STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

IN RE: PETITION FOR REVIEW OF THE NEW MEXICO SECRETARY OF ENVIRONMENT'S DECISION GRANTING GROUNDWATER DISCHARGE PERMIT DP-1132 IN PROCEEDING GWB 17-05 (P)

WQCC No. 18-05 (A)

NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE TO COMMUNITIES FOR CLEAN WATER MOTION TO VACATE AGENCY DECISION AND REMAND

Pursuant to 20.1.3.15.A NMAC, Respondent the New Mexico Environment Department ("NMED" or "the Department") respectfully submits this response to Petitioner Communities for Clean Water ("CCW" or "Petitioner") Motion to Vacate Agency Decision and Remand the Petition for Review of DP-1132 ("Motion"), which was filed with the Water Quality Control Commission ("WQCC" or "the Commission") on February 4, 2019.

As fully discussed below, Petitioner's motion is premised on numerous misstatements of the facts and erroneous legal conclusions, and should therefore be denied.

As a preliminary matter, NMED objects to the attempted introduction of new information into the record, more than five months after the close of the record in the GWB 17-05 (P) proceeding, seemingly for the sole purpose of impugning the character and professionalism of the Hearing Officer.

I. TIMELINE OF FACTS RELEVANT TO THE MOTION

The following timeline of facts are relevant to this motion. NMED does not dispute the accuracy of the new information CCW provides in its Motion, but believes additional facts from the Administrative Record provide important context in this matter.

1. On March 12, 2018, Petitioner filed their Motion to Dismiss DP-1132 Proceeding, alleging that issuance of a discharge permit for the Radioactive Liquid Waste Treatment Facility

("RLWTF") under the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 ("WQA"), was not lawful. **[AR 15255-15274]**.

2. On April 2, 2018, NMED and the Applicants filed Responses to Petitioner's Motion to Dismiss. **[AR 15164-15252]**.

3. On April 6, 2018, Petitioners filed their Reply to the Responses to their Motion. **[AR 15154-15163]**.

4. On April 9, 2018, NMED filed its Notice of Supplemental Exhibits. **[AR 15048-15100]**.

5. On April 18, 2018, Petitioner's Motion to Dismiss was denied by the Hearing Officer, stating that it "was decided on its merits *based on the briefing submitted.*" (emphasis added) **[AR 15101-15105]**.

6. A public hearing on DP-1132 was held on April 19, 2018, in Los Alamos, New Mexico. **[4-9-18 1 Tr. 13-17]**; **[AR 14339-14617]**.

7. At the public hearing, public comment was heard from ten people, five of whom stated they believed the RLWTF should properly be regulated under the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA") or the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 ("HWA"), rather than via a groundwater discharge permit. **[4-9-18 1 Tr. 17:11-44:8]**; **[AR 14299-14335]**.

8. At the public hearing, a member of CCW submitted 28 identical comment letters signed by individuals, also expressing the opinion that the RLWTF should be regulated under the New Mexico Hazardous Waste Act. **[4-9-18 1 Tr. 20:7-22:19]**; **[AR 14299-14326]**.

9. On June 15, 2018, the National Nuclear Security Administration ("NNSA") announced a job opening at the Los Alamos National Laboratory ("LANL"). The closing date to apply was July 26, 2018. Exhibit B to Motion.

10. On July 19, 2018, the Hearing Officer issued her Hearing Officer's Report, recommending issuance of DP-1132. **[AR 14214-14229]**.

11. On August 3, 2018, all parties filed Comments on the Hearing Officer's Report. **[AR 14197-14213]**.

12. On August 29, 2018, the Hearing Officer issued her Revised Hearing Officer's Report, again recommending issuance of DP-1132, and the Secretary of NMED issued his Final Order, issuing DP-1132. **[AR 14179-14196]**.

13. On September 18, 2018, the Hearing Officer, Ms. Anderson, accepted an offer of employment from NNSA. Exhibit B to Motion.

14. November 21, 2018 was Ms. Anderson's last day at NMED, she started at NNSA on November 25, 2018. Exhibit B to Motion.

II. STANDARD OF REVIEW

Permit Reviews before the Commission, are guided by NMSA 1978, Section 74-6-5(Q) ("...The commission shall consider and weigh only the evidence contained in the record before the constituent agency and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the constituent agency. Based on the review of the evidence, the arguments of the parties and recommendations of the hearing officer, the commission shall sustain, modify or reverse the action of the constituent agency. The commission shall enter ultimate findings of fact and conclusions of law and keep a record of the review.") and 20.1.3.16.F(3) NMAC ("The commission shall consider and weigh only the evidence contained in the record before the department and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the department. The commission shall sustain, modify or reverse the action of the department based

on a review of the evidence, the arguments of the parties and recommendations of the hearing officer. The commission shall set forth in the final order the reasons for its actions.").

The provisions of the WQA and the Commission's own adjudicatory regulations as they relate to permit reviews are especially important in ruling on this Motion. First. CCW now asks the Commission to consider information that is not contained in the record for the GWB 17-05 (P) proceeding. Second, it is important for the Commission to understand that the Hearing Officer's Report contains only a *recommended* decision. The final decision on issuance of any permit is made by the Secretary of the Environment, not a hearing officer. The Commission, in conducting a permit review, conducts a "review of the evidence, the arguments of the parties and recommendations of the hearing officer" and sustains, modifies or reverses the action of the Department based upon that review. 20.1.3.16.F(3) NMAC. Implicit in this is that the Commission affords the Hearing Officer's Report, and any rulings or recommendations by the Hearing Officer, whatever weight it deems appropriate.

III. ARGUMENT

A. The Hearing Officer Has Not Been Disqualified

CCW misrepresents a number of issues in their Motion. CCW requests that the final decision of the Secretary of Environment be vacated, and the matter remanded back to him, "due to the disqualification of the Hearing Officer." Motion at 1, 4. However, the hearing officer has not been "disqualified". If CCW is requesting the Hearing Officer be retroactively disqualified from presiding over the GWB 17-05 (P) permitting action, the Commission does not appear to have the authority to do that. The Hearing Officer was appointed by the Secretary of Environment pursuant to the Department's Permit Procedures, 20.1.4.100 NMAC. Presumably, only the Secretary has the authority to remove, or "disqualify" a hearing officer. It is unclear if a hearing

officer may be removed (or "disqualified") after the conclusion of a permitting action. The applicable regulations (20.1.4 NMAC, 20.6.2.3108, 3109, and 3110 NMAC) are silent on this.

CCW goes on to claim that "it is indisputable that this Hearing Officer was disqualified from presiding in this proceeding or from making any rulings affecting NNSA's and the other parties' rights and obligations." Motion at 5. On the contrary, what is indisputable is that there is nothing in the record indicting the Hearing Officer was disqualified or otherwise precluded from presiding over a proceeding that concluded weeks before she received an offer of employment from NNSA, and months before actually leaving the employ of NMED.

B. There is No Evidence the Hearing Officer Acted Improperly

CCW alleges the Hearing Officer acted with impropriety, bias, and conflict of interest. Motion at 3, 7, 8. Yet they can show no examples of such behavior. At the heart of the GWB 17-05 (P) proceeding was CCW's quest to have the RLWTF regulated under RCRA and the HWA. In order to achieve this, CCW (and over 30 commenters, many of them signing identical form letters) argued that the WQA does not authorize the Department to issue a groundwater discharge permit in cases where there exists only the potential for a discharge to impact groundwater. CCW first made this argument in the GWB 17-05 (P) proceeding[1] on March 12, 2018. That motion was fully briefed by all parties by April 9, 2018, and the Hearing Officer denied the motion on April 18, 2018, more than two months before the NNSA job applied for by the Hearing Officer was even posted. CCW points out that the Hearing Officer ruled two additional times on the same issue, in the two Hearing Officer Reports dated July 19, 2018 and August 29, 2018.[2] Yet, CCW made no new arguments in their post-hearing pleadings, nor was any relevant new evidence introduced at

[1] CCW had previously submitted comments on the draft permit to the same effect.
[2] CCW also mischaracterizes the Hearing Officer's rulings on this matter as not "offering any analysis, reasoning, or explanation." As explained in NMED's Answer Brief (filed December 31, 2018), the Hearing Officer's order denying CCW's motion to dismiss incorporated the extensive briefing submitted by the parties.

the hearing or afterward that would change this ruling. Had the Hearing Officer ruled one way on a pre-hearing motion, and then changed her ruling after seeking employment with a party to the proceeding, that would potentially be evidence of bias, impropriety, or conflict of interest. To rule consistently throughout a proceeding on a matter. as occurred here is, if anything, evidence of impartiality and fairness rather than impropriety.

CCW's inferences do not amount to direct evidence of bias and conflict of interest. There can be no question that any ruling or action taken by the Hearing Officer prior to the NNSA job posting must, necessarily be free of any accusation of bias. Likewise, the NNSA job posting closed on July 26, 2018. Yet the Hearing Officer filed the Hearing Officer's Report on July 19, 2018, several days before the posting even closed. Whether or not Ms. Anderson had submitted an application before or after she filed the Hearing Officer's Report is immaterial, as the contents of the report itself were consistent with the manner in which the hearing had been conducted, months earlier, and reflected a review and analysis of the post-hearing pleadings submitted by the parties. Her Amended Hearing Officer's Report, filed August 29, 2018, was also substantively consistent with the prior report, and merely reflected some factual corrections in response to comments filed by the parties on the July 19 report.

CCW cites various federal cases [Motion at 7-9], however these are inapposite because they reference judges and adjudicators, people acting in a decision-making capacity. As explained above, the Hearing Officer made no substantive decisions after the April public hearing, the Secretary of Environment was the final decisionmaker in deciding to issue the final permit.

CCW implies that Ms. Anderson may have been tempted to alter the contents of one or both of the Hearing Officer's Reports she filed, believing this would increase the chances of being hired by NNSA. This is a direct attack on the professionalism and character of a licensed attorney.

As an attorney employed by NMED, Ms. Anderson's duty was to her client – the Secretary of Environment. "In the practice of law, there is no higher duty than one's loyalty to a client." *Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 1, 292 P.3d 466, 467. CCW accuses Ms. Anderson of altering her work product in this scenario, essentially betraying her duty to her client. CCW can provide no evidence of such alteration, however, because there is none. The suggestion that an attorney would act outside of the interests of her client while providing no probative evidence is simply a reflection that CCW disagrees with the rulings made by the Hearing Officer throughout the proceeding, a proceeding which began long before NNSA posted the job in question, and which ended before NNSA made any offer of employment to Ms. Anderson.

Lack of evidence aside, CCW's allegations do not even make sense. Betraying one's duty to their current client is not the optimal way for an attorney to demonstrate that they will always act in the best interests of any future client. Even if the idea of altering one's work product in favor of a prospective future employer would occur to an attorney, the idea that it would likely backfire would also occur. Attorneys rely upon their professional reputation to a large extent, to willingly harm one's own reputation in such a way as CCW suggests here would be shortsighted at best.

C. Ms. Anderson Accepted Nothing of Value from NNSA While Serving as the Hearing Officer for the GWB 17-05 (P) Proceeding

CCW insinuates that Ms. Anderson violated Rule 21-313(A) NMRA by accepting an offer of employment (a "thing of value") from NNSA. Motion at 7. A simple review of the timeline here indicates that is not the case, Ms. Anderson did not accept an offer of employment from NNSA until five months after the public hearing was held, and nearly a month after the proceeding itself was over and the permit was issued (and she was thereby discharged of her duties as a hearing officer in GWB 17-05 (P)).

IV. CONCLUSION

For the reasons explained above, NMED respectfully requests that the Commission dismiss CCW's Motion, and disregard the extra-record information provided by CCW in its Motion while conducting this permit review.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

By: */s/ John Verheul*

John Verheul
Assistant General Counsel
121 Tijeras Avenue NE, Ste 1000
Albuquerque, New Mexico 87102
Phone: (505) 383-2063
Email: john.verheul@state.nm.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Hearing Clerk and was served on the following via electronic mail on February 19, 2019:

Stuart R. Butzier
Christina Sheehan
Modrall, Sperling, Roehl, Harris & Sisk, PA
P.O. Box 9318
Santa Fe, New Mexico 87504-9318
stuart.butzier@modrall.com
christina.sheehan@modrall.com

and

Susan McMichael
Office of Laboratory Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, New Mexico 87545
smcmichael@lanl.gov

Attorneys for Triad National Security, LLC

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Attorney for the U.S. Department of Energy

Stephen Vigil
Office of the Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504-1508
svigil@nmag.gov

Counsel for the Water Quality Control Commission

Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

and

Jonathan Block
New Mexico Environmental Law Center
1405A Luisa Street
Santa Fe, New Mexico 87505
jblock@nmelc.org

Attorneys for Communities for Clean Water

/s/ John Verheul
John Verheul