

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

CONCERNED CITIZENS FOR NUCLEAR
SAFETY and HONOR OUR PUEBLO
EXISTENCE,

Petitioners,

-against-

NEW MEXICO WATER QUALITY
CONTROL COMMISSION,

Respondent.

No. _____

VERIFIED PETITION FOR AN ORIGINAL
WRIT OF MANDAMUS

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
Counsel for Petitioners

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Preliminary statement

1. Concerned Citizens for Nuclear Safety (“CCNS”) and Honor Our Pueblo Existence (“HOPE”) (collectively, “Petitioners”), which stand to be affected by operations of Los Alamos National Laboratory (“LANL”), petition the Supreme Court for a writ of mandamus directed to the Respondent, New Mexico Water Quality Control Commission (“WQCC”).

Parties

2. Respondent, WQCC, is established under the Water Quality Act, § 74-6-1 *et seq.* NMSA 1978 (“WQA”), and oversees ground water discharge permits issued by the New Mexico Environment Department (“NMED”), as a WQA “constituent agency.” (§ 74-6-2.K NMSA 1978).
3. Real parties in interest include the U.S. Department of Energy National Nuclear Security Administration (“DOE/NNSA”) and Triad National Security, LLC (“Triad”), which are Permittees under WQA Permit DP-1132.

Jurisdiction

4. This Court has original jurisdiction under Article VI, Section 3 of the New Mexico Constitution. *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 2022-NMSC-020, ¶ 3, 519 P.3d 46.

1. Introduction and summary

5. This case concerns DOE/NNSA's avoidance of compliance with the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"), assisted by NMED and WQCC, and, regrettably, by the WQCC Chair, who secretly negotiated with DOE/NNSA for a salaried position.
6. In brief, the LANL Radioactive Liquid Waste Treatment Facility ("RLWTF") manages waste that is hazardous under the Hazardous Waste Act, § 74-4-1 *et seq.* NMSA 1978 ("HWA"), which enforces RCRA in New Mexico. The RLWTF requires a HWA permit. (§ 74-4-4.A(6) NMSA 1978). It does not have a HWA permit.
7. On May 5, 2022, NMED issued WQA permit DP-1132, a groundwater discharge permit, to Permittees, ostensibly to regulate the RLWTF. (AR 20126 – 20257).
8. However, § 74-6-12.B NMSA 1978 mandates that the WQA

does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978].

Since the RLWTF manages hazardous waste, it comes within the authority of the Environmental Improvement Board ("EIB") pursuant to the HWA, and the WQA does not apply to the RLWTF.

9. Petitioners appealed DP-1132 to the WQCC on June 6, 2022. The WQCC “shall consider” a permit review within 90 days. (§ 74-6-5.P NMSA 1978).

To date, the WQCC has not considered Petitioners’ appeal.

10. On August 30, 2022, the WQCC entered an order, staying proceedings concerning DP-1132. Appeal to the Court of Appeals is unavailable, since it requires a “permitting action.” (§ 74-6-7.A NMSA 1978).

11. The WQCC Chair, Stephanie Stringer, presided at WQCC hearings where the WQCC stayed the appeal of DP-1132. Ms. Stringer had secretly applied for, and later secretly accepted, a salaried position with DOE/NNSA. Under constitutional due process requirements, Ms. Stringer was disqualified to act on the appeal of DP-1132.

12. Petitioners seek mandamus, requiring the WQCC in No. 22-21 (1) to reverse DP-1132 because the WQA does not apply to the RL WTF; (2) alternatively, to vacate its stay of proceedings and (3) to vacate all orders issued under Chair Stephanie Stringer, who was disqualified, or based on such orders.

Factual background

a. Environmental protection is at stake

13. Protection of New Mexico citizens and communities is undermined by applying the WQA to the RL WTF instead of the HWA, which the law requires. The WQA authorizes regulation of a discharge towards ground

water but cannot regulate a hazardous and radioactive waste treatment facility.

14. The RLWTF "meet[s] the definition of a "tank" or "tank system" in 40 C.F.R. § 260.10." (Ex. 6, LANL comments). HWA regulations impose detailed requirements for tank systems (40 C.F.R. §§ 264.190-.200, Subpart J¹), including a professional engineer's assessment of a tank system's design, structural integrity, and compatibility. Inspection by an independent inspector and tightness testing are required. (40 C.F.R. § 264.192). Ancillary equipment (pipes, valves) must be protected against settlement, vibration, expansion, or contraction. (40 C.F.R. § 264.192(e)). Corrosion protection is mandated. (40 C.F.R. § 264.192(f)).
15. Secondary containment is required to prevent migration of wastes or liquids, detect leaks and collect releases. (40 C.F.R. § 264.193(a, c)). Containment consists of a liner, vault, double-walled tank, or equivalent. (40 C.F.R. § 264.193(d)). Ancillary equipment requires secondary containment. (40 C.F.R. § 264.193(f)).
16. Wastes that would cause system failure are barred. Controls must prevent a spill or overflow. (40 C.F.R. § 264.194(b)). Scheduled inspections are required. (40 C.F.R. § 264.195(a, b)). Ancillary equipment without

¹ Petitioners cite the federal regulations, which have been adopted as HWA regulations. § 20.4.1.100 - .900 NMAC.

containment must be inspected daily. (40 C.F.R. § 264.195(f)). After leaks or spills, wastes must be removed and failed equipment disposed of. (40 C.F.R. § 264.196).

17. Seismic compliance is mandated. (40 C.F.R. § 264.18; § 270.14(b)(11)).

The RLWTF is located at Technical Area 50 (“TA-50”), within the Pajarito Fault System. The Rendija Canyon and Guaje Mountain Faults end there. Faulting is found in Mortandad Canyon, north of TA-50. (Citizens’ Prefiled Testimony at 20-22, Nov. 4, 2019) (Arends) (AR 18131-18174).

18. In contrast, the WQA and its discharge regulations (§§ 20.6.2.3000 – 3114 NMAC) do not address construction or operation of a waste management facility, waste disposal by evaporation, or seismic compliance.

19. Draft DP-1132 referred to “secondary containment” (at § II.Y) (at 6) for “untreated” waste streams (*Id.* § VI.A.7, at 15) (AR 14723). But NMED’s witness testified that all units at the RLWTF

meet the requirements of secondary containment in accordance with Condition 7. Condition 7 has been fulfilled and may be removed from the Discharge Permit.

(Pullen) (NMED Ex. 3, at 11; see also 23, Nov. 4, 2019) (AR 17607-17874).

Thus, DP-1132 has no ongoing requirement of secondary containment at the RLWTF or at two additional facilities under construction.

20. Disturbingly, DP-1132, as issued, contains terms unsupported by the WQA, therefore unenforceable:

- a. Authorization of collection of wastes by pipe and truck. (DP-1132 at 10-11, 32).
- b. Regulation of waste treatment processes. (at 12-13).
- c. Regulation of leak detection. (at 19-20, 34-35).
- d. Regulation of operation of the Solar Evaporation Tanks ("SET") (at 18-19, 22-26, 29, 31, 33-35).
- e. Regulation of "discharges" to the Mechanical Evaporative System ("MES") and the SET (at 25-26, 31, 33).

21. The WQA regulates a "discharge of any water contaminant." (§ 74-6-5.A NMSA 1978). Permittees state that discharges would occur only when the MES and SET are both inoperative. (Triad/DOE Ex. 5, at 2) (AR 17910). *See also*: Triad/DOE Ex. 4, Form 2C, at 5, 7, NPDES Permit Re-Application (2012) (AR 17907, 17909) Experts for both Permittees and NMED testified that a discharge towards ground water² is "highly unlikely." (Tr. 90 l. 9)

² WQA regulations define "discharge plan" as "a description of any operational, monitoring, contingency, and closure requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water." (§ 20.6.2.7 NMAC). Further, "ground water" means "interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply." (*Id.*).

(Beers) (AR 18271) (Tr. 212 l. 16) (Pullen) (AR 18393). In sum, much of DP-1132 creates the appearance of regulation, without constituting an enforceable permit.

22. Moreover, Permittees are building additional facilities at TA-50 to operate under DP-1132 without agency review:

The Low-Level Radioactive Waste Water (RLW) Treatment System is defined herein as . . . *and subsequent replacement facilities utilizing the same treatment processes located within the physical confines of TA-50.*

(DP-1132 at 10) (*emphasis supplied*). Similarly, the transuranic (“TRU”) waste system includes “associated TRU waste stream conveyance, storage, and treatment components at TA-50,” covering new construction. (*Id.*).

b. Stephanie Stringer’s disqualification.

23. During Petitioners’ WQCC appeal, Ms. Stringer was NMED Deputy Cabinet Secretary for Operations, NMED representative on the WQCC, WQCC Chair, and (until August 30, 2022) WQCC Hearing Officer. She had broad authority:

The hearing officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by this part including, but not limited to:

1. conduct permit reviews or hearings under this part;
2. rule upon motions and procedural requests that do not seek final resolution of the proceeding and issue all necessary orders . . .

(§ 20.1.3.10.B NMAC). She determined which matters shall be heard, suggested the decision, and obtained the desired rulings. WQCC members rarely spoke and mostly voted yes on each motion.³ After the vote, the Chair, alone, drafted and signed the WQCC order.

24.If ever this Court might defer to agency decisions, it cannot do so here.

Petitioners had sought a remand to NMED, because the Secretary failed to “respond to all significant comments on the draft permit.” (§ 20.6.2.3109 NMAC). Triad and DOE/NNSA opposed and moved to stay all proceedings. A WQCC hearing was scheduled for August 9, 2022.

25.Chair Stringer submitted a job application to DOE/NNSA on August 7, 2022. (See stipulated facts in Petitioners’ Supplemental Memorandum at 2 (Nov. 17, 2022) (Ex. 1). She did not disclose her action, which would have required her recusal. At the August 9, 2022 WQCC hearing, Chair Stringer stated that there was no basis for a remand to NMED; she did not even call for a vote. (video recording at 2:51). Addressing Respondents’ motion for stay, she stated, “It is important to know the determination that is made by the EAB.” (at 3:13). The motion for a stay passed. Since then, Petitioners’ appeal has been frozen.

³ Hearings are publicly available through the NMED web site: <https://www.youtube.com/channel/UC1mQA0FgEgoLqs4Hkltvi4g>.

26.DOE/NNSA promptly invited Chair Stringer to a meeting, which occurred on August 23, 2022. (Petitioners' Supp. Memo. at 2) (Ex.1). On August 30, 2022, she signed the WQCC order, staying all proceedings. (Order, August 30, 2022) (Ex. 2). On August 31, 2022 DOE/NNSA offered Chair Stringer a salaried position. (Petitioners' Supp. Memo. at 2) (Ex. 1).

27.Offer in hand, Chair Stringer still did not disclose her career plans. Since subject-matter jurisdiction "is a fundamental consideration at all stages of any proceeding," *Davidson v. Enfield*, 1931-NMSC-045, ¶¶ 10-11, 35 N.M. 580, 583-84, 3 P.2d 979, 980. Petitioners moved to reverse DP-1132 at the September 13, 2022 hearing, invoking § 74-6-12.B NMSA 1978. A WQCC member moved to deny Petitioners' motion, based on the stay. Chair Stringer seconded the motion (Hearing, Sept. 13, 2022, at 34 min.). It passed. (Order, September 16, 2022) (Ex. 3).

28.Petitioners then moved the WQCC to vacate its stay, arguing that the case would be resolved quickly under § 74-6-12.B NMSA 1978. The WQCC denied the motion, calling it "improper." (Order, Nov. 14, 2022) (Ex. 4).

29. Petitioners learned on October 31, 2022, that Stephanie Stringer had taken a job with DOE/NNSA. This is the second known instance involving WQA Permit DP-1132 when DOE/NNSA secretly hired a NMED decisionmaker.⁴
30. Petitioners moved the WQCC on December 1, 2022 to vacate the decisions in which Stephanie Stringer had participated, arguing that her interest in a prospective job with DOE/NNSA required her disqualification under the Due Process Clause and vacatur of orders in which she participated.
31. The WQCC denied vacatur and *sua sponte* “reaffirmed and ratified” prior orders staying proceedings in No. 22-21. (Orders dated August 30, 2022; September 16, 2022; and November 14, 2022) (Order dated January 19, 2023) (Ex. 5).
32. On February 1, 2023, after a status conference, the duly appointed WQCC Hearing Officer entered an order lifting the WQCC’s stay of proceedings in No. 22-21 (Ex. 8) and entered a second order with a schedule for further proceedings (Ex. 9).

⁴ In 2018 DOE/NNSA secretly hired NMED Hearing Officer, Erin Anderson, during issuance of DP-1132. When this came out, parties moved to vacate her decision. WQCC refused. (WQCC No. 18-05, April 9, 2019). The parties petitioned this Court for mandamus. (Petition, June 6, 2019, No. S-1-SC-37717). This Court directed an answer. (Order, June 14, 2019, No. S-1-SC-37717). The WQCC met again and vacated the hearing officer’s decision. (Notice of Decision, June 19, 2019, No. S-1-SC-37717).

33. Two days later (February 3, 2023) the WQCC entered its own order, again refusing to vacate decisions in which Stephanie Stringer participated, and *sua sponte* “reaffirmed and ratified” prior orders staying proceedings in No. 22-21.⁵ (Orders dated August 30, 2022; September 16, 2022; and November 14, 2022) (Order dated February 3, 2023) (Ex. 10). The same day, the WQCC entered an order cancelling the WQCC hearing scheduled for February 14, 2023, citing an “absence of business to be discussed or transacted.” (Ex. 11).

c. Importance of the issues presented

34. Petitioners do not lightly invoke the Court’s extraordinary-writ jurisdiction.

The RLWTF is important to LANL’s operation and is one of LANL’s “key facilities.” (Ex. 13) Whether DOE/NNSA facilities comply with HWA is important to several nearby communities.

35. By law NMED is required to enforce HWA. (§§ 9-7A-4, 9-7A-6 NMSA 1978). NMED has committed to do so, statewide, in lieu of RCRA. EPA holds NMED responsible:

Subject to the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616, November 8, 1984), New Mexico now has responsibility for permitting treatment, storage and disposal

⁵ There is no indication that the WQCC entered the February 3, 2023 orders by action at a public meeting, as required by § 74-6-3.D NMSA 1978.

facilities within its borders and for carrying out all other aspects of the RCRA program.

(50 Fed. Reg. 1515 (Jan. 11, 1985)). NMED acknowledges that

States that receive final authorization from the U.S. EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal Hazardous Waste Program.

(NMED web site, Oct. 11, 2022).

36. If NMED does not enforce RCRA, EPA may revoke NMED's delegated authority. Grounds include:

When the State's legal authority no longer meets the requirements of this part, including:

* * *

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this part, including:

* * *

Failure to exercise control over activities required to be regulated under this part, including failure to issue permits . . .

(40 C.F.R. § 271.22). Refusal to require a HWA permit for the RLWTF would constitute failure to issue a permit.

3. Argument

a. The WQA permit clearly violates New Mexico and federal law.

37. The RLWTF manages hazardous waste. LANL has declared on the record that the RLWTF will "receive and treat or store an influent wastewater

which is hazardous waste as defined in 40 C.F.R. § 261.3[.]” (LANL Comments, Dec. 12, 2013, Encl. 3 at 1) (AR 09794) (Ex. 6). LANL has stated that “The RLWTF satisfies each of these conditions[.] The RLWTF receives and treats a small amount of hazardous wastewater[.]” *Id.* LANL has never disputed this fact.⁶

38.A facility that treats, stores, or disposes of hazardous waste must apply for or have received a RCRA permit:

Six months after the initial promulgation of the part 261 regulations, treatment, storage, or disposal of hazardous waste by any person who has not applied for or received a RCRA permit is prohibited. . . .

(40 C.F.R. § 270.1).

39.Consistently, the Legislature called for EIB regulations requiring any person who manages hazardous waste to obtain a HWA permit. (§ 74-4-4.A(6) NMSA 1978). EIB complied. (§ 20.4.1.900 NMAC). The Legislature also called for HWA waste management regulations. (§ 74-4-4.A(5)(a) – (i) NMSA 1978). EIB issued them. (Part 20.4.1 NMAC).

40.HWA has the force of federal law. (42 U.S.C. § 6926(d)). WQA is a state law. Any conflict between them is resolved in favor of HWA by the Supremacy Clause. (U.S. Const., Art. VI, Cl. 2).

⁶ Triad, as successor to Los Alamos National Security, LLC, is bound by the record of the application. (§ 20.6.2.3111 NMAC).

41. Further, to prevent conflicts the Legislature *expressly limited* the subject matter jurisdiction of the WQA:

Limitations:

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 [Chapter 74, Article 4 NMSA 1978], . . .

(§ 74-6-12.B NMSA 1978).

42. Consequently,

The Water Quality Act is a separate regulatory scheme and does not overlap the Hazardous Waste Act.

Schwartzman, Inc. v. Atchison, T. & S.F. Ry., 857 F. Supp. 838, 847 n.4

(D.N.M. 1994). Plainly, the RL WTF is an “activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act,” therefore outside WQA jurisdiction. Additionally, a permit which violates the WQA must be denied. (§ 74-6-5.E NMSA 1978). Thus, issuance of a WQA permit for the RL WTF is unlawful.

b. The WQCC’s indefinite stay is clearly unlawful.

43. The stay issued by the WQCC is clearly unlawful. First, by statute, a petition for review must be considered within 90 days:

If a timely petition for review is made, the commission shall consider the petition within ninety days after receipt of the petition.

(§ 74-6-5.P NMSA 1978). The 90-day period expired on September 5, 2022. The WQCC has not considered the petition. Petitioners asked the WQCC to lift the stay; their motion was denied. (Order, Nov. 14, 2022) (Ex. 4).

44. The WQCC asserted that the purpose of the stay is to await the outcome of an Environmental Protection Agency Environmental Appeals Board (“EPA EAB”) proceeding concerning a federal discharge permit at the RL WTF. On December 28, 2022 the EAB ruled, remanding the case to EPA Region 6. (Ex. 12). The EAB decision does not mention the WQA, which governs this case.⁷

45. It is error to stay a case to await a decision in another case that cannot affect the action at bar, and mandamus will issue:

As we have concluded that the district court has refused to proceed pending a final judgment of the state court that can have no effect upon the decision of the action at bar, we hold that its refusal was not authorized by law and that it is our duty, as it is within our power, to direct a writ of mandamus to go, ordering it to vacate the stay and to proceed in due course with the trial herein.

⁷ The briefs in the EPA EAB proceeding were filed with the WQCC and circulated to members, showing that no issue under the WQA is presented.

Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 190 (2d Cir. 1955) (L. Hand, J.).

46. Moreover, a tribunal must weigh the impact of a stay on the parties:

Judicial economy might favor a stay of these proceedings, but the notion should not be invoked where it substantially impairs a party's rights.

Wood v. Millers National Insurance Co., 1981-NMSC-086, ¶ 13, 96 N.M. 525, 529, 632 P.2d 1163, 1167. The WQCC never inquired into the stay's impact on Petitioners, who would benefit from HWA enforcement, and Respondents, who seek to fend off HWA compliance.

c. Stephanie Stringer was clearly disqualified.

47. Stephanie Stringer was obligated to act as an impartial decisionmaker. U.S. Const., Amend. 5, 14; N.M. Const. Article II, § 18. Fairness and impartiality are a due process right. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-243 (1980); *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978); *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). An adjudicator must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or control him but God and his conscience." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015). *See also United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1938).

48. Stephanie Stringer secretly sought a salaried position with DOE/NNSA, whose interests she could promote by rulings of the WQCC, thereby enhancing her job prospects. Under the Constitution, a financial interest disqualifies: “[N]o judge ‘can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.’” *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *In re Murcheson*, 349 U.S. 133, 136 (1955) (Disqualification required when judge has pending claims similar to those ruled upon.); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (Disqualification where “adjudicator has a pecuniary interest.”). *See also*: *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (Even less than a direct or positive financial stake disqualifies, citing *Tumey v. Ohio*, 273 U.S. 510 (1927) (Judge disqualified where he receives costs of prosecution if he convicts.)); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (Judge disqualified where his office benefits from convictions.). *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT § 12.04, p. 250 (1972) (stating the prevailing view that “most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.”).

49. This Court holds that “a fair and impartial tribunal requires that the trier of fact be disinterested,” based on objective facts:

At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition

regarding the outcome of the case. *See Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749 (1927); *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943). In addition, our system of justice requires that the appearance of complete fairness be present. *See Wall v. American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D.Ga.1974), *aff'd*, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974). The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. *See generally Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1974).

Reid v. New Mexico Bd. of Examiners of Optometry, 1979-NMSC-005, ¶¶ 7-8, 92 N.M. 414, 416, 589 P.2d 198, 200. These principles apply fully to administrative proceedings:

These principles apply to administrative proceedings as well as to trials. *Matter of Protest of Miller, supra*. When government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed. *National Labor Relations Board, supra*.

Id. *See also Lujan v. City of Santa Fe*, 89 F. Supp. 3d 1109, 1133, 1146-47 (D.N.M. 2015), discussing *City of Albuquerque v. Chavez*, 1997-NMCA-054, ¶ 18, 123 N.M. 428, 434, 941 P.2d 509, 515 ("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.”).

50. Specifically, *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), holds that an adjudicator who seeks employment by a party is disqualified for financial interest:

To begin with, it is beyond question that judges may not adjudicate cases involving their prospective employers. The risk, of course, is that an unscrupulous judge may be tempted to use favorable judicial decisions to improve his employment prospects—to get an application noticed, to secure an interview, and ultimately to receive an offer. . . . Simply put, “a judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case.”

Al-Nashiri, 921 F.3d at 235.

51. The duty to recuse arises upon any contact concerning employment:

[T]he Judicial Conference's Committee on Codes of Conduct has opined that “[a]fter the initiation of any discussions with a [potential employer], no matter how preliminary or tentative the exploration may be, the judge must recuse . . . on any matter in which the [prospective employer] appears.”

Al Nashiri, 921 F.3d at 235.

52. Orders in which the disqualified judge participated must be vacated:

If a judge “should have been recused from the . . . proceedings, then any work produced” by that judge “must also be ‘recused’—that is, suppressed.” *In re Brooks*, 383 F.3d 1036, 1044 (D.C. Cir. 2004).

Al-Nashiri, 921 F.3d at 238.

53. Here, orders that must be vacated include the stay order (Ex. 2) and the order granting appeal (Ex. 7), both dated August 30, 2022, and four later orders (September 16, 2022, November 14, 2022, January 19, 2023, and February 3, 2023) (Ex. 3, 4, 5, 10) that denied requested relief on the basis that proceedings were stayed. See *Al-Nashiri*, 921 F.3d at 240.

54. The presence of a single disqualified decisionmaker on a multimember tribunal denies due process and requires that its decisions be vacated:

The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect “not amenable” to harmless-error review, regardless of whether the judge’s vote was dispositive.

Williams v. Pennsylvania, 579 U.S. 1, 14 (2016). Moreover, the recordings of the August 9 and September 13 hearings show that Chair Stringer’s stated position controlled the outcome, and she alone wrote the disputed orders.

55. In *Reid*, 1979-NMSC-005, the disqualified board member was one in a panel of three. Similarly, the Second Circuit has ruled that the corruption of a single judge invalidated the decision of three:

Judicial action, whether just or unjust, right or wrong, is not for sale; 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.”

Manton, 107 F.2d at 846.

56. The action of the remaining WQCC members who “reaffirmed and ratified” (Ex. 5, 10) the disputed orders fails to remedy the disqualification. The Constitution requires vacatur: “‘Any work produced’ by that [recused] judge ‘must also be “recused”—that is, suppressed.” *In re Al-Nashiri*, 921 F.3d at 238. If a party wishes to move again for a stay of proceedings, it may do so, based on a new showing, and the WQCC may then consider the utility and legality of a stay in the present circumstances. This has not been done.

57. No one can assume that the same orders will be entered:

Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Williams, 579 U.S. at 16.

58. Moreover, WQCC members may see the situation more clearly now than on August 9, 2022. They now see that the Chair was disqualified. They now see that § 74-6-12.B NMSA 1978 excludes application of the WQA here.

59. Respondents have argued that there is no proof that Stephanie Stringer was motivated by bias. This is irrelevant. When a decisionmaker has a conflicting interest, there is no occasion for evidence of biased decisionmaking. *Chavez*, 1997-NMCA-054, ¶ 18, 123 N.M. 428, 434, 941

P.2d 509, 515 (“We do not agree with Chavez that a party must show actual bias.”). The record rarely discloses a judge’s actual motives:

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883 (2009). Thus, “[t]he failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.” (*Id.* 886).

60. In any case, the idea that Stephanie Stringer could apply for a job with DOE/NNSA, and, simultaneously, rule upon motions affecting DOE/NNSA without considering how DOE/NNSA might react—is incredible:

The challenge [the judge] faced, then, was to treat the Justice Department with neutral disinterest in his courtroom while communicating significant personal interest in his job application. Any person, judge or not, could be forgiven for struggling to navigate such a sensitive situation. And that is precisely why judges are forbidden from even trying.

Al-Nashiri, 921 F.3d at 236-37. The now-public spectacle of the WQCC Chair secretly seeking, and accepting, employment with DOE/NNSA, while rendering WQCC decisions favorable to DOE/NNSA, casts a dark cloud over the State’s administrative processes. Disqualification and vacatur of the affected orders are required.

d. Mandamus is the clear remedy

61. Mandamus is available in New Mexico to require a state agency to honor a clear legal right:

Mandamus is a discretionary writ that will lie when there is a purely legal issue "that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal. *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55; *see also* NMSA 1978, § 44.

Adobe Whitewater Club, 2022-NMSC-020, ¶ 10, 519 P.3d 46.

62. Mandamus may issue to require an agency to perform a duty that is "clearly enjoined by law":

At the request of a person beneficially interested, mandamus lies to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law. NMSA 1978, §§ 44-2-4, -5.

Lovato v. City of Albuquerque, 1987-NMSC-086, ¶6, 106 N.M. 287, 289, 742 P.2d 499, 501. *See also: New Mexico Building & Construction Trades Council v. Dean*, 353 P.3d 1212, 1215, 2015 N.M. Lexis 158 (2015); *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 21, 149 N.M. 330, 335, 248 P.3d 878, 887; *Cook v. Smith*, 1992-NMSC-041, ¶ 5, 114 N.M. 41, 42, 834 P.2d 418, 419; *State ex rel. Four Corners Exploration Co. v. Walker*, 1956-NMSC-010, ¶ 7, 60 N.M. 459, 463, 292 P.2d 329, 331-32.

63. The questions here have great public importance. These include HWA regulation of a key facility at LANL, itself undoubtedly an important entity. This case examines NMED's refusal to enforce HWA to protect New Mexico citizens and communities—a failure that calls for a statewide remedy. The situation, if uncured, could lead to EPA's withdrawal of the State's authority to enforce RCRA. Shamefully, this case displays DOE/NNSA's use of surreptitious methods, causing disqualification of high-level NMED personnel, to block mandated regulation.
64. NMED's and the WQCC's statutory obligations could not be more clear. HWA applies to the RLWTF because of the nature of the wastes managed by the facility and the directions of the Legislature and the EIB. It is NMED's responsibility to require that a HWA permit regulate the RLWTF.
65. The WQA "Limitations" (§ 74-6-12.B NMSA 1978) are clear, and here deny NMED authority to issue a WQA permit for the RLWTF.
66. Even if a stay were authorized, the idea that the EPA EAB will guide decision here, where only the most basic application of § 74-6-12.B is needed, is baseless. The December 28, 2022 EAB decision shows that the EPA panel cannot guide the WQCC in applying the WQA. (Ex. 12) A stay may not issue to await a decision by another tribunal, where the result in the first action does not depend on anything done in the second.

67. Prompt action is needed. *Al-Nashiri* states that mandamus may issue to prevent an “irreparable injury that will go unredressed if he does not secure mandamus relief now.” 921 F.3d at 237. Continuing, it states:

Strict as it is, that standard is easily satisfied here. While “[t]he ordinary route to relief . . . is to appeal from [a] final judgment,” “[w]hen the relief sought is recusal of a disqualified judicial officer, . . . the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable.” *Cobell v. Norton*, 334 F.3d 1128, 1129 (D.C. Cir. 2006).

Al-Nashiri, 921 F.3d at 238. Even if the disqualified officer has left, to proceed with litigation under orders issued by that officer inflicts irreparable harm:

Requiring *Al-Nashiri* to proceed under the long shadow of all those orders, even if enforced by a new, impartial military judge, would inflict an irreparable injury unfixable on direct review. *Al-Nashiri* thus has no adequate remedy for Spath’s conduct other than to scrub Spath’s orders from the case at the earliest opportunity.

Al-Nashiri, 921 F.3d at 238.

68. Petitioners have been denied due process by DOE/NNSA’s hiring the WQCC Chair, who corruptly engineered orders that nullify HWA and ignore WQA. Petitioners cannot be required to struggle through further litigation under corrupt and unlawful orders.

69. The orders to be vacated are:

1. August 30, 2022 order granting request for permit review and appointing hearing officer. Since this order impliedly denies a remand, it must be vacated. (Ex. 7)

2. August 30, 2022 order on motion to stay proceedings pending resolution of related litigation. Since the stay is unlawful for independent reasons, it must be vacated and may not be reinstated. (Ex. 2)

3. September 16, 2022 order denying opposed motion to reverse issuance of DP-1132 for lack of subject matter jurisdiction. Since the WQA permit is unlawful for independent reasons, the permit must be reversed and may not be upheld. (Ex. 3)

4. November 14, 2022 order denying opposed motion to lift stay of proceedings. The stay must be vacated and may not be reinstated. (Ex. 4)

5. January 19, 2023 order denying motion to vacate orders issued under disqualification and ratifying such orders. The stay must be vacated and may not be reinstated; orders issued under disqualification must be vacated. (Ex. 5)

6. February 3, 2023 order denying motion to vacate orders issued under disqualification and ratifying such orders. The stay must be vacated and may not be reinstated; orders issued under disqualification must be vacated. (Ex. 10).

Conclusion

70. LANL has stated expressly that the RLWTF manages hazardous waste. The

law requires the RLWTF to have a permit under the HWA. Application of

the WQA is prohibited by § 74-6-12.B NMSA 1978.

71. The WQCC has ignored the statutory requirement that a permit review be

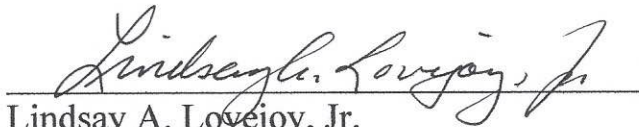
considered within 90 days. (§ 74-6-5.P NMSA 1978). It is unsupportable to

stay proceedings indefinitely to await a decision by EPA that will not affect this case, thereby preventing the WQCC or the courts from determining the validity of the permit in issue here.

72. The Chair of the WQCC has participated in issuing unlawful orders despite her disqualifying interest in employment by DOE/NNSA.

73. Petitioners request that the Court require a response to this Petition and issue a writ of mandamus, requiring the WQCC (1) to direct NMED to reverse the issuance of DP-1132 for lack of subject matter jurisdiction; alternatively, (2) to vacate the WQCC's stay of proceedings concerning WQA permit DP-1132, and (3) to vacate any decisions in which Chair Stephanie Stringer participated or which are based on decisions in which she participated.

74. Petitioners request that the Court award costs and attorneys fees to the Petitioners under Rule 12-504.F NMRA, (1) for this mandamus proceeding and (2) for Petitioners' participation in WQCC No. 22-21, since DOE/NNSA by its actions rendered that entire proceeding a futility.




Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
Counsel for Petitioners

February 16, 2023

Verification

I, Joni Arends, Executive Director of Concerned Citizens for Nuclear Safety, have reviewed the foregoing Verified Petition for an Original Writ of Mandamus and confirm that it is true and correct to the best of my knowledge, information, and belief.

February 16, 2023.

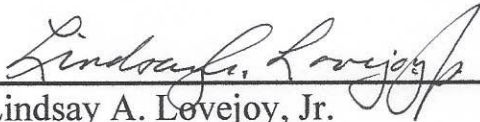


Joni Arends

Certification

I, Lindsay A. Lovejoy, Jr. counsel for Petitioners, certify that this document contains fewer than 6,000 words, as calculated by the Microsoft Word system.

February 16, 2023.

A handwritten signature in cursive script, reading "Lindsay A. Lovejoy, Jr.", is written over a horizontal line.

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
Counsel for Petitioners

Certificate of Service

I hereby certify that on February 16, 2023, a true and correct copy of the foregoing *Verified Petition for an Original Writ of Mandamus* was served on counsel for the Parties to the Water Quality Control Commission proceedings WQCC 22-21 through File and Serve.

Raúl Torrez, Esq.
New Mexico Office of the Attorney General
408 Galisteo Street
Santa Fe, NM 87501
rtorrez@nmag.gov

Pamela Jones, Commission Administrator
Water Quality Control Commission
1190 St. Francis Drive, Suite S-2103
Santa Fe, NM 87502
pamela.jones@state.nm.us

Robert F. Sanchez
New Mexico Office of the Attorney General
408 Galisteo Street
Santa Fe, NM 87501
rfsanchez@nmag.gov

Counsel for the Water Quality Control Commission

Christopher Atencio, Assistant General Counsel
Lisa Chai, Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Albuquerque, NM 87102
Christopher.atencio@state.nm.us
Lisa.chai1@state.nm.us

Counsel for the New Mexico Environment Department

Silas R. DeRoma, Site Counsel
U.S. Department of Energy/NNSA
Los Alamos Site Office
3747 West Jemez Road, MS-A316
Los Alamos, NM 87544
silas.deroma@nnsa.doe.gov

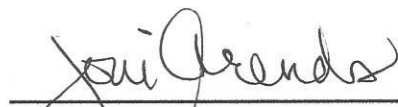
*Counsel for the U.S. Department of Energy and National Nuclear Security
Administration*

Jeffrey J. Wechsler and Kari E. Olson
Montgomery & Andrews, P.A.
P. O. Box 2307
Santa Fe, NM 87504-2307
jwechsler@montand.com
kolson@montand.com

and

Maxine M. McReynolds
Christopher Stoneback
Office of General Counsel
Los Alamos National Laboratory
P. O. Box 1663, MS A187
Los Alamos, NM 87545
mcreynolds@lanl.gov
stoneback@lanl.gov

Counsel for Triad National Security, LLC



Joni Arends