IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

PROTECT TESUQUE, INC.

Petitioner,

v.

S-1-SC-40872

THE HONORABLE JAMES KENNEY, Secretary of Environment, and the NEW MEXICO ENVIRONMENT DEPARTMENT,

Respondents,

BL SANTA FE, LLC,

Real Party in Interest.

EMERGENCY VERIFIED PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR STAY

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Protect Tesuque, Inc. ("Protect Tesuque") submits this Emergency Verified Petition for Writ of Mandamus and Request for Stay.

INTRODUCTION

When an executive agency refuses to apply a legislative enactment and instead applies a different policy without legislative authority to do so, it abrogates and usurps the legislative authority to make law in violation of Article III, Section 1 of the New Mexico Constitution. *See generally State ex rel. Sandel v. New Mexico Public Utility Commission,* 1999-NMSC-019, 127 N.M. 272. That is precisely what the New Mexico Environment Department ("NMED") is doing here. By refusing to apply the Liquid Waste Disposal and Treatment Regulations, Part 20.7.3 NMAC (09/14/1973, as amended through 09/15/2014) ("LW Regulations") mandated by the Environmental Improvement Act of 1971, NMSA 1978, Sections 74-1-2 through -18 (1971, as amended through 2024) (the "EIA") and promulgated by the Environmental Improvement Board (the "EIB"), NMED is not just abrogating the Legislature's direction to enforce and apply the EIB's LW Regulations, it is imperiously usurping the legislative power by substituting a different, far less protective set of regulations than the Legislature and the EIB have mandated, and applying those less protective regulations – not the governing LW Regulations – to a favored subset of liquid waste dischargers.

In 1971, four years *after* enactment of the Water Quality Act, NMSA 1978, Sections 74-6-1 through -17 (1967, as amended through 2025) (the "WQA"), and three years *after* adoption of the Ground and Surface Water Protection regulations, Part 20.2.6.2 NMAC (01/04/1968, as amended through 12/21/2018) (the "GSWP Regulations"), the Legislature enacted the EIA.

This Court "presume[s] that the Legislature acts with full knowledge of, and consistent with, existing legislation." *Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 15, 136 N.M. 630, 103 P.2d 554. Cognizant of the pre-existing WQA and the GSWP Regulations, the Legislature clearly stated its purpose in enacting the EIA:

> to create a department that will be responsible for environmental management and consumer protection in this state in order to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people.

NMSA 1978, § 74-1-2.

To fulfill that purpose, the EIA created the EIB, empowered it to "promulgate all regulations applying to persons and entities outside of the department [of environment]", NMSA 1978, Section 74-1-5, directed it to promulgate comprehensive regulations governing the on-site discharge of domestic and

commercial liquid wastes, and directed the New Mexico Environment Department (the "NMED") to enforce those regulations. NMSA 1978, §§ 74-1-2, 74-1-7(3).

The purpose of the LW Regulations is:

> to protect the health and welfare of present and future citizens of New Mexico by providing for the prevention and abatement of public health hazards and surface and ground water contamination from on-site liquid waste disposal practices.

20.7.3.6 NMAC.

The LW Regulations fulfill the EIA's purpose and mandate by restricting the discharge of *untreated* liquid waste to three permissible alternatives, 20.7.3.201(B) NMAC, and the discharge of *treated* liquid waste to two permissible alternatives. 20.7.3.201(C) NMAC. Where, as here, treated liquid waste is to be discharged to ground from a liquid waste treatment unit, it must be discharged to a permitted and approved "liquid waste disposal system", as those terms are defined and specifically regulated in the LW Regulations. *Id.* Disposal of such treated liquid wastes in a regulated, on-site liquid waste disposal system is the *only* permissible means of disposal to ground.

On the erroneous and absurd pretext that the EIB's LW Regulations do not apply to large volume generators of domestic and commercial liquid waste, the NMED has ruled that the LW Regulations' mandatory safeguards do not apply to the permit application of a luxury resort hotel and 84 private residences to discharge

up to 30,000 gallons of aggregated liquid waste per day. *See* Order on Motion by Protect Tesuque Inc. For Pre-Hearing Permit Denial, dated 04/07/25 (the "Order"), attached as **Ex. 1**.[1] Instead, the Department has ruled that it will apply a different, far less protective set of regulations that allow these favored property owners to avoid virtually all of the mandatory safeguards the LW Regulations require.

The rules of statutory and regulatory construction establish the clear primacy of the LW Regulations over the GSWP Regulations NMED wishes to apply. *See* NMSA 1978, § 12-2A-10. Even the GSWP Regulations make this clear. *See* 20.6.2.3105(B) and 20.6.2.2101(A) NMAC. As demonstrated below, neither the EIA nor the LW Regulations provide any exemption for large volume dischargers of domestic and commercial liquid waste. The EIA and the LW Regulations should be construed in accordance with their express purpose and plain meaning, *see* NMSA 1978, Section 12-2A-18, not misinterpreted, ignored, and undermined by the State agency responsible for their enforcement.

[1] Pursuant to Rule 12-504(B)(2), Protect Tesuque includes the following exhibits for the Court's consideration: **Ex. 2**, Ground Water Quality Bureau Draft Discharge Permit, DP-75, dated 09/16/24; **Ex. 3**, Protect Tesuque's Motion for Pre-Hearing Permit Denial (the "Motion"); **Ex. 4**, NMED's Response to Protect Tesuque's Motion; **Ex. 5**, BL Santa Fe, LLC's Response to Protect Tesuque's Motion; **Ex. 6**, Protect Tesuque's Consolidated Reply; and **Ex. 7**, J. Herman Email Re DP-75 Leachfield Authorization.

The Supreme Court has original jurisdiction in mandamus to restrain an administrative agency from violating Article III, Section 1 of the New Mexico Constitution by abrogating a legislative enactment or usurping the legislative branch's exclusive authority to make law. *State ex rel. Sandel*, 1999-NMSC-019. In refusing to apply the EIB's LW Regulations, NMED is abrogating both the EIA and the EIB's LW Regulations. In applying the WQA and its implementing regulations to large volume dischargers of liquid waste rather than the LW Regulations, the NMED is also usurping the exclusive authority of the Legislature and the EIB to make the law that governs on-site liquid waste disposal.

The instant Petition presents non-discretionary legal issues regarding the determination and correct application of governing law. This Petition presents fundamental constitutional questions of great public importance that can be answered on the basis of undisputed facts. An expeditious resolution cannot be obtained through a direct appeal.

PARTIES

Petitioner Protect Tesuque is a New Mexico non-profit corporation committed to ensuring clean water for hundreds of Tesuque residents whose water wells are immediately downstream from Bishop's Lodge Resort's (the "Resort") proposed disposal field.

Respondent NMED was created under the EIA and tasked with enforcing, *inter alia*, the LW Regulations promulgated by the EIB.

Real Party in Interest BL Santa Fe, LLC owns the Resort and seeks a permit under the WQA and GSWP Regulations, on behalf of itself and 84 property owners in the Hills and Villas subdivision, to discharge 30,000 gallons per day of partially treated liquid waste.

Originally, both the Resort and the developers of the Hills and Villas subdivision chose to forego on-site disposal to ground of their liquid waste. Instead, they installed a private sewer system to collect and discharge their aggregated liquid waste into an enclosed system or public sewer. *See* 20.7.3.201(B) and (C) NMAC. They now seek to undo that prior decision and instead discharge their aggregated liquid waste to ground without installation of the liquid waste treatment units and disposal systems the LW Regulations require.

ADMINISTRATIVE PROCEEDING

On September 16, 2024, NMED provided public notice of its intent to grant a discharge permit to the Resort under the GSWP Regulations for discharge to ground of 30,000 gallons per day of aggregated domestic and commercial liquid waste. In response to scores of outraged public comments, Secretary Kenney ordered a public hearing on challenges to the proposed permit and appointed a hearing officer to conduct the proceeding. On January 8, 2025, the hearing officer granted Protect

Tesuque's request to entertain a motion challenging the law and regulations applied by NMED for review and approval of the proposed permit. On April 7, 2025, following briefing but no oral argument on the motion, the hearing officer denied Protect Tesuque's motion, ruling without explanation that the LW Regulations do not apply to the Resort's permit application. *See* **Ex. 1**, Order.

RELIEF REQUESTED

This Petition seeks a Writ of Mandamus directing the Secretary of Environment and NMED to apply the EIA and LW Regulations to the Resort's permit application to discharge 30,000 gallons per day of domestic and commercial liquid waste to ground. Because NMED's hearing officer has set a permit hearing to begin May 19, 2025, the Court should stay the May 19 proceedings, exercise original jurisdiction, vacate NMED's determination that the EIA and LW Regulations do not apply to the Resort's discharge of liquid waste, and direct the Secretary and NMED to adjudicate the Resort's application for a discharge permit pursuant to the requirements of the EIA and LW Regulations.

JURISDICTION

This Court has original jurisdiction over mandamus actions against state officers, boards, or commissions and the power to issue writs of mandamus "necessary or proper for the complete exercise of its jurisdiction." N.M. Const. art. VI, § 3. For the reasons explained below, this Court has authority to issue mandamus

to compel NMED to enforce the EIA and LW Regulations. *See State ex rel. Egolf v. New Mexico Pub. Regulation Comm'n*, 2020-NMSC-018, ¶ 32, 476 P.3d 896 (N.M. 2020).[2]

As this Court has repeatedly noted, the exercise of original jurisdiction in a mandamus proceeding is governed by a three-part test:

> The issue presents a purely legal issue concerning the non-discretionary duty of a governmental official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

State ex rel. Sandel, 1999-NMSC-019, ¶ 11 (citing *Clark* at 120 N.M. at 569).

This case fully meets these requirements. First, the issue presented is a matter of great public importance: NMED has entirely ignored the Legislature's directive to enforce the LW Regulations under the EIA, violating the separation of powers doctrine as a result. Second, the applicability and primacy of the EIA and the LW Regulations can be determined on the basis of uncontroverted facts. NMED's proposed permit would allow the Resort to discharge to ground 30,000 gallons per day of domestic and commercial liquid waste aggregated from its hotel facilities and

[2] This is particularly true where "'an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims authority to modify the existing law or to create new law on its own.'" *State ex. Rel. Egolf*, 2020-NMSC-018, ¶ 32 (quoting *State ex Rel. Sandel*, 1999-NMSC-019, ¶ 12).

84 separate property owners. It is uncontroverted that NMED has determined that the WQA alone will govern the permit application, not the EIA and LW Regulations. Third, the issue presented requires an expeditious resolution that cannot be obtained through a direct appeal. NMED has already allowed the Resort to begin discharges of its aggregated liquid wastes into an unpermitted, under-sized disposal field that unlawfully fails to comply with the mandatory requirements of the LW Regulations for on-site disposal fields. *See* J. Herman Email Re DP-75 Leachfield Authorization, dated 02/07/25, attached as **Ex. 7**. The harm to downstream residents is immediate, ongoing, and irremediable.

NMED's refusal to apply the EIA and LW Regulations to the Resort's permit application is not subject to interlocutory review under the applicable regulations. An appeal of the Secretary's final determination to the Commission would afford no opportunity to adjudicate the constitutional issue raised by this Petition. *See Dillon v. King*, 1974-NMSC-096, ¶ 28, 87 N.M. 79; *El Castillo Ret. Residences v. Martinez*, 2015-NMCA-041, ¶¶ 21, 24, 346 P.3d 1164. Meanwhile, however, the Resort continues to discharge unlawfully aggregated liquid wastes into an unlawful disposal field, causing accumulating irreparable harm to all downstream neighbors.

ARGUMENT

I. The GSWP Regulations Provide Fewer Protections Than the LW Regulations

In 1967, the WQA empowered the Commission to promulgate water quality standards for surface and groundwater and promulgate discharge regulations to prevent or abate pollution. In 1968, the Commission promulgated the GSWP Regulations, which cover a vast array of waste generators, including industrial, chemical and pharmaceutical manufacturers, oil and gas producers, commercial, residential and recreational waste dischargers, and metal-working and construction industries.

The GSWP Regulations establish maximum concentration levels in groundwater for certain specified contaminants. If the pre-existing *in situ* concentration of a listed contaminant in groundwater is less than the standard established in 20.6.2.3103 NMAC for that contaminant, further "degradation of the groundwater up to the limit of the standard" will be allowed. 20.6.2.3101(A)(1) NMAC. If, however, the pre-existing concentration in groundwater of a listed contaminant exceeds the standard set in 20.6.2.3103, no further degradation of the

groundwater beyond the existing *in situ* concentration for that contaminant will be allowed. 20.6.2.3101(A)(2) NMAC.[3]

In short, a discharge permit granted under the GSWP Regulations allows contaminant-containing discharges to occur so long as the discharge does not cause the *in situ* groundwater concentration levels of the contaminants listed in 20.6.2.3103 to exceed the concentration levels set in 20.6.2.3103. Instead of preventing contaminant release to the environment, a discharge permit under the GSWP Regulations effectively allows it.

Three years after the WQCC promulgated the GSWP Regulations, the Legislature enacted the EIA, created the EIB, empowered the EIB to "promulgate all regulations applying to persons and entities outside of the department [of environment]", NMSA 1978, § 74-1-5, specifically defined the meaning of "on-site liquid wastes", NMSA 1978, § 74-1-3(C), and directed the EIB to promulgate rules

[3] As a recent peer-reviewed article in the *Proceedings of the National Academy of Sciences* ("*PNAS*") confirms, regulating the concentration levels of a small set of known contaminants, such as those listed in 20.6.2.3103 NMAC, fails to prevent the hazard to public health and the environment caused by the ever-growing variety of newly synthesized man-made contaminants present in wastewater. Worse still, its not possible to know the hazards posed by such newly synthesized chemicals on public health and the environment until many years after their release. *See* January 7, 2025 PNAS Article.

and standards for a small subset of the dischargers covered by the WQA: domestic and commercial liquid waste dischargers. NMSA 1978, § 74-1-8(A)(3).

In enacting the EIA four years after the WQA, and three years after the GSWP Regulations, the Legislature clearly found the WQA and GSWP Regulations insufficient to address the specific environmental and public health hazards posed by the treatment and disposal of domestic and commercial liquid waste. In short, additional regulation specifically addressing the hazards of liquid waste disposal to ground was needed to protect both the environment and public health. Underscoring that conclusion, the Legislature subsequently made clear that any county or municipality requirements for on-site liquid waste systems must be at least as stringent as the LW Regulations. NMSA 1978, § 74-1-14.

Rather than enforce the law and regulations specifically adopted to protect the public against liquid waste disposal, NMED is instead applying superseded regulations that allow polluters to degrade water quality and threaten public health. Whereas the GSWP Regulations allow degradation of *in situ* groundwater up to the contaminant concentration levels specified in 20.6.2.3103 NMAC, the LW Regulations prevent such degradation by regulating the means through which domestic and commercial liquid waste must be treated and disposed to ground, or discharged to a permitted public sewer. 20.7.3.201(C) NMAC. They do so by requiring mandatory safeguards that ensure that on-site treatment and disposal of

liquid waste releases as few contaminants as possible. Those additional safeguards include:

- Prohibiting the introduction of hazardous materials into domestic and commercial liquid waste, 20.7.3.304(A) NMAC;
- Restricting the permissible means by which treated domestic and commercial liquid waste may be disposed, 20.7.3.201(C) and 20.7.3.401(G) NMAC;
- Restricting on-site disposal of domestic and commercial liquid waste to the property that generates the wastes, 20.7.3.201(G) NMAC;
- Specifying the means and limiting the rate at which domestic and commercial liquid wastes can be treated for disposal to ground, 20.7.3.7(L)(5) and 20.7.3.302(C) NMAC;
- Limiting the locations, scale and rates at which treated liquid wastes can be discharged to ground, 20.7.3.301-303 NMAC; and
- Requiring adequately sized, appropriately situated, suitably separated on-site disposal fields for discharge of treated liquid waste to ground. 20.7.3.302 and 703 NMAC.

II. The LW Regulations Prevail Over the GSWP Regulations

The rules of regulatory construction are clearly laid out in NMSA 1978, Section 12-2A-10(B) and (D):

> B. If an administrative agency's rules appear to conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, the later-adopted rule governs. However, an earlier-adopted specific, special or local rule prevails over a later-adopted general rule unless the context of the later-adopted rule indicates otherwise.
>
> D. If a rule is a comprehensive revision of the rules on the subject, it prevails over previous rules on the subject, whether or not the revision and the previous rules conflict irreconcilably.

The LW Regulations are not only later-adopted than the GSWP Regulations, but they also provide far more comprehensive and specific rules governing the on-site treatment and disposal of domestic and commercial liquid waste, subjects the GSWP Regulations simply do not address. *See State v. Santillanes*, 2001-NMSC-018, ¶ 7, 130 N.M. 464 ("[I]f two statutes dealing with the same subject conflict, the more specific statute will prevail over the more general statute absent a clear expression of legislative intent to the contrary."). The LW Regulations specifically address, *inter alia*, the appropriate allocation of risk and responsibility for on-site treatment and disposal of liquid wastes; the acceptable levels and methods of treatment required for specific properties and generators of liquid waste; the acceptable locations, soil conditions, dimensions and set-backs required for on-site disposal fields; the appropriate, site-specific rate and volume of treated wastes to be

disposed; and required standards for waste handling, storage and disposal. All of these subjects are carefully addressed in the LW Regulations; the GSWP Regulations address none of them.

That is why the LW Regulations provide the baseline requirements for on-site treatment and disposal of domestic and commercial liquid waste, and override the earlier, less specific, less comprehensive GSWP Regulations insofar as any conflict between their requirements, as the GSWP Regulations themselves confirm. *See* 20.6.2.1001(A) and 20.6.2.3105(B).

While the LW Regulations establish the governing requirements for on-site treatment and disposal of domestic and commercial liquid waste, they do not preempt the GSWP Regulations, which also apply if effluent from a liquid waste permittee violates the water quality standards of the GSWP Regulations. 20.6.2.3105(B) NMAC. The LW Regulations and the GSWP Regulations thus supplement one another if a liquid waste permittee violates the safeguards required by the LW Regulations or threatens to exceed the water quality standards established by the GSWP Regulations. *See* 20.6.2.3105(B) and 20.7.33.2 NMAC.

III. NMED Is Allowing Large Volume Dischargers to Ignore the LW Regulations

NMED's refusal to apply the LW Regulations to the Resort's permit application allows the Resort and other "large volume" generators of liquid waste to

bypass virtually all of the mandatory safeguards and protections the LW Regulations require, as the following table illustrates:

Requirements **LW Regulations**	**NMED Draft Permit** **GSWP Regulations**
• Every lot owner responsible for safe disposal of its liquid wastes	
• No introduction of hazardous wastes	
• Two permissible alternatives for disposal of treated liquid waste: - On-site disposal to ground via permitted liquid waste system - Off-site disposal to public sewer	
• On-site treatment and disposal must occur on the lot generating the waste	
• Rate-limited treatment based on site-specific conditions - Tertiary treatment and disinfection	- Tertiary treatment and disinfection
• Rate-limited disposal based on site-specific conditions - Minimum surface and absorption area per field - Minimum separation between fields - Minimum setbacks from streams, etc. - Number of disposal fields based on total volume discharged per lot	
• Effluent from tertiary treatment system sampled and analyzed for total nitrogen	• Effluent from tertiary treatment system sampled and analyzed for total nitrogen

While the LW Regulations and the Draft Permit both require tertiary treatment, 20.7.3.603 NMAC, and limited effluent testing for total nitrogen, 20.7.3.901(C)(3) NMAC, nothing in the GSWP Regulations or the Draft Permit requires the Resort to fulfill the many other mandatory safeguards of the LW Regulations. The 84 individual lot owners of the Hills and Villas subdivision have no responsibility under the GSWP Regulations or the Draft Permit to ensure compliance with permitted conditions, nor are they prohibited from introducing hazardous materials to their liquid wastes. Nothing in the GSWP Regulations or the Draft Permit requires treatment and disposal of each lot's liquid waste to occur on the lot generating the waste. Nor do they require the use of a permitted "liquid waste system" as defined in the LW Regulations. Liquid wastes from scores of separate lots are impermissibly aggregated into a much larger combined waste-stream that is then treated and discharged into a single, under-sized disposal field that is ten (10) times smaller – and receives six (6) times more effluent per day – than the LW Regulations allow. Nothing in the GSWP Regulations or the Draft Permit requires an adequate number of adequately sized, appropriately sited, adequately separated disposal fields for discharge of the volume of tertiary treated effluent the Resort seeks to discharge. 20.7.3.302(A), (B) and (C); 20.7.3.303; 20.7.3.701; and 20.7.3.703 NMAC. Nor does anything in the GSWP Regulations or the Draft Permit

restrict the daily rate of discharge per disposal field to 5,000 gpd for on-site disposal of such tertiary treated effluent. 20.7.3.302(C) NMAC.

IV. NMED's Refusal to Apply the LW Regulations Abrogates the Legislature's Mandate and the EIB's LW Regulations

In *State ex rel. Sandel*, this Court issued a writ of mandamus vacating a New Mexico Public Utilities Commission ("PUC") order that substituted a market-based rate-setting policy for the "just and reasonable" standard adopted by the Legislature, effectively resulting in the deregulation of the retail market for electricity in New Mexico. 1999-NMSC-019, ¶¶ 19, 22 and 30.

In vacating the PUC's order, this Court unanimously held that the PUC's refusal to apply the "just and reasonable" standard mandated by the Legislature violated Article III, Section 1 of the New Mexico Constitution by acting "in a manner that is beyond the scope of authority granted to the NMPUC by the Legislature." *Id*. ¶ 26. By deregulating the electric power industry, the PUC had "abdicate[d] its statutory responsibilities" by refusing to enforce the law enacted by the Legislature and acting contrary to its express objective. *Id*. While the PUC had offered a statutory interpretation to justify its action, this Court gave no deference to that interpretation, noting that the PUC's attempt to "pour a new meaning into [the statute was] not sufficient to show that the NMPUC has acted within its authority and carried out its responsibilities" under the legislative enactment. *Id*.

"To ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants", NMSA 1978, Section 74-1-2, the Legislature created the EIB and conferred plenary jurisdiction to it through the EIA to promulgate regulations governing the on-site treatment and disposal of domestic and commercial liquid waste. The Legislature *did not* confer jurisdiction to NMED to supplant, countermand or ignore the EIB's regulations. And yet, contrary to the Legislature's mandate and objective, NMED is doing just that by refusing to apply the EIB's LW Regulations to the Resort's liquid waste permit application.

Although NMED attempts to "pour new meaning" into the LW Regulations to justify its refusal to enforce them, such artifice will not justify or excuse NMED's abrogation of the Legislature's mandate or usurpation of the EIB's authority, as this Court recognized in *Sandel*. By refusing to apply the LW Regulations to the Resort's permit application, and by substituting instead the GSWP Regulations as the sole basis for administrative review and approval of the Resort's permit application, NMED has eviscerated the public policy established by the Legislature and arrogated to itself the legislative authority delegated solely to the EIB.

V. The LW Regulations Do Not Exclude Large Volume Domestic and Commercial Dischargers From Their Requirements.

Although not articulated in the hearing officer's Order, NMED's hearing officer apparently accepted NMED's assertion that the EIA and LW Regulations do not apply to generators of more than 5,000 gallons per day of liquid waste.

The Legislature alone has the power to establish the jurisdiction of the LW Regulations. To the extent the EIA defines the jurisdictional scope of authority delegated to the EIB, it does so in Section 74-1-3(C), which limits the generators to be regulated, not the volume of wastes they generate:

> "on-site liquid waste system" means a liquid waste system, or part thereof, serving *a dwelling, establishment or group*, and *using a liquid waste treatment unit designed to receive liquid waste followed by either a soil treatment or other type of disposal system*.

NMSA 1978, § 74-1-3(E) (emphasis added).

Similarly, no provision of the LW Regulations excludes their applicability to large volume generators of domestic and commercial liquid waste. Parts 20.7.3.201(B) and (C) of the LW Regulations require ***any person*** who wishes to dispose of liquid waste to ground – irrespective of the volume generated – to do so by means of the LW Regulations' specifically defined and regulated on-site treatment and disposal systems.

Pursuant to 20.7.3.2 NMAC, the LW Regulations apply

> to on-site *liquid waste systems*, and effluent from such systems, that receive 5,000 gallons or less of liquid waste per day, and do not generate discharges

that require a discharge permit pursuant to 20.6.2 NMAC or a national discharge pollution elimination system (NPDES) permit.

20.7.3.2 NMAC (emphasis added). Plainly, "5,000 gpd" in 20.7.3.2 NMAC refers to the treatment and disposal *systems* by which liquid waste is discharged – not the volume of waste generated or discharged by a dwelling or establishment.

NMED strains to construe the first clause of 20.7.3.2 as though it reads "this part, 20.7.3 NMAC, applies to dwellings, establishments and groups that generate 5,000 gallons or less of liquid waste per day…" But that is plainly ***not what the first clause of 20.7.3.2 states***. Rather, properly construed in the context of the LW Regulations entire tire, it states that the regulations apply to the 5,000 gallon per day liquid waste ***systems*** that 20.7.3.201(B) and (C) require **every person discharging liquid waste to ground** to use for on-site disposal, and to the effluent from such systems.[4] Pursuant to 20.7.3.203(C) NMAC, properties that generate more than 5,000 gallons of liquid waste per day, like the Resort, may either install multiple on-site liquid waste treatment and disposal systems that each receive no more than 5,000

[4] The purpose of the 5,000 gpd limitation is self-evident: to prevent overloading of soils and groundwater with effluent contaminants. Significantly, the allowed discharge volume per system has changed over time, increasing from 2,000 gpd (*see* Liquid Waste Disposal Regulations, Section 101(M) (1973)) to 5,000 gpd in 2014. 20.7.3.2 NMAC (09/15/14). These changing limits further demonstrate that the discharge limits restrict the scope of systems that can be used for on-site discharge, not the scope of dischargers subject to the LW Regulations.

gallons per day, or they can discharge their liquid waste to a permitted public sewer. 20.7.3.201(B) and (C) NMAC.

Pursuant to NMSA §12-2A-18, "a statute or rule is construed, if possible, to:

1) give effect to its objective and purpose;
2) give effect to its entire text; and
3) avoid an unconstitutional, absurd or unachievable result."

This Court has repeatedly held that a statute or rule should be construed, if possible, to give effect to all of its provisions, so that one part will not destroy another. *See State v. Herrera*, 1974-NMSC-037, 86 N.M. 224 (statutes should be construed so that effect will be given to every part thereof); *Maloney v. Neil*, 169-NMSC-095, 80 N.M. 460 (words, phrases and provisions in statutes and rules must be construed to produce a harmonious whole).

By excluding the largest, most hazardous generators of domestic and commercial liquid waste from regulation under the LW Regulations, and failing to apply the mandatory requirements of the LW Regulations to all generators of domestic and commercial liquid waste, NMED's construction of 20.7.3.2 violates the express purpose of the EIA and LW Regulations in direct violation of NMSA 1978, Section 12-2A-18(A) and 20.7.3.100 NMAC. By construing the LW Regulations based on 20.7.3.2 alone, without regard to the other controlling provisions of the LW Regulations that plainly apply to all generators of liquid waste without regard to the volume of wastes generated, NMED distorts and misconstrues

the plain meaning and full scope of the regulations in violation of NMSA 1978, Section 12-2A-18(B). And, in construing and applying the LW Regulations as excluding the largest, most hazardous generators of domestic and commercial liquid waste from the requirements of the regulations, NMED is producing an absurd, unconstitutional result in violation of NMSA 1978, Section 12-2A-18(A)(3).

The absurdity of NMED's construction is self-evident. Construing a 5,000 gpd limit on the scope of systems allowed for on-site disposal as an exemption from regulation for the largest, most hazardous dischargers who generate more than 5,000 gpd is akin to construing a 30 mph speed limit as inapplicable to vehicles that can go faster than 30 mph. It is not just absurd, it is a disingenuous abnegation of the express purpose for which the Liquid Waste Regulations were adopted.

In rejecting a similar attempt by an administrative agency to read limitations into enabling legislation, this Court made clear that deference to an administrative agency's interpretation is "not boundless" and "does not give the [agency] authority to "pour any meaning" it desires into a statute." *State ex rel. Sandel,* 1999-NMSC-019, citing *Farmers Union Cent. Exchange, Inc. v. F.E.R.C.*, 734 F.2d 1468, 1504 (D.C. Cert. 1984). As this Court held in *State ex rel. Sandel*:

> Because we cannot read into a statute or ordinance language which is not there, particularly if it makes sense at written [citations omitted], we cannot read the [Act] as authorizing the [agency] to abdicate its statutory responsibilities by set[ting] at naught an explicit provision of the Act.

Id. at 279, citing *FPC v. Texico, Inc.,* 417 U.S. 380, 394 (1974).

VI. A Domestic or Commercial Discharger of Liquid Waste Cannot Bypass the LW Regulations

NMED also contends that the second clause of 20.7.3.2 ("and do not generate discharges that require a discharge plan pursuant to 20.6.2 NMAC ….") means the LW Regulations do not apply if a liquid waste discharger, like the Resort, has filed a discharge plan under the GSWP Regulations. This argument not only distorts the plain meaning of 20.7.3.2, but ignores the primacy of the LW Regulations.

As confirmed by NMSA 1978, Section 12-2A-10, the LW Regulations – not the GSWP Regulations – are the primary, baseline regulations governing the on-site treatment and disposal of liquid waste by any dwelling, commercial establishment or group. *See* 20.6.2.1001(A) NMAC. Effluent discharged in compliance with the requirements of the LW Regulations is exempt from regulation under the GSWP Regulations. 20.6.2.3105(B) NMAC. The contention that any discharger of liquid waste can unilaterally bypass the LW Regulations' mandatory safeguards and nullify their applicability by filing an application for permit under the GSWP Regulations would not only nullify the express provisions of both regulations but render the comprehensive regulatory framework adopted by the EIB at the Legislature's direction an absurdity, all in violation of NMSA 1978, Section 12-2A-18. NMED cannot undermine the primacy of the LW Regulations by imperiously usurping the

legislative power to enforce different regulations than the Legislature and EIB have mandated.

Nothing in the second clause of 20.7.3.2 NMAC requires this tortuous, absurd result. As the EIA, the LW Regulations, the WQA, and the GSWP Regulations all make clear, every domestic and commercial discharger of liquid waste must in the first instance comply with the requirements of the LW Regulations. *See* 20.6.2.3105(B) and 20.6.2.2101(A). Those who do so are exempt from further additional regulation under the GSWP Regulations, unless they discharge effluent that violates the water quality standards the GSWP Regulations establish.

So long as a discharger of liquid waste fulfills the permit and regulatory requirements of the LW Regulations, the effluent it discharges is exempt from any requirement to file a discharge notice or discharge plan. 20.6.2.3105(B) NMAC. If, however, a liquid waste permittee violates the conditions of its permit or discharges effluent that causes a violation of the water quality standards of 20.6.2.3103, the liquid waste permittee is no longer exempt from regulations under the GSWP Regulations and must then also file a discharge plan. As the WQA states, it provides "additional and cumulative" remedies to prevent or abate pollution, not exclusive or peremptory remedies. NMSA 1978, § 74-6-13. In such cases, as 20.7.3.2 plainly states, the exemption from regulation under the GSWP Regulations no longer applies to such "discharges that require a discharge permit pursuant to 20.6.2 NMAC." Such

additional and cumulative regulatory protection against pollution does not obviate or supplant the primary protection required by the LW Regulations; rather, it supplements it, just as the Legislature and EIB intended.

VII. The Resort's Tertiary Treatment Process Is No Substitute for the Safeguards the LW Regulations Require

While the Resort – but notably not NMED – insists that its tertiary treatment plant produces effluent that "meets or exceeds" all of the water quality standards of 20.6.2.3103 NMAC, it offers no evidence whatsoever to substantiate that claim.[5] Indeed, if the Resort's claim were in fact true, the Resort would be exempt from any need for permitting under the GSWP Regulations. 20.6.2.3105(A) NMAC.

The truth is far more sobering than the Resort's flaccid assurances. Neither the GSWP Regulations nor NMED's Draft Permit impose any requirement to identify the contaminants ***actually contained*** in the Resort's wastewater. Consequently, we simply do not know what contaminants its wastewater contains. Nor do the GSWP regulations or Draft Permit require analytical testing to confirm (1) whether the Resort's treatment process actually removes or reduces such contaminants; (2) whether the Resort's discharged effluent contains such

[5] The Resort has submitted quarterly analytical testing of its discharged effluent and sampled groundwater for no more than two contaminants listed in Part 20.6.2.3103 NMAC.

contaminants; or (3) whether the *in situ* downstream groundwater contains such contaminants. Again, it is unknown what contaminants the Resort's waste-stream actually contains, whether its treatment plant actually removes or reduces those contaminants, and what concentrations of contaminants the Resort is actually discharging to its disposal field.

The ***only restriction*** imposed by NMED's Draft Permit on contaminants in the Resort's effluent discharged to its disposal field (Draft Permit Condition 9) is for total nitrogen only.[6] *See* **Ex. 2**, Ground Water Quality Bureau Discharge Permit, DP-75. And the ***only analytical testing required*** for contamination of *in situ* groundwater is for total nitrogen, total dissolved solids and chloride. Draft Permit Condition 31. No other testing for contaminants in discharged effluent or groundwater is required.

Such incomplete and ineffectual protection is precisely why the Legislature decided 50 years ago that additional protections beyond the WQA and GSWP Regulations were needed. It is why the Legislature created the EIB, and why it directed the EIB to promulgate the LW Regulations to address the specific hazards to public health and the environment that liquid waste disposal creates. It is why

[6] To use its treated waste-water for surface irrigation of its property, the Resort must also meet "Class 1A"standards for E. coli, biochemical oxygen demand (BOD_s) and turbidity. Draft Permit Condition 10. These requirements do not apply to effluent discharged to the Resort's disposal field.

this Court should issue a Writ of Mandamus to fulfill the Legislature's stated purpose in enacting the EIA 50 years ago to "protect this generation as well as those yet unborn from health threats posed by the environment." NMSA 1978, § 74-1-2.

CONCLUSION

For these reasons, this Court should order a stay of the permit hearing scheduled to begin on May 19, 2025, and issue a writ of mandamus to compel the NMED to enforce the EIA and apply the LW Regulations to the Resort's permit application.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Pursuant to Rule 12-504(H), I certify that this brief complies with the type-volume requirements of Rule of Appellate Procedure 12-504(G). The body of the Petition has 5,996 words and is typed in 14 font/proportionally-spaced Times New Roman.

/s/ Thomas M. Hnasko
Thomas M. Hnasko

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2025, a true and correct copy of the foregoing was filed and served on the following:

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VERIFICATION

I, Lloyd R. Day, a Director of Protect Tesuque, Inc., state under oath that I have read this *Emergency Petition for Writ of Mandamus and Request for Stay* and that the factual statements it contains are true and correct to the best of my knowledge, information, and belief.

Date: April 21, 2025.

Lloyd R. Day