

lew Q - P - ORIGINAL
6/16/16 - copy
lew Q. ecopg

Lindsay A. Lovejoy, Jr.

attorney-at-law

9 March 2017

Samuel Coleman, P.E.
Acting Administrator
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Suite 1200
Dallas, TX 75202

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

Dear Mr. Coleman:

The undersigned represent Concerned Citizens for Nuclear Safety ("CCNS"), the citizen organization that submitted a letter request (in two copies, with attachments), dated June 17, 2016, to the Regional Administrator as an interested party, requesting, pursuant to 40 C.F.R. § 124.5, the termination of NPDES permit #NM0028355, issued to Los Alamos National Laboratory, as to Outfall #051, on the ground that no discharges are associated with that outfall.

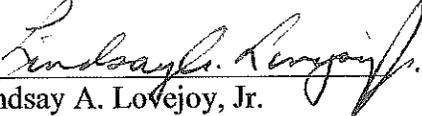
At that time, we understood from 40 C.F.R. § 22.51 that the presiding officer for a proceeding would be a Regional Judicial Officer. We have received an order from the Regional Judicial Officer, Mr. Rucki, stating that he has no authority to address the issue. (Order, March 2, 2017). The Order states, in pertinent part, that "CCNS may, if it chooses, re-file this matter with the Regional Administrator." *Id.*

CCNS chooses to re-file this matter, as stated by the Regional Judicial Officer, with the Acting Regional Administrator. An additional copy of the June 17, 2016 letter request is enclosed. All interested parties received a copy of this letter (with attachments) in June 2016.

We are requesting Mr. Rucki to provide you with a set of the attachments to our June 17,

2016 filing, which constitute evidence demonstrating that the permit in this case covers an outfall that has not discharged in over six (6) years and which the permittee has stated numerous times is connected to a "zero discharge" facility. CCNS hereby requests that you, as the Acting Regional Administrator, rule upon the within Request to terminate NPDES permit #NM0028355 as to Outfall #051.

Respectfully submitted:


Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
lindsay@lindsaylovejoy.com


Jonathan Block, Eric D. Jantz,
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87506
(505) 989-9022
jblock@nmelc.org

*Counsel for Applicant,
Concerned Citizens for Nuclear Safety*

cc (w/o attachments):

Thomas Rucki, Esq.
Regional Judicial Officer
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Mr. Ben Harrison
Acting Regional Counsel
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Mr. Charles F. McMillan, Director
Los Alamos National Laboratory
P.O. Box 1663 (MS K499)
Los Alamos, New Mexico 87545

Ms. Kimberly D. Lebak, Manager
U.S. DOE Los Alamos Field Office,
3747 West Jemez Road (MS A316)
Los Alamos, New Mexico 87544

Mr. Butch Tongate, Secretary
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

RECEIVED
EPA-GWO-DIR OFC
17 MAR 15 AM 9:08

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGION SIX REGIONAL ADMINISTRATOR**

In the matter of

CONCERNED CITIZENS FOR NUCLEAR SAFETY
REQUEST TO TERMINATE NPDES PERMIT
NM 0028355 FOR LOS ALAMOS NATIONAL
LABORATORY RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY DUE TO LACK OF
DISCHARGES

**REQUEST TO TERMINATE NPDES PERMIT # NM0028355 AS TO OUTFALL
051 FOR THE RADIOACTIVE LIQUID WASTE TREATMENT FACILITY**

I. STATEMENT OF FACTS.

1. This Request to Terminate NPDES Permit No. NM0028355 as to Outfall 051 is filed on behalf of the Applicant (“Petitioner” hereinafter), Concerned Citizens for Nuclear Safety (“CCNS”). The mission of CCNS, among other matters, is to address issues of public health and safety in connection with the nuclear weapons operations and legacy waste clean-up of the Los Alamos National Laboratory (“LANL”). The CCNS membership contributes financially, personally, or both to advance this mission. Members have participated in numerous hearings related to the hazardous waste, air, surface and ground water permitting of the LANL facility since the 1990s. Some CCNS members reside in the vicinity of Los Alamos, New Mexico, where LANL is located. CCNS members also reside at Santa Clara Pueblo, Pueblo de San Ildefonso, Española and Santa Fe, which are “downstream” and “downwind” of the operations of the LANL facility.

2. LANL is a federal facility within the terms of 33 U.S.C. § 1323 and 42 U.S.C. § 6961, owned by the U.S. Department of Energy (“DOE”) and managed by Los Alamos National Security, LLC. LANL’s functions include design and development of nuclear weapons. Such functions involve use of radioactive and hazardous materials, the release of which would be dangerous to human health and the environment.

3. Members of CCNS are at risk from the release or mismanagement of radioactive and hazardous wastes at LANL. Releases of such wastes would create a direct and immediate risk to members of CCNS.

4. CCNS members, Kathy Wanpovi Sanchez and J. Gilbert Sanchez, who live at 38 O Toh Nah Po, Santa Fe, New Mexico 87508, within 11.5 miles from Outfall 051, which serves the Radioactive Liquid Waste Treatment Facility (“RLWTF”), and 6.25 miles from the LANL boundary at State Route 4 and Jemez Road, have authorized CCNS to represent them in this proceeding and any others necessary to obtain the relief sought herein, as they are persons who would suffer harm from releases of waste from the RLWTF and facilities transporting waste to and from the RLWTF. These representative CCNS members wish to participate in proceedings under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*, to assure that the RLWTF operates safely and is regulated pursuant to RCRA. They believe that the current regime of regulation by the New Mexico Environment Department (“NMED”) Ground Water Quality Bureau, resulting from the asserted exemption of the RLWTF from RCRA regulations, does not provide sufficient scrutiny and safeguards over the operations of the RLWTF and is not lawful or appropriate, where the RLWTF does not discharge pollutants into the environment that reach the waters of the United States and is not required, or even eligible, to have a permit to do so. *See generally*, 33 U.S.C. §§ 1311, 1342, 1362(12).

5. LANL operates the RLWTF at Technical Area 50 (“TA-50”) within the LANL site. The RLWTF treats liquid radioactive and hazardous wastes generated at LANL, which are delivered to the RLWTF by pipe and by truck. The RLWTF treats both low-level and transuranic radioactive and hazardous liquid waste. Such wastes contain hazardous constituents and come within the definition of “solid waste” and “hazardous waste” under RCRA, 42 U.S.C. § 6903(5), (27). RCRA is applied in New Mexico pursuant to a program under the New Mexico Hazardous Waste Act, §§ 74-4-1 *et seq.*, NMSA 1978, by action of the U.S. Environmental Protection Agency (“EPA”).

6. Until late 2010, the RLWTF discharged to the environment certain pollutants that are regulated under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“CWA”), through an outfall into a tributary to Mortandad Canyon. This outfall (“Outfall 051”) is regulated under LANL’s National Pollutant Discharge Elimination System (“NPDES”), 33 U.S.C. § 1342, permit No. NM0028355. LANL has maintained, and continues to maintain despite changed circumstances, that the RLWTF and its discharge through Outfall 051 are exempt from regulation under RCRA as a “wastewater treatment unit” and an NPDES discharge.¹

7. The RLWTF was originally constructed at TA-50 in 1963. It was reconstructed in the early 2000’s. The present RLWTF is designed and operated as a “zero liquid discharge” facility and has not discharged any liquid since November 2010. A 1998 LANL report² recited LANL’s objective to attain zero liquid discharge: “Determining viable options for eliminating

¹ See 42 U.S.C. § 6903(27); 40 C.F.R. § 260.10 (*Tank system, Wastewater treatment unit*), and § 264.1(g)(6).

² Moss, et al., “Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility,” (1998) (Ex. A).

the discharge of treated radioactive liquid waste to Mortandad Canyon was the directive of the outfall 051 elimination working group.”³

8. The 1998 report emphasizes that the adoption of zero liquid discharge will cause elimination of the RCRA exemption, thus imposing additional regulatory requirements: “Under RCRA, wastewater treatment facilities that are subject to NPDES permit limits may qualify for exemption from certain RCRA requirements, including engineering design standards. When the RLWTF implements zero liquid discharge, if the NPDES permit for Mortandad Canyon is deleted, current exemptions would not apply. RCRA-listed wastes are already administratively prohibited from the RLW [“Radioactive Liquid Waste”] stream. However, the potential for exposure to increased RCRA regulatory coverage with zero discharge underscores the need for better administration and documentation of compliance with WAC [“Waste Acceptance Criteria”] requirements.”⁴

9. LANL’s 1998 report states that the loss of the RCRA exemption was an “important consideration” in planning: “Loss of this exemption would mean that the RLWTF would be required to meet additional RCRA regulatory guidelines regarding waste treatment practices. RCRA guidelines regarding waste treatment at the RLWTF would focus on concentrations of metals and organics in the RO [“reverse osmosis”] concentrate stream and sludges produced at the RLWTF. The RLWTF would need to manage the constituents in the waste stream and so have much better knowledge of, and control over, wastes discharged to it for treatment.”⁵

³ *Id.*, Ex. A at v.

⁴ *Id.*, Ex. A at 12.

⁵ *Id.*, Ex. A at 32.

10. In sum: “[T]he loss of the NPDES permit at the RLWTF will cause the loss of the RCRA exemption for the RLWTF. RCRA regulatory oversight will increase at the RLWTF. NPDES regulatory oversight will decrease.”⁶ Also: “As regulatory requirements become more stringent and as the possibility of eliminating outfall 051 progresses, it will be important to have complete characterization of wastes discharged to the RLWTF. . . . If the outfall 051 NPDES permit is allowed to be deleted, operation of the RLWTF will fall under RCRA guidelines. Management of waste at the source, including management of the waste generators’ WAC and management of facility connections to the collection system, is a necessary part of this process. Specific monitoring regimes will be required by the RLWTF.”⁷

11. If the RLWTF were regulated under RCRA, it would be subject, *inter alia*, to detailed protective RCRA requirements, calling for, *e.g.*, a public permitting process for approval of any new construction (40 C.F.R. § 270.10(f)), assurances of the engineering integrity of tank systems (40 C.F.R. §§ 264.190-200), and completeness of closure planning (40 C.F.R. §§ 264.110-120). LANL has maintained that these and other requirements do not apply to the RLWTF under its RCRA exemption. These requirements are applied under a public process, therefore enabling members of the public, such as CCNS’s representative members, Kathy Wanpovi Sanchez and J. Gilbert Sanchez, to advocate higher levels of public health and safety assurance in the operation of the RLWTF than are provided under the New Mexico state regulation of the facility pursuant to its ground water quality regulations.

⁶ *Id.*, Ex. A at Table 6.

⁷ *Id.*, Ex. A at 37.

12. Despite LANL's expressed concerns about the loss of the RCRA exemption, LANL advised NMED that zero liquid discharge at the RLWTF was LANL's "ultimate goal."⁸ LANL repeatedly so advised EPA.⁹ NMED has stated publicly that elimination of Outfall 051 is a desirable goal.¹⁰

13. During the RLWTF's reconstruction, LANL advised EPA and NMED of the upgrades.¹¹ LANL's January 2012 NPDES re-application lists 12 submissions concerning changes at the RLWTF.¹²

14. Elsewhere than at the RLWTF, LANL has striven to reduce the number of outfalls at LANL subject to NPDES regulation under its sitewide Outfall Reduction Program.¹³ LANL

⁸ Letter, Hanson and Rae to Bustamante (Sept. 3, 1998) (Ex. B).

⁹ See Letter, Erikson and Baca to Coleman (Mar. 18, 1999) (Ex. C); Letter, Rae to Coleman (Dec. 22, 1999) (Ex. D); Letter, Rae to Coleman (June 13, 2000) (Ex. E).

¹⁰ See Letter, Yanicak to Coghlan (CCNS) (May 12, 1999) at 2 (Ex. F).

¹¹ See Letter, Rae to Coleman (Oct. 22, 2001) (Ex. G); Letter, Rae to Coleman (Jan. 31, 2002) (Ex. H); Letter, Rae to Coleman (May 7, 2002) (Ex. I); Letter, Rae to Coleman (Nov. 27, 2002) (Ex. J); Letter, Rae to Strickley (April 18, 2003) (Ex. K); Letter, Grieggs to Hall (May 14, 2007) (Ex. L); Letter, Grieggs to Hall (May 6, 2008) (Ex. M); Letter, Grieggs and Turner to Hall (June 3, 2010) (Ex. N); Letter, Grieggs and Turner to Hall (Aug. 19, 2010) (Ex. O); Letter, Grieggs and Turner to Hall (Sept. 16, 2010) (Ex. P); Letter, Grieggs and Turner to Hall (Dec. 9, 2010) (Ex. Q); Letter, Grieggs and Turner to Simmons (Feb. 23, 2011) (Ex. R); Letter, Grieggs and Turner to Chen (Feb. 23, 2011) (Ex. S); Letter, Grieggs and Turner to Branning (Sept. 28, 2011) (Ex. T); Letter, Grieggs and Turner to Branning (Nov. 16, 2011) (Ex. U); Letter, Dorries and Turner to Schoeppner (July 25, 2013) (Ex. V).

¹² Letter, Dorries and Smith to Hosch (Jan. 27, 2012) with attached excerpts from February 2012 Los Alamos National Laboratory, NPDES Permit No. NM0028355, 2012 NPDES Permit Re-Application, concerning Outfall 051, and Form 2C, showing no discharge from Outfall 051 after November 2010. (Ex. W).

¹³ Los Alamos National Laboratory, NPDES Permit No. NM0028355, 1998 NPDES Permit Re-Application, at 11-12 (May 1998) (Ex. X); Letter, LANL to Saums, with Response to NMED-SWQB Review Comments, at 9-10 (Mar. 10, 1999) (Ex. Y); Letter, Rae to Hathaway with attached Benchmark Environmental report (Mar. 18, 1999) (Ex. Z); NPDES Permit No. NM0028355 Fact Sheet, at 10-14 (Oct. 18, 1999) (Ex. AA).

asked EPA to delete from the NPDES permit outfalls that are “no longer in use.”¹⁴ LANL reported that outfall 001B was out of use and could be deleted.¹⁵ LANL stated that outfall 03A028, associated with the closed PHERMEX facility, could be deleted.¹⁶ The 2007 NPDES permit omitted Outfalls 001B and 03A028.¹⁷ For its part, NMED has suggested that unused outfalls be deleted from the permit.¹⁸ LANL’s NPDES application omitted these outfalls.¹⁹ The 2008 LANL Site-Wide Environmental Impact Statement (“SWEIS”) reports the closing of several outfalls.²⁰ In 1999 there were 36 permitted outfalls; in 2005 there were 21. Further: “Thirty-five outfalls were removed from service as a result of efforts to reroute and consolidate flows and eliminate outfalls. . .”²¹

15. The need for the RLWTF is diminishing. The 2008 LANL SWEIS shows that LANL liquid waste production has steadily declined in 1999-2005 and RLWTF discharge

¹⁴ Letter, Gurulé to Hathaway (Nov. 25, 1998) (Ex. BB); Letter, Erickson to Hathaway (Oct. 26, 1999) (Ex. CC).

¹⁵ LANL Comments on EPA Preliminary Draft NPDES Permit, Part II at 5 (Mar. 17, 2005) (Ex. DD).

¹⁶ LANL NPDES Permit No. NM0028355 Comments on Draft Permit, at 8-9, 13, 15 (Mar. 30, 2006) (Ex. EE).

¹⁷ Letter, Lane to Wilmot with attached NPDES Permit (July 17, 2007) (Ex. FF).

¹⁸ Letter, Saums to Rae at 5, 6 (Feb. 2, 1999) (Ex. GG); Letter, Ferguson to Gurulé (Oct. 13, 1999) (EX. HH); Letter, Yanicak to Casalina (June 2, 2011) (Ex. II).

¹⁹ Los Alamos National Laboratory, NPDES Permit No. NM0028355, 2012 NPDES Permit Re-Application (January 27, 2012) (Ex. W).

²⁰ Final Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory at 4-43, Table 4-12 at 4-44 (2008) (“SWEIS”) (Ex. JJ).

²¹ *Id.*, Ex. JJ, SWEIS at 4-43.

volume has steadily decreased.²² The 2008 SWEIS notes that elimination of RLWTF discharges would minimize the potential to mobilize contaminated sediments.²³

16. However, LANL has consistently scheduled the RLWTF outfall to remain in the NPDES permit.²⁴ Despite the extensive changes to the RLWTF looking to the goal of zero liquid discharge, LANL sought to continue the RCRA exemption. When LANL told EPA about planned construction of concrete “evaporation tanks” for the RLWTF, LANL also put forth its theory that the “tanks” would be exempt from RCRA.²⁵

17. The 2008 SWEIS, Appendix G, discusses alternative designs for the “upgrade” of the RLWTF.²⁶ In the first Record of Decision (“ROD”) based on the 2008 SWEIS, DOE determined to pursue design of a Zero Liquid Discharge RLWTF.²⁷ In a later ROD, DOE expressly determined to construct and operate a new RLWTF and operate the Zero Liquid Discharge facility.²⁸

²² *Id.*, Ex. JJ, SWEIS Table 4-13, at 4-46; 4-48.

²³ *Id.*, Ex. JJ, SWEIS at 5-38; *see* G-76.

²⁴ NPDES Permit No. NM0023855 Fact Sheet for the Draft NPDES Permit to Discharge to the Waters of the United States at 21 (Oct. 18, 1999) (Ex. AA); February 2012 Los Alamos National Laboratory, NPDES Permit No. NM0028355, 2012 NPDES Permit Re-Application, concerning Outfall 051, and Form 2C, showing no discharge from Outfall 051 after November 2010 (Ex. W).

²⁵ Letter, Grieggs to Hall (May 14, 2007) (Ex. KK).

²⁶ Ex. JJ, SWEIS at G-60, G-73, G-83, G-88.

²⁷ Record of Decision, Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, 73 Fed. Reg. 55833, 55839 (Sept. 26, 2008) (Ex. LL).

²⁸ Record of Decision, Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, 74 Fed. Reg. 33232, 33235 (July 10, 2009) (Ex. MM).

18. LANL's 2012 NPDES permit renewal application sought a permit for 11 outfalls, one of which was Outfall 051²⁹, even though Outfall 051 was falling out of use. LANL stated in the 2012 re-application that "[t]he configuration of the RLWTF and Outfall 051 will be changing in the next 5 years due to the construction of two new Concrete Evaporation Tanks at Technical Area (TA) 52 under the Zero Liquid Discharge (ZLD) Project."³⁰

19. Thus, LANL sought a continued permit for Outfall 051—but expressly requested a permit only for a *possible* discharge: "The RLWTF has not discharged to Outfall 051 since November 2010. LANL requests to re-permit the outfall so that the RLWTF can *maintain the capability to discharge to the outfall should the Effluent Evaporator and/or ZLD Evaporation Tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in LANL scope/mission.*"³¹ LANL gave no pollutant discharge data for Outfall 051 (which was not discharging anything) and explained that a "composite sample for the Form 2C constituents will be collected from Outfall 051 *when/if the RLWTF discharges effluent to Mortandad Canyon.*"³² EPA confirmed that "[t]he facility includes the outfall [051] in the application *in case the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage.*"³³

20. LANL's NPDES permit comments repeat that, since the RLWTF's conversion to zero liquid discharge, Outfall 051 appears in the application only as a fallback, for use in

²⁹ Ex. W, February 2012 Los Alamos National Laboratory, NPDES Permit No. NM0028355, 2012 NPDES Permit Re-Application, concerning Outfall 051, and Form 2C, showing no discharge from Outfall 051 after November 2010.

³⁰ *Id.*, Ex. W at 7 of 9.

³¹ *Id.*, Ex. W at 5 of 9 (*emphasis supplied*).

³² *Id.*, Ex. W at Form 2C (*emphasis supplied*).

³³ NPDES Permit No. NM0028355 Fact Sheet for the NPDES Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN) (*emphasis supplied*).

possible contingencies: “The Laboratory’s TA-50 Radioactive Liquid Waste Treatment Facility (RLWTF) has not discharged since November 2010 as a result of using the mechanical evaporator. Additionally, RLWTF has constructed two Zero Liquid Discharge (ZLD) tanks that can passively evaporate treated effluent. The ZLD tanks are currently being processed for permitting under the NMED’s Ground Water Discharge Permit program and are not currently in operation. Based on discharge records prior to November 2010, and with options of using the existing mechanical evaporator or new ZLD evaporation tanks, RLWTF would discharge to Outfall 051 only once or twice per week *if evaporation is not an option.*”³⁴

21. LANL’s statement, quoted above, first, admits that the RLWTF would have two options to evaporate liquid waste, *viz*: mechanical evaporator and evaporation tanks, and, second, suggests that evaporation might somehow not be “an option”—without explaining how both evaporation systems might become unavailable, nor how probable such a situation would be.

22. LANL’s submission also asked leave to omit pollutant values for Outfall 051 discharges and supply them only if discharges take place: “DOE/LANS request that opportunity to provide EPA *with new data for Outfalls 051 and 05A055, if discharges through these outfalls are initiated* during the life of the new permit.”³⁵

23. A mid-2014 LANL report states: “Discharges from Outfall 051 decreased significantly after the mid-1980s and effectively ended in late 2010.”³⁶ In late 2014 NMED

³⁴ Los Alamos National Laboratory, NPDES Permit No. NM0028355, Comments on Draft NPDES Permit Issued June 29, 2013 at 3 (Aug. 13, 2013) (Ex. OO) (*emphasis supplied*).

³⁵ *Id.*, Ex. OO at 5, ¶ 8 (*emphasis supplied*).

³⁶ Isotopic evidence for reduction of anthropogenic hexavalent chromium in Los Alamos National Laboratory groundwater, 373 Chemical Geology 1, 4 (May 12, 2014) (Ex. PP).

reported to EPA Region 6 that Outfall 051 had not discharged since November 2010.³⁷ A LANL web site, NPDES Industrial Outfall Locations, states that “a mechanical evaporator was installed so no water has been discharged at Outfall 051 since November 2010.”³⁸

24. The Final Permit, dated August 12, 2014, refers to regulation of discharges from Outfall 051 *if discharges resume*.³⁹

25. EPA, on December 19, 2014 issued a draft permit modification, denying a compliance schedule for Outfall 051. EPA stated that “[n]o discharge has occurred since 2010. The permittees can start evaluating the treatment technology and operation practices prior to the next discharge.”⁴⁰ Thus, EPA saw no urgency to determine the Outfall’s compliance, since a discharge from Outfall 051 was not viewed as imminent.

26. When LANL’s permit re-application was filed in January 2012, discharges from Outfall 051 had ended only about a year before. Today, no discharges from Outfall 051 have occurred for over five years. Based on five blank years, it is apparent that LANL has no intention of discharging through Outfall 051.

II. GOVERNING LAW.

27. NPDES permits may be granted only for “the discharge of any pollutant, or combination of pollutants.” 33 U.S.C. § 1342(a)(1). Regulations define “discharge” to mean

³⁷ Letter, Yurdin to Dorries with Inspection Report, 4th page (Aug. 5, 2014) (Ex. QQ).

³⁸ LANL web site, NPDES Industrial Permit Outfall Locations, <http://www.lanl.gov/environment/protection/compliance/industrial-permit/index.php> (reviewed on June 17, 2016) (Ex. RR).

³⁹ Letter, Honker to Dorries, with Response to Comments and Authorization to Discharge under the National Pollutant Discharge Elimination System at 15, 17 (Aug. 12, 2014) (*emphasis supplied*) (Ex. SS).

⁴⁰ Letter, Hosch to Lebak, with U.S. EPA Public Notice of Draft NPDES Permit(s), Fact Sheet at 4 (Dec. 19, 2014) (Ex. TT).

“[a]ny addition of a ‘pollutant’ or combination of pollutants to ‘waters of the United States’ from any ‘point source.’” (40 C.F.R. § 122.2). As there is neither a “discharge” through Outfall 051, nor any plan or proposal to commence to discharge through Outfall 051, there is no basis for any permit authorizing such a discharge.

28. EPA Region 6 has said that a NPDES permit was issued for Outfall 051 because a discharge was merely *possible*: “EPA generally defers to a permit requester’s determination that a discharge could occur and that permit coverage is needed.”⁴¹ But the CWA contains no authority to issue a permit for a discharge that “could occur,” nor for a “capability” to discharge.

29. There are controlling precedents. EPA in 2003 issued CWA regulations for concentrated animal feeding operations (“CAFOs”).⁴² EPA’s express premise was that any large CAFO (as defined) has the *potential* to discharge, and so must obtain a NPDES permit, even if there was no discharge: “The ‘duty to apply’ provision is based on the presumption that every CAFO has a *potential to discharge* and therefore must seek coverage under an NPDES permit.”⁴³

30. EPA’s regulatory premise was conclusively rejected by the courts. In *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005), the Court of Appeals for the Second Circuit held that “in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES

⁴¹ Letter, S. Dwyer to L. Lovejoy (Dec. 18, 2015) (Ex. UU).

⁴² *See generally*, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176 (Feb. 12, 2003).

⁴³ *Id.*, at 7202 (*emphasis supplied*).

permit in the first instance.” *Waterkeeper Alliance*, 399 F.3d at 505. In sum, “the Clean Water Act gives the EPA *jurisdiction to regulate and control only actual discharges—not potential discharges*, and certainly not point sources themselves.” *Id.* (*emphasis supplied*). The court expressly ruled that, under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), analysis, EPA had *no discretion* to regulate potential discharges: “Congress has ‘directly spoken to the precise question at issue’ and ‘the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress’.” *Id.* at 506.

31. Despite that categorical ruling, after *Waterkeeper* EPA went back and drafted new CAFO regulations, again seeking to regulate facilities that were not discharging—but supposedly had a “potential” to discharge.⁴⁴

32. EPA admitted that “the CWA subjects only actual discharges to permitting requirements rather than potential discharges.”⁴⁵ However, reasoning that it could regulate “any person who discharges or proposes to discharge pollutants”⁴⁶, EPA issued 2008 CAFO rules, containing objective criteria identifying facilities that were “proposing to discharge.”⁴⁷

⁴⁴ See Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to *Waterkeeper* Decision, 71 Fed. Reg. 37744 (June 30, 2006); Revised National Pollutant Discharge Elimination System Permit Regulations for Concentrated Animal Feeding Operations; Supplemental Notice of Proposed Rulemaking, 73 Fed. Reg. 12321 (Mar. 7, 2008); Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to *Waterkeeper* Decision, 73 Fed. Reg. 70418 (Nov. 20, 2008).

⁴⁵ 71 Fed. Reg. at 37746-47, 37748; *see also* 73 Fed. Reg. at 12324, 73 Fed. Reg. at 70420, 70422.

⁴⁶ 71 Fed. Reg. at 37747-48.

⁴⁷ 71 Fed. Reg. at 37744, 37748; 73 Fed. Reg. at 70422 and 70423-25.

33. The 2008 rules called “for a case-by-case evaluation by the CAFO owner or operator as to whether the CAFO discharges or proposes to discharge from its production area or land application area based on actual design, construction, operation, and maintenance.”⁴⁸ EPA reasoned that “a CAFO proposes to discharge if based on an objective assessment it is designed, constructed, operated, or maintained such that a discharge will occur, not simply such that it might occur.”⁴⁹

34. The Court of Appeals for the Fifth Circuit rejected EPA’s second attempt to issue CWA permits based upon a potential to discharge: “Instead, the EPA’s definition of a CAFO that ‘proposes’ to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to this definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging. This definition thus requires CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of *Waterkeeper*, as well as Supreme Court and other well-established precedent.” *National Pork Producers Council v. U.S. Environmental Protection Agency*, 635 F.3d 738, 750 (5th Cir. 2011).

35. The Fifth Circuit quoted the Supreme Court (635 F.3d at 750) : “The triggering statutory term here is not the word ‘discharge’ alone, but ‘discharge of a pollutant,’ a phrase made narrower by the specific definition requiring an ‘addition’ of a pollutant to the water. § 1362(12).” *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 380-81 (2006). It added (635 F.3d at 750) that “several circuit courts have held that the scope of the EPA’s authority under the CWA is strictly limited to the discharge of pollutants into navigable

⁴⁸ 73 Fed. Reg. at 70423.

⁴⁹ 73 Fed. Reg. at 70423-24.

waters,” citing *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988), and *Service Oil, Inc. v. EPA*, 590 F.3d 545, 550 (8th Cir. 2009).

36. The appellate court emphasized that: “These cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. . . . Any attempt to do otherwise exceeds the EPA's statutory authority. Accordingly, we conclude that the EPA's requirement that CAFOs that “propose” to discharge apply for an NPDES permit is *ultra vires* and cannot be upheld.” (635 F.3d at 751). The court added: “In summary, we conclude that the EPA cannot impose a duty to apply for a permit on a CAFO that ‘proposes to discharge’ or any CAFO before there is an actual discharge.” *Id.* To repeat, “there must be an actual discharge into navigable waters to trigger the CWA’s requirements and the EPA’s authority.” *Id.*

37. After the Fifth Circuit decision, EPA abandoned its effort to require a permit for a potential discharge. EPA withdrew regulations requiring a NPDES permit for a facility that, by regulatory tests, “proposes to discharge.”⁵⁰ EPA conceded: “The EPA accepts the decision of the Court that vacated the requirement that CAFOs that propose to discharge apply for NPDES permits and the EPA lacks the discretion to reach a different conclusion.”⁵¹

38. “The District of Columbia Circuit has held that for NPDES requirements to apply to any given set of circumstances, ‘five elements must be present: (1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) *a point source*.’ *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).” *National Wildlife Federation v. Consumers*

⁵⁰ National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44494 (July 30, 2012).

⁵¹ *Id.*, at 44496.

Power Co., 862 F.2d 580, 583 (6th Cir. 1988). Since the *Waterkeeper* decision, EPA's Office of General Counsel has stated, and EPA administrative proceedings have ruled, that EPA "cannot require one to obtain an NPDES permit on the basis of a mere potential to discharge." *In re Vos*, 2009 EPA ALJ LEXIS 47 at 63 (Dec. 2, 2008).

39. Thus, the courts have ruled explicitly and repeatedly, and EPA has concurred: EPA did not seek certiorari in *Waterkeepers*, nor in *National Pork Producers*; instead it withdrew the contested regulations. Clearly, EPA acquiesced in the decisions. EPA expressly conceded that EPA "lacks the discretion to" issue a NPDES permit based only on the fact that a facility may possibly discharge. EPA's issuance of a CWA permit for Outfall 051 based upon LANL's statement that Outfall 051 "could" discharge violates the CWA.

40. There is no discharge through Outfall 051. No discharge through Outfall 051 is planned or proposed. The permit should be terminated for Outfall 051.

41. LANL's NPDES permit is subject to conditions stated in 33 U.S.C. § 1342(b)(1), including that the permit "can be terminated or modified for cause including . . . change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge."⁵²

42. In addition, regulations state that permit modification or revocation and reissuance are available in event of facility alterations, new information, new regulations, and similar situations. (40 C.F.R. § 122.62). Termination is available in event of a change in conditions, including discharge reduction, notably: "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 . . ." (40 C.F.R. § 122.64(a)(4)).

⁵² 33 U.S.C. § 1342(b)(1)(C)(iii); see § 1342(a)(3); *see also* 40 C.F.R. § 122.64.

43. Further, 40 C.F.R. § 122.64(b) states that “the Director shall follow part 124 of this chapter . . . for termination.” Part 124 contains specific provisions on modification, revocation and reissuance, or termination. (40 C.F.R. § 124.5). This section allows an application to be made by “any interested person” to which the Director may respond. (40 C.F.R. § 124.5(b)). Section 124.5 directs that the agency follow the § 124.6 permitting process if modification, etc., is planned to be approved, *i.e.*, it states that if the Director tentatively determines to modify, etc., the permit, he shall prepare a draft permit under Section 124.6 or a notice of intent to terminate (40 C.F.R. §§ 124.5(c), 124.5(d)). Such draft shall follow the established procedure for review and issuance of a final permit. Further, a notice of intent to terminate is “a type of draft permit which follows the same procedures as any draft permit prepared under 124.6 of this chapter.” (40 C.F.R. § 124.5(d)).

44. The validity of the NPDES permit for Outfall 051 should be reviewed under the present administrative process, because the RLWTF is an important component of LANL and receives waste from numerous sources within LANL. The availability of the RCRA wastewater treatment unit exemption and the availability of the definitional exemption from RCRA are important issues. They call for a decision based upon consideration of a single uncontradicted fact: Outfall 051 is not used to discharge any pollutants or, indeed, any liquid at all.

45. Legally and factually, the NPDES permit for Outfall 051 must be terminated. Because there is no basis for permitting Outfall 051 under the CWA, the RLWTF is subject to regulation under RCRA and, as New Mexico is a delegation state, under the New Mexico Hazardous Waste Act.

III. CONCLUSION AND REQUESTED RELIEF.

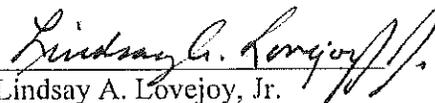
Petitioner contends that the foregoing facts and law conclusively require EPA, Region 6, to terminate permit NM 0028355 with respect to Outfall 051 due to lack of discharge.

WHEREFORE, Petitioner respectfully requests that the EPA grant this Petition and enter an order terminating NPDES permit NM 0028355 with respect to Outfall 051.

DATED: at Santa Fe, New Mexico, this 17th day of June, 2016.

Respectfully submitted,

CONCERNED CITIZENS FOR NUCLEAR SAFETY

BY: 
Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
lindsay@lindsaylovejoy.com

BY: 
Jonathan Block, Eric D. Jantz
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87506
(505) 989-9022
jblock@nmelc.org

Co-Counsel for Concerned Citizens for Nuclear Safety

CERTIFICATION OF SERVICE

By our signatures above, we, Lindsay Lovejoy and Jonathan Block, hereby certify that on this day we mailed, U.S. Postal Service First Class postage pre-paid, copies of the foregoing Application with attachments to the Director of the Los Alamos National Laboratory, and the U.S. Department of Energy Los Alamos Field Office Manager:

Charles F. McMillan, Director
Los Alamos National Laboratory
P.O. Box 1663 (MS K499)
Los Alamos, New Mexico 87545

Kimberly D. Lebak, Manager
Los Alamos Field Office, U.S. DOE
3747 West Jemez Road (MS A316)
Los Alamos, New Mexico 87544