

ATTACHMENT S

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF:
PETITION FOR REVIEW OF THE
DECISION OF THE NEW MEXICO
ENVIRONMENT DEPARTMENT ISSUING
FINANCIAL ASSURANCE FOR GROUND-
WATER DISCHARGE PERMIT
No. DP-1132**

WQCC No. 22-21(A)



Pamela Jones Digitally signed by Pamela Jones Date: 2022.08.29 14:57:39 -0600

**CONCERNED CITIZENS FOR NUCLEAR
SAFETY AND HONOR OUR PUEBLO
EXISTENCE,**

Petitioners.

**NEW MEXICO ENVIRONMENT DEPARTMENT’S RESPONSE TO
MOTION TO REVERSE THE ISSUANCE OF DP-1132
FOR LACK OF SUBJECT MATTER JURISDICTION**

Most, if not all, of us believe that our positions and arguments are of paramount importance and deserve immediate resolution in our favor, but in the course of a ground water discharge permit proceeding, the New Mexico Legislature has established a clear and consistent process for reviewing claims of improper permitting actions by a constituent agency. These processes are in place to ensure that the Water Quality Control Commission has all the information that it needs to ensure that each person is fully heard; short-circuiting the process will not ensure that this matter is properly heard.

Pursuant to 20.1.3.15(D) NMAC, the New Mexico Environment Department (“Department”) submits its response to Concerned Citizens for Nuclear Safety and Honor Our Pueblo Existence (collectively “Petitioners”) Motion to Reverse the Issuance of DP-1132 for lack of Subject Matter Jurisdiction (“Motion”). The Department opposes this motion because the relief requested is outside the Water Quality Control Commission’s (“WQCC”) statutory grant of

authority and because the existence of a permit issued pursuant to the federal Clean Water Act means that the Hazardous Waste Act does not apply to this matter.

I. BACKGROUND

At issue in this matter is groundwater discharge permit DP-1132, issued by the Department to the U.S. Department of Energy and Triad National Security, LLC on May 5, 2022, to regulate the discharge and potential release of water contaminants from the Los Alamos National Laboratory Radioactive Liquid Waste Treatment Facility (“RLWTF”). [AR 20140]. As the WQCC is aware, the most current proceeding in this matter arose from the Petition filed by Petitioners on June 6, 2022, in which Petitioners requested remand to the Department for further proceedings surrounding the hearing officer’s report and Secretary’s June 24, 2020 order. Petition at p. 21.

Triad National Security, LLC (“Triad”) moved for stay in the proceedings on July 1, 2022. The Department moved for a tolling of upcoming deadlines on July 26, 2022. The WQCC heard from the parties at its regularly scheduled meeting on August 9, 2022, and granted a stay in the proceedings pending resolution of a related matter before the U.S. Environmental Protection Agency’s Environmental Appeals Board. Subsequent to the WQCC’s grant of stay, Petitioners filed this Motion.

II. ARGUMENT

Petitioners’ Motion seeks reversal of issuance of DP-1132 because, they claim, the WQCC does not have subject matter jurisdiction over this matter. However, the argument Petitioners present mischaracterizes this proceeding and essentially requests a final resolution of the matter without full briefing or the opportunity to submit arguments on the merits, a departure from the established procedures of the WQCC. While all those interested can certainly desire expeditious

resolution of a matter, departure from the established procedure may result in denial of one or more of the parties to fully participate in the process.

a. The WQCC has the authority to review permit issuances by the Department.

Pursuant to the Water Quality Act, the Department's permitting actions may be reviewed by the WQCC. NMSA 1978, § 74-6-5(O) (2009). If a timely petition for review is made, the WQCC shall review the petition within 90 days after receipt of the petition. NMSA 1978, § 74-6-5(P). The WQCC must review the record and allow the parties to submit arguments; only then may the WQCC sustain, modify, or reverse the decision of the constituent agency. NMSA 1978, § 74-6-5(Q).

The substance of Petitioners' arguments is that the Department lacked the subject matter jurisdiction to issue DP-1132. Motion at p. 5. However, the key in this argument is that the Department issued DP-1132, not the WQCC. [AR 21026]. Petitioners argue that they raised the issue of subject matter jurisdiction in the permitting proceeding below, but that issue was not resolved to its satisfaction by either the Department or the Secretary. Motion at p. 5. Indeed, in their Petition, Petitioners specifically request remand for additional proceedings to address this matter to its satisfaction. Petition at pp. 20-21.

Whether correctly or incorrectly, the Department issued DP-1132 pursuant to its authority found in the Water Quality Act, NMSA 1978, Sections 74-6-1 to -17, ("WQA") and 20.6.2 NMAC. [AR 21026]. That is the question that is at issue before the WQCC: was the Department correct in issuing this permit. As such, the WQA clearly establishes that the correct venue for reviewing permitting actions, including the decisions and evidence supporting them, is before the WQCC. Thus, there is no question that the WQCC has subject matter jurisdiction. What Petitioners request is essentially to argue the merits of this matter, in spite of a stay of proceedings ordered by the

WQCC and without Answer Briefs filed by either Triad or the Department. Though this request was not raised in the Petition, reversal is one of the actions that the WQCC can take only after it has reviewed the record and given the parties the opportunity to submit arguments. NMSA 1978, §74-6-5(Q). Petitioners' request is outside the authority that the Legislature granted to the WQCC. The question of subject matter jurisdiction to issue the permit can be properly raised in the established briefing process.

b. The RLWTF is Not Subject to the Authority of the Environmental Improvement Board Pursuant to the Hazardous Waste Act

Additionally, Petitioners' are incorrect in the substance of their arguments in the Motion. Petitioners argue that there is a jurisdictional exclusion of the Water Quality Act, NMSA 1978, Section 74-6-12(B). pp. 2 - 5. That section provides, in pertinent part, that "the Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act." In support of this assertion, Petitioners state that the RLWTF will treat and store hazardous waste, and therefore the provisions of the Hazardous Waste Act apply. Motion at p. 3.

Where Petitioners' argument fails is that the RLWTF is subject to Section 402 of the federal Clean Water Act, which establishes the National Pollutant Discharge Elimination System ("NPDES") Program. It is uncontested that the United States Environmental Protection Agency ("EPA") issued NPDES Permit No. NM0028355. The EPA most recently issued this permit on March 30, 2022. The RLWTF therefore meets the definition of a "wastewater treatment unit" in 40 C.F.R. § 260.10, the implementing regulations of the federal Resource Conservation and Recovery Act ("RCRA"). This is important, because wastewater treatment units as defined by 40 C.F.R. § 260.10 are specifically excluded from the requirement to obtain a RCRA permit by 40 C.F.R. 271.1(C)(2)(v) ("The following persons are among those who are not required to obtain a

RCRA permit: [...] owners and operators of [...] wastewater treatment units as defined in 40 CFR 260.10.”).

As explained in Petitioners’ Opening Brief at ¶11, the [Hazardous Waste Act] is a state-law program that the EPA has authorized to enforce RCRA, which is federal law. Therefore, despite the state regulations at 20.4.1.900 NMAC requiring persons who treat, store or dispose of hazardous waste to apply for and receive a Hazardous Waste Act permit, because the RLWTF is exempt from permitting under the federal RCRA, it is also exempt from the permitting requirements of the state Hazardous Waste Act. Again, as explained by Petitioners’ Opening Brief at ¶19, under the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, where there is a conflict between federal and state law the federal law prevails. Therefore, the wastewater treatment unit exemption to RCRA which applies to the RLWTF *also* means the facility is exempt from the authority of the Hazardous Waste Act, and the jurisdictional limitation of NMSA 1978, Section 74-6-12(B) does not apply. DP-1132 can therefore be issued pursuant to the Water Quality Act despite the RLWTF treating and storing hazardous waste.

III. CONCLUSION

For the reasons stated above, the Department respectfully requests that the WQCC deny Petitioners’ Motion to Reverse. Reversing the permitting action of the Department at this stage in the proceedings is outside the scope of the WQCC’s authority and would deprive both the Department and the applicants of the opportunity to submit Answer Briefs responding to Petitioners’ claims. Additionally, because there is at present a validly issued NPDES permit, the RLWTF is exempt from RCRA and, by extension, the Hazardous Waste Act. Regardless of the importance of Petitioners’ arguments, they do not merit departure from the well-established permit review process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2022, a copy of the foregoing Response to Motion to Reverse the Issuance of DP-1132 for Lack of Subject Matter Jurisdiction was sent by electronic mail to the persons listed below. A copy can be sent via U.S. mail first class, postage prepaid, upon request.

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