EXHIBIT 12

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

August 16, 2017

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RE: Request to Terminate NPDES Permit #NM0028355 as to Outfall #051 for Radioactive Liquid Waste Treatment Facility

Dear Mr. Lovejoy and Mr. Jantz:

This letter is in response to the above-referenced request to terminate permit coverage, which was filed pursuant to 40 C.F.R. § 124.5 with the Acting Regional Administrator of EPA Region 6 (Region 6) by Concerned Citizens for Nuclear Safely (CCNS) on March 9, 2017 ("Request to Terminate"). CCNS asks the Region to terminate permit coverage for Outfall 051 under NPDES Permit #NM0028355, issued in 2014 to Los Alamos National Security, LLC (LANS) and the Department of Energy (DOE) as co-permittees for the Los Alamos National Laboratory facility located at Los Alamos, NM (LANL). The permit authorizes LANL to discharge from eleven sanitary and/or industrial outfalls, including a discharge of treated radioactive liquid waste from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051 into Mortandad Canyon.

CCNS argues that because LANL's RLWTF facility was redesigned as a zero discharge facility in the early 2000's and has not discharged since 2010, Outfall 051 does not require NPDES permit coverage, and that in fact issuing such coverage is outside the jurisdiction of EPA pursuant to federal court rulings in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011)("*National Pork Producers*") and *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005)("*Waterkeeper*"). CCNS further argues that NPDES coverage for Outfall 051 is improper because it makes LANL's RSWTF eligible for a Waste Water Treatment Unit (WWTU) regulatory exemption under the Resource Conservation and Recovery Act (RCRA) despite no actual Clean Water Act (CWA) discharges.

Region 6 does not agree with CCNS's arguments and has determined not to unilaterally propose termination of LANL's NPDES permit coverage for Outfall 051. Under 40 C.F.R. § 124.5(b), if the Regional Administrator decides a request to terminate NPDES permit coverage filed by an interested party is not justified, the Regional Administrator must send the requester "a brief written response giving a reason for the decision." Accordingly, Region 6 provides the following response.

40 C.F.R. § 124.5(a) states that NPDES permits may only be terminated for the reasons specified in 40 C.F.R. § 122.64. That section provides the following causes for terminating a permit during its term:

(1) Noncompliance by the permittee with any condition of the permit;
(2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;
(3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or
(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW). 40 C.F.R. § 122.64(a)(1) - (4).

CCNS does not allege that LANL is in violation of its permit conditions with regard to Outfall 051 or that the permittees failed to disclose or misrepresented any relevant facts. In addition, there is no information to support a determination that the permitted discharge endangers human health or the environment and could only be regulated through termination of the permit.

Finally, EPA is not aware of a change in any condition (e.g., facility closure or termination of the discharge by connection to a POTW) that would warrant termination of permit coverage for Outfall 051 pursuant to § 122.64(a)(4). In their application for permit coverage, LANS and DOE described the "no discharge" nature of the RLWTF and specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. The permittees indicated that under certain circumstances, e.g. if one or both evaporative systems have to be taken off-line, a discharge could occur. Without permit authorization, such a discharge could subject the permittees to liability under the CWA for discharging without a permit.

40 C.F.R. § 122.21 places the burden on the owner/operator of a facility to obtain NPDES permit coverage prior to discharge. If the owner/operator does not seek coverage and a discharge occurs, the owner/operator is strictly liable under the CWA and subject to civil and/or criminal penalties. Consequently, EPA generally defers to an owner/operator's determination that a discharge could occur and that permit coverage is needed. It is not unusual for facilities that do not routinely discharge to seek and retain permit coverage to protect against liability in the event of an unanticipated discharge.

Region 6 does not read *National Pork Producers* or *Waterkeeper* to prohibit EPA from issuing an NPDES permit to a facility seeking coverage to protect against liability in the event of a discharge. Those cases dealt with EPA's authority to **require** operators of Concentrated Animal Feeding Operations (CAFOs) to obtain NPDES permit coverage when there had been no discharge. The Courts in those cases found that EPA could require discharging CAFOs to obtain NPDES permits, but that the agency could not mandate coverage in cases where there was no actual discharge. The burden was on the CAFO owner/operator to determine whether to seek permit coverage or to risk liability in case of a discharge. Neither *National Pork Producers* nor *Waterkeeper* address EPA's authority to issue a permit to a facility **requesting** coverage for a possible discharge. In such cases, as in the current situation, EPA

has authority under CWA § 402 (a) to issue a permit authorizing the discharge of pollutants should one occur. Otherwise, the CWA's requirement that facilities obtain NPDES permit coverage **prior to discharge** would be impossible for the agency to implement.

As to CCNS's argument that LANL's NPDES permit for discharges from Outfall 051 should be terminated because the NPDES permit coverage allows LANL to obtain a Waste Water Treatment Unit (WWTU) regulatory exemption under the Resource Conservation and Recovery Act (RCRA), Region 6 has determined this argument to be outside the scope of our decision. Whether or not issuance of NPDES permit coverage might trigger the RCRA WWTU regulatory exemption has no bearing on EPA's NPDES permitting decisions, which must be based on the requirements of the CWA and implementing regulations.

For the above reasons, Region 6 has determined CCNS's Request to Terminate LANL's NPDES permit coverage for Outfall 051 under NPDES Permit No. NM0028355 is not justified. Should you have any question regarding this matter, please contact Ms. Stacey Dwyer of my staff at (214) 665-6729, or Renea Ryland at (214) 665 -2130.

Sincerely,

WK Honker

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