

**NEW MEXICO ENVIRONMENT DEPARTMENT  
BEFORE THE SECRETARY OF THE ENVIRONMENT**



IN THE MATTER OF THE APPLICATION OF )  
WASTE CONTROL SPECIALISTS LLC FOR )  
A GROUNDWATER DISCHARGE PERMIT )  
(DP-1817) FOR THE WASTE CONTROL )  
SPECIALISTS LLC FACILITY )

**GWB-18-11(P)**

**CITIZENS FOR ALTERNATIVES TO RADIOACTIVE DUMPING  
AND THE ALLIANCE FOR ENVIRONMENTAL STRATEGIES'  
OPPOSED MOTION FOR A CONTINUANCE OF THE SEPTEMBER 21, 2018  
DEADLINE AND OF THE OCTOBER 2, 2018 PUBLIC HEARING**

**Preliminary Statement**

This motion is submitted on behalf of Citizens for Alternatives to Radioactive Dumping (“CARD”) and the Alliance for Environmental Strategies (“AFES”) in seeking postponement continuance of the deadline for submitting the Statement of Intent to Present Technical Testimony and of the public hearing concerning the proposed ground water discharge permit, DP-1817, now scheduled for October 2, 2018. The hearing should be rescheduled because the Administrative Record for application DP-1817 is incomplete, inconsistent, and inadequate to allow the public to fully understand and present technical testimony on the basis upon which the Secretary of the Environment will make a final determination approving or disapproving DP-1817.

The movant is requesting that the New Mexico Environment Department (the “Department”) add all missing documentation to the Administrative Record, update and correct the Index to the Administrative Record consistent with the corrected Administrative Record, revise the Fact Sheet so that inconsistencies between the published Fact Sheet, corrected Record and the draft permit are eliminated, and translate into Spanish these corrected documents

(corrected Index and corrected Fact Sheet). The movant respectfully requests that the hearing be rescheduled to *one month from the date the Department notifies the movant via email that the tasks listed above have been completed* and publishes notices in English and Spanish of the availability of the corrected and translated documents. The movant understands that the other deadlines in the matter will be based on that revised hearing date.

Alternately, the movant believes that no hearing would be necessary on this permit should the Department; 1) provide a *revised* Draft Permit that is sufficiently protective New Mexico groundwater; 2) correct, complete and make available to the public a complete Administrative Record and Index for such a revised Draft Permit; 3) issue a Fact Sheet that explains the reasoning of such a revised Draft Permit and that corresponds to the contents of the revised Draft Permit; 4) translate the Index of the Administrative Record and the new Fact Sheet for such a revised Draft Permit into Spanish to provide the opportunity for public comment by limited English proficiency (LEP) Spanish speakers; and 5) inform the public, both English and Spanish speaking, of the availability of these documents whether online, at the GWQB, or in hardcopy at the Eunice Public Library.

This motion is based upon this memorandum of points and authority and the affidavit attached hereto. This motion is further based upon the documents on file with the Department.

**I. THE ENVIRONMENT DEPARTMENT SHOULD GRANT A CONTINUANCE OF THE DEADLINES TO FILE A NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY AND A CONTINUANCE OF THE OCTOBER 2, 2018 HEARING**

**A. Standard of Review**

The movant understands that there are a number of factors that should be considered in evaluating a motion for continuance, including the length of the requested delay, the likelihood

that a delay would accomplish the movant's objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and the court, the legitimacy of the motives in requesting the delay, the fault of the movant in causing a need for the delay, and the prejudice to the movant in denying the motion. The movant also understands that “The grant or denial of a motion for a continuance rests within the sound discretion of the trial court, and the burden of establishing an abuse of discretion rests with the defendant.” *State v. Sanchez*, 120 N.M. 247, 253, 901 P.2d 178, 184 (1995).

The movant believes that the facts of the situation support each of the factors listed above and that the current request will accomplish our objectives, will not result in undue delay, and will prevent the movant and the public in general from being prejudiced in this matter should the hearing not be delayed.

Without additional time, it is not possible to fully prepare and present technical testimony pertinent to the Draft Permit DP-1817. Furthermore, additional time is needed to correct and translate key documents for the Spanish speaking citizens who would like to offer testimony at the public hearing or during the pre-hearing period. Therefore, the Draft Permit is not ready for consideration, comment and testimony by the public or by expert witnesses and the public will be harmed by not having all the necessary information required to present complete comments on the proposed application.

## **B. Background Information**

The public process for DP-1817 has been complex with three draft permits, nine public notices, and one delay for the public hearing. There were issues with the adequacy of the public notices. While the Department did recognize and correct certain issues, for example agreeing to

translate the public notice in Spanish, new problems arose. For example, the translated documents omitted important and required information. The last comment period extension and the hearing delay were necessitated to allow the Department to provide translated material for LEP Spanish speakers which they agreed to do due pursuant to the Resolution Agreement of January 2018 between the Department and EPA, and to allow those Spanish speakers to inform themselves, provide public comment, and participate in the hearing process. The material requested to be translated included: the Index of the Record and the Fact Sheet that would describe the Draft Permit, which was to substitute for translating the actual Permit.

Unfortunately, instead of describing the current Draft Permit, the Spanish-language Fact Sheet provided new information that contradicted the Draft Permit and included the wrong date of the hearing. Movant only realized the significant problems with the Index that was posted on August 8, 2018 much later when it was discovered that the posted version of the Index and Record had not only been added to but had had a significant amount of information deleted and changed as well.

**1. The Administrative Record is incomplete and in disorder, so that the public cannot obtain answers to basic questions from the Record.**

- a. The first version of the Administrative Record ("original" Record) and its Index ("original" Index) were submitted to and accepted by the Commission as the Record during a proceeding between the Department and WCS in WQCC Matter 17-01, which concerns the application for DP-1817. The Administrative Record in that proceeding contained documents dating from 2005 through February 16, 2017 and the Index of those documents (Index numbered WQCC 1701[A]). However, the Administrative Record and Index now available on the Department's web site ("revised" Record and "revised"

Index) have been extensively revised and contain, with one exception, only documents dating from October, 2012 or later with no explanation about the change or as to the location of the removed items so the public can review them. Fifty-eight entries dated before the 10/17/12 start of the revised Index have been removed as well as an additional 52 entries with later dates. Quite a few of these items contained important information that is now missing from the Record. The Index is significant as it details the contents of the Record and is how the public can determine the most pertinent documents to review in the record. The entries in the revised Index of the revised Record have been reduced from 138 as of February 2017 to 83 now with the exception of only one massive document that is dated 2007 and accounts for an additional 75 entries.

- b. During the review of the Record at the Department offices in Santa Fe, movant was told that the documents being provided and reviewed consisted of the “Administrative Record,” but some 50-100 of the provided documents were not indexed at that time. As of the posting of the first revised Index online on August 8, 2018 the number of entries indexed in the Administrative Records actually decreased compared to the original Index provided during movant's reviews on September 13, 2017 and October 25, 2017. This indicates that not all of the additional 50 or 100 documents and/or emails that were said to be part of the Record on October 25, of 2017 were added. This is true despite adding and indexing 12 additional documents that came into the GWQB between October 25 of 2017 and August of 2018. Surely these missing documents contain information that reflects and explains components the Department’s decision making process and are necessary to fully understand the basis for the existing version of the permit.

- i. It appears that the Department posted different versions of the Index to the Administrative Record between August 8, 2018 and the present. The first revised Index that was posted online on or about August 8, 2018 only went to June 4, 2018 and had 82 entries while the current, second revised Index ends at July 13, 2018 and includes 158 entries, including 75 entries from the 2007 document. Unfortunately, though the July 13, 2018 entry is in the second revised Index now, it does not appear in the copies of the revised Record that are online.
  - ii. During all the comment periods for the last two drafts of the permit (dated 3-3-17 and 5-4-17) the Index of the Record ended in February of 2017. Documents after that date were not indexed or possibly even added to the Record until some were added in August 2018. Thus, the public could not readily access important information or see if required noticing and deadlines had been met.
  - iii. Documents certifying publication, as the regulations require for the eight public notices (including notices of hearings) issued by the Ground Water Quality Bureau (GWQB) in this matter are also missing from the Record—both original and revised—for half of the Department’s public notices and are incomplete for the rest. Only the Applicants provided complete proof of publication for their PN-1.
- c. Bates numbers on the individual pages of the revised Record have been changed as well so that, for instance, #01187 which was referenced in our April 2018 Non-Employee Discrimination Complaint and which at that time referred to the first page of the Department's Comments on Proposed Amendment to TPDES Permit No. 4857, now refers to page 2 of a letter between WCS and Sara Arthur of the Ground Water Quality

Bureau (GWQB). References in public comments made earlier and that referred to such Bates page numbers or even to Index entry numbers in the original Index will now find that their references have been similarly compromised. Since the Secretary is supposed to take public comment into consideration when making his decision on the Permit and since he can only consider information that is in the Record, public comment as a whole has been significantly compromised.

Clearly, a significant amount of material has been removed from the Record; it and the Index have become "moving targets" that change depending on when you view them, and yet, no notice or explanation of these changes has been provided to the public. The Record should be completed so that the public can see the full process that has led to the present permit at issue and so the public can have some confidence that what they are reviewing is the final Record that will not change during the pre-hearing period. The Administrative Record and its Index should be complete, final, and available to the public before any pre-hearing period begins.

**2. Information in the Administrative Record is contradictory so it is not possible to determine the basis and support for the current draft of the permit.**

- a. The Draft Permit, dated May 4, 2017, is in conflict with the Department's Fact Sheet and Public Notice, which were published on August 2, 2018. The applicable regulations require that the permit application state the "[d]epth to and concentration of the ground water most likely to be affected by the discharge" and provide for the "installation, use, and maintenance of monitoring devices for the ground water most likely to be affected by the discharge." (20 NMAC 6.2.3106.C.3, 6.2.3107.A.2.). The Draft Permit states that the "[g]round water most likely to be affected is at a depth of between 19 and 35 feet" (at

3), and it states that these “perched lenses” are “the focus of the groundwater detection monitoring in this Discharge Permit.” (at 3).

However, the more recent August 2, 2018 Public Notice states that the “uppermost aquifer below the Facility is at a depth of approximately 225 feet below ground level” (at 2). And the Fact Sheet states that “the 225-foot zone is considered the ‘protectible’ groundwater because it is the shallowest zone that meets the regulatory definition of ‘ground water’ in 20.6.2.7.Z NMAC . . . The water in the shallower zones does not meet that definition.” (at 2). The Fact Sheet now says that the purpose of the permit is also to obtain information “to ensure protection of New Mexico groundwater,” which it asserts is obtained by “monitor[ing] shallow groundwater accumulation (if any) in monitoring well NM-1 at the interface between the Dockum claystone and the OAG alluvial material,” i.e., the shallow stratum. Thus, the Draft Permit seeks to protect the 19 to 35 feet deep zone, but in the Fact Sheet the purpose of the permit has been changed to protection of the 225-foot zone. And, while the regulations require “the installation, use, and maintenance of monitoring devices for the ground water most likely to be affected by the discharge,” 20.6.2.3107.A.2 NMAC, no such monitoring is proposed in the Fact Sheet. This is extremely confusing and with the permit in this state of flux it is not possible for the public or any expert witness to analyze and comment upon the permit without an explanation of the contradictory information and the basis for the changes that have been made to the permit.

- 3. Numerous matters of significance to a permit concerning the Waste Control Specialists (“WCS”) facility are not addressed in the Draft Permit itself, from the public notices and from the Fact Sheets.**



- a. There is no discussion of the effect of the ongoing intense oil and gas development in the area and the associated water injection and hydrofracturing in use to enhance production. Such practices can create vertical flow paths that may conduct discharged water to the bodies of New Mexico ground water at depth.
  - b. The WCS Facility currently stores mixed transuranic waste in containers that were rejected for disposal at the Waste Isolation Pilot Plant because of the risk of deflagration. This is not mentioned in the Draft Permit or in public notices and fact sheets.
  - c. WCS has applied to the Nuclear Regulatory Commission to become a consolidated interim storage facility for spent fuel from nuclear reactors. Such high level and sometimes mixed radioactive waste as well as possibly explosive transuranic mixed waste present additional hazards at WCS that must be analyzed. Information about these existing and possible facilities within WCS and conditions around the discharge area should have been included somewhere in the Draft Permit and in information provided to the public. This information existed in the original Index and Record but is one of the items removed when the Record and Index were revised.
4. **The public notice procedures leading to a public hearing have contained repeated errors and notices of availability of the revised Administrative Record were not issued.**
- a. The Draft Permit, though only 20 pages long, has not been translated into Spanish, which is the principal language of many nearby residents. Spanish speakers must rely on the Fact Sheet, which is much less complete, doesn't fully describe and sometimes contradicts the current draft permit and contains multiple errors. For instance, in event of an exceedance, the Draft Permit allows WCS an unlimited amount of time to identify

baseline conditions (at ¶ 15); the Fact Sheet erroneously states that it must be done in a specified time. (at 9).

- b. Further, the Fact Sheet contains the wrong date for the hearing (at 7). Finally,
- c. The translated Fact Sheet was not provided in the Eunice Public Library as the Department said would be done.
- d. Although the English and translated Fact Sheets and the English and translated Indexes were posted online, no information was provided to the general public to inform them that these existed and were available for review. Only a few selected members of the public were informed via email when the English revised Index and revised Record were posted on August 8, 2018. No one was informed when the Spanish revised Index was posted about a month after the English Index was available. The public was not informed that the posted Index had been revised from the original Index or when it was revised a second time and further entries were added later in 2018. No reason was given for any of these revisions.
- e. The Department did not inform the general or Spanish speaking public when the revised Administrative Record was available for review. The only way to know would be to check the website every day, which is difficult for members of the public who do not have ready access to the internet, and particularly difficult for Spanish speakers since almost all of the website is in English. This lack of notice meant that people may not have realized changes were made and didn't have a chance for review.

In this situation, the Department's reasoning and basis for determining how the Draft Permit complies with the groundwater regulations, and how the purpose of the Water Quality

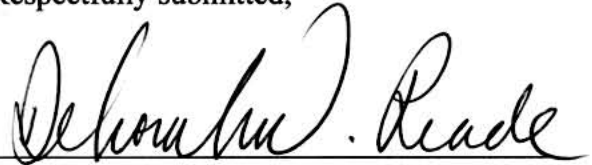
Act can be attained by this draft are entirely unclear, and the published documents provide no clear path of logic or science to support the Draft Permit. Such confusion makes it impossible for citizens to understand the Department's position, to analyze it, and to comment at a hearing. An expert witness cannot interpret what the Department is seeking to do with this Draft Permit and comment on whether such purposes can be accomplished. The public cannot understand how the Draft Permit complies with the requirements of the Water Quality Act. The public must not be put in this position. The Department should postpone the hearing until the administrative record is completed and until it can present a Draft Permit that is consistent and supported by a comprehensive Administrative Record and Index.

WHEREFORE, the movant requests that the Department add all missing documentation to the Administrative Record, update and correct the Index to the Administrative Record consistent with the corrected Administrative Record, translate into Spanish these corrected documents (corrected Index and corrected Fact Sheet), eliminate inconsistencies between the published Fact sheet and the Draft Permit and publish notice in English and Spanish of the availability of the corrected and translated documents. The movant respectfully requests that the hearing be rescheduled to one month ***from the date the Department notifies the movant via email that the tasks listed above have been completed.*** The movant understands that the other deadlines in the matter will be based on that revised hearing date.

Alternately, the movant believes that no hearing would be necessary on this permit should the Department; 1) provide a *revised* Draft Permit that is sufficiently protective New Mexico groundwater; 2) correct, complete and make available to the public a complete Administrative Record and Index for such a revised Draft Permit; 3) issue a Fact Sheet that

explains the reasoning of such a revised Draft Permit and that corresponds to the contents of the revised Draft Permit; 4) translate the Index of the Administrative Record and the Fact Sheet for such a revised Draft Permit into Spanish to provide the opportunity for public comment by limited English proficiency Spanish speakers; 5) provide printed copies of the Indexes, Fact Sheets, public notices, revised Draft Permit and Permit Application in the Eunice Public Library and electronic copies online; 6) public notice in English and Spanish of the availability of all provided documents.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Deborah W. Reade". The signature is written in a cursive style with a horizontal line underneath it.

Deborah Reade

—for—

Citizens for Alternatives to Radioactive  
Dumping and the Alliance for Environmental  
Strategies

117 Duran Street

Santa Fe, New Mexico 87501

Telephone: 505-986-9284

Email: Reade@nets.com

September 17, 2018

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the September 17, 2018 a copy of the Opposed Motion for a Continuance of the September 21, 2018 deadline and of the October 2, 2018 Public Hearing and affidavit in support of the motion were hand-delivered to:

John Baca or Pam Casteneda (as available),  
Hearing Clerk, NMED,  
P.O. Box 5469, 1190 St. Francis Drive,  
Santa Fe, New Mexico 87502,

And emailed to:

Pam.Casteneda@state.nm.us

And emailed to:

Lara Katz, NMED  
Office of General Counsel,  
1190 South St. Francis Drive, Santa Fe, New Mexico, 87505  
[lara.katz@state.nm.us](mailto:lara.katz@state.nm.us).

and

Michael Woodward and Wesley McGuffey  
Attorneys for Waste Control Specialists  
Hance Scarborough, LLP  
111 Congress Avenue Suite 500  
Austin, Texas 78701  
[wmcguffey@hslawmail.com](mailto:wmcguffey@hslawmail.com)  
[MWoodward@hslawmail.com](mailto:MWoodward@hslawmail.com)