a public hearing on draft DP-1793 and the Secretary's final approval of DP-1793, now in effect. *See generally* **[BIC 1-35]**; *see also,* Communities for Clean Water's *First Amended Docketing Statement*, p. 2-5 (March 28, 2016).

Both the WQCC and the Secretary deprived Communities for Clean Water of the public participation requirements under the Act by denying a request for a public hearing. NMSA 1978, Section 74-6-5(G); Section 20.6.2.3108.K NMAC. In a challenge to the substance of a permit, the petitioner and the WQCC are limited to the administrative record – the WQCC may not consider or admit new evidence. *See* NMSA 1978, Section 74-6-5(Q), *and* 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. That is a real harm that Communities for Clean Water has quite sufficiently averred.

Significantly, as noted above, there were no minutes of the meeting held on April 15, 2015 in which representatives of NMED, the Permittees, and Communities for Clean Water attended. Had a public hearing been held,

Communities for Clean Water would have been allowed to present evidence and cross examine the Permittees' and NMED's witnesses, thereby providing the WQCC with a complete record to review. Instead, the WQCC was left with a record that both NMED and the Permittees were able to fabricate in order to support their post hoc decision to deny a hearing even though Communities for Clean Water raised a number of significant, substantial issues with the permit that were never resolved.

In the case of *Cattlegrowers' Ass'n v. New Mexico Water Quality Control Comm'n*, 2013-NMCA-046, ¶¶ 8-13, 2012 N.M. App. LEXIS 135 ¶¶ 8-13, relied upon by LANS **[AB 10]**, the Court determined that the Association failed to allege any harm that would befall its members from the implementation of the regulation at issue, therefore holding that the Association did not have a right to appeal the regulation under Section 74-6-7. *Id.* However, this case can be distinguished from this matter in two ways.

First, in the *Cattlegrowers'* case the proceedings below consisted of a public hearing on the regulation at issue that NMED conducted for a total of FIVE DAYS. *Id.* at ¶ 4 (emphasis added). The Association was able to present evidence and oral argument and cross-examine witnesses on the proposed regulation. In the case at bar, Communities for Clean Water was denied a public hearing on the draft discharge permit at issue and there were no "proceedings" in which it was allowed

to participate.

Second, in *Cattlegrowers'*, the Court reasoned that the Association did not satisfy the adversely affected requirement of Section 74-6-7 because "it failed to allege such adverse effects in its testimony presented to the WQCC" and because "[t]he fear of future lawsuits not directly stemming from [the regulation at issue] is hypothetical harm and does not establish that the [Association] will be adversely affected." *Id.* at ¶ 13. Contrary to LANS's assertion **[AB 10]**, Communities for Clean Water sufficiently alleged adverse effects in the proceedings before the WQCC and with this Court. Unlike the Association in *Cattlegrowers'*, Communities for Clean Water allege genuine harm – not hypothetical harm - directly flowing from the WQCC's decisions. *See generally* citations to the record provided on pages 6-7 of this *Reply Brief.*

LANS's argument that, "There can be no harm from the denial of a request for a public hearing when reversing the denial of the hearing will have no impact on the final Permitting Action," at best, inappropriately presumes that NMED will not make any substantive changes to the permit on remand; and, at worst, implies collusion between LANS and NMED to essentially "fix" the substance of DP-1793, which would make a mockery of public participation in the permitting process. **[AB 10-11]**

This Court has the power to set aside the WQCC's decision sustaining the

Secretary's denial of Communities for Clean Water's request for a public hearing and the Secretary's final approval of DP-1793. NMSA 1978, Section 74-6-7(B). The Court need only determine that these decisions were arbitrary or capricious or an abuse of discretion, not supported by substantial evidence in the record, or otherwise not in accordance with the law, in order to set aside the WQCC's action and vacate the permit. *Id.* That means DP-1793 will no longer be in effect, the permitting process will begin anew, and Communities for Clean Water will be entitled to have a public hearing on the permit.

2. Issues raised in this appeal are not moot.

The WQCC's decision and the Secretary's decision are final agency decisions subject to review. *Paule v. Santa Fe County Board of County Commissioners*, 2005-NMSC-021, ¶ 9, 138 N.M. 82; *Village of Los Ranchos de Albuquerque v. Shiveley*, 1989-NMCA-095, ¶ 12, 110 N.M. 15, 17. LANS incorrectly asserts, without any support in law, that they are interlocutory decisions beyond review. **[AB 9, 11]** This Court has stated, in pertinent part, that, "[w]here 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, 765.

In fact, at the October 13, 2015 hearing on Communities for Clean Water's *Motion to Stay DP-1793*, the WQCC's counsel raised the issue of "[w]hether there

is some procedural mechanism for appealing the denial of the hearing itself other than challenging the …discharge permit that results." **[3 RP 01498: 18-23]** In effect, arguing that the Secretary's decision to deny a request for a public hearing was beyond review by the WQCC. Communities for Clean Water promptly corrected that misreading of the regulations and NMED concurred that a Petition for Permit Review is the proper procedural mechanism for appealing the Secretary's decisions denying a request for a public hearing and approving DP-1793. **[3 RP 01499: 13-20, 01500: 12-14[6]]** LANS did not object to an appeal of the Secretary's decision denying a request for a public hearing being handled under a permit review *or on any other grounds. Id.*

Furthermore, an actual controversy does exist in this matter, as demonstrated above, and a ruling by this Court will provide Communities for Clean Water with genuine relief. **[BIC 34-35]**; *see also* NMSA 1978, Section 74-6-7(B) (requiring a reviewing court to set aside a decision if it is found to be either arbitrary, capricious or an abuse of discretion, or not supported by substantial evidence in the record, or not otherwise in accordance with the law). LANS's inappropriate assumption **[AB 11]** that, "[t]he permit is final and no changes to DP-1793 may be made even if a hearing were to be held," is incorrect as a matter of law. NMSA 1978, Section 74-6-7(B).

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[6] "The New Mexico Environment Department hasn't objected to it being handled under a permit review."

3. The WQCC's decision is harmful error.

Communities for Clean Water has clearly demonstrated how the WQCC's decision sustaining the Secretary's denial of its request for a public hearing on draft DP-1793 and the Secretary's final approval of DP-1793 has significantly prejudiced Communities for Clean Water and its ability to effectively challenge the permit now in effect. *See* pages 6-10 of this *Reply Brief.* The WQCC's decision is, therefore, not harmless error. **[AB 12-13];** *see also, AA Oilfield Serv., Inc. v. New Mexico State Corp. Comm'n*, 1994-NMSC-085, ¶ 14, 118 N.M. 273.

B. 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.

Communities for Clean Water's *Brief in Chief* directly challenges the WQCC's decision of sustaining the Secretary's decision to deny Communities for Clean Water's request for a public hearing on draft DP-1793, and the Secretary's final approval of the permit. **[BIC 10-33]** Furthermore, LANS's reliance on *Carlsbad Irrigation Dist. V. Carlsbad Irrigation Dist. (In re Carlsbad Irrigation Dist.)* is inapt for two reasons. **[AB 17-19]**

First, that case dealt with an appeal of the New Mexico State Engineer's *Final Order* to district court, and the standard of review applied to such an appeal is a de novo standard – "...the parties could offer any additional relevant evidence they desired" and were not limited to only evidence in the administrative record.

Carlsbad Irrigation Dist. V. Carlsbad Irrigation Dist. (In re Carlsbad Irrigation Dist.), 1974-NMSC-082, ¶ 16, 87 N.M. 149, 152, citing to NMSA 1978, Section 75-6-1(E). Whereas in a Petition for Permit Review proceeding, the WQCC and the parties were limited to a record review – the WQCC's review was not de novo as no new evidence could be admitted or considered. *Compare* NMSA 1978, Section 74-6-5(Q) *with* Section 20.1.3.16.F(3) NMAC.

Second, the New Mexico Supreme Court reasoned, in pertinent part, 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." *Carlsbad Irrigation District*, 1974-NMSC-082, ¶ 17, 87 N.M. 149, 152. Significantly, in contrast, the WQCC did not make its own findings regarding the sole issue before it (the existence of substantial public interest in a draft discharge permit). Rather, it found that the Secretary "*appropriately applied his discretion in denying the request for a public hearing.*" **[4 RP 01822]** (emphasis added).

Plainly, this does not constitute an independent determination that there was no substantial public interest in draft DP-1793 and that a public hearing was therefore not required. **[AB 19]** This is patent evidence that the WQCC applied the wrong standard of review in determining whether the Secretary's decision was an abuse of discretion or not. The decision in no way constitutes a de novo determination that no substantial public interest existed in draft DP-1793.

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

Communities for Clean Water has met its burden in challenging the sufficiency of the evidence in this matter **[AB 21-23]** under *Gila Resources Information Project*, 2015-NMCA-076, ¶ 15, N.M. App. LEXIS 44, ¶ 11. Communities for Clean Water has identified with particularity the findings of the WQCC not supported by substantial evidence in the record. **[BIC 17-21]** Communities for Clean Water's arguments address the WQCC's decision. **[BIC 10-33]** Communities for Clean Water does not ignore "all the evidence contained in the record and the Commission's order showing that the public interest in DP-1793 was not substantial" because there is none. Notably, LANS fails to cite to "all the evidence" in support of its assertion. **[AB 22]** In fact, LANS fails to cite to *any* evidence in the record to support its assertion. *Id.*

Lastly, Communities for Clean Water has offered an overwhelming amount of evidence in the record in support of its challenge to the WQCC's decision. **[AB 22]**; *see also* **[BIC 22-23, citing to 3 RP 01092-01099, 01104-01118, and 01121-01126]** Therefore, Communities for Clean Water has adequately developed its arguments and challenges to the WQCC's decision, supported by substantial evidence in the record. *Citizen Action New Mexico v. New Mexico Env't Dept.*, 2015-NMCA-058, N.M. App. LEXIS 79.

3. The WQCC's decision is not entitled to deference.

LANS's argument **[AB 20]** that the WQCC's decision is entitled to deference is without merit. The WQCC's interpretation and application of Section 20.6.2.3108.K NMAC (through its sustaining the Secretary's interpretation and application of the regulation) is not entitled to deference, as that interpretation violates the rules of statutory and regulatory construction.[7] The cases LANS cites **[AB 20]** do not hold that the WQCC's interpretation of a regulation is entitled to deference in all circumstances.

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). 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 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.

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[7] The WQCC, in sustaining the Secretary's denial of a public hearing on draft DP-1793, has violated the plain language canon of construction, the absurd or unreasonable result canon of construction, and the harmonious application canon of construction. **[BIC 21-24]**

C. The WQCC's Interpretation And Application Of Section 20.6.2.3108.K NMAC Is Subject To Judicial Review.

Despite LANS's assertion **[AB 24-25]**, Communities for Clean Water is *not* challenging the validity of Section 20.6.2.3108.K NMAC. Communities for Clean Water *is* challenging the manner in which the WQCC interpreted and applied Section 20.6.2.3108.K NMAC with Section 74-6-5(G). **[BIC 21-24]** It is well established that this Court has the authority to review an agency's interpretation and application of a statute such as the Water Quality Act, as well as its implementing regulations. *See generally*, *Gila Res. Info. Project v. N.M. Water Quality Control Comm'*, 2005-NMCA-139, ¶ 36, 138 N.M. 625, 633; *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, 125 N.M. 786; *Albuquerque Bernalillo Co. Water Util. Auth. v. N.M. Public Regulation Comm'n*, 2010-NMSC-013, ¶ 15, 148 N.M. 21, 39; *State v. Juan*, 2010-NMSC-041, ¶ 39, 148 N.M. 747, 59; *Pueblo of Picuris v. N.M. Energy, Minerals and Nat. Res. Dept.*, 2001-NMCA-084, ¶ 14, 131 N.M. 166, 169; *Jones v. Empl. Servs. Div. of Human Servs. Dep't*, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 98.

LANS's unsupported assertion that there can be no judicial review of the WQCC's interpretation and application of regulations established under the Water Quality Act is ludicrous.

V. 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 Los Alamos National Security, LLC'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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