

ATTACHMENT J

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STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE
PETITION FOR REVIEW OF THE
DECISION OF THE NEW MEXICO
ENVIRONMENT DEPARTMENT ISSUING
GROUND-WATER DISCHARGE PERMIT
NO. DP-1132,

WQCC No. 22-21(A)

CONCERNED CITIZENS FOR NUCLEAR
SAFETY AND HONOR OUR PUEBLO
EXISTENCE,

Petitioners

vs.

NEW MEXICO ENVIRONMENT
DEPARTMENT,

Respondent.

**ANSWER BRIEF OF THE DEPARTMENT OF ENERGY,
NATIONAL NUCLEAR SECURITY ADMINISTRATION
AND TRIAD NATIONAL SECURITY, LLC**

Pursuant to 20.1.3.16(A)(4)(b) NMAC and the Scheduling Order (Feb. 1, 2023), the Department of Energy, National Nuclear Security Administration, Los Alamos Site Office (DOE/NNSA) and Triad National Security, LLC (Triad) hereby submit this Answer Brief.¹

¹ This matter was stayed pursuant to the Commission's Order on Motion to Stay Proceedings Pending Resolution of Related Adjudication (Aug. 30, 2022). The Commission reaffirmed the stay in its Order Denying Opposed Motion to Vacate Stay of Proceedings (Nov. 14, 2022) and Orders Denying Petitioners' Opposed Motion to Vacate Orders Issued Under Disqualification (Jan 19, 2023, and Feb. 3, 2023 (signed Jan. 31, 2023)). Permittees moved to lift the stay following issuance of the EPA Environmental Appeals Board's (EAB) Remand Order. Permittees' Mot. to Lift the Stay of Proceedings (Feb. 1, 2023). The Hearing Officer issued an Order Granting Opposed Motion to Lift the Stay of Proceedings (Feb. 1, 2023) and issued a Scheduling Order (Feb. 1, 2023) (amended March 15, 2023). The Scheduling Order required the Department and Permittees to file answer briefs within 25 days of February 19, 2023, or by March 16, 2023.

INTRODUCTION

On May 5, 2022, the New Mexico Environment Department (Department) issued a Ground Water Discharge Permit to DOE/NNSA and Triad (collectively, Permittees) pursuant to the New Mexico Water Quality Act (WQA), NMSA 1978, §§ 74-6-1 through 74-6-17 (1993), and Water Quality Control Commission (Commission) Regulations, 20.6.2 NMAC (DP-1132). AR 20126-20257.² The Department's purpose in imposing the requirements and conditions specified in DP-1132 is to control the discharge, and potential release, of water contaminants from the Los Alamos National Laboratory (Laboratory) Radioactive Liquid Waste Treatment Facility (RLWTF) so as to protect public health, groundwater for present and potential future use as a domestic water supply or an agricultural water supply, and those segments of surface water gaining from ground water inflow. AR 20140. In addition to its regulation under the WQA, RLWTF is also regulated under the federal Clean Water Act (CWA), including under National Pollutant Discharge Elimination System (NPDES) Permit No. NM0028355 (NPDES Permit). AR 17317; AR 20141.

RLWTF supports mission-critical programs at the Laboratory. AR 17886 (Beers Prefiled Test., 4:74-78). RLWTF, as it pertains to conditions within DP-1132, is a wastewater treatment facility that is authorized to discharge up to 40,000 gallons per day (gpd) and includes: the influent collection and storage system, including the Waste Management Risk Mitigation Facility (WMRM); the low-level radioactive liquid waste (RLW) treatment system; the transuranic RLW treatment system; the secondary treatment system; the Mechanical Evaporator System (MES); the Solar Evaporative Tank (SET); and an outfall (Outfall 051) regulated by the NPDES Permit issued by the United States Environmental Protection Agency (EPA) pursuant to the CWA, Section 402,

² Administrative Record (AR) citations are to the Administrative Record filed in this proceeding on June 21, 2022. See Notice of Filing of the Administrative Record (June 21, 2022).

33 U.S.C § 1342 (the Permitted NPDES Outfall or Outfall 051). AR 20141. DP-1132 authorizes Permittees to discharge treated effluent to three locations: the MES, the SET, or through Outfall 051. AR 17317; AR 20142.

In issuing DP-1132, the Department determined that the requirements of 20.6.2.3109.C NMAC have been or will be met. AR 20140. On June 6, 2022, Concerned Citizens for Nuclear Safety (CCNS) and Honor Our Pueblo Existence (HOPE) (collectively Petitioners) filed a Verified Petition for Review (Petition) with the Commission, and, on July 18, 2022, Petitioners filed their Opening Brief.

The Petition should be denied. The Department's sound decision on issuance of DP-1132 should be sustained by the Commission because substantial evidence in the record demonstrates that DP-1132:

- (1) Was issued in accordance with law; and
- (2) Is protective of groundwater resources.

RLWTF, a wastewater treatment facility, has discharged, is discharging, and will discharge in the future treated effluent. *See* AR 17731-17732 (Pullen Prefiled Test., 4:18-5:6); AR 15272 (Mason Aff., ¶ 7). Based on the record,³ the Department determined that RLWTF's discharges may directly or indirectly impact groundwater. AR 20141-20142. Pursuant to the WQA, which protects groundwater resources and governs the issuance and implementation of groundwater discharge permits, where there is or may be a discharge of water contaminants that may directly or indirectly impact groundwater, the Department has jurisdiction and authority to issue a discharge permit. NMSA 1978, §§ 74-6-2(B), (M) (2003); 20.6.2.3104 NMAC.

³ The index for the Administrative Record is 45 pages, and the Administrative Record itself is over 20,000 pages and spans filings over 26 years.

In issuing DP-1132, moreover, the Department determined that the provisions of 20.6.2.3109.C NMAC have or will be met, AR 20140, which provisions are protective of New Mexico groundwater resources. DP-1132's provisions are protective of groundwater resources. *See* AR 20133-20257 (DP-1132); *see also* AR 18377-18379 (Tr. 196:18-198:23 (Pullen)); AR 17728; AR 17778 (Pullen Prefiled Test., 1:13-14; 51:9-11). Therefore, DP-1132 effectuates the WQA's purpose to "abate and prevent water pollution." *See Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546.

Procedurally, moreover, the Petition should be denied. Petitioners show no adverse affect arising from the DP-1132 permitting action, and Petitioners' requested relief, remand, is not proper. DP-1132 has been the product of exhaustive administrative consideration (including Department and Secretary assessments of jurisdiction to issue DP-1132), comprehensive analysis of and revision to DP-1132's conditions, extensive public involvement, including the submission of comment and evidence, multiple public hearings, issuance and remand, and multiple decisions on DP-1132 issues made by the Department, various hearing officers, the Secretary, and the Commission. It is time to move forward and focus on the sound implementation of DP-1132. The Commission should sustain the Department's issuance of DP-1132.

DP-1132'S EXTENSIVE PROCEDURAL HISTORY

Construction of RLWTF began in July 1961, and the processing of RLW began in June 1963. AR 18896. On April 3, 1996, the Department notified the Laboratory that a groundwater discharge permit was required under the WQA. AR 00014-00015; AR 17733 (Pullen Prefiled Test., 6:18-19). The Laboratory's application consists of the materials submitted on August 19, 1996 (AR 00113-00532), an updated application submitted on February 16, 2012 (AR 05337-08003), an amendment to the application submitted on August 10, 2012 (AR 08269-08313),

supplemental information submitted on June 6, 2016 (AR 13273-13354), and materials contained in the Administrative Record that were prepared prior to issuance of DP-1132 (collectively, Application). *See also* AR 17733 (Pullen Prefiled Test., 6:19-20); AR 17885 (Beers Prefiled Test., 3:57-58).

The original DP-1132 application included only one discharge point, namely the Permitted NPDES Outfall, AR 00117, but it also addressed the fact that the Laboratory was studying incorporating evaporative systems and treatment upgrades into the design of RLWTF, AR 00127-00129. Over several years, at the Department's request, the Laboratory submitted substantial additional technical information, draft discharge plans, closure plans, monitoring plans, and other information. *See generally* Administrative Record Index, 1-7 (June 21, 2022). As recognized by the Department, it "engaged in numerous meetings, inspections and written correspondence regarding the RLWTF in order to compile accurate information on the facility in preparation for drafting a Discharge Permit that will accurately reflect the activities conducted at the RLWTF." AR 05255.

On November 1, 2007, the Laboratory submitted a Notice of Intent (2007 NOI) for the discharge of treated effluent water to above-ground tanks that would receive part or all of the treated effluent from RLWTF. AR 03704-03707; AR 18972.

In 2011, after review of the Laboratory's 2007 NOI and in accordance with 20.6.2.1201(D) NMAC, the Secretary determined that a discharge permit was required for the proposed discharge, because the proposed evaporative tanks were a component of RLWTF and they would contain effluent or leachate which may move directly or indirectly into groundwater. AR 05265-05268; AR 18972. The Laboratory submitted an updated comprehensive application in February 2012 (AR 05337-08003), an amendment in August 2012 (AR 08269-08313), and supplemental

information in 2016 (AR 13273-13354). *See also* AR 17885 (Beers Prefiled Test., 3:57-59); AR 05337- 08003.

The first full public hearing on DP-1132 occurred in 2018, following public notice and comment. *See* AR 17734 (Pullen Prefiled Test., 7:4-17); AR 14046-14051. Petitioners⁴ were actively engaged in the permit review process, including appearing in the 2018 DP-1132 public hearing and presenting extensive comment, evidence, and argument on jurisdictional, discharge, and other theories. AR 15206-15225; AR 17071-17106. Based on that hearing, by order dated August 29, 2018, the Secretary issued a final DP-1132. AR 17734 (Pullen Prefiled Test., 7:17-18); AR 18973. Following DP-1132's issuance, the Laboratory operated RLWTF in compliance with the terms of DP-1132.⁵ However, the Commission ordered that, based upon an appearance of impropriety, the Secretary's April 2018 Order be vacated, and a second public hearing occur. AR 18974.

The second full public hearing on DP-1132 occurred in 2019, following public notice and comment. AR 17735 (Pullen Prefiled Test., 8:2-12); AR 17735-17736 (Pullen Prefiled Test., 8:13-9:5); AR 18974. Petitioners again submitted comment, evidence, and argument, and moved to dismiss the proceeding, arguing that the Department lacked jurisdiction to issue a discharge permit because there are, in Petitioners' estimation, not sufficiently concrete plans for the Laboratory to discharge treated effluent and—although RLWTF is also regulated pursuant to the CWA—that the Hazardous Waste Act (HWA) should apply to RLWTF. AR 17191-17224.

⁴ Communities for Clean Water (CCW) was an alliance of five citizen organizations, including Petitioners CCNS and HOPE.

⁵ Initial compliance measures included: preparation of work plans for the stabilization of steel influent tanks and other components; soil moisture monitoring and alluvial well monitoring; inspection and calibration of flow meters; preparation of emergency response procedures; submission of documentation concerning secondary containment requirements; and water tightness testing. *See* AR 17736-17739 (Pullen Prefiled Test., 9:15-12:10); AR 17999-18003.

In support of issuance of DP-1132, Permittees presented three qualified expert witnesses and the Department presented a qualified expert witness, all of whom provided credible and thorough testimony. *See* AR 18783-18785; AR 18970; AR 18992-18994. In contrast, Petitioners presented one witness, and that witness did not challenge any specific condition of DP-1132, but, instead, offered opinion that regulating RLWTF under the Resource Conservation and Recovery Act (RCRA) and the HWA could be better than regulating it under the WQA. AR 18785-18786. The Department met its burden of proof, through its own admitted expert and those offered by Permittees, that the conditions of DP-1132 would be adequate, proper, and valid. AR 18797. The Hearing Officer issued a report, recommending that the Secretary issue the permit. AR 18969-19002.

The Secretary entered an order on the substance of the Hearing Officer's report and recommendation. AR 19099-19105. The Secretary, directly addressing Petitioners' jurisdictional and discharge theories, determined that the WQA is applicable, that the HWA is not relevant to the issuance of groundwater discharge permits, and that the issuance of a groundwater discharge permit is the primary mechanism under State law to protect State groundwater resources. *See* AR 19099-19102. However, the Secretary expressed concern about financial assurance provisions in DP-1132. AR 19101, ¶ 9. Accordingly, the Secretary remanded the matter to the Department for the limited purpose of "considering the types and levels of financial assurance that should be applied" and ruling "on any procedural or other matters related to financial assurance" for DP-1132, and for these issues to "provide for public participation and a hearing, if requested pursuant to the Permit Rules." AR 19102, ¶¶ 2-4. During the limited remand, Permittees submitted a revised closure plan (addressing financial assurance/responsibility) for DP-1132, and the Department approved it by letter dated September 17, 2021. AR 19336.

On December 17, 2022, the Department issued a notice of intent to approve DP-1132 with the revised closure plan and published notice of the availability of Draft DP-1132 for public review and comment, and with the opportunity to request a hearing. AR 19637-19640. Several parties, including Petitioners, submitted comments on the draft permit, but no one requested a public hearing that provided reasons for why a public hearing should be held. *See* AR 19793-19804; AR 19818; *see also* 20.6.2.3108(M) NMAC. The Secretary determined it was appropriate to issue final DP-1132, AR 19817-19820, with the Ground Water Quality Bureau recognizing that the “two prior public hearings and the massive administrative record” had “provided more than adequate opportunity for all persons to present evidence regarding other aspects [unrelated to financial assurance] of this discharge permit.” AR 19819. On May 5, 2022, the DP-1132 again issued. AR 20126-20257.

Neither Permittees, nor any other interested parties, have challenged any permit condition in DP-1132. Petitioners, however, now seek to have the Commission remand this matter to the Secretary to further address Petitioners’ jurisdictional and discharge theories. *See* Pet. ¶¶ 20, 42-47.⁶ Whether to grant this request is the sole issue before the Commission.

STANDARD OF DECISION

In reviewing the Secretary’s decision to reissue DP-1132, the Commission shall “consider and weigh only the evidence contained in the record before the [D]epartment and the recommended decision of the [H]earing [O]fficer, if any, and shall not be bound by the factual findings or legal conclusions of the [D]epartment.” 20.1.3.16(F) NMAC. In construing the WQA’s application, however, the Department is conferred “a heightened degree of deference to legal questions that

⁶ At odds with the Petition’s requested remand relief, Petitioners have also filed a Petition for Writ of Mandamus with the New Mexico Supreme Court, seeking to bypass the Commissions’ statutorily assigned role to adjudicate WQA matters. *See* Petition for an Original Writ of Mandamus (Feb. 16, 2023).

implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Morningstar Water Users Assn' v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28 (internal quotations omitted). The Commission shall "sustain, modify or reverse the action of the [D]epartment based on a review of the evidence, the arguments of the parties and recommendations of the [H]earing [O]fficer." *Id.*

ARGUMENT

Petitioners raise two issues to challenge the Secretary's issuance of DP-1132: (1) the HWA, and not the WQA, applies to discharges from RLWTF; and (2) the Secretary lacked jurisdiction to issue DP-1132 because there are no actual or planned discharges from the facility. As demonstrated below, both arguments should be rejected, and the Commission should sustain the Secretary's issuance of DP-1132.

I. THE SECRETARY HAS JURISDICTION TO ISSUE DP-1132 TO REGULATE DISCHARGES THAT MAY IMPACT GROUNDWATER

For their first argument, Petitioners urge this Commission to ignore its statutory responsibility to review and approve DP-1132 on the grounds that "[t]he RLWTF is required to have a hazardous waste permit." Op. Br. ¶ 4. That argument should be rejected for three reasons.

A. The Hazardous Waste Act Does Not Diminish the Authority of the Secretary to Regulate Discharges and Issue Groundwater Discharge Permits Under the Water Quality Act

First, the WQA governs facilities that discharge contaminants that may directly or indirectly impact groundwater. *See* NMSA 1978, § 74-6-1, *et seq.* This includes governing the issuance and implementation of groundwater discharge permits. *See* NMSA 1978, § 74-6-5.

The WQA is the primary statute that protects groundwater quality in New Mexico. The objective of the WQA is "to abate and prevent water pollution." *Bokum Res. Corp.*, 1979-NMSC-090, ¶ 59. Pursuant to NMSA 1978, 74-6-12(B):

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, the Ground Water Protection Act or the Solid Waste Act *except to abate water pollution or to control the disposal or use of septage and sludge.*

NMSA 1978, § 74-6-12.B (emphasis added).⁷ To protect groundwater resources, the WQA provides the Commission with the authority “to adopt a comprehensive water quality management program” and “adopt regulations requiring that permits for discharge of a water contaminant be obtained from a constituent agency.” NMSA 1978, § 74-6-4(B); § 74-6-5(A); *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006-NMCA-115, ¶ 16, 140 N.M. 464.

The WQA’s implementing regulations create a comprehensive discharge permitting system whose objective is to protect groundwater resources. *See e.g.* Title 20, Chapter 6, Part 2 NMAC (“Ground and Surface Water Protection”). The WQA authorizes the Department to issue groundwater discharge permits, issue permits with conditions, deny permits, or modify permits. NMSA 1978, § 74-6-5(M), (N). The Commission, in turn, has subject matter jurisdiction to hear “permit reviews, which include proceedings for the appeal from permitting actions pursuant to the [WQA].” 20.1.3.2(A)(1) NMAC; *see also* 20.1.3.10(B)(2)(a) NMAC.

The WQA defines a “source” of pollution to mean “a...facility...from which there is or *may be a discharge* of water contaminants *directly or indirectly* into groundwater.” NMSA 1978, § 74-6-2(M) (emphasis added). A “water contaminant” is “any substance that *could alter if discharged or spilled* the physical, chemical, biological, or radiological qualities of water.” NMSA 1978, § 74-6-2(B) (emphasis added). The WQA’s implementing regulations provide that

⁷ Similarly, RCRA anticipates overlap with other environmental statutes, providing that nothing in RCRA “...shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act...except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.” 42 U.S.C. § 6905(a).

“no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless [the person] is discharging pursuant to a discharge permit issued by the secretary.” 20.6.2.3104 NMAC. Accordingly, pursuant to the WQA and its implementing regulations, the Secretary has jurisdiction or authority to issue a discharge permit for a facility, where, as here, it has found that there is or may be a discharge of water contaminants that may directly or indirectly impact groundwater. NMSA 1978, §§ 74-6-2(B), (M); 20.6.2.3104 NMAC.

Petitioners argue that DP-1132 “violates the jurisdictional limits” of the WQA. Op. Br. 23. But there can be no question that the discharges from RLWTF satisfy the jurisdictional requirements of the WQA. This is true because there “may be a discharge of water contaminants” from RLWTF “directly or indirectly into groundwater.” NMSA 1978, § 74-6-2(M). Thus, a discharge permit is not only within the “jurisdictional limits,” Op. Br. 23, it is *required*, 20.6.2.3104 NMAC.

Similarly, Petitioners make much of the fact that a small amount of the waste stream *into* RLWTF is characteristically hazardous. *See* Op. Br. 6. To be clear, RLWTF does not accept listed hazardous waste. *See, generally*, Application; *see also* AR 20141; AR 13307-13354; AR 17886 (Beers Prefiled Test., 4:79-82). However, less than one percent of the influent is characteristically hazardous for corrosivity, which simply means that it has a pH that is either very high or very low. AR 13283. This of course means that over ninety-nine percent of the influent into RLWTF is not hazardous within the meaning of RCRA and the HWA. Significantly, the first step in either the low-level RLW main treatment process or transuranic RLW treatment process is to perform chemical reactions, which allows the Laboratory to adjust the pH so that the liquid is no longer hazardous by any definition. *See, e.g.*, AR 13307-13313 (describing the low-level RLW reaction

step of the main treatment process).

Petitioners rely heavily on Section 74-6-12(B), but that provision does not apply. By its own terms, that provision applies only to an “activity . . . subject to . . . the Hazardous Waste Act,” NMSA 1978, § 74-6-12(B). Therefore, to establish its applicability, the Petitioners must point to record evidence that the discharges from RLWTF are discharges of hazardous waste. *Compare* NMSA 1978, § 74-6-12(B), *with* NMSA 1978, §§ 74-4-4 & 74-4.2(A) (HWA applies to, *inter alia*, disposal of hazardous waste). Petitioners make no effort to carry this burden, nor would the record support such a contention since the discharges from RLWTF have been treated and are no longer hazardous.

In short, the WQA applies to discharges of treated effluent from RLWTF. As the Department explained, “[t]he applicability of the HWA to RLWTF [is] not controlling” because “DP-1132 is proposed to be issued under the WQA” and RLWTF has discharges that “may move directly or indirectly into groundwater.” AR 18978; *see also* AR 19099-19105.⁸

B. The Commission Should Adopt the Reasoning of the Secretary and Hearing Officer as They Are Well-Supported by the Record

Second, the Commission should follow the lead of the Secretary and Department Hearing Officer and reject Petitioners’ novel theory.

In his March 4, 2020 report and recommendation, the Department Hearing Officer presiding over the second public hearing on DP-1132 made specific conclusions concerning the applicability of the WQA and HWA. AR 18975-18979; AR 18976. In particular, the Hearing Officer cogently explained:

⁸ EPA came to a similar conclusion regarding NPDES Permit No. NM0028355, noting that “[w]hether or not issuance of NPDES permit coverage might trigger the RCRA [Wastewater Treatment Unit] WWTU regulatory exemption has no bearing on EPA’s NPDES permitting decisions, which must be based on the requirements of the CWA and implementing regulations.” AR 13800.

...DP-1132 does not propose to regulate an "...activity or condition subject to the authority of the environmental improvement board pursuant to the [HWA]." Rather, DP-1132 is proposed to abate water pollution, as DP-1132 regulates actions subject to the WQA and the regulations adopted pursuant to the WQA. WQCC Regulations provide for the regulation of discharges of "effluent or leachate" which "may move directly or indirectly into groundwater." 20.6.2.3104 NMAC. [The Department's] authority to prevent and abate water pollution under the WQA and WQCC implementing regulations requiring a permit for discharges that "may move directly or indirectly into groundwater" provide legal authority to require DP-1132, and the HWA expressly recognizes [the Department's] authority to "abate water pollution."...The applicability of the HWA to the RLWTF are not controlling as to the issuance of DP-1132. DP-1132 is proposed to be issued under the WQA.

AR 18978.

The Secretary adopted the recommendation of the Hearing Officer on this issue and directly addressed Petitioners' jurisdictional and discharge theories. AR 19099-19105. The Secretary determined that the WQA is applicable, that the HWA is not relevant to the issuance of groundwater discharge permits, and that the issuance of a groundwater discharge permit is the primary mechanism under State law to protect State groundwater resources. *See* AR 19099-19102.

More particularly, the Secretary held:

The Secretary of the Environment Department ("Secretary"), having considered the Hearing Record..., all post hearing submittals, the Hearing Officer's Report⁹] and the comments on the Hearing Officer's Report, and being otherwise fully advised, FINDS:

...

5. The interplay between the HWA and the WQA is not a relevant consideration in this matter as the construct of the wastewater treatment unit exemption is a construct of the implementing regulations of the Resource Conservation and Recovery Act ("RCRA") and the HWA with relevance to Clean Water Act discharge permits – not WQA groundwater discharge permits. However, the Citizens raise an equitable argument as to whether the RCRA and HWA wastewater treatment unit exemption is practicably enforceable by the Department in the State. The Department cannot issue permits nor assure compliance with either section 402 or 307(b) of the Clean Water Act. The WQA applies to the Application in this case for the purpose of protecting groundwater in the State.

...

⁹ This includes the March 4, 2020 Revised Hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law. AR 18969-19002.

7. The WQA makes the Applicants responsible for protecting the health of the citizens of New Mexico and the environment in part by eliminating contamination of the State's groundwater in connection with their operations, and the issuance of ground water discharge permits is the primary mechanism authorized under State law for protecting the State's groundwater.

AR 19099-19101.

Petitioners' jurisdictional questions have been addressed. The record supports the Hearing Officer and the Secretary, and the Petitioners have provided no reason to disturb these well-reasoned conclusions.

C. Even If the HWA Applies to DP-1132, RCRA and the HWA Have Many Fact-Based Exemptions, Including the WWTU Exemption, That Apply to Certain Water Treatment Facilities

Petitioners simplistically assert that the HWA applies to the RLWTF because it treats hazardous waste. But just because a facility may have some nexus to hazardous waste does not necessarily render the facility subject to regulation under RCRA or the HWA. Applicable federal law makes clear that Petitioners' assertion is false.

Many wastewater treatment facilities, such as RLWTF, treat small quantities of hazardous waste, such as acids and caustics. To avoid duplicative, and sometimes conflicting, requirements the Wastewater Treatment Unit ("WWTU") Exemption *exempts application of the HWA* to wastewater treatment facilities such as RLWTF. *See* 40 C.F.R. §§ 260.10; 264.1(g)(6); 265.1(c)(10); 270.1(c)(2)(v). More particularly, subject to meeting threshold requirements, the WWTU Exemption is designed to exempt application of RCRA, and the HWA in New Mexico,¹⁰ to a wastewater treatment unit where that wastewater treatment unit is already regulated under CWA Section 402. *See e.g.* 42 U.S.C. § 6905(a) (providing that nothing in RCRA "shall be construed to apply to (or authorize any State, interstate, or local authority to regulate) any activity

¹⁰ New Mexico adopted RCRA's regulations, including the WWTU exemption, per 20.4.1.100-.101; 20.4.500-.501; 20.4.1.600-.601; and 20.4.1.900 and .902, NMAC.

or substance which is subject to the Federal Water Pollution Control Act . . . except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts”); 42 U.S.C. § 6905(b) (noting that in administering RCRA, EPA is to “avoid duplication, to the maximum extent practicable, with the appropriate provisions of...the Federal” CWA).

RLWTF is a wastewater treatment unit that has been regulated under Section 402 of the CWA through NPDES Permit No. NM0028355 for approximately 45 years. *See e.g.* AR 15574 (Beers Prefiled Test., 5); AR 16869-16973.¹¹ The NPDES Permit regulates RLWTF discharges from Outfall 051. It governs, among other things, effluent limitations, monitoring and reporting requirements, and operation and maintenance. *See* AR 16869-16973. The Laboratory most recently reapplied for reissuance of its NPDES Permit in March 2019.¹² Because it is subject to regulation under Section 402 of the CWA, and otherwise satisfies the WWTU Exemption elements,¹³ RLWTF is exempt from HWA coverage under the WWTU Exemption. As the Department explained in this proceeding:

The RLWTF . . . meets the definition of a “wastewater treatment unit” in 40 C.F.G. § 260.10, the implementing regulations of [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”).

...

¹¹ NPDES Permit No. NM0028355 is available at: [https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Attachments%20By%20ParentFilingId/D593160982B83D03852588790044134D/\\$FILE/Administrative%20Record%20Index.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Attachments%20By%20ParentFilingId/D593160982B83D03852588790044134D/$FILE/Administrative%20Record%20Index.pdf)

¹² Although EPA reissued the NPDES Permit on March 30, 2022 (2022 NPDES Permit), the appeal to the EAB has been remanded for further public comment. *See* Notice of Issuance of Environmental Appeals Board Order (Jan. 4, 2023). Pending reissuance of the 2022 NPDES Permit on remand, the Laboratory remains subject to certain applicable versions of NPDES Permit No. NM0028355. With respect to RLWTF Outfall 051, it is the 2014 version of NPDES Permit No. NM0028355 that regulates discharges to RLWTF Outfall 051. *See e.g.* 40 C.F.R. 124.60(b); 40 C.R.R. 124.16(c).

¹³ Petitioners presented no evidence to address the elements of the WWTU Exemption. Rather, Petitioners primary argument below was that the WWTU Exemption did not apply because there are no discharges from RLWTF. AR 17213. As discussed above, this is demonstrably incorrect.

Therefore . . . 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.

NMED’s Response to Motion to Reverse the Issuance of DP-1132, 4-5 (Aug. 29, 2022); *see also* NMED’s Response to Opposed Motion to Vacate Stay of Proceedings, 4-5 (Oct. 11, 2022).

Moreover, as the Hearing Officer below explained “[t]he record reflects that three different forums are considering the [HWA issue] raised in this proceeding by [Petitioners].” AR 18979. One of those forums, the Tenth Circuit Court of Appeals, clarified that the WWTU Exemption applies:

In 2016, when Concerned Citizens filed its petition with the EPA, the Lab held a National Pollutant Discharge Elimination System (“NPDES”) permit to discharge treated radioactive effluent from Outfall 051. *In Re Los Alamos National Security, LLC and the U.S. Department of Energy*, 2018 WL 3629715, at *1 (EAB 2018). This NPDES permit exempted the Lab from regulation under both the Resource Conservation and Recovery Act (“RCRA”) and the New Mexico Hazardous Waste Act (“HWA”).

Concerned Citizens for Nuclear Safety, Inc. v. U.S.E.P.A., 2020 WL 8674182 at *1. Petitioners present no basis for revisiting this issue before the Commission. It necessarily follows that Section 74-6-12(B) does not apply because discharges from RLWTF are not an “activity or condition subject to . . . the Hazardous Waste Act.” NMSA 1978, § 74-6-12(B).

II. DISCHARGES FROM RLWTF ARE AN APPROPRIATE BASIS FOR ISSUING DP-1132

For their second argument, Petitioners assert that the Secretary’s decision to issue DP-1132 was error because the “WQA is specifically limited to the regulation of ‘the discharge of any water contaminant,’ and RLWTF does not plan to discharge any water contaminant.” *See Op. Br.*, ¶ 6. This misstates both the facts and the controlling law.

A. RLWTF Has Actual and Planned Discharges to Outfall 051

To begin, Petitioners are simply mistaken with respect to the facts. RLWTF has discharged treated effluent through Outfall 051 in the past, is currently discharging, and will continue to discharge in the future. *See, e.g.*, AR 17731-17732 (Pullen Prefiled Test., 4:18-5:6); AR 17733 (Pullen Prefiled Test., 6:4-11); AR 15272 (Mason Aff., ¶ 7).

This current and foreseeable plan to discharge from RLWTF is consistent with the Laboratory's Application for a groundwater discharge permit, which expressly noted that "[d]ischarge to the environment is via NPDES Outfall #051," *in addition to* "solar evaporation at the TA-52 Zero Liquid Discharge (ZLD) Solar Evaporation Tanks, or mechanical evaporation at TA-50-257." AR 05348. The Application specifically identified Outfall 051 as a "Discharge Location[]" and addressed "Discharge Volumes" to the environment from Outfall 051, noting that the "[d]ischarges occur in batches." AR 05349; AR 05357. As the Laboratory has maintained, "[t]reated water that meets NPDES, NMED, and DOE discharge standards can be discharged to the environment via permitted outfall #051 in Mortandad Canyon." AR 14388; AR 14392.

Actual discharges from RLWTF to the NPDES Permitted Outfall have always been variable based on Laboratory operational needs. For example, discharges in 1996 alone fluctuated from 0 gpd to 20,885 gpd to 41,770 gpd. AR 00131. What has been consistent is that the Laboratory, based on operational need, has maintained an NPDES permit authorizing these discharges continuously since 1978. Pursuant to that authorization, RLWTF discharged 18,632,173 liters of treated effluent from Outfall 051 in 2000, AR 01615; 13,613,000 liters in 2001, AR 01756; 11,010,203 liters in 2002, AR 02028; 11,257,000 liters in 2003, AR 02356; 8,170,000 liters in 2004, AR 02947; 6,796,000 liters in 2005, AR 03424; 6,181,500 liters in 2006, AR 03574; 4,585,100 liters in 2007, AR 03869; 5,298,900 liters in 2008, AR 04476; 4,401,900

liters in 2009, AR 04517; and treated effluent was also discharge from Outfall 051 in 2010, *see* AR 03969; AR 04008; AR 04031; AR 04044.

More recently, RLWTF discharged 80,798 liters of treated effluent from Outfall 051 on June 18, 2019, AR 14640, AR 14652, AR 18224-18225, AR 18244; AR 17777; 405,540 liters during the third quarter of 2021, AR 19948; and 157,876 liters during the first quarter of 2022, AR 19860. Consistent with that recent history, DP-1132 itself acknowledges that “Permittees are discharging effluent or leachate” from RLWTF. AR 20141-20142. Figure 1 shows a discharge from RLWTF at the permitted Outfall.

Figure 1: Outfall 051 Discharge. AR 18064.



RLWTF’s operational plan, moreover, contemplates continued routine discharges to Outfall 051 when necessary to support Laboratory operations. AR 18224; AR 17910; AR 17907; AR 18244; AR 18398; AR 15272-15273. Despite the installation of the evaporative systems at RLWTF, the record demonstrates that Outfall 051 has remained an operationally necessary means of discharging treated effluent when necessary to efficiently support Laboratory operations, or when the MES or SET become unavailable due to maintenance or malfunction. AR 18224 (Tr.

43:17-22 (Beers)); AR 17910; AR 17907; AR 18244 (Tr. 63:12-21 (Beers)); AR 18398 (Tr. 217:5-16 (Pullen)); AR 15272 (Mason Aff., ¶ 7). As determined by the Department in an NPDES Permit No. NM0028355 Compliance Evaluation Inspection, moreover, RLWTF “[f]acility representatives indicated that they plan to utilize the ability to discharge once the new permit is issued.” AR 16849.

Not only do the continued RLWTF discharges to the NPDES Permitted Outfall demonstrate that the Laboratory accurately predicted and appropriately planned for continued discharges from Outfall 051, but other Laboratory and Department actions demonstrate that continued discharges are anticipated to occur from Outfall 051. For example, effluent limits were established for Outfall 051, in addition to the MES and the SET, and discharge volumes were to be measured and recorded at Outfall 051, in addition to the MES and the SET. *See* AR 09416-09417; AR 09422. Public notice on DP-1132 stated that Permittees would “discharge treated effluent to a mechanical evaporation system, solar evaporation system or to an outfall (Outfall 051 also regulated under a...NPDES...permit issued by the [EPA] pursuant to the federal Clean Water Act section 402, 33 U.S.C. § 1342).” AR 09450. The Laboratory, moreover, installed two new alluvial groundwater monitoring wells, RLW-A-1 and RLW-A-2,¹⁴ “hydraulically downgradient from the Radioactive Liquid Waste Treatment Facility (RLWTF), where Los Alamos National Laboratory (LANL) discharges treated effluent from TA-50 to NPDES Outfall 051 in Effluent Canyon” for the purposes of monitoring discharges from RLWTF Outfall 051. AR 14793; *see also* AR 14211; AR 18076-18077 (Katzman Prefiled Test. 7:152-8:157). And the Laboratory also completed watertightness testing, a prerequisite to discharging from Outfall 051. AR 18224-18225, AR 18244 (Tr. 43:17-44:5 (Beers)).

¹⁴ These wells are referred to as MCA-RLW-1 and MCA-RLW-2 in DP-1132.

Against the weight of this evidence, Petitioners make only limited and unsupported responses. They argue, for instance, that Mr. Beers's testimony concerning the Laboratory's intention to make future discharges is "unsupported." *See* Op. Br. ¶ 32. This argument is based on a misrepresentation of the hearing record. Petitioners suggest that Mr. Beers testified that a discharge from Outfall 051 is "highly unlikely." *See* Op. Br. ¶ 32. However, the cited testimony does not even involve planned discharges from Outfall 051; rather, Mr. Beers testified that an "unplanned release from the MES" would be unlikely. AR 18271 (Tr. 90:1-9 (Beers)).

Notwithstanding Petitioners' limited argument to the contrary, a review of the entire record indisputably demonstrates that RLWTF has, is, and will discharge treated effluent from Outfall 051.¹⁵

B. RLWTF Has Actual and Planned Discharges to the MES and SET

There have also been discharges to the MES, a natural gas fired evaporator, since it became operational in 2010. AR 18211 (Tr. 30:5-8 (Beers)). The Laboratory intends to continue this practice. AR 18224 (Tr. 43:1-11 (Beers)). Likewise, the SET was installed in 2012 but has not yet been used. *See, e.g.*, AR 14563; AR 17896 (Beers Prefiled Test., 14:284-285); AR 18210 (Tr. 29:5-7 (Beers)). The Laboratory expects to rehabilitate and place the SET into service, at which time there will be RLWTF discharges to the SET. AR 18224 (Tr. 43:12-16 (Beers)).

The MES and SET are designed as evaporative systems. AR 17888 (Beers Prefiled Test., 6:111-123). Nevertheless, the Department determined that discharges to both the MES and SET require a groundwater discharge permit because they may impact groundwater through a release. *Id.*, 6:121-123; AR 18391-18392 (Tr. 210:23-211:24 (Pullen)). In the words of the Department,

¹⁵In comments on a draft DP-1132, Petitioners recognized that the Laboratory discharges through Outfall 051. AR 09638. Petitioners, moreover, actively participated in meetings regarding DP-1132's terms and conditions, advocating, for instance, for monitoring wells downgradient of Outfall 051. *See* AR 12831. Petitioners also conceded that the Laboratory still had "minimal discharges." AR 09639.

“because the proposed evaporative tanks contain an effluent or leachate which may move directly or indirectly into ground water, NMED has determined that a Discharge Permit is required for the proposed discharge. NMED considers the proposed evaporative tanks to be a component of the RLWTF, therefore, they must be included in the Discharge Permit for the facility.” AR 05255; *see also* AR 05396.

Petitioners maintain that discharges to lined impoundments or similar closed structures are not permitted under the WQA because there is no certainty that releases will impact groundwater. *See* Op. Br. ¶ 34. Their argument is based on a narrow reading of the word “discharge,” and they implicitly argue that releases from the treatment facilities into MES or SET are not “discharges.” *See, e.g.*, Op. Br. ¶¶ 37-43. But Petitioners cite no authority in support of their position, and their argument is contrary to established Department practice. The Department has required permits for discharges to lined impoundments and similar structures. *See* AR 17777-17778 (Pullen Prefiled Test., 50:21-51:4); *see also* AR 17351-17424. As explained by the Department in responding to Petitioners’ comments alleging RLWTF is a “zero-liquid discharge” facility:

CCW’s legal argument is flawed for a number of reasons. First, the WQA only requires “the discharge of any water contaminant” for a permit to be required (NMSA 1978, § 74-5-5.A). **There are many WWTPs [Wastewater Treatment Plants] in New Mexico with similar arrangements to RLWTF, they discharge only to lined impoundments or to evaporative systems. All of these facilities are regulated by [the Department] pursuant to discharge permits.** There are no WWTPs in New Mexico regulated under EIB [Environmental Improvement Board] regulations promulgated pursuant to the Hazardous Waste Act. Discharge permits are the appropriate mechanism for WWTPs (such as RLWTF) because the permits contemplate a failure of one or more of the mechanical systems (either in treatment or impoundment) that protect groundwater from contamination as a result of the discharge. **Were CCW to be correct in their assertion that the WQA does not apply to a WWTP that does not discharge directly to groundwater, there would be a great number of unregulated WWTPs in New Mexico.** [The Department] prefers to retain and exercise its authority to regulate these facilities under regulations promulgated by the WQCC, pursuant to the WQA, in order to protect New Mexico’s groundwater.

AR 13815 (emphasis added); *see also* AR 18846-18847; AR 18977 (Hearing Officer explaining that “NMED has issued more than twenty-five (25) permits that limit discharges to lined evaporative impoundment systems”).¹⁶

This policy accords with the general purpose of the WQA “to abate *and prevent* water pollution.” *Bokum Res. Corp. v. N.M. Water Quality Control Comm’n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546 (emphasis added); *see also* NMSA 1978, § 74-6-4(E). From this general purpose, the WQA sets out a comprehensive permitting system to address water pollution, both actual and *potential*. *See*, NMSA 1978, § 74-6-2(L) (defining “source” to mean a facility that “from which there is or may be a discharge”); 20.6.2.3103 NMAC (requiring a discharge permit for discharges that “may move directly or indirectly into groundwater”). On this basis, the *possibility* that a discharge (e.g., a discharge into a lined impoundment like the MES or SET) may impact groundwater (e.g., through a leak) is sufficient to trigger the Secretary’s authority under the implementing regulations to require and issue a discharge permit.

III. PETITIONERS CONCEDE THAT DP-1132 IS PROTECTIVE OF GROUNDWATER

At base, the purpose of DP-1132 is to protect groundwater resources. The record establishes that DP-1132 accomplishes this purpose. *See* AR 18377-18379 (Tr. 196:18-198:23 (Pullen)); AR 17728; AR 17778 (Pullen Prefiled Test., 1:13-14; 51:9-11).

DP-1132 is structured around various foundational conditions. AR 17889 (Beers Prefiled Test., 7:140-42). These include: (1) an Operational Plan; (2) Monitoring and Reporting; (3) Contingency Plans; and (4) Closure, Post Closure, and Corrective Action. *See id.*; *see also* AR 20126, *et al.* The Operational Plan consists of twenty-two conditions with specific requirements

¹⁶ EPA has maintained a similar practice. AR 13799-13800.

for the operation and maintenance of certain units within RLWTF; for instance, Condition 8 concerns prescribed testing and demonstrations for various systems used to convey, store, treat, or dispose of liquid or semi-liquid waste streams to ensure that they are not leaking. *See* AR 17889-17890 (Beers Prefiled Test., 7:144-8:159); AR 20144-20162. The Monitoring and Reporting provisions consist of Conditions 23-37 and concern approved methodologies for conducting sampling and analysis and regular reporting to the Department to determine the quality of discharged effluent and to detect any unintended releases. *See* AR 17890-17891 (Beers Prefiled Test., 8:161-9:178); AR 20162-20172. These reports are made quarterly and annually and are available to the public. The Contingency Plans consist of Conditions 38-39 and contain specific provisions for response to unauthorized releases in accordance with 20.6.2.1203 NMAC, including mandatory 7-day and 15-day corrective action plans to address any release. AR 17891 (Beers Prefiled Test., 9:180-191); AR 20172-20174. The Closure, Post Closure, and Corrective Action requirements consist of Conditions 40-48 of the permit. *See* AR 17891-17893 (Beers Prefiled Test., 9:193-11:208); AR 20174-20180. As Petitioners recognize, “DP-1132 clearly covers many other subjects, including facility design, construction, operation, monitoring, discharge of water contaminants, and closure.” Op. Br. ¶ 26. DP-1132 is protective of groundwater resources. *See* AR 18377-18379 (Tr. 196:18-198:23 (Pullen)).

Petitioners do not challenge *any* substantive provision of DP-1132 or claim that DP-1132 will result in either “a hazard to public health” or an “undue risk to property.” *See* 20.6.2.3109.C NMAC. Petitioners also do not allege that any discharged constituent to groundwater has affected them in any way, that Petitioners have suffered any procedural or information injury arising from the DP-1132 permitting action, or that DP-1132’s terms are in any way inconsistent with the WQA or its implementing regulations. *See id.* It is therefore uncontested that DP-1132 achieves the

WQA's purpose to "abate and prevent water pollution." *See Bokum Resources Corp.*, 1979-NMSC-090, ¶ 59.

IV. THE PETITION IS PROCEDURALLY DEFICIENT

A. The Only Relief the Petition Seeks Is Remand and Remand Is Not Proper Because Petitioners Had Significant Opportunity to Submit Comment or Evidence

Petitioners' permit review is "subject to...the scope of the administrative relief properly requested in the Petition." Order Granting Request for Permit Review and Appointing Hearing Officer ¶ 1 (Aug. 30, 2022); *see also* 1978 NMSA, § 74-6-5(R) (2005); 20.1.3.16(A)(3) NMAC. Remand is the only relief Petitioners seek in their Petition. *See* Pet. ¶¶ 20, 42-47, *et seq.* As discussed below, however, remand is not proper in this case.

Remand is only appropriate where "there was *no reasonable opportunity* to submit comment or evidence on an issue being challenged." 1978 NMSA, § 74-6-5(R); § 20.1.3.16(A)(3) NMAC (emphasis added). Petitioners, however, had *significant* opportunity to submit comment or evidence on groundwater discharge permit DP-1132, including on Petitioners' jurisdictional, discharge, and other theories. There has been extensive public notice on DP-1132. There have been two full public hearings on DP-1132. There have been multiple public comment periods on DP-1132. Petitioners participated in those hearings and in multiple instances provided comments and evidence, including on their jurisdictional, discharge, and other theories. There have been multiple administrative proceedings on DP-1132.

Not only did Petitioners have significant opportunity to submit comment or evidence on DP-1132, but the Secretary and Hearing Officer, in multiple instances, directly addressed Petitioners' jurisdictional and discharge theories, the very theories Petitioners seek remand on. *See e.g.* AR 18975-18979; AR 19099-19105. The Hearing Officer, for instance, determined that DP-

1132 does not regulate an activity subject to the HWA; that DP-1132 abates water pollution and regulates actions subject to the WQA; that the WQA's implementing regulations regulate discharges that may move directly or indirectly into groundwater; and that the HWA is not controlling. AR 18978. The Secretary decided that the WQA is applicable; that the HWA is not relevant to the issuance of groundwater discharge permits; and that the issuance of a groundwater discharge permit is the primary mechanism under State law to protect State groundwater resources. *See* AR 19099-19105 (Order of the Secretary (June 24, 2020)). That Petitioners do not like what the Hearing Officer and Secretary had to say on the issues does not mean that Petitioners lacked reasonable opportunity to submit comment or evidence on the issues. It just means that Petitioners' arguments, comments, and evidence were not persuasive.

Remand is not appropriate here because Petitioners had significant opportunity to present comment or evidence on DP-1132. *See* 1978 NMSA, § 74-6-5(R); § 20.1.3.16(A)(3) NMAC. As remand is the only relief Petitioners sought in their Petition for Review, and as remand is not proper, the Petition for Review should be denied.

B. Petitioners Lack Standing Because They Have Not Demonstrated that They Have Been Adversely Affected by the Issuance of DP-1132

Petitioners fail to show that they have been adversely affected by the DP-1132 groundwater discharge permitting action, which failure negates standing and precludes Petitioners from being able to obtain permit review. To file a permit review petition, Petitioners must be "adversely affected by such permitting action." NMSA 1978, § 74-6-5(O). Showing adverse effect is a "statutory prerequisite" to petitioning for permit review. *See N.M. Cattle Growers' Ass'n v. New Mexico Water Quality Control Comm'n*, 2013-NMCA-046, ¶ 17, 299 P.3d 436. Where a statute designates who may petition for permit review, the statute governs who has standing and the issue of standing becomes interwoven with subject matter jurisdiction. *See id.* ¶ 9. To show that they

are adversely affected by the DP-1132 permitting action, and thus satisfy the statutory prerequisite for this Commission to accept the Petition, establish standing, and confer subject matter jurisdiction, Petitioners “must show injury or a real risk of future injury.” *Id.* ¶ 13 (construing “adversely affected” in NMSA 1978, § 74-6-7 (1993) of the WQA). Absent adverse effect, Petitioners lack standing and are precluded from filing a Petition for Review. *See id.* ¶ 17; NMSA 1978, § 74-6-5(O).

Nowhere do Petitioners allege that any discharged constituent to groundwater affected them in any way, that DP-1132’s terms are not protective of groundwater resources, or that DP-1132’s terms are in any way inconsistent with the WQA or its implementing regulations. *See* Petition. Petitioners show no causal connection, no traceability, between any DP-1132 permitting action and any adverse effect, injury, or harm to Petitioners. *See id.*

Rather than demonstrating any adverse effect arising from the DP-1132 groundwater discharge permitting action, Petitioners claim that some *other* permitting action should have been conducted under the HWA, and that this alleged absence of HWA permitting somehow lessens Petitioners’ ability to obtain and disseminate information. *See* Pet. ¶¶ 3-6, 10. Whether or not some *other* HWA permitting action should or should not occur has *no* bearing on whether or not Petitioners suffered any adverse effect arising from *this* WQA permitting action.¹⁷ This is a groundwater discharge permitting action. It is being conducted pursuant to the WQA. The permit at issue is DP-1132, a groundwater discharge permit issued pursuant to the WQA. The permitting activity at issue is RLWTF discharges that may impact groundwater. It is this “permitting action”

¹⁷ Whether any permitting action should or should not occur under the HWA, moreover, is not redressable in this Commission proceeding. The Commission’s jurisdictional scope extends to permitting actions under the WQA. *See* NMSA 1978, § 74-6-4(E), § 74-6-5(A); § 20.1.3.2(A) NMAC.

that must “adversely affect[]” Petitioners. NMSA 1978, § 74-6-5(O). And Petitioners show no adverse effect arising from this permitting action. *See generally*, Pet.

Absent a demonstration that Petitioners have been adversely affected, Petitioners lack standing, are precluded from filing a Petition for Review, and the Petition should be denied. *See N.M. Cattle Growers*, 2013-NMCA-046, ¶ 17 (providing an analysis for a similar standing provision found at NMSA 1978, § 74-6-7).

CONCLUSION

The Petition should be denied. Petitioners have not been adversely affected by the DP-1132 groundwater discharge permitting action, negating standing and precluding Petitioners from petitioning for permit review. Petitioners’ only relief sought, remand, is not proper, as Petitioners had significant opportunity to present comment or evidence on DP-1132. If considering the Petition, the Commission should sustain issuance of DP-1132. DP-1132 was issued in accordance with the WQA and its implementing regulations. The WQA, not the HWA, governs the issuance and implementation of groundwater discharge permits.

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