EXHIBIT G

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGION SIX REGIONAL ADMINISTRATOR

In the matter of:

CONCERNED CITIZENS FOR
NUCLEAR SAFETY,
HONOR OUR PUEBLO EXISTENCE, AND
NEW MEXICO ACEQUIA ASSOCIATION:
COMMENTS ON PROPOSED
RENEWAL OF NPDES PERMIT
NM 0028355 FOR LOS ALAMOS
NATIONAL LABORATORY,
RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY

SUPPLEMENTAL COMMENTS OF CONCERNED CITIZENS FOR NUCLEAR SAFETY, HONOR OUR PUEBLO EXISTENCE, AND NEW MEXICO ACEQUIA ASSOCIATION ON PROPOSED RENEWAL OF NPDES PERMIT # NM0028355

These supplemental comments on the proposed renewal of National Pollutant Discharge Elimination System ("NPDES") Permit No. NM0028355 are filed on behalf of Concerned Citizens for Nuclear Safety ("CCNS"), Honor Our Pueblo Existence ("H.O.P.E."), and the New Mexico Acequia Association ("NMAA") (collectively, "Citizens").

1. The Department of Energy ("DOE") has filed supplemental arguments (Feb. 25, 2021) ("Supp.") in pursuit of renewal of an NPDES permit for Outfall

051 at the Radioactive Liquid Waste Treatment Facility ("RLWTF"). These materials state DOE's current intentions as to the operation of that facility.

2. As is detailed in Citizens' Comments (Oct. 15, 2020), DOE adopted a "zero liquid discharge" program at the RLWTF in 1998 and carried out that program by installing mechanical evaporator equipment in about 2010 and constructing solar evaporation "tanks" in 2012. The tanks are still undergoing permitting. Despite the successful program to eliminate discharges, DOE seeks a renewed Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), permit under the NPDES, 33 U.S.C. § 1342.

3. The NPDES statute authorizes EPA to issue a permit for a "discharge," and DOE is correct that the statutory and regulatory references to discharges are "forward-looking." (Supp. 3). As to its intentions, DOE has stated that it seeks a permit for the RLWTF's Outfall 051 for the purpose of discharging *if* the evaporation equipment is out of service or the quantity of wastewater is such that additional disposal methods, beyond the evaporation units, are required. DOE states:

> The operating principle has been that, if the evaporation equipment operates reliably and continuously, and if the wastewater volume does not increase due to a change in the Laboratory's mission, then Outfall 051 should not be needed.

(Supp. 13. See also Supp. 3, 8; Citizen Comments, ¶ 37-41). In its supplemental comments, DOE adds only that it plans to operate Outfall 051 in an "integral" manner (Supp. 13, "integral role," 18, "integral component") with the evaporation equipment. DOE does not explain this statement, but it clearly does not amount to a plan or proposal actually to discharge via the outfall in the future. DOE offers no commitment to use the outfall at any particular time or for discharge of any particular amount of wastewater or pollutants.

4. In a Notice of Planned Change (Feb. 25, 2021), filed with the supplemental comments, DOE substitutes new data concerning the volume of possible discharges from Outfall 051 for the "estimates" previously provided. The previous "estimates" expressed only the quantity of discharges that is theoretically possible—not planned or proposed. The latest figures, derived from a discharge made in 2020, do not represent a quantity that DOE plans or proposes to discharge in the future. DOE's position remains that it wishes to discharge via Outfall 051 only *if* the evaporation equipment is unavailable or its needs to discharge wastewater change. In proceedings held by the State of New Mexico, testimony from two expert witnesses has established that the occurrence of such circumstances is "highly unlikely." (Ex. AAA to Citizens' Comments).

5. The Clean Water Act authorizes EPA only to issue a NPDES permit for a "discharge." 33 U.S.C. § 1342(a). DOE argues that its stated intention to

discharge only if certain conditions occur—*i.e.*, when and if evaporation equipment is unavailable or additional capacity is needed, if ever—is sufficient to support a NPDES permit. DOE also contends that, if it obtains a NPDES permit for Outfall 051, it would then be entitled to the Wastewater treatment unit exemption, 42 U.S.C. § 6903(27); 40 C.F.R. § 260.10 (*Tank system, Wastewater treatment unit*); § 264.1(g)(6), from hazardous waste regulation under the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* ("RCRA"), for the entire RLWTF. DOE is in error on both issues.

6. DOE's argument is presented entirely without reference to the applicable statute and regulations, which control here. Under the CWA, EPA's *only* authority to grant a NPDES permit is § 1342, which authorizes EPA to issue a permit *only* for the "discharge of any pollutant, or combination of pollutants." 33 U.S.C. § 1342(a). Numerous decisions have established that the statutory element of a "discharge" is clear under *Chevron 1, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), analysis and is not met by anything less. Where there is no discharge, EPA has no authority to issue a permit. Recent cases are *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005), and *National Pork Producers Council v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011). In unambiguous language, *Waterkeeper* states that the CWA requires a discharge to support an NPDES permit:

> Congress left little room for doubt about the meaning of the term "discharge of any pollutant." The Act expressly defines the term to mean "(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). Thus, 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 permit in the first instance.

Waterkeeper, 399 F.3d at 504-05. The Second Circuit emphasized that its decision was based on *Chevron 1* analysis:

> For all these reasons, we believe that the Clean Water Act, on its face, prevents the EPA from imposing, upon CAFOs [concentrated animal feeding operations], the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (where 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. 506 (*footnote omitted*).

7. DOE asserts that *Waterkeeper* holds only that EPA may not require an NPDES *application* from a non-discharging entity. (Supp. 5). However, the decision is emphatic that a person who has only an asserted "potential" to discharge—as DOE claims the RLWTF does—is not subject to the CWA:

> The CAFO Rule violates this statutory scheme. It imposes obligations on all CAFOs regardless of whether or not they have, in fact, added any pollutants to the navigable waters, *i.e.,* discharged any pollutants.

> After all, the Rule demands that every CAFO owner or operator either apply for a permit - and comply with the effluent limitations contained in the permit - or affirmatively demonstrate that no permit is needed because there is "no potential to discharge." *See* 40 C.F.R. §§ 122.23(d) and (f). In the EPA's view, such demands are appropriate because all CAFOs have the *potential* to discharge pollutants. *See* Preamble to the Final Rule at 7202 ("The 'duty to apply' provision is based on the presumption that every CAFO has a potential to discharge."). While we appreciate the policy considerations underlying the EPA's approach in the CAFO Rule, however, we are without authority to permit it because it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges - not potential discharges, and certainly not point sources themselves. *See National Resources Defense Council v. EPA*, 273 U.S. App. D.C. 180, 859 F.2d 156, 170 (D.C. Cir. 1988) (noting that "the [Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants"). To the extent that policy considerations do warrant changing the statutory scheme, "such considerations address themselves to Congress, not to the courts." *MCI Telecomms. Corp. v. AT&T Co.,* 512 U.S. 218, 234, 129 L. Ed. 2d 182, 114 S. Ct. 2223 (1994) (citation omitted).

Waterkeeper, 399 F.3d at 505.

8. In *National Pork,* the Fifth Circuit concurred with the Second Circuit's reasoning and decision:

> The Second Circuit's decision is clear: without a discharge, the EPA has no authority and there can be no duty to apply for a permit.
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> * * *
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> Because the issues presented in *Waterkeeper* are similar to the issues presented here, we find the Second Circuit's analysis to be instructive and persuasive. Accordingly, we decline to uphold the EPA's requirement that CAFOs that propose to discharge apply for an NPDES permit.

National Pork, 635 F.3d at 750. In *Waterkeeper* and *National Pork* EPA did not seek certiorari to challenge the court of appeals rulings and instead withdrew the contested regulations. EPA, Revised Regulation in Response to Waterkeeper Decision, 71 Fed. Reg. 37744 (June 30, 2006); EPA, Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44494 (July 30, 2012). EPA stated publicly that a non-discharging facility is outside its regulatory reach:

> 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.

77 Fed. Reg. 44494, 4496.

9. DOE contends that *Waterkeeper* and *National Pork* "had nothing to do with EPA's authority to issue CWA permits, but focused instead on EPA's lack of authority to require persons to *apply for permits in the absence of actual pollutant discharges*—as if the questions were unrelated. Obviously, they are not unrelated, as those cases expressly state. Both decisions hold that EPA cannot lawfully issue a CWA permit for a so-called "potential" discharge, and therefore EPA cannot demand a permit application for a "potential" discharge.

10. These court of appeals decisions follow the *Chevron 1* principle that, if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law

and must be given effect. *Chevron,* 467 U.S. at 843 n.9. *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987).

11. The Supreme Court has elaborated concerning the clear language of 33 U.S.C. § 1342(a):

> The triggering statutory term here is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its 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, 381-82 (2006). *National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 165 (D.C. Cir. 1982), accordingly holds that

> to require NPDES permits, 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. Consumers Power Co., 862 F.2d 580 (D.C. Cir. 1988), restates the same principles. *Id.* at 583. As the Tenth Circuit has stated:

> The CWA sets forth guidelines for the NPDES permits for the discharge of pollutants in Section 402, 33 U.S.C. § 1342. To establish a violation of these sections, a plaintiff must prove that the defendant (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit.

Sierra Club v. El Paso Gold Mines, 421 F.3d 1133, 1141-1142 (10th Cir. 2005). Further, In re *Lowell Vos*, 2009 EPA ALJ Lexis 8 (2009), states that "EPA agrees that it cannot require one to obtain an NPDES permit on the basis of a mere potential to discharge." *Id.* at *63.

12. In addition, the CWA requires permits issued by EPA[1] to be subject to these terms:

> (1) To issue permits which--
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> * * *
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> (C) can be terminated or modified for cause including, but not limited to, the following:
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> * * *
>
> (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge . . .

33 U.S.C. § 1342(b)(1). Thus, under the CWA, in the event that there is no discharge, the permit is subject to termination.

13. Regulatory exclusions from the requirement of a permit for a discharge cannot stand. *See, e.g.*, *National Cotton Council v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009) (regulatory exclusion for pesticides applied in accordance with Federal Insecticide, Fungicide, and Rodenticide Act held in conflict with CWA); *Northwest Environmental Advocates v. U.S. EPA,* 537 F.3d 1006 (9th Cir. 2008) (exclusion for ship discharges held in conflict with CWA); *Northern Plains Research Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003) (exemption for disposal of produced water held preempted by CWA); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2001) (EPA lacks authority to exempt point source from permit requirement); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir.

[1] The quoted language refers to authorized state programs. Under § 1342(a)(3), EPA's federal program must contain the same requirements.

1977) (exclusions for silvicultural, various animal feeding operations, and other operations held unauthorized).

14. The reviewing court in each case held the CWA unambiguous and, therefore, its analysis invoked *Chevron 1*: "The Clean Water Act is not ambiguous. Further, it is a fundamental precept of this Court that we interpret unambiguous expressions of Congressional will as written." *National Cotton Council*, 553 F.3d at 929. "The text of the statute clearly covers the discharge at issue here." *Northwest Environmental Advocates*, 553 F.3d at 1021. "The reasons for our conclusion are apparent from the statute's terms." *Northern Plains Research Council*, 325 F.3d at 1160. "The Forest Service's argument fails because the statute is clear and unambiguous." *League of Wilderness Defenders*, 309 F.3d at 1185. "The wording of the statute, legislative history, and precedents are clear. . . . We find a plain Congressional intent to require permits in any situation of pollution from point sources." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d at 1377, 1383.

15. If the CWA had left any room for doubt, *Chevron 2* analysis shows that DOE's argument is not a "permissible" reading of the statute. Where statutory language is ambiguous, the Court may "turn to the relevant regulatory definition in understanding the statutory meaning of [the] term." *Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201, 1209 (10th Cir. 2015). In *Seneca-Cayuga Tribe of*

Oklahoma v. National Indian Gaming Commission, 327 F.3d 1019 (10th Cir. 2003), the court pointed out that the responsible agency's regulations offer important guidance as to the meaning of ambiguous terms, and, if reasonable, may be considered controlling:

> [C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principles of deference to administrative interpretations . . . consistently followed . . . whenever decision as to the meaning or reach of a statute [] involves reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation [] depends upon more than ordinary knowledge respecting the matters subjected to agency regulations.

Seneca-Cayuga Tribe, 327 F.3d at 1036. Thus, deference to an agency's regulations rests upon "the notion that the 'rule-making process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny.'" *Id.* at 1036. Finding the regulation a reasonable construction, the Court stated that "we therefore accord it 'controlling weight'." *United States v. 162 Megamania Gambling Devices,* 231 F.3d 713, 718-19 (*quoting Chevron*, 467 U.S. at 842-44); *see also Seneca-Cayuga Tribe, supra*, at 1040, 1043.

16. Here, EPA's regulations offer a clarifying construction. EPA is authorized to "prescribe such regulations as are necessary to carry out the functions under this Act." 33 U.S.C. § 1361(a). Under 40 C.F.R. § 122.21, a person who "discharges or proposes to discharge" a pollutant has a "duty to apply"—thus, a

statutory requirement—to obtain an NPDES permit. To "propose" is to purpose, plan or intend. Webster's New World Dictionary, 2d ed. Other regulatory language makes plain that a proposed discharge is one that is actually planned and thereafter carried out. See 40 C.F.R. § 122.21(c). Thus, one who proposes to discharge actually intends to do so; the proposal is not a hypothetical prospect, nor speculation about the possibility of a future discharge in prospective conditions; such would fall outside "the bounds of reasonable interpretation," *Arlington v. FCC*, 569 U.S. 290, 296 (2013), because it would reduce what Congress enacted as a clear limit upon permit issuance to an unverifiable and meaningless product of the imagination.

17. For such reasons the additional five outfalls that DOE seeks to include in a CWA permit, but which do not currently discharge nor propose to discharge, cannot lawfully be permitted under 33 U.S.C. § 1342. The CWA does not regulate an outfall that serves only as a backup or potential discharge point, for use if certain conditions are met. The CWA regulates only an outfall that actually discharges or proposes to discharge.[2]

[2] Thus, the listed discharge points do not come within 33 U.S.C. § 1342(a)(1) or 40 C.F.R. § 122.21(a)(1):

1. Outfall 13S: The supplemental comments state that this outfall "is fully capable of receiving SWWS (Sanitary Wastewater Treatment System) treated effluent based upon demand, volume, and availability of equipment to pump, store, discharge, and/or treat using facilities and equipment located at an elevation that is much higher than SWWS." (Supp. 19 – 20).

However, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall. The October 28, 2020 DOE submittal to EPA, titled "NPDES Permit No. NM0028355 Monthly Discharge Monitoring Reports (DMRs) for September 2020, Quarterly DMRs for July 2020 – September 2020, Yearly DMRs for October 2019 – September 2020, and Term DMRs for October 2014 – September 2020," states "No Discharge October 2014 – September 2020," "No discharge to Cañada del Buey," and "No Discharge to Outfall During Monitoring Period." EPC-DO: 20-346, LA-UR 20-28634.

2. Outfall 03A027: This outfall is said to be "capable of receiving SCC Cooling Tower blowdown discharges." (Supp. 20). Again, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall. DOE also reported [No Data Indicator Code] NODI=C, meaning there was no discharge from the outfall. The monthly and quarterly DMRs report "The Outfall Pipe capped on 9/9/2016. No Discharge During Monitoring Period." The yearly DMR states, "No Discharge to Outfall 027 this monitoring period." *Id.*
3. Outfall 03A113: The supplemental comments state that the outfall discharged certain amounts in 2017 through 2020, but adds: "Cooling Tower TA-53-293 is in operational standby and is no longer discharging to the outfall, but the permit application proposes this as a future discharge source to the outfall." (Supp. 21 – 22). Once again, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall.
4. Outfall 03A160: The supplemental comments state: "The 2019 NPDES Permit Re-Application proposed discharges to that outfall based upon historical data and the use of the outfall as an operational backup." (Supp. 22). Thus, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall. DOE reported, "No Discharge During Monitoring Period," on the monthly, quarterly and yearly DMRs. *Id.*
5. Outfall 05A055: DOE states in its supplemental comments: "The outfall provides operational flexibility for maintenance, repair, and replacement of equipment (i.e., evaporator), and serves as a critical backup should LANL be unable to evaporate effluent." (Supp. 23). Thus, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall. DOE reported, "No Discharge During Monitoring Period," on the monthly, quarterly and yearly DMRs. *Id.*

18. DOE also urges that the statutory limits enforced in *Waterkeeper* and *National Pork* must be ignored if the permit applicant *requested* the permit. (Supp. 5). DOE contends that *Waterkeeper* and *National Pork* say nothing about issuance of a NPDES permit to a person who "voluntarily" requests one. (Supp. 5 – 6). That issue was not presented in those cases, because there a NPDES permit was not desired for its exemptive powers; here, it is.

19. But the CWA does not authorize a permit that is "requested" as distinguished from a permit for a "discharge." The statutory limitation to a discharge is a jurisdictional requirement. *Waterkeeper*, 399 F.3d at 505. If DOE's theory is correct—that EPA may issue a NPDES permit to an entity that does not discharge nor propose to discharge, so long as the person requests a permit—then there would be no limitation on EPA's power to issue a permit. (Supp. 5-6). Such a situation would violate the principle that Congress may not delegate legislative authority:

> [I]n *Mistretta v. United States*, 488 U.S. 361 (1989), we revisited the nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could "ascertain whether the will of Congress has been obeyed," no delegation of legislative authority trenching on the principle of separation of powers has occurred. Id., at 379, quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944). *See American Power & Light Co. v. SEC, supra,* at 105 (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the

> courts to test the application of the policy in the light of these legislative declarations").

Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218-19 (1989). Here, Congress delegated to EPA the authority to issue a permit only for a "discharge," not for a possible future discharge that is not planned or expected but only imagined, and certainly not for a person who simply requests a permit for its own convenience. If Congress had authorized EPA to issue a permit on request, a serious question of unconstitutional delegation of authority without standards or policy direction would be presented.

20. Moreover, the concept of a "voluntary" request for a permit cannot stand scrutiny. All permits are requested "voluntarily" in response to an applicant's needs and the prevailing legal provisions. To seek indicia of "voluntariness" in order to uphold an unauthorized permit is a fool's errand and would only encourage the fabrication of permitting history. Once the NPDES permit process begins, the regulatory structure is entirely mandatory. See, *e.g.*, 40 C.F.R. § 122.21(f), (g). The idea that EPA can disregard the statutory limits when an entity "requests" a sought-after permit not only would nullify the CWA's jurisdictional limits but also would introduce profound mischief, *e.g.*, by authorizing EPA to hand out unnecessary CWA permits to non-discharging entities, which permits would carry an exemption from hazardous waste regulation. This malign concept has no source in the law Congress enacted.

21. DOE asserts that the possible need for an immediate discharge supports issuance of a permit "just in case" of an emergency. (Supp. 4). This argument simply ignores the statutory limitation that requires a "discharge." Moreover, here such a need is imaginary. When the RLWTF was reconstructed for zero-liquid-discharge, indoor storage tanks sufficient to hold 300,000 gallons of effluent were installed. RLWTF Closure Plan, DP-1132 (July 2016) at 15 (AR0001597) and Appendix A, Table 7 at 50 (AR0001632). Even if *both* evaporation systems were somehow inoperative, the RLWTF has storage capacity in the solar evaporation tanks sufficient to hold more than seven months of output. Petition to EAB, Ex. 1 (AR0000198) (solar evaporation tank capacity is 754,036 gallons); *see also* Petition to EAB, Ex. 2 (AR0000204) (in 2009 RLWTF discharged 4,401,900 liters or 1,162,859 gallons). Talk of an emergency that compels a sudden discharge is simply a fantasy.

22. Moreover, EPA in construing the CWA must consider the impact of its permitting action upon RCRA coverage. DOE argues (Supp. 16) that a CWA permit for Outfall 051 will confer upon the RLWTF an exemption from RCRA regulation under the Wastewater treatment unit exemption. Such is DOE's evident motive in seeking a permit; thus, DOE seeks to set up a conflict between CWA and RCRA regulation. But EPA is charged with application of both CWA and RCRA. 33 U.S.C. § 1251(d); 42 U.S.C. § 6921. EPA has no authority to "pick and

choose" the federal law that it will apply and, instead, must seek to give effect to both. *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1624 (2018); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). EPA must consider the impact of a CWA permit on RCRA enforcement. DOE asks EPA to adopt an incorrect construction of the CWA requirement of a "discharge" that renders both statutes ineffective: The CWA permit would regulate nothing, because there is no discharge, but, by DOE's reading, it would block the RCRA process, thwarting RCRA's preventive purposes. To the contrary, where the CWA has no role to play, EPA should not uselessly expand the supposed jurisdiction of the CWA to bar RCRA from protecting human health and the environment.

23. Citizens do not agree that the Wastewater treatment unit exemption properly should apply to the RLWTF, as DOE contends (Supp. 16), even if a CWA permit were issued for Outfall 051. At present, substantially all of the wastewater from the RLWTF is disposed of by evaporation. The evaporation equipment—both the existing mechanical evaporator and the constructed, but not yet operational, solar evaporation tanks—is entirely *unregulated*, and it would not be regulated in the renewal permit. In contrast, under RCRA, all such equipment would be regulated under a permit. Moreover, contrary to DOE's argument, EPA has issued its opinion letter, discussed below, stating that a facility like the RLWTF is not an exempt Wastewater treatment unit.

24. Specifically, a "Wastewater treatment unit" is defined in 40 C.F.R. § 260.10:

> Wastewater treatment unit means a device which:
> (1) Is part of a wastewater treatment facility that is subject to regulation under either section 402 or 307(b) of the Clean Water Act; and
> (2) Receives and treats or stores an influent wastewater that is a hazardous waste as defined in § 261.3 of this chapter, . . . and
> (3) Meets the definition of tank or tank system in § 260.10 of this chapter.

EPA explained in issuing the rule in 1988 that the exemption applies to a tank system that is part of a facility that is subject to CWA Section 302 regulation, but does not apply when the tank system is *also* used for a different purpose:

> [A]ny hazardous waste tank system that is used to store or treat the wastewater that is managed at an on-site wastewater treatment facility with a National Pollution Discharge Elimination System (NPDES) permit . . . . is exempt from the RCRA regulations.
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> * * *
>
> EPA intends that this exemption apply to any tank system that manages hazardous wastewater and is dedicated for use with an on-site wastewater treatment facility. However, if a tank system, in addition to being used in conjunction with an on-site wastewater treatment facility, is used on a routine or occasional basis to store or treat a hazardous wastewater prior to shipment off-site for treatment, storage, or disposal, it is not covered by this exemption.

53 Fed. Reg. 34079, 34080 (Sept. 2, 1988).

25. In 1998, EPA issued an Agency opinion letter concerning a tank system that was used for wastewater treatment in certain months, and used for other purposes for the remainder of the year—just as the RLWTF is used to

dispose of wastewater by evaporation, in addition to potentially using the CWA-permitted outfall. EPA stated that the Wastewater treatment unit exemption does not apply to such a tank system:

> You ask what EPA meant by the language "dedicated" [for use with an on-site wastewater treatment facility] and offer two possible interpretations. One interpretation, you suggest, is that the WWTU must be dedicated solely for wastewater treatment at all times. A second interpretation, you suggest, is an "alternating use" scenario in which a WWTU may operate as a WWTU for a portion of the year, dedicated for wastewater treatment for that period of time in use, and then operate as an accumulation tank for a different part of the year. The Agency confirms the first interpretation, described above. That is, in order to satisfy the WWTU exemption, a tank must be dedicated solely for on-site wastewater treatment at all times and for no other purpose. EPA believes that the preamble language is clear on this point. EPA did not intend the WWTU exemption to apply in situations involving "dual use" of a tank (when a tank is concurrently used for wastewater treatment and for another purpose). Nor did EPA intend for the exemption to apply in situations, such as the one your letter describes, involving "alternating use" of the tank.

Letter, E.A. Cosworth, OSW, to Susan Pendleton, ERM New England, Inc., RO 14262. Reflecting this interpretation, section 4.6 of the current Hazardous Waste Act ("HWA") permit for LANL states that the Wastewater treatment unit exemption shall apply to the RLWTF only if *all* wastewater is discharged through the NPDES-regulated Outfall 051 or as authorized by that NPDES permit:

> The Permittees shall discharge all treated wastewater from the TA-50 Radioactive Liquid Waste Treatment Facility (RLWTF) through the outfall permitted under Section 402 of the federal Clean Water Act, or as otherwise authorized by the terms of an applicable Clean Water Act permit that regulates the treatment and use of wastewater. If the Permittees intentionally discharge through a location other than the

> permitted outfall or as otherwise authorized, they will fail to comply with this requirement, and as a consequence the wastewater treatment unit exemption under 40 CFR § 264.1(g)(6) will no longer apply to the RLWTF. https://www.env.nm.gov/hazardous-waste/lanl-permit/

Since most of the RLWTF's wastewater is disposed of *not* through Outfall 051 nor pursuant to the NPDES permit, but by evaporation, the exemption does not apply.

26. DOE tells the Agency that the RLWTF is entitled to the Wastewater treatment unit exemption based upon a 1992 EPA opinion letter by S.K Lowrance to T.W. Cervino. (Supp. 15-16). The letter claims exemption of "facilities which are permitted, were ever permitted, or should have been permitted under NPDES," and DOE asserts that such wording means that the RLWTF, which now has a NPDES permit for Outfall 051, is entitled to an exemption, because it was permitted—*i.e.*, "ever." So stating, DOE seeks to stretch the Agency's statements to meet the RLWTF. Certainly, the RLWTF has historically been permitted. But neither the CWA nor its regulations authorize a perpetual permit. In 1998 LANL adopted the "zero-liquid-discharge" program, and the facility was changed and rebuilt; evaporation equipment was installed, and discharges effectively stopped. The fact that a facility was once permitted under the NPDES *but was then changed* to eliminate discharges, and so is *not the same* facility, does not support a new NPDES permit.

27. DOE elaborates upon its theory that EPA's stormwater regulation program somehow proves that EPA may issue a NPDES permit for a non-

discharging facility. DOE states that the stormwater program regulates "episodic" discharges. (Supp. 8 – 9). "Episodic" discharges occur at intervals, and the intervals may be unpredictable. But the point is: there will be actual stormwater discharges in the future, because there will be precipitation, although the weather dictates the timing. The stormwater program addresses the discharges attributable to such precipitation, which are significant. EPA in 1990 offered an assessment of the nature of the stormwater problem:

> The Assessment concluded that pollution from diffuse sources, such as runoff from agricultural, urban areas, construction sites, land disposal and resource extraction, is cited by the States as the leading cause of water quality impairment. These sources appear to be increasingly important contributors of use impairment as discharges of industrial process wastewaters and municipal sewage plants come under increased control and as intensified data collection efforts provide additional information.

EPA, NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, Background and Water Quality Concerns (Nov. 16, 1990). The stormwater program clearly deals with massive discharges of contaminated waters. A very different question is presented by the current permit proposal: Whether a permit may issue where there is no discharge and no plan to discharge at all. The stormwater program offers no guidance on that question.

CONCLUSION

It is not for EPA to break through the jurisdictional limits of the CWA to issue a permit that blocks the application of federal hazardous waste laws to a

facility that admittedly treats and stores hazardous waste, and is required under RCRA to adhere to stringent regulations in the handling of such dangerous substances. The CWA permit for outfalls that have no plan to discharge has no legal basis and should be denied.

Respectfully submitted,

/s/_____

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
Attorney for Citizens
Concerned Citizens for Nuclear Safety
Honor Our Pueblo Existence
New Mexico Acequia Association

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