STATE OF NEW MEXICO
BEFORE THE
WATER QUALITY CONTROL COMMISSION

PETITION FOR REVIEW OF THE DECISION OF THE NEW MEXICO ENVIRONMENT DEPARTMENT ISSUING GROUND WATER DISCHARGE PERMIT No. DP-1132	))))	WQCC No.22-21

PETITIONERS' COMMENTS ON HEARING OFFICER'S REPORT ON STANDING

Preliminary statement

Concerned Citizens for Nuclear Safety ("CCNS") and Honor Our Pueblo Existence ("HOPE") (collectively, "Petitioners") submit this memorandum in response to certain statements in the Hearing Officer's Report on Petitioners' Standing ("Report"), submitted on April 6, 2023.

Argument

1. Petitioners respectfully request that the Commission and its Hearing Officer consider the following comments concerning the Report, which recommends dismissal of this appeal on grounds of standing, submitted on April 6, 2023. Certain contentions that appear in the Respondents' briefs and in the Report

were not contemplated in the sequence of briefing, and Petitioners would not want them to go unanswered.

2. First, the Report dismisses as excessively vague and speculative the declarations of members of Concerned Citizens for Nuclear Safety ("CCNS"), recounting how they have sustained injury. The function of the standing requirement is served by such injuries, which distinguish the interests of the individuals from other members of the public. Such harms need not be grave or permanent. Justice Ginsburg described injuries from Clean Water Act violations in a very similar manner.[1]

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[1] For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges. Record, Doc. No. 71 (Exhs. 41, 42). Curtis reaffirmed these statements in extensive deposition testimony. For example, he testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw's discharges. *Ibid.* (Exh. 43, at 52-53; Exh. 44, at 33).

Other members presented evidence to similar effect. CLEAN member Angela Patterson attested that she lived two miles from the facility; that before Laidlaw operated the facility, she picnicked, walked, birdwatched, and waded in and along the North Tyger River because of the natural beauty of the area; that she no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutants; and that she and her husband would like to purchase a home near the river but did not intend to do so, in part because of Laidlaw's discharges. Record, Doc. No. 21 (Exh. 10). CLEAN member Judy Pruitt averred that she lived one-quarter mile from Laidlaw's facility and would like to fish, hike, and picnic along the North Tyger River, but has

3. She summed up the rule that governs standing contentions:

> We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Sierra Club* v. *Morton*, 405 U.S. 727, 735, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972).

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183, 120 S. Ct. 693, 705 (2000).

4. It is said that Petitioners do not complain about the Water Quality Act, § 74-6-1 *et seq*. NMSA 1978 ("WQA"), permit issued by NMED. (Report at 3; Permittees' Standing Br. 13, 14-19). To the contrary, Petitioners have emphatically complained that the WQA permit, DP-1132, because of

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refrained from those activities because of the discharges. *Ibid.* (Exh. 7). FOE member Linda Moore attested that she lived 20 miles from Roebuck, and would use the North Tyger River south of Roebuck and the land surrounding it for recreational purposes were she not concerned that the water contained harmful pollutants. Record, Doc. No. 71 (Exhs. 45, 46). In her deposition, Moore testified at length that she would hike, picnic, camp, swim, boat, and drive near or in the river were it not for her concerns about illegal discharges. *Ibid.* (Exh. 48, at 29, 36-37, 62-63, 72). CLEAN member Gail Lee attested that her home, which is near Laidlaw's facility, had a lower value than similar homes located further from the facility, and that she believed the pollutant discharges accounted [*183] for some of the discrepancy. Record, Doc. No. 21 (Exh. 9). Sierra Club member Norman Sharp averred that he had canoed approximately 40 miles downstream of the Laidlaw facility and would like to canoe in the North Tyger River closer to Laidlaw's discharge point, but did not do so because he was concerned that the water contained harmful pollutants. *Ibid.* (Exh. 8). *Laidlaw*, 527 U.S. at 181-83.

limitations of the WQA, inadequately regulates tank systems, fails to address seismic risks, and fails to regulate new construction. (See Petitioners' Reply Brief at 5-6) (March 27, 2023). It also contains provisions that are unauthorized by the WQA and so unenforceable. (Id. 7).

5. The idea that Petitioners cannot complain about the failure to adopt a Hazardous Waste Act, § 74-4-1 et seq. NMSA 1978 ("HWA") permit ignores the fact that NMED cannot issue a WQA permit without deciding, expressly or implicitly, that the WQA "Limitation" does not apply here, because the HWA does not apply:

> 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], the Ground Water Protection Act [Chapter 74, Article 6B NMSA 1978] or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge.
> § 74-6-12 NMSA 1978.

As to that determination, the HWA clearly *does* apply to the RLWTF, because it manages hazardous waste. See § 74-4-4.A NMSA 1978.

6. The assertion that "whether some other permitting action should or should not occur has no bearing on whether or not Petitioners suffered some adverse effect arising from this WQA permitting action" (Report at 5) ignores the linkage between the WQA and the HWA that is part of the statute that the Legislature drew.

7. The Report (at 3) says that Petitioners cannot complain before the Commission about the absence of a HWA permit, as it is outside the jurisdiction of this Commission. But the Commission must obey the law, and the HWA has the status of federal law, the supreme law of the land. 42 U.S.C. § 6926(d). The Commission must follow federal law.

8. Moreover, standing is not limited to a fault in the WQA permit. Standing is often demonstrated by a chain of events. In *United States v. SCRAP*, 412 U.S. 669 (1973), the Supreme Court based standing on a series of several events, and the New Mexico Supreme Court cited the *SCRAP* decision as an example of how standing should be understood in New Mexico. *DeVargas Savings and Loan Assoc. v. Campbell*, 1975-NMSC-026, ¶ 12, 87 N.M. 469, 535 P.2d 1320. The court pointed out that "the extent of injury may be slight." *Id.* The Court of Appeals has emphasized that the harm may be "attenuated," and for injury, there need be no more than an "identifiable trifle." *Ramirez v. City of Santa Fe*, 1993-NMCA-049, ¶ 9, 115 N.M. 417, 420, 852 P.2d 690, 693.

9. It is argued that Petitioners have not shown that hazardous wastes have reached the Rio Grande. (Report at 5). But to insist on a showing that the worst has happened overstates the requirements of standing law. It cannot be necessary to prove all of the elements of a violation simply to bring suit.

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.

Laidlaw, 528 U.S. at 181. Elsewhere, Permittees and NMED argue that it would be error to limit NMED's regulatory authority to cleanup efforts (Permittees' Responding Brief at 22 (March 16, 2023); NMED's Answer Brief at 10-13 (March 16, 2023)), but here, in disputing standing, they would require that very limit.

10. Numerous cases in the federal courts of appeals sustain standing based upon exposure to the risks of violations. The same rule should apply here.[2]

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[2] *First Circuit: Animal Welfare Institute v. Martin,* 623 F.3d 19, 25-26 (1st Cir. 2010) (Plaintiffs' interest in observing Canada lynx in the wild supports suit to compel application for incidental take permit under Endangered Species Act); *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 285 (1st Cir. 2006) ("Mallinckrodt has created a substantial probability of increased harm to the environment. That increased risk, in turn, rendered reasonable the actions of the plaintiffs' members in abstaining from their desired enjoyment of the Penobscot.").

Second Circuit: New York Public Interest Research Group v. Whitman, 321 F.3d 316, 325-26 (2d Cir. 2003) (PIRG members' "allegations about the health effects of air pollution and of uncertainty as to whether the EPA's [permitting] actions expose them to excess air pollution are sufficient to establish injury-in-fact, given that each lives near a facility subject to Title V permitting requirements.").

Third Circuit: Interfaith Community Organization v. Honeywell Int'l, Inc., 399 F.3d 248, 257 (3d Cir. 2005) ("The individual Plaintiffs, in establishing injury-in-fact, have shown sufficiently direct and present concerns, neither general nor unreasonable, that constitute a legally cognizable injury . . .").

Fourth Circuit: Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387, 395 (4th Cir. 2011) ("[T]he plaintiffs were not required to

present evidence of actual harm to the environment so long as a direct nexus existed between the plaintiffs and the 'area of environmental impairment.'").

Fifth Circuit: *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996) ("All of the affiants expressed fear that the discharge of produced water will impair their enjoyment of these activities because these activities are dependent upon good water quality.").

Sixth Circuit: Sierra Club v. U.S. EPA, 793 F.3d 656, 663-65 (6th Cir. 2015) (EPA's erroneous designation of Clean Air Act attainment area creates risk constituting injury); *American Canoe Association v. City of Louisa Water & Sewer Commission,* 389 F.3d 536, 541 (6th Cir. 2004) ("Kash's averments are virtually indistinguishable from those that the Court found sufficient to establish an injury in fact in *Laidlaw.*").

Seventh Circuit: Sierra Club v. U.S. EPA, 774 F.3d 383, 392 (7th Cir. 2014) ("[T]he increased probability of injury to Sierra Club members creates standing here . . ."); *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 658 (7th Cir. 2011) ("even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability."); *Sierra Club v. Franklin County Power, LLC,* 546 F.3d 918, 925 (7th Cir. 2008) ("This 'likely exposure' to pollutants is 'certainly something more than an "identifiable trifle" even if the ambient level of air quality does not exceed [certain national limits].'").

Eighth Circuit: Kuehl v. Sellner, 887 F.3d 845, 850-51 (8th Cir. 2018) (Plaintiffs have standing where injured by mistreatment of endangered species in captivity).

Ninth Circuit: NRDC v. Southwest Marine, Inc., 236 F.3d 985, 994 (9th Cir. 2000) ("Here, members of the plaintiff organizations, and individual plaintiff Kenneth Moser, testified that they have derived recreational and aesthetic benefit from their use of the Bay (including areas of the Bay next to Defendant's shipyard), but that their use has been curtailed because of their concerns about pollution, contaminated fish, and the like.").

Tenth Circuit in 2018: Benham v. Ozark Materials River Rock, LLC, 885 F.3d 1267, 1273 (10th Cir. 2018) ("Here, Mr. Benham has shown injury in fact by maintaining that he regularly swims and fishes in Saline Creek and that his ability to do so has been diminished by Ozark's discharge of material into the creek and its surrounding wetlands.").

Eleventh Circuit: Sierra Club v. Johnson, 436 F.3d 1269, 1279 (11th Cir. 2006) ("Judge Doremus' affidavit brings him within that [*Laidlaw*] description,

Conclusion

The Petitioners have standing to assert that the WQA permit, DP-1132 should be reversed, so that the HWA may apply to the RLWTF.

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assuming that reduced aesthetic and recreational values stemming from concern about pollution qualifies. It does.").

D.C. Circuit: La. Envtl. Action Network v. EPA, 955 F.3d 1088, 1095 (D.C. Cir. 2020) (Standing found where "All of the members allege that they experience various symptoms that they attribute to emissions from neighboring pulp mills, and each alleges having curtailed favored activities accordingly.").

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2023 a true and correct copy of the foregoing *Petitioners' Comments on Hearing Officer's Report* was served on the below-listed counsel for the Parties to the Water Quality Control Commission proceedings by email. A copy can be sent via U.S. mail first class, postage prepaid, upon request.

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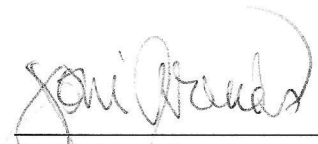

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