STATE OF NEW MEXICO
BEFORE THE
WATER QUALITY CONTROL COMMISSION

PETITION FOR REVIEW OF THE NEW MEXICO SECRETARY OF THE ENVIRONMENT'S DECISION GRANTING GROUNDWATER DISCHARGE PERMIT DP-1132 IN PROCEEDING GWB 17-20(P)

WQCC No. 18-05(A)

COMMUNITIES FOR CLEAN WATER REPLY BRIEF ON MOTION TO VACATE AGENCY DECISION AND REMAND THE PETITION FOR REVIEW OF DP-1132

This memorandum is submitted on behalf of Communities for Clean Water ("CCW"), Petitioner herein, in reply to contentions contained in memoranda filed by Respondents United States Department of Energy ("DOE") and Triad National Security, LLC ("Triad") and New Mexico Environment Department ("NMED"), referred to herein as the "DOE/Triad Br." and the "NMED Br."

ARGUMENT

On this motion certain facts are undisputed. A hearing was held on April 19, 2018 before the Hearing Officer employed by NMED and appointed to preside in this proceeding, Ms. Erin Anderson, a member of the Bar of the State of New Mexico. At that hearing, counsel for CCW cross-examined technical witnesses presented by the Permittees, DOE and Triad, and by NMED at length and established facts relevant to the key legal issue, *viz:* whether a Water Quality Act

permit may issue for a non-discharging facility. Evidence showed that Permittees had neither an intention nor a plan to discharge water from any of the possible discharge points at the Radioactive Liquid Waste Treatment Facility ("RLWTF").

Since that hearing, Petitioner CCW has learned that the Hearing Officer, while the matter was pending before her, applied for a job as an attorney with the DOE agency, National Nuclear Security Administration ("NNSA"). She submitted her application sometime between June 15, 2018 and July 26, 2018. Presumably, there were interviews, although these facts have been withheld. On July 19, 2018 the Hearing Officer issued her Draft Report, and on August 29, 2018 she issued her Revised Report. *See generally*, Exhibits A and B that accompany CCW's Motion to Vacate and Remand. Both the Draft and the Revised Reports held fully in favor of DOE/NNSA on the key legal issue, issuance of a permit for a non-discharging facility, such as the RLWTF. The then-Secretary of the Environment, Butch Tongate, immediately (August 29, 2018) adopted the Revised Report in his own Final Order, and the matter is now here on appeal.[1] On September 18, 2018 NNSA completed the hiring process by offering employment to the Hearing Officer. She

[1] It is not contended that Secretary Tongate was aware of more than the content of the Hearing Officer's report of findings with recommendations in this matter given the size of the administrative record, including the hearing transcript, the complexity and length of the permit and supporting documents, and the fact that he instantly approved the permit the same day he received the report.

accepted the offer and now enjoys a salaried position as an attorney for NNSA which, no doubt, includes an additional benefits package.

Responding to CCW's assertion of this serious ethical violation, DOE/Triad here present the facts in hypothetical terms: They concede that "the Hearing Officer *conceivably* applied for a position with [NNSA] prior to the conclusion of the permit proceedings before." NMED (DOE/Triad Br. 1) (emphasis added). They assert first that CCW's ethical complaint constitutes "speculation": "CCW *speculates* [the Hearing Officer] *may have* applied for a position with the NNSA while serving as Hearing Officer during at least a portion of the permitting proceedings below" (DOE/Triad Br. 2) (emphasis added), but immediately concede that the facts are as CCW stated them: "The facts . . . *concededly* do *make* CCW's *speculation plausible* that the Hearing Officer *may* have submitted an application for employment with the NNSA after the hearing itself but while the proceeding was in its latter stages," and "it would be justified for the Commission to *assume for these purposes* that contact may well have occurred prior to the Hearing Officer's issuance of her report and revised report." (DOE/Triad Br. 3) (emphasis added).

In other words, DOE/Triad admits that the Hearing Officer approached the DOE component agency, NNSA, seeking a position while she had under

advisement her reports in this case,[2] that DOE/NNSA did not refuse her solicitation and did not inform CCW of this situation, and that, subsequently, she obtained a job at NNSA. It would be difficult to imagine a better example of cause for disqualification. One thinks of the *Manton*[3] case in this regard—the decision maker's pecuniary (financial) advantage overruling the Code of Ethics and the legal requirement of Due Process of Law.

Briefs filed on this motion by NMED and DOE/Triad urge the WQCC to overlook this clear ethical violation, which is squarely in the lap of the DOE and its NNSA component.[4] Such arguments reflect a regrettable failure to appreciate or to honor the ethical dictates governing counsel and the Hearing Officer. This motion involves neither some procedural misstep nor a mere difference in legal interpretations. This motion raises the absence, indeed, the active procurement of the absence, of the single most critical element of a public process, a fundamental requirement of Due Process of Law: an impartial decision-maker. To defend a corrupted process—by asserting, *e.g.*, that CCW *cannot prove* that the Hearing

[2] The fact that the Hearing Officer was disposed to seek employment with the DOE's NNSA office at the Los Alamos National Laboratory is probative of the likelihood that, throughout the entire process for which she was theoretically serving as a neutral, detached adjudicator, she was inclined to be prejudiced against the legal position CCW was advocating and supportive of the position of the DOE/Triad.

[3] *United States v. Manton*, 107 F.2d.834 (2d Cir. 1938),

[4] Unless and until there is a full investigation of which parties knew of these facts and when they knew them, on the face of what is both known and admitted, the NNSA had an ethical responsibility to inform the other parties as soon as it had knowledge that the Hearing Officer was interested in employment with the DOE/NNSA.

Officer was improperly influenced or that, *if she was*, it did not affect the outcome—mocks and disparages the ethical standards that govern the legal profession.

Thus, DOE/Triad and NMED argue that this Commission may proceed to a *de novo* review, despite the corruption of proceedings before the Hearing Officer. (DOE/Triad Br.1, 4-5; NMED Br. 4). Such a course would be totally inappropriate under the circumstances presented in the Motion to Vacate and Remand and this Reply. The case on point in this regard, the *Manton* case, remains the most shameful ethical breach staining the history of the federal judiciary.

In that case, Judge Manton, Chief Judge of the United States Court of Appeals for the Second Circuit, offered as a defense that, if he had taken bribes from litigants, it was no crime, because the ultimate judgments were legally correct and, in fact, were made by panels that included judges whose probity was unquestioned. To this argument, which parallels that of the DOE/Triad and NMED, the Second Circuit responded: regardless of the outcomes in those cases where the adjudicator had a financial interest: "Judicial action, whether just or unjust, right or wrong, is not for sale." *Id.*[5]

[5] The Second Circuit continued: "and if the rule shall ever be accepted that the correctness of judicial action taken for a price removes the stain of corruption and exonerates the judge, the event will mark the first step toward the abandonment of that imperative requisite of even-handed justice proclaimed by Chief Justice Marshall more than a century ago, that the judge must be "perfectly and completely independent with nothing to influence or control him but God and his conscience." 107 F.2d at 846.

DOE/Triad urge that "Nothing . . . compels the Commission to give any weight whatsoever to the offerings of the Department's Hearing Officer." DOE/Triad Br. 5. But the entirety of NMED's decision, which includes the Hearing Officer's Draft Report, the parties' comments on that Report, the Revised Report, and the Secretary's Decision and Final Order, is underpinned solely by the Hearing Officer's Revised Report, for which she was most certainly disqualified by having applied, and gone through the application process, for a paid position working for one of the parties to the proceeding: DOE's NNSA component. The Secretary's exercise here of his statutory discretion to issue a permit clearly relies exclusively on the Hearing Officer's Revised Report.[6]

The argument that the WQCC could, or even should, undertake review here *without considering* the Hearing Officer's Reports and the Secretary's Order that follows it makes no sense and is, in practice, not possible. The misconduct at issue cannot be excused through the WQCC according the Hearing Officer's Report "whatever weight it deems appropriate" (NMED Br. 4), when that report is basic to this process and deserves no weight. It is the only record of findings based on the evidence at the hearing—a record that the Secretary himself relied upon, adopted, and one that the WQCC would find impossible to ignore.

[6] *See* n1, *supra*.

The opposing briefs contain fundamental misstatements, which nevertheless could not affect the result on this motion. Thus, it is not true, as DOE/Triad assert (DOE/Triad Br. 2, 7, 8) that CCW sought dismissal of the hearing it had requested or sought to avoid any hearing. CCW sought dismissal of this proceeding because it would result in an unlawful permit. At the hearing CCW obtained further evidence on cross-examination that demonstrates—as it contended to the Hearing Officer in post-hearing filings and comments on the Hearing Officer's Draft Report—the illegality of issuing the permit.[7] Not long thereafter, the Hearing Officer submitted her application for a job with the DOE/NNSA, issued a Hearing Officer's Draft Report that ignored those facts, then issued a Hearing Officer's Revised Report that again ignored those facts, and, ultimately, the Secretary, who, as noted above, presumably, knew nothing of the unethical discussions and little more about the matter than what was contained in her Report, accepted the Report

[7] CCW has contended from the start of the proceeding that, as the facility for which LANL requested a groundwater discharge permit, the RLWTF, is now a "zero discharge" facility and has not discharged from its single NPDES-permitted outfall #051 in over eight years, the proper permit is one under the Resource Conservation and Recovery Act ("RCRA") and the New Mexico Hazardous Waste Act ("HWA"). Moreover, under the Water Quality Act, a permit does not go into effect unless and until there is a discharge – thus, permitting the RLWTF would be issuing a permit for seven years that will never become effective. *See* NMSA 1978, § 74-6-5.I ("for new discharges, the term of the permit shall commence on the date the discharge begins, but in no event shall the term of the permit exceed seven years from the date the permit was issued"). Thus, under DP-1132, for at least seven years, the Ground Water Bureau "regulates" non-existent discharges to groundwater while preempting actual, pertinent regulation under the HWA and the RCRA.

in good faith and issued the permit. The entire process was corrupt and must be vacated. [8]

The fatuous claim that CCW cannot complain if the Hearing Officer ignored CCW's arguments (DOE/Triad Br. 6) and the unsupported assertion that CCW's

[8] *Supr*a, n2. **N.B.:** the CCW *Motion to Vacate and Remand* cited numerous legal authorities in additional to those in the United States Court of Appeals for the Second Circuit to support the legal conclusions, *viz*., New Mexico's draft CODE OF CONDUCT FOR HEARING OFFICERS at 2-9 (A Hearing Officer is expected to promote public confidence in the integrity of the process, perform duties without bias, avoid external influences or the impression of such influences, disqualify him or herself if necessary, and minimize the risk of conflict by not taking part in activities such as would require disqualification, and not accept anything of value ("gifts, loans, bequests, benefits, or other things of value") if doing so would *appear* to a reasonable person to undermine the Hearing Officer's impartiality.) (emphasis added); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015) (quoting from *Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829-1830*, p. 616 (1830)); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (An unbiased adjudicator "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which [she or] he may present his case with assurance that the arbiter is not predisposed to find against him"(emphasis added); *Reid v. New Mexico Bd. of Examiners of Optometry,* 1979-NMSC-005, 92 N.M. 414, 589 P.2d 198) (it is important to assure an adjudicator removes him or herself if "there is an indication of a possible temptation to an average [person] sitting as a judge to try the case with bias for or against any issue presented" and "that administrative bodies. . . adjudicat[ing] or mak[ing] binding determinations which directly affect the legal rights of individuals" utilize "procedures which have traditionally been associated with the judicial process"); *Lujan v. City of Santa Fe*, 89 F.Supp. 3d 1109, discussing the test for bias in *City of Albuquerque v. Chavez*, 1997-NMCA-054, 123 N.M., 428, 941 P.2d 509 ("A hearing officer should disqualify himself or herself for bias whenever a reasonable person would have serious doubts about whether the hearing officer could be fair") (emphasis added); *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698 (1973) (persons with a pecuniary interest in legal proceedings should not be adjudicators; even less than a direct or positive financial stake is disqualifying of both judges and administrative adjudicators) (emphasis added); *Utica Packing Co. v. Block*, 781 F. 2d 71, 78 (6th Cir. 1986) (quoting *D. C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971) ("With regard to judicial decisionmaking, whether by court or agency, *the appearance of bias* or pressure may be *no less objectionable than the reality*") (emphasis added); KENNETH DAVIS, ADMINISTRATIVE LAW TEXT, § 12.04, at 250 (1972) (the prevailing view is that "most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators") (emphasis added).

"legal position on DP-1132 were impartially decided" (DOE/Triad Br. 8) disregard the rule of *Manton*, that a corrupt decision cannot be rehabilitated by the fact that some of the decision makers were innocent or that the outcome was supposedly correct: "But the unlawfulness of the conspiracy here in question is in no degree dependent upon the indefensibility of the decisions which were rendered in consummating it." *United States v. Manton*, 107 F.2d 834, 846 (1938).

There is no point in arguing, as NMED does, that there is no proof that the Hearing Officer was, in fact, biased in DOE's favor—or if there is, it "is not contained in the record for the GWB 17-05(P)" (NMED Br. 4), when the principal evidence of the Hearing Officer's disqualification is the uncontested representations by counsel for DOE and Triad—who ought to know, because NNSA, a component of DOE, is the party that took an application, vetted it, interviewed the candidate, made an offer of employment, and then hired the Hearing Officer for a position at Los Alamos. Nor may it be asserted that "the Hearing Officer has not been 'disqualified' " (NMED Br. 4-5), when she was clearly not the disinterested arbiter that the rules require and, had the facts been known, would have been forced to withdraw. 20.1.4.100(E)(2) NMAC.[9]

[9] Plainly, NMED is not familiar with the difference between the usage of 'disqualified'—as an adjective meaning that her actions disqualified her—and as a participle indicating completion of a process of disqualification, *i.e.*, the motion practice taking place now. The applicable rule, 20.1.4.100(E)(2), requires that a Hearing Officer be impartial. A person who cannot be impartial is, by definition and by rule, "disqualified" from serving as a Hearing Officer in the matter in which that person cannot be impartial.

A basic principle of Due Process underlying the disqualification of an adjudicator is that one who demonstrates that the decision-maker had a secret self-interest (*e.g.*, in gaining employment from the permit-seeker) and an opportunity to abuse his or her decision-making position (*e.g.*, by ruling favorably to the permit-seeker) need neither produce the proverbial cancelled check that rewarded the faithless arbiter nor present witnesses to that person's corrupt understanding. To the contrary, the act itself of decision-making while subject to conflicting inducements is an ethical violation which, at the same time, denies Due Process of Law (under both the state and federal constitutions) to the party who went forward in good faith in a hearing before a corrupt adjudicator. One need not prove that the decision-maker *in fact* was influenced by improper factors–only that there was a *possible temptation* to submit to that influence:

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U.S., at 60 (quoting *Tumey* v. *Ohio, supra*, at 532).

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). Plainly, NMED has failed to weigh properly the ethical obligations that apply here.

Thus, NMED's assertion that the Petitioners cannot show "impropriety, bias, and conflict of interest" (NMED Br. 5, 6) ignores the plain facts of the matter, case law, ethical canons, the fact that the Hearing Officer resolved the principal legal

argument here against Petitioners three times without ever stating any reasons, *and*, most significantly, the fundamental rule: that a litigant who has been denied a disinterested decision maker is not required to show actual misconduct when that temptation was present.

Arguing that the Hearing Officer "made no substantive decisions after the April public hearing" (NMED Br. 6) and that the Secretary was the "final decisionmaker" completely ignores the facts that the rule (20.1.4.100(E)(2)), canons of ethics, case law on due process in relation to administrative proceedings, and the United States and New Mexico constitutions *all* require a disinterested Hearing Officer. Moreover, it ignores the facts that, after the hearing, the Hearing Officer issued two Reports addressing the key legal issue, and the Secretary relied upon and adopted the Hearing Officer's Revised Report *immediately* and without any changes.

Finally, NMED's claim that the Hearing Officer did not accept a pay-off ("thing of value")—*i.e.*, an attorney's position at NNSA—until "nearly a month after the proceeding" (NMED Br. 7) is puerile[10] and ignores the fact that Ms.

[10] The same applies to NMED's speculative arguments, *id.*, that Ms. Anderson, as an attorney would not act "outside of the interests of her clients" or betray her duty to the current client or "alter [her] work product in favor of a prospective future [*sic*] employer" (NMED Br. 6-7) are also utterly juvenile and naive given that Ms. Anderson *did*, in fact, seek employment from one of the parties to the adjudication over which she was presiding and for which she had yet to issue a final set of recommended findings of fact, law, and decision—and continued in her position without anyone other than herself and the DOE's NNSA, a party to the proceeding, knowing of her potential financial relationship to NNSA.

Anderson and NNSA had been negotiating over her job at least since July 26 (and possibly earlier) when she issued the Revised Report. It also ignores the fact that she eagerly sought such a position when an opening appeared, showing that she wanted to be employed by one of the parties to the proceeding—perhaps from the start of her involvement in the case.

DOE/Triad and NMED object to the vacation of the judgment and remand of the case. The precedents involving judicial disqualification support vacation of judgments that may have been affected by the disqualified judge, as this one clearly was. *See, e.g., Knickerbocker Textile Corp. v. Sheila-Lynn, Inc*., 172 Misc. 1015, 1024-28, 16 N.Y.S.2d 435 (Sup. Ct. 1939) (containing an extensive, scholarly discussion of case law and reasons supporting re-hearing where one of a panel of judges—or, as in *Knickerbocker*, one of a panel of arbitrators—is disqualified).

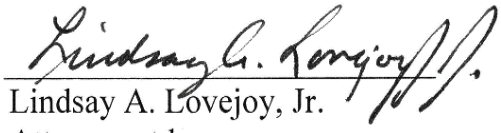
DOE/Triad and NMED further complain that CCW has no specific proposal for the remand to NMED. CCW has consistently contended that no permit should issue here, because it would be illegal. If DOE/Triad nevertheless seek a permit, they must follow a lawful process. This proceeding, however, has disclosed such a course of agency misconduct that the current Secretary, newly appointed, may rightly conclude that the actions of the Hearing Officer who sought employment by a litigant, of the litigant DOE/NNSA that promptly and willingly entertained her

improper solicitation and hired her away during a NMED proceeding, and of others involved in this NMED proceeding who may have known of or facilitated these unethical and improper actions should be made a matter of record in this proceeding for the benefit of NMED and the public. Such courses are within the discretion and subject to the initiative of the Secretary and should not be constrained by a limited remand.

CONCLUSION

The decision before this Commission is corrupt and may not be allowed to stand. This matter must be remanded so that NMED—the constituent agency that gave rise to this invalid decision—may eliminate the corruption from its decision-making and conduct a lawful permitting process. The Commission should not restrict NMED in its choice of proceedings in this situation.

Respectfully submitted,

BY: 

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CERTIFICATE OF SERVICE

I, Jonathan M. Block, hereby certify that on this 25th day of February, 2019, I caused the foregoing *Communities For Clean Water Reply Brief on Motion to Vacate Agency Decision and Remand the Petition for Review of DP-1132* to be served on the parties listed below by email and mailing it to them, U.S. Mail First Class postage pre-paid, and filing it with the Administrator of Boards and Commissions as an original and twelve copies.

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