

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

| | | |
|-------------------------------|---|------------------|
| In re: |) | |
| |) | |
| U.S. Department of Energy and |) | |
| Triad National Security, LLC |) | NPDES Appeal No. |
| |) | |
| Permit No. NM0028355 |) | |
| _____ |) | |

Petition for Review under 40 C.F.R. §124.19

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

Attorney for Petitioners
Concerned Citizens for Nuclear Safety
Honor Our Pueblo Existence
Veterans for Peace, Chapter #63

May 9, 2022

TABLE OF CONTENTS

| | |
|--|-----------|
| Table of Authorities..... | |
| Request for Oral Argument..... | |
| Statement of Compliance with Word Count..... | |
| Petition for Review under 40 C.F.R. §124.19..... | |
| I. STATEMENT OF FACTS..... | 4 |
| II. GOVERNING LAW PRECLUDES A PERMIT FOR NON- DISCHARGING OUTFALLS..... | 26 |
| III. RESPONSES TO COMMENTS DO NOT SUPPORT THE ACTION OF REGION 6..... | 48 |
| CONCLUSION AND REQUESTED RELIEF | |
| Certificate of Service..... | |

TABLE OF AUTHORITIES

Cases

U.S. Supreme Court

| | |
|---|----------------|
| <i>Arlington v. FCC</i> , 569 U.S. 290 (2013)..... | 41 |
| <i>Chevron U.S.A. Inc. v. NRDC, Inc.</i> (“ <i>Chevron I</i> ”), 467 U.S. 837 (1984)..... | 30, 35 |
| <i>Epic Systems Corp. v. Lewis</i> , 138 S.Ct. 1612 (2018)..... | 45, 46, 48, 50 |
| <i>Morton v. Mancari</i> , 417 U.S. 535 (1974). | 47 |
| <i>S.D. Warren Co. v. Maine Board of Environmental Protection</i> , 547 U.S. 370 (2006)..... | 32, 38 |
| <i>Skinner v. Mid-America Pipeline Co.</i> , 490 U.S. 212 (1989)..... | 44 |

United States Court of Appeals

| | |
|---|----|
| <i>Citizens to Save Spencer County v. U.S. EPA</i> , 600 F.2d 844 (D.C. Cir. 1979)..... | 47 |
|---|----|

| | |
|--|-----------------|
| <i>Dalzell v. RP Steamboat Springs, LLC</i> , 781 F.3d 1201, 1209 (10th Cir. 2015)..... | 40 |
| <i>In re Lowell Vos</i> , 2009 EPA ALJ Lexis 8 (2009)..... | 38 |
| <i>In re Vos</i> , 2009 EPA ALJ LEXIS 47 at 63 (Dec. 2, 2008)..... | 32 |
| <i>League of Wilderness Defenders v. Forsgren</i> , 309 F.3d 1181 (9th Cir. 2001)..... | 39 |
| <i>National Cotton Council v. U.S. EPA</i> , 553 F.3d 927 (6th Cir. 2009)..... | 38, 39 |
| <i>National Pork Producers Council v. U.S. Environmental Protection Agency</i> , 635 F.3d 738 (5th Cir. 2011)..... | 32 , 37, 43, 49 |
| <i>National Wildlife Federation v. Consumers Power Co.</i> , 862 F.2d 580 (6th Cir. 1988)..... | 32, 38 |
| <i>National Wildlife Federation v. Gorsuch</i> , 693 F.2d 156 (D.C. Cir. 1982)..... | 32, 38 |
| <i>Natural Resources Defense Council, Inc. v. Costle</i> , 568 F.2d 1369 (D.C. Cir. 1977)..... | 40 |
| <i>Natural Resources Defense Council, Inc. v. EPA</i> , 859 F.2d 156 (D.C. Cir. 1988)..... | 32 |
| <i>Northern Plains Research Council v. Fidelity Exploration and Development Co.</i> , 325 F.3d 1155 (9th Cir. 2003)..... | 39 |
| <i>Northwest Environmental Advocates v. U.S. EPA</i> , 537 F.3d 1006 (9th Cir. 2008)..... | 39 |
| <i>Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission</i> , 327 F.3d 1019 (10th Cir. 2003)..... | 40 |
| <i>Service Oil, Inc. v. EPA</i> , 590 F.3d 545(8th Cir. 2009)..... | 32 |
| <i>Sierra Club v. El Paso Gold Mines</i> , 421 F.3d 1133 (10th Cir. 2005)..... | 38 |

United States v. 162 Megamania Gambling Devices, 231 F.3d 713.....40

Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency,
399 F.3d 486 (2d Cir. 2005).....30, 32, 35, 36, 37, 43, 49

United States District Courts

In re Massengill, 100 B.R. 276 (E.D.N.C. 1988).....47

Federal Statutes

Clean Water Act

33 U.S.C. §§ 1251 *et seq.*.....4

33 U.S.C. § 1311.....26

33 U.S.C. § 13234

33 U.S.C. § 1342.....27, 41, 45, 46, 48

33 U.S.C. § 1342(a).....33, 38, 50

33 U.S.C. § 1342(a)(1).....26, 29, 41

33 U.S.C. § 1361(a).....40

Resource Conservation and Recovery Act

42 U.S.C. § 6903.....27.

42 U.S.C. § 6903(5), (27).....6, 7, 27

42 U.S.C. § 6921 *et seq.*4

42 U.S.C. § 6925.....27, 45

42 U.S.C. § 6961.....4

Federal Regulations

Clean Water Act

40 CFR § 122.2.....29, 49

40 CFR § 122.21.....21, 40

40 CFR § 122.21(a).....21, 33

40 CFR § 122.21(a)(1).....41

| | |
|--|-------------|
| 40 C.F.R § 122.21(a)(2)(D)..... | 21 |
| 40 CFR § 122.21(c)..... | 41, 49 |
| 40 C.F.R. § 122.21(g)..... | 21 |
| 40 C.F.R. § 122.21(g)(3)..... | 21 |
| 40 C.F.R. § 122.21(g)(4)..... | 21 |
| 40 C.F.R. § 122.64..... | 33 |
| Resource Conservation and Recovery Act | |
| 40 C.F.R. § 260.10..... | 7-8, 27, 28 |
| 40 C.F.R. § 261.3..... | 7 |
| 40 C.F.R § 264.1(g)(6)..... | 8, 27, 28 |
| 40 C.F.R. §§ 264.18(a)..... | 11 |
| 40 C.F.R. §§ 264.110-120..... | 11 |

| | |
|--------------------------------|----|
| 40 C.F.R. §§ 264.190-200..... | 11 |
| 40 C.F.R. § 270.10(f)..... | 11 |
| 40 C.F.R. § 270.14(b)(11)..... | 11 |

Environmental Protection Agency Rulemaking

| | |
|--|---------|
| 68 Fed. Reg. 7176, 7202 (Feb. 12, 2003)..... | 29 |
| 71 Fed. Reg. 37744 (June 30, 2006)..... | 31, 37 |
| 73 Fed. Reg. 12321 (Mar. 7, 2008)..... | 31 |
| 73 Fed. Reg. 70418 (Nov. 20, 2008)..... | 31 |
| 77 Fed. Reg. 3152 (Jan. 23, 2012)..... | 27 |
| 77 Fed. Reg. 44494 (July 30, 2012)..... | 32 , 37 |

State Statutes

New Mexico Hazardous Waste Act

NMSA 1978, § 74-4-1 *et seq.*.....6.

State Regulations

New Mexico Ground and Surface Water Protection

20.6.2.3000-3114 NMAC.....11

REQUEST FOR ORAL ARGUMENT

Petitioners Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace (collectively, “Petitioners”) respectfully request that the Environmental Appeals Board hear oral argument in the review proceeding initiated today by Petitioners. Petitioners suggest that this proceeding involves important issues of compliance with the Clean Water Act, 33 U.S.C. §§ 1252 *et seq.* (“CWA”), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 *et seq.* (“RCRA”), by a major operating facility at Los Alamos National Laboratory.

STATEMENT OF COMPLIANCE WITH WORD LIMIT

This document complies with the word limitation of 40 C.F.R. 124.19(d)(3), because, excluding the parts of the document exempted by 40 C.F.R. 124.19(d)(3), this document contains less than 12,000 words.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In re:)
U.S. Department of Energy and)
Triad National Security, LLC) NPDES Appeal No.
)
Permit No. NM0028355)
_____)

Petition for Review under 40 C.F.R. §124.19

Three New Mexico citizen organizations, Concerned Citizens for Nuclear Safety (“CCNS”), Honor Our Pueblo Existence (“HOPE”) and Veterans for Peace Chapter #63 (“VFP”) (collectively, “Petitioners”), petition for review of the renewal of National Pollutant Discharge Elimination System (“NPDES”) Permit No. NM0028355. The Permit was issued on March 30, 2022. The time to petition for review was extended from May 2, 2022 to May 9, 2022 by order dated May 2, 2022.

CCNS, HOPE and the New Mexico Acequia Association (“NMAA”) submitted extensive comments to EPA Region 6 on October 15, 2020. CCNS, HOPE, and VFP submitted supplemental comments on March 29, 2021. The

matters raised in this Petition were presented to EPA Region 6 in those comments and other submissions in the permit renewal proceeding.

On May 5, 2022, the New Mexico Environment Department (“NMED”) issued Discharge Permit DP-1132, authorizing the operation of Solar Evaporating Tanks to dispose of discharges from the Radioactive Liquid Waste Treatment Facility (“RLWTF”). This authorization renders it entirely unnecessary to discharge hazardous and radioactive waste through Outfall 051. Petitioners are drawing the Appeal Board’s attention to this event since the fact is undisputed and it bears upon the issuance of the NPDES permit in issue here.

This case involves the application of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (“CWA”), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 *et seq.* (“RCRA”), to the same activity. Under governing precedent, EPA Region 6 is required to give both statutes the fullest application. Instead of doing so, EPA Region 6 reached out beyond the statutory limits of CWA jurisdiction to create a supposed conflict with RCRA and chose, without legal basis, to apply only the CWA here, and to prevent the application of RCRA, contrary to established law.

I. STATEMENT OF FACTS

1. Los Alamos National Laboratory (“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 DOE and Triad National Security, LLC (“Triad”). DOE and Triad are Permittees under the NPDES Permit in issue. 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.

2. Members and supporters of CCNS, HOPE and VFP are at risk of illness or injury from the release or mismanagement of radioactive and hazardous wastes at LANL. Failure to enforce RCRA at the LANL Radioactive Liquid Waste Treatment Facility (“RLWTF”) and other LANL sites increases the danger of release or mismanagement of radioactive and hazardous waste. Releases of such wastes would create a direct and immediate risk to members and supporters of CCNS, HOPE and VFP. Further, obtaining and transmitting information about the risks of LANL facilities is a critical function of CCNS. EPA’s failure to allow enforcement of RCRA at the RLWTF denies CCNS essential information about public safety that would otherwise be available to CCNS in the public RCRA permitting process.

3. New Mexico is a majority-minority state. Environmental justice and equity are major concerns. Of the 2.1 million residents of New Mexico, the four largest ethnic groups in New Mexico are: Hispanic or Latino (49.3%), American Indian and Alaska Native (Non-Hispanic) (11%), Black or African American

(Non-Hispanic) (2.6%), and White (Non-Hispanic) (36.8%). From 2016 to 2020, 142,000 residents were Veterans. Nearly 17% of the New Mexico population lives in poverty. <https://www.census.gov/quickfacts/NM>

4. DOE recently announced that LANL is one of five DOE pilot programs under the Biden Administration’s “Justice40 Initiative.” Executive Order 14008, Jan. 27, 2021 “Tackling the Climate Crisis at Home and Abroad.” <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> Justice40 addresses the effect of intersecting issues of climate and clean energy to disadvantaged communities, such as those located downwind and downstream of LANL.

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.

6. The RLWTF treats and stores 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. *See* 42 U.S.C. § 6903(5), (27). RCRA is applied in New Mexico pursuant to the New Mexico Hazardous Waste Act, § 74-4-1 *et seq.*, NMSA 1978 (“HWA”), authorized by EPA.

7. LANL has conceded that the RLWTF will “receive and treat or store an influent wastewater which is hazardous waste as defined in 40 C.F.R. § 261.3[.]” Comments on New Mexico proposed permit DP-1132, Dec. 12, 2013, Encl. 3 at 1 (DP-1132 AR 09794) (Exhibit VV).¹ Further: “The RLWTF receives and treats a small amount of hazardous wastewater[.]” *Id.* Moreover, LANL has told the New Mexico Environment Department (“NMED”) that, “[A]ll units at the TA-50 RLWTF . . . have been characterized as a SWMU [Solid Waste Management Unit] or AOC [Area of Concern] and are therefore subject to regulation under the [NMED HWA Consent Order for LANL].” (LANL letter to [Jerry] Schoeppner, Head, Groundwater Quality Bureau (Sept. 11, 2014)) (Exhibit WW) (DP-1132 AR at 12732).

8. Until late 2010, the RLWTF discharged to the environment certain pollutants that are regulated under the CWA through an outfall (“Outfall 051”) into Effluent Canyon, a tributary to Mortandad Canyon. Outfall 051 is regulated by LANL’s NPDES permit No. NM0028355, issued in 2014, which was renewed on March 30, 2022 and the subject of this appeal.

9. 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 and HWA as a “wastewater treatment unit”

¹ See administrative record documents at <https://www.epa.gov/nm/los-alamos->

(“WWTU”) and an NPDES discharge. See 42 U.S.C. § 6903(27); 40 C.F.R. § 260.10 (*Tank system, Wastewater treatment unit*), and § 264.1(g)(6). LANL’s position is stated, *e.g.*, in Review Comments, Draft DP-1132, Dec. 12, 2013, Encl. 3 at 1-2 (Exhibit VV).

10. The RLWTF has undergone major changes in its configuration and operation, which in turn affect its regulatory status. 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, except for certain releases in June 2019, March and August 2020, described below.

11. The history of discharges from the RLWTF is shown in quarterly monitoring reports submitted by DOE to the NMED Ground Water Quality Bureau.² (LANL also submits Discharge Monitoring Reports to EPA).

² Quarterly reports are: AR 04030-36 (3d Quarter 2010) (Oct. 28, 2010); AR 04044-48 (4th Quarter 2010) (Jan. 11, 2011); AR 04578-83 (1st Quarter 2011) (Apr. 19, 2011); AR 05209-14 (2d Quarter 2011) (July 25, 2011) (“all effluent was evaporated on-site.” AR 05210); AR 05237-42 (3d Quarter 2011) (Oct. 21, 2011) (listed in 2018 AR); AR 05303-08 (4th Quarter 2011) (Jan. 24, 2012); AR 08215-21 (1st Quarter 2012) (Apr. 26, 2012); AR 08235-41 (2d Quarter 2012) (July 17, 2012); AR 08323-29 (3d Quarter 2012) (Oct. 29, 2012); AR 08329-32 (4th Quarter 2012) (Jan. 30, 2013); AR 08681-83 (1st Quarter 2013) (Apr. 30, 2013); AR 09270-84 (2d Quarter 2013) (July 25, 2013); AR 09577-84 (3d Quarter 2013) (Oct. 17, 2013); AR 09921-24 (4th Quarter 2013) (Jan. 21, 2014); AR 10193-203 (1st Quarter 2014) (Apr. 16, 2014) (listed in 2018 AR); AR 10253-56 (2d Quarter 2014) (July 22, 2014); AR 12837-41 (3d Quarter 2014) (Oct. 27,

12. LANL management in 1998 adopted “a goal of zero discharge of radioactive liquid effluent to the environment.” (Memo by D.J. Erickson and T. Baca, July 10, 1998) (Exhibit XX). A 1998 LANL report³ recited LANL’s objective to attain zero liquid discharge: “Determining viable options for eliminating the discharge of treated radioactive liquid waste to Mortandad Canyon was the directive of the outfall 051 elimination working group.”⁴

13. The 1998 report emphasizes that the adoption of zero liquid discharge will cause elimination of the RCRA Wastewater Treatment Unit (“WWTU”) exemption, 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,

2014); AR 12921-24 (4th Quarter 2014) (Jan. 13, 2015); AR 12872-74 (1st Quarter 2015) (Apr. 23, 2015); AR 13239-42 (2d Quarter 2015) (July 28, 2015); AR 13255-58 (4th Quarter 2015) (Jan. 20, 2016); AR 13266-71 (1st Quarter 2016) (Apr. 28, 2016); AR 13413-16 (2d Quarter 2016) (July 28, 2016); AR 13417-20 (3d Quarter 2016) (Oct. 19, 2016); AR 13438-41 (4th Quarter 2017) (Jan. 18, 2017); AR 13476-79 (1st Quarter 2017) (Apr. 17, 2017); AR 13840-43 (3d Quarter 2017) (Oct. 30, 2017); AR 15189-92 (4th Quarter 2018) (Jan. 29, 2018); AR 14112-16 (1st Quarter 2018) (May 1, 2018); AR 14122-23 (2d Quarter 2018) (July 27, 2018); AR 14146-57 (3d Quarter 2018) (Oct. 18, 2018); AR 14352-69 (4th Quarter 2018) (Jan. 30, 2019); AR 14528-56 (1st Quarter 2019) (Apr. 17, 2019); AR 14636-72 (2nd Quarter 2019) (July 22, 2019); and AR 14860-93 (3d Quarter 2019) (Oct. 28, 2019).

³ Moss, et al., “Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility,” (1998) (Ex. A).

⁴ *Id.*, Ex. A at v.

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.”⁵

14. 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. Additional sampling procedures would likely be needed 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.⁶

15. 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.⁷

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 [waste acceptance criteria] and

⁵ *Id.*, Ex. A at 12.

⁶ *Id.*, Ex. A at 32.

⁷ *Id.*, Ex. A at Table 6.

management of facility connections to the collection system, is a necessary part of this process. Specific monitoring regimes will be required by the RLWTF.⁸

16. If the RLWTF were regulated under RCRA, it would be subject to specific protective RCRA requirements, calling for, *e.g.*, a public permitting process for approval of new construction (40 C.F.R. § 270.10(f)), assessment of compliance with safety standards for seismic risk (40 C.F.R. §§ 264.18(a), 270.14(b)(11)), 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). These requirements would be applied in a public process, enabling members of the public to advocate regulatory compliance at higher levels of public health and safety assurance than are provided under the New Mexico ground water quality regulations. 20.6.2.3000-3114 NMAC. LANL has maintained that these and other requirements do not apply to the RLWTF under its RCRA WWTU exemption.

17. After considering the impact of the RLWTF's loss of the RCRA exemptions, LANL still advised NMED that zero liquid discharge was LANL's "ultimate goal."⁹ LANL repeatedly so advised EPA.¹⁰ NMED itself has stated publicly that elimination of Outfall 051 is a desirable goal.¹¹

⁸ *Id.*, Ex. A at 37.

⁹ Letter, Hanson and Rae to Bustamante (Sept. 3, 1998) (Ex. B).

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

At locations other than the RLWTF, under its sitewide Outfall Reduction Program, LANL has striven to reduce the number of outfalls subject to NPDES regulation.¹⁴

LANL asked EPA to delete from the NPDES permit outfalls that are "no longer in

¹⁰ 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).

¹¹ See Letter, Yanicak to Coghlan (CCNS) (May 12, 1999) at 2 (Ex. F).

¹² 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).

¹³ 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).

¹⁴ 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).

use.”¹⁵ LANL reported that outfall 001B was out of use and could be deleted.¹⁶ LANL stated that outfall 03A028, associated with the closed PHERMEX facility, could be deleted.¹⁷ The 2007 NPDES permit omitted Outfalls 001B and 03A028.¹⁸ NMED itself has suggested that certain unused outfalls be deleted from the permit.¹⁹ LANL’s 2012 NPDES re-application omitted these outfalls.²⁰ The 2008 LANL Site-Wide Environmental Impact Statement (“SWEIS”) reports the closing of several outfalls.²¹ 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. . .”²² In 1999-2005

¹⁵ Letter, Gurulé to Hathaway (Nov. 25, 1998) (Ex. BB); Letter, Erickson to Hathaway (Oct. 26, 1999) (Ex. CC).

¹⁶ LANL Comments on EPA Preliminary Draft NPDES Permit, Part II at 5 (Mar. 17, 2005) (Ex. DD).

¹⁷ LANL NPDES Permit No. NM0028355 Comments on Draft Permit, at 8-9, 13, 15 (Mar. 30, 2006) (Ex. EE).

¹⁸ Letter, Lane to Wilmot with attached NPDES Permit (July 17, 2007) (Ex. FF).

¹⁹ 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).

²⁰ Los Alamos National Laboratory, NPDES Permit No. NM0028355, 2012 NPDES Permit Re-Application (January 27, 2012) (Ex. W).

²¹ 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).

²² *Id.*, Ex. JJ, SWEIS at 4-43.

RLWTF discharge volume has steadily decreased.²³ The 2008 SWEIS notes that elimination of RLWTF discharges would minimize the potential to mobilize contaminated sediments.²⁴

19. DOE/EIS-0380-SA-06: *Final Supplemental Analysis* of the 2008 SWEIS shows a projected reduction in liquid waste output from the RLWTF:

The 2008 LANL SWEIS projected total of 5.3 million gallons per year of liquid radioactive waste would be treated at the Radioactive Liquid Waste Treatment Facility (RLWTF) (DOE 2008a, ch.5, p. 136, Table 5-37). Based on the projected liquid waste that would be treated under [plutonium] pit [triggers for nuclear weapons] production (1.7 million gallons per year) and the current annual treatment of liquid waste (one million gallons), it is expected that the proposed action would not exceed the 2008 LANL SWEIS analyzed projections (LANL 2019b). p. 69 of pdf. <https://www.energy.gov/nepa/downloads/doeeis-0380-sa-06-final-supplement-analysis>

20. However, LANL has consistently scheduled Outfall 051 to remain in the NPDES permit.²⁵ Despite the RLWTF modifications to achieve zero liquid discharge, LANL has sought to maintain the RCRA exemptions for the RLWTF. When LANL told EPA about planned construction of concrete “evaporation tanks”

²³ *Id.*, Ex. JJ, SWEIS Table 4-13, at 4-46; 4-48.

²⁴ *Id.*, Ex. JJ, SWEIS at 5-38; *see* G-76.

²⁵ 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).

for the RLWTF, LANL also put forth its theory that the “tanks” would be exempt from RCRA.²⁶

21. The 2008 SWEIS, Appendix G, presents alternative designs for the “upgrade” of the RLWTF.²⁷ In the first Record of Decision (“ROD”) based on the 2008 SWEIS, DOE determined to pursue design of a Zero Liquid Discharge RLWTF.²⁸ In a later ROD, DOE expressly determined to construct and operate a new RLWTF and operate the Zero Liquid Discharge facility.²⁹

22. LANL’s 2012 NPDES permit renewal application sought a permit for 11 outfalls, one of which was Outfall 051.³⁰ 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

²⁶ Letter, Grieggs to Hall (May 14, 2007) (Ex. KK).

²⁷ Ex. JJ, SWEIS at G-60, G-73, G-83, G-88.

²⁸ 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).

²⁹ 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).

³⁰ 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.

Evaporation Tanks at Technical Area (TA) 52 under the Zero Liquid Discharge (ZLD) Project.”³¹

23. LANL in 2012 sought a permit only for a *possible* discharge from Outfall 051, contingent on unavailability of evaporation equipment or capacity needs:

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.*³²

LANL then 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.*”³³ 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.”³⁴

³¹ *Id.*, Ex. W at 7 of 9.

³² *Id.*, Ex. W at 5 of 9 (*emphasis supplied*).

³³ *Id.*, Ex W at Form 2C (*emphasis supplied*).

³⁴ 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*).

24. LANL's 2013 NPDES permit comments repeat that Outfall 051 is included in the permit only as a fallback, for use if evaporation equipment is unavailable:

The Laboratory's TA-50 [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*.³⁵

LANL did not explain how both evaporation systems might simultaneously become unavailable, nor how likely such a situation would be.

25. LANL's comments also asked leave to supply pollutant values for Outfall 051 discharges 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."³⁶

³⁵ 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*).

³⁶ *Id.*, Ex. OO at 5, ¶ 8 (*emphasis supplied*).

26. A mid-2014 LANL report states: “Discharges from Outfall 051 decreased significantly after the mid-1980s and effectively ended in late 2010.”³⁷ In late 2014 NMED reported to EPA Region 6 that Outfall 051 had not discharged since November 2010.³⁸ 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.”³⁹

27. The previous NPDES Final Permit, dated August 12, 2014, refers to regulation of discharges from Outfall 051 *if discharges resume*.⁴⁰ EPA, in issuing a draft permit modification on December 19, 2014, 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.”⁴¹ Thus, EPA saw no urgency

³⁷ Isotopic evidence for reduction of anthropogenic hexavalent chromium in Los Alamos National Laboratory groundwater, 373 Chemical Geology 1, 4 (May 12, 2014) (Ex. PP).

³⁸ Letter, Yurdin to Dorries with Inspection Report, 4th page (Aug. 5, 2014) (Ex. QQ).

³⁹ 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).

⁴⁰ 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).

⁴¹ Letter, Hosch to Lebak, with U.S. EPA Public Notice of Draft NPDES Permit(s), Fact Sheet at 4 (Dec. 19, 2014) (Ex. TT).

to determine the Outfall's compliance, since a discharge from Outfall 051 was not imminent.

28. Responding to an inquiry from CCNS, EPA Region 6 in 2015 indicated that it had issued a CWA permit for Outfall 051, even though the RLWTF has been "recently redesigned to eliminate all discharges," because LANL requested the permit and stated that, under certain circumstances, "e.g., maintenance, malfunction, and/or capacity shortage," a discharge "*could* occur," explaining that "EPA generally defers to a permit requester's determination that a discharge *could* occur and that permit coverage is needed." Letter, Dwyer to Lovejoy, Dec. 18, 2015 (Exhibit BBB) (*emphasis supplied*).

29. EPA Region 6 then acknowledged that the CWA permit could give rise to a WWTU exemption, precluding RCRA regulation, but EPA stated expressly that it would give *no consideration to RCRA* or the WWTU exemption:

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.

Id.

30. CCNS in 2016 requested Region 6 to terminate the 2014 CWA permit (Request to Terminate NPDES Permit #NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility, June 17, 2016) (the "Request"). Region 6 responded on August 16, 2017. (Letter, Honker to Lovejoy et al.)

(Exhibit YY). EPA’s letter said that the permit for Outfall 051 was sought “in case of a future discharge,” stating, that if the evaporation equipment were taken off line and a discharge were necessary, a discharge “*could occur.*” (at 2) (*emphasis supplied*). EPA said again: “EPA generally defers to an owner/operator’s determination that a discharge *could* occur and that permit coverage is needed.” *Id.* (*emphasis supplied*). EPA also asserted that EPA has authority, if requested, to issue a permit authorizing a discharge, in case one should occur.

31. EPA then emphasized, again, that the fact that a permit would give the RLWTF an exemption from RCRA as a WWTU was

outside the scope of our decision

and

has no bearing on EPA’s NPDES permitting decisions, which must be made based on the requirements of the CWA and implementing regulations.

Id. 3 (*emphasis supplied*).

32. CCNS appealed to the EPA Environmental Appeals Board, which denied relief in an opinion dated March 14, 2018. The Court of Appeals for the Tenth Circuit dismissed CCNS’s appeal on the basis of standing. (CA10 No. 18-9542) (April 23, 2020), *rehearing denied*, (June 23, 2020), and the Supreme Court denied certiorari.

33. In March 2019 Permittees DOE and Triad filed the present application to renew the expiring Permit No. NM0028355. NPDES regulations require an

application from one who “discharges or proposes to discharge pollutants.” 40

CFR 122.21(a). Further, discharge volumes must be stated:

(a)(2)(D) Applicants for existing industrial facilities (including manufacturing facilities, commercial facilities, mining activities, and silvicultural activities), must submit Form 2C.

* * *

(g) Application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers. Existing manufacturing, commercial, mining, and silvicultural dischargers applying for NPDES permits, except for those facilities subject to the requirements of § 122.21(h), shall provide the following information to the Director, using application forms provided by the Director.

* * *

(3) Average flows and treatment. A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outfall, including process wastewater, cooling water, and stormwater runoff; the average flow which each process contributes; and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. . . .

(4) Intermittent flows. If any of the discharges described in paragraph (g)(3) of this section are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence (except for stormwater runoff, spillage or leaks).

40 C.F.R. § 122.21.

34. The EPA instructions for Form 2C state:

Complete this form and Form 1 if your facility is an existing manufacturing, commercial, mining, or silvicultural facility that *currently discharges process wastewater*.

EPA Form 3510-2C (March 2019) (*emphasis supplied*). Concerning intermittent discharges, EPA’s instructions state:

By relevant outfall number, identify each operation that has intermittent or seasonal discharges. Indicate the average frequency (days per week and months per year), the long-term average and maximum daily flow rates in mgd, and the duration of the intermittent or seasonal discharges. Base your answer on actual data if available. Otherwise, provide your best estimate. Report the average of all daily values measured during days when the discharge occurred for “Long-Term Average,” and report the highest daily value for “Maximum Daily.”

Id.

35. Permittees DOE and Triad stated in their March 2019 renewal application that the RLWTF would discharge into Effluent Canyon. 2019 App., Form 1, Appx. H, Enclosure 1 at H-100. They stated that the average flow from the RLWTF was 20,000 gallons per day. 2019 App., Form 2C for Outfall 051, at 1, 2 of 15. They stated under “Frequency,” in columns captioned “specify average,” that Outfall 051 discharges intermittently four days per week, and 12 months a year. 2019 Application Form 2C, Outfall 051, at 2 of 15.

36. Further, DOE and Triad stated in their Fact Sheet that treated effluent may be discharged to Outfall 051. 2019 App., Outfall 051 Fact Sheet at 5 of 10. Average discharge was stated again as 20,000 GPD. *Id.* 7 of 10. Permittees stated in their Outfall 051 Fact Sheet that the average flow rate is 0.020 MGD [million gallons per day] and the daily maximum flow is 0.040 MGD, with an estimated frequency of discharge of four days a week. *Id.* 7.

37. Permittees DOE and Triad’s 2019 statements, referred to above, giving the frequency and volume of discharge from Outfall 051, are inaccurate and

are misstatements of fact, since discharges from Outfall 051 ended in 2010 (with a single exception in June 2019, termed operational readiness discharge). DOE and Triad's 2021 statements (Permittees' Supp. 17 – 18) indicate that the mechanical evaporator was being serviced and for that reason releases were made in March and August 2020.

38. In the 2012 permit renewal application, the Permittees stated that they would only discharge via Outfall 051 if the evaporation equipment (Mechanical Evaporator and Solar Evaporation Tanks) were unavailable:

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 Mechanical Evaporator and/or Zero Liquid Discharge (ZLD) Solar Evaporation Tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in LANL scope/mission.

Form 2C, at 5 of 9 (Feb. 2012).

39. The 2019 renewal application adopts and incorporates all prior applications, including the 2012 application:

Due to the complex nature of the NPDES Permit Re-Application and potential need for supplemental information, the applicant requests that all previous applications, modifications, maps, data, and pertinent correspondence submitted in reference to NPDES Permit No. NM0028355 transmitted to the EPA up to the time the new permit is issued, be considered part of this re-application.

Introduction at 1 of 13.

40. In November 2019, DOE submitted passages from the 2012 NPDES renewal application in NMED proceedings about DP-1132 to describe the Outfall 051 discharges planned, as of 2019:

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 Mechanical Evaporator and/or Zero Liquid Discharge (ZLD) Solar Evaporation Tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in LANL scope/mission.

Form 2C, at 5 of 9 (Feb. 2012) (Ex. ZZ).

41. In November 2019 NMED hearings, witnesses for both DOE and NMED testified that a discharge from the RLWTF, based on the stated condition that evaporation equipment be unavailable, is “highly unlikely.” (Transcript, Nov. 14, 2019, In re *Proposed Discharge Permit DP-1132 for the [RLWTF]*, at 90 (Beers, witness for DOE); at 212 (Pullen, witness for NMED) (Ex. AAA).

42. NMED on May 5, 2022 issued a permit, DP-1132, for the Solar Evaporation Tanks (Letter, John Rhoderick (NMED) to DOE-NNSA and Triad, re DP-1132), putting those evaporation tanks into operation and making it additionally unlikely that there should be any discharge through Outfall 051.

43. Other outfalls are included in the NPDES permit renewal, even though Permittees do not now discharge from them nor propose to discharge from them. These are listed in the Permittees’ Fact Sheet:

1. Outfall 13S (Sanitary Wastewater System (SWWS) Plant), located at TA-46 and discharging to Canada del Buey:

Outfall 13S did not discharge between October 2014 and September 2018, analytical results were taken from operational flows. Fact Sheet at 5.

2. Outfall 03A027 (Strategic Computing Complex (SCC) Cooling Tower), located at TA-3 and discharging to a perennial reach of Sandia Canyon:

Outfall 03A027 did not discharge from September 2016 to at least May 2019, so older monitoring data was submitted. *Id.* 5.

3. Outfall 03A113 (cooling tower), located at TA-53 (Los Alamos Neutron Science Center (LANSCE)) and discharging to an ephemeral reach of Sandia Canyon:

Stormwater also mixes and is discharged from this outfall (the application stated stormwater discharges occurred 49 days between October 2017 and September 2018). The cooling towers identified as TA-53-293 are not currently in use but could return to service in the future, a Notice of Change will be submitted for these future changes prior to their implementation and impact to the outfall. *Id.* 5 - 6.

4. Outfall 03A160 (cooling tower), located at TA-35 and discharging treated cooling water from the National High Magnetic Field Laboratory (NHMFL) to Ten Site Canyon, a tributary to Mortandad Canyon:

It is the intent of the facility to no longer discharge to the outfall unless there is an operational upset that prevents cooling water from being discharged to the SWWS. The NHMFL is currently constructing a water treatment system for the cooling towers, a Notice of Change will be submitted for these future changes prior to their implementation and impact to the outfall. *Id.* 6.

5. Outfall 05A055 for High Explosive Wastewater Treatment Facility

(HEWTF) at TA-16, discharging to Cañon de Valle:

Effluent from the HEWTF is normally routed to the electric evaporator(s), the facility did not discharge to the outfall from October 2014 to September 2018. Operational samples were submitted for analytical testing. *Id.* 6-7.

Since November of 2007, the HEWTF has used the electric evaporator and not discharged through the permitted outfall. The permittees will continue to use the evaporator except under abnormal conditions. at H-125.

44. Like Outfall 051, these outfalls are not used for the discharge of pollutants, and they are outside the scope of NPDES permitting.

II. GOVERNING LAW PRECLUDES A PERMIT FOR NON-DISCHARGING OUTFALLS

45. Whether to issue a NPDES permit that includes Outfall 051 and other unused outfalls is governed by the applicable law, namely: the CWA, RCRA, and regulations issued by EPA under these laws.

46. The CWA forbids the discharge of pollutants into the waters of the United States, 33 U.S.C. § 1311, but it authorizes EPA to

issue a permit for the discharge of any pollutant, or combination of pollutants.

33 U.S.C. § 1342(a)(1).

47. RCRA authorizes EPA to issue regulations:

requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subtitle, to have a permit issued pursuant to this section.

42 U.S.C. § 6925. RCRA is enforced in New Mexico through the HWA, which NMED is authorized to enforce pursuant to EPA authorization. See EPA Notice, 77 Fed. Reg. 3152 (Jan. 23, 2012).

48. To address potential conflicts between CWA and RCRA regulation of a facility, Congress has statutorily exempted certain discharges from RCRA regulation, and EPA has added regulatory exemptions. Here relevant are 42 U.S.C. § 6903(27); 40 C.F.R. §§ 260.10 (*Tank system, Wastewater treatment unit*), 40 C.F.R. §§ 264.1(g)(6). The cited provisions exempt a *discharge* from a §1342 NPDES point source:

(27) The term “solid waste” . . . does not include . . . industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880) [33 U.S.C. § 1342], . . .

42 U.S.C. § 6903. Further, there is an exemption for a *tank system* that is subject to regulation under §1342:

Tank system means a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system.

Wastewater treatment unit means a device which:

(1) Is part of a wastewater treatment facility that is subject to regulation under either section 402 [33 U.S.C. § 1342] 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.

40 C.F.R. § 260.10.

(g) The requirements of this part do not apply to:

* * *

(6) The owner or operator of . . . a wastewater treatment unit as defined in § 260.10 of this chapter

40 C.F.R. § 264.1(g)(6).

49. DOE and Triad have asserted that the RLWTF is subject to the WWTU exemption and so need not comply with RCRA. See ¶ 8, *supra*. Key to their claim that the RLWTF is a “wastewater treatment unit” is the contention that it is “subject to regulation under . . . section 402 . . . of the Clean Water Act [33 U.S.C. § 1342].”

50. The RLWTF does not now discharge any pollutant via Outfall 051 and does not propose to do so, except, possibly, DOE has stated, in event of unavailability of evaporation equipment.⁴² All parties discount such a situation as “highly unlikely.” See ¶ 42, *supra*. It is all the more unlikely now that the Solar Evaporation Tanks are authorized to operate. At the same time, it is recognized

⁴² A discharge occurred on June 18, 2019. The purpose of the discharge was said to be operational readiness. The actual purpose has never fully been explained. See Tr. 215-18, Nov. 14, 2019 (Ex. AAA). DOE’s and Triad’s filings limit future discharges to occurrence of unavailability of evaporation equipment or changes in capacity requirements. At the time of this discharge the Mechanical Evaporator was functioning. The Solar Evaporation Tanks are now authorized to operate as well.

that hazardous waste is currently, and foreseeably, managed by the RLWTF. See ¶ 6, *supra*.

51. EPA Region 6 has stated that a NPDES permit was issued for Outfall 051 because a discharge “could occur.” However, Congress did not include in the CWA any authority to issue a permit for a discharge that “could occur,” nor for a “potential” or a “capability” to discharge. A “potential discharge” is, in literal terms, the *absence* of any discharge. But the limit of EPA’s jurisdiction to issue an NPDES permit is “the discharge of any pollutant, or combination of pollutants.” 33 U.S.C. § 1342(a)(1). And “discharge” means “[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 discharge through Outfall 051, there is no legal basis for a CWA permit.

52. The legal issue has been thoroughly litigated. EPA in 2003 issued CWA regulations for concentrated animal feeding operations (“CAFOs”).⁴³ EPA’s premise was that any large CAFO (as defined) has the *potential* to discharge, and so must obtain a NPDES permit:

⁴³ 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).

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.⁴⁴

In *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005), the Second Circuit rejected EPA’s premise, holding 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 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*).

Under analysis directed by *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), 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’.

Waterkeeper Alliance, 399 F.3d at 506.

53. Despite that categorical ruling, after *Waterkeeper Alliance* EPA drafted new CAFO regulations, again seeking to regulate facilities that were not

⁴⁴ *Id.*, at 7202 (*emphasis supplied*).

discharging—but supposedly had a “potential” to discharge.⁴⁵ This time, EPA assumed that it could regulate “any person who discharges or proposes to discharge pollutants,”⁴⁶ and issued the 2008 CAFO rules, containing criteria purportedly intended to identify facilities that were “proposing to discharge.”^{47, 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 The Fifth Circuit rejected EPA’s second attempt to issue CWA permits based upon a “potential” to discharge:

[T]he 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. . . . 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.

⁴⁵ 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).

⁴⁶ 71 Fed. Reg. at 37747-48.

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

⁴⁸ 73 Fed. Reg. at 70423.

⁴⁹ 73 Fed. Reg. at 70423-24.

National Pork Producers Council v. U.S. Environmental Protection Agency, 635 F.3d 738, 750 (5th Cir. 2011).

54. After *National Pork*, EPA stopped trying to impose a permit requirement for a “potential” discharge. EPA withdrew regulations requiring a NPDES permit for a facility that, by EPA’s criteria, “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 See also: *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 380-81 (2006); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 550 (8th Cir. 2009); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988); *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *In re Vos*, 2009 EPA ALJ LEXIS 47 at 63 (Dec. 2, 2008). EPA did not seek certiorari in *Waterkeeper Alliance*, nor in *National Pork*; instead, it withdrew the contested regulations.

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.

55. Here, the legal question before EPA is: Is the RLWTF “subject to regulation under . . . section 402 of the Clean Water Act” in the language of the WWTU exemption? The CWA grants CWA jurisdiction only over “the discharge of any pollutant, or combination of pollutants.” 33 U.S.C. § 1342(a). EPA’s regulations state, further, that a CWA permit is required for “[a]ny person who discharges or proposes to discharge pollutants.” 40 C.F.R. § 122.21(a)(1). In addition, the CWA requires that any CWA permit:

can be terminated or modified for cause including, but not limited to, the following:

* * *

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

—thus, indicating that, if there is no discharge, the permit should be terminated.

EPA’s parallel regulations state that a permit is terminable for the elimination of discharge and that the causes for termination expressly apply in this renewal proceeding:

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

* * *

(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. It is clear that the CWA does not authorize the permitting of a facility whose discharge has been terminated—such as the RLWTF.

56. The Permittees argue that they seek a permit 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. (Supp. 13. See also Supp. 3, 8; Citizen Comments, ¶¶ 37-41). In its supplemental comments, Permittees add only that they plan to operate Outfall 051 in an “integral manner.” (Supp. 13, “integral role,” 18, “integral component”) with the evaporation equipment. They do not explain this statement, but it clearly does not amount to a plan or proposal actually to discharge via the outfall in the future.

57. In a Notice of Planned Change (Feb. 25, 2021), filed with supplemental comments, Permittees substitute new data concerning the volume of possible discharges from Outfall 051 for the baseless “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 constitute a quantity that Permittees plan or propose to discharge in the future. Permittees’ position remains that they plan to discharge via Outfall 051 only *if* the evaporation equipment is unavailable or their needs to discharge wastewater change.

58. Permittees argue that their stated intention to discharge *only if* certain conditions occur is sufficient to support a NPDES permit. Permittees’ argument is

presented entirely without reference to the applicable statute, regulations, and caselaw, which control here. Numerous decisions establish that the element of a “discharge” is clear statutory language under the analysis required by *Chevron I*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), and is not met by anything less. Thus, *Waterkeeper Alliance* states unambiguously 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 Alliance, 399 F.3d at 504-05. The Second Circuit emphasized that its decision was based on *Chevron I* 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).

59. Permittees assert that *Waterkeeper Alliance* 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 the Permittees claim 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.").

Continuing, the court emphasized that to base a permit upon a “potential” discharge violates the limitations that Congress laid down:

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 Natural 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 Alliance, 399 F.3d at 505.

60. 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.

* * *

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 Alliance* and *National Pork* EPA did not seek certiorari 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 on the record 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.

61. 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. *See also 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.

62. The element of a discharge is key to CWA jurisdiction. Thus, 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. 1977) (exclusions for silvicultural, various animal feeding operations, and other operations held unauthorized).

63. The reviewing court in each case held the CWA unambiguous; therefore, its analysis invoked *Chevron I*: “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.

64. If the CWA language left any room for doubt (which it does not), *Chevron 2* analysis shows that Permittees’ 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). *See Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1036 (10th Cir. 2003) (Responsible agency’s regulations offer important guidance as to the meaning of ambiguous terms.). 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 (10th Cir. 2000) (*quoting Chevron*, 467 U.S. at 842-44); *see also Seneca-Cayuga Tribe, supra*, at 1040, 1043.

65. Here, 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 shows that a proposed discharge is one that is 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; 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.

66. For such reasons the additional five outfalls that Permittees seek 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.⁵²

⁵² 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 Permittees’ 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. Permittees 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. Permittees reported, “No Discharge During Monitoring Period,” on the monthly, quarterly and yearly DMRs. *Id.*
5. Outfall 05A055: Permittees state 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. Permittees reported, “No

67. Permittees urge that the statutory limits enforced in *Waterkeeper Alliance* and *National Pork* must be ignored if the permit applicant *requested* the permit. (Supp. 5). They contend that *Waterkeeper Alliance* and *National Pork* say nothing about issuance of a NPDES permit to a person who “voluntarily” requests one. (Supp. 5 – 6). 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 Alliance*, 399 F.3d at 505.

68. If Permittees’ 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

Discharge During Monitoring Period,” on the monthly, quarterly and yearly DMRs. *Id.*

Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218-19 (1989). Congress delegated to EPA the authority to issue a permit only for a “discharge,” not for a possible future discharge that is not planned but only imaginary, and certainly not for an entity that simply requests a permit for its own convenience.

69. 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 law. To litigate about indicia of “voluntariness” of an unauthorized permit is a fool’s errand and would only encourage the fabrication of permitting history. The idea that EPA can disregard the statutory limits when an entity “requests” a 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.

70. Permittees assert that the possibility of a 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 in the Waste Management and Risk Mitigation Facility. 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 for 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 fabrication.

71. The reality is that the RLWTF manages hazardous waste, and RCRA directs that such a facility must have a hazardous waste permit. 42 U.S.C. § 6925. Thus, this case poses the question: Should RCRA be applicable to the RLWTF, in accordance with 42 U.S.C. § 6925, or should the CWA, 33 U.S.C. § 1342, which regulates discharges, be deemed applicable to the non-discharging RLWTF, to render it exempt from RCRA regulation?

72. That question presents a possible conflict between two federal statutes, the CWA and RCRA. Recognized principles of statutory interpretation apply here. First, a decisionmaker must strive to avoid finding a statutory conflict, such that one statute must be displaced; the decisionmaker must, to the contrary, seek to give effect to both statutes. Thus: “the canon against reading conflicts into statutes is a traditional tool of statutory construction.” *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018). The Supreme Court in *Epic Systems* said:

When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at “liberty to pick and choose among congressional

enactments” and must instead strive “to give effect to both.” *Morton v. Mancari*, 417 U. S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing “a clearly expressed congressional intention” that such a result should follow. *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U. S. 528, 533, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995). The intention must be “clear and manifest.” *Morton, supra*, at 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290. And in approaching a claimed conflict, we come armed with the “stron[g] presum[ption]” that repeals by implication are “disfavored” and that “Congress will specifically address” preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U. S. 439, 452, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988).

Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1624 (2018).

73. Here, EPA Region 6 made no effort to avoid a statutory conflict. Even though (1) the CWA authorizes a permit *only* for a “discharge of any pollutant, or combination of pollutants” (33 U.S.C. § 1342), (2) courts have repeatedly held that the CWA *does not authorize* a permit for a “possible” discharge, (3) DOE had no intention to discharge through Outfall 051, and (4) Congress and EPA have established a structure for resolving the conflict in the WWTU exemption based on an actual discharge—EPA Region 6 strived to *create* a new conflict with RCRA, reaching out to break through the jurisdictional limits of the CWA, and holding that, because a discharge “could occur,” the CWA somehow requires a permit for Outfall 051. EPA Region 6’s expansive, and unsupported, interpretation of the CWA’s jurisdiction created a supposed conflict with RCRA regulation, invoking the WWTU exemption, and denying RCRA any

effect. EPA's decision produces a useless CWA permit, which as to the RLWTF regulates nothing, and nullifies RCRA regulation of the RLWTF, which is preempted by its useless CWA permit.

74. The decision cannot be supported by concepts of implied repeal. "Repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974). In any case, the CWA cannot have impliedly repealed RCRA, because RCRA was enacted in 1976, and the CWA was enacted in 1972.

75. Most basically, EPA Region 6 may not "pick and choose" the federal law that it will apply; rather, it must, in interpreting the two statutes, give effect to both:

When there are two acts upon the same subject, the rule is to give effect to both if possible The intention of the legislature to repeal 'must be clear and manifest.' *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

Morton v. Mancari, 417 U.S. 535, 551 (1974). Further:

[T]he maximum possible effect should be afforded to all statutory provisions, and, whenever possible, none of these provisions rendered null or void.

Citizens to Save Spencer County v. U.S. EPA, 600 F.2d 844, 870 (D.C. Cir. 1979).

See also In re Massengill, 100 B.R. 276 (E.D.N.C. 1988).

76. Instead, EPA Region 6 *expressly disregarded* RCRA, stating flatly that RCRA, and hazardous waste regulation, are

outside the scope of our decision

and

ha[ve] no bearing on EPA’s NPDES permitting decisions . . .

Ex. YY at 3, which decisions were made without considering their impact on hazardous waste regulation, which was to nullify RCRA.

77. But EPA does not have discretion to formulate environmental policy in disregard of the enactments of Congress. EPA may not ignore the Supreme Court’s admonition that courts (and by implication agencies) cannot selectively enforce the statutes enacted by Congress:

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law should be. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it’s the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Epic Systems, 138 S.Ct. at 1624.

III. RESPONSES TO COMMENTS DO NOT SUPPORT THE ACTION OF REGION 6

78. In its Responses to Comments (March 30, 2022), EPA Region 6 states that it has issued a permit for Outfall 051 (and other non-discharging outfalls) because they constitute a “potential discharge.” Responses at 10-11. EPA argues that “The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis.” (at 10). But a “potential discharge” is, if anything, the absence of any discharge such as CWA § 1342 requires.

Although EPA has meticulously described a “discharge” as “[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), it has nowhere defined a “potential discharge,” and for good reason, because, Congress addresses the real world, and in the CWA Congress authorized only the regulation of actual discharges occurring in the real world, not imaginary “possible” or “potential” ones. If *Waterkeeper Alliance* and *National Pork* establish anything, it is that EPA cannot claim the authority to regulate what EPA supposes is a “potential” discharge.

79. EPA asserts also that a permit must be available before a discharge occurs, which is true, but EPA regulations include those who “propose” to discharge. Under the regulations, a proposed discharge is one that is actually planned and thereafter carried out (See 40 C.F.R. § 122.21(c))—something entirely missing here, where a discharge would only occur when all the existing evaporation equipment is inoperative, a circumstance that is “highly unlikely.” (See ¶ 42).

80. EPA also contends that there were discharges from Outfall 051 in 2019 and 2020. (Responses at 11). These were mostly attributed by LANL to the lack of evaporation equipment. But the Solar Evaporation Tanks have now been authorized to operate, making it even more than “highly unlikely” that a discharge would be necessary. Importantly, the statutory and regulatory references to

discharges are “forward-looking” (Permittees’ Supp. comments at 3). For the *future*, Permittees do not assert that there will be discharges due to unavailability of evaporation equipment. Thus, there is no legal basis to issue a CWA permit.

81. EPA Region 6 flatly insists that it may issue a CWA permit to a non-discharging facility without considering the impact of such action on RCRA regulation. (Responses at 11). The Permit may result in the issuance of a WWTU exemption for the entire RLWTF—nullifying RCRA regulation entirely. EPA’s action disregards the Supreme Court’s direction to give the fullest effect to both of the applicable statutes. *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018).

82. Elsewhere (Responses to Comments at 73-74), EPA addresses the governing precedents of *Waterkeeper Alliance* and *National Pork*, claiming that these decisions, which limit EPA’s authority to require a permit to persons who are actually discharging, do not affect EPA’s power to issue a permit to one who requests one “voluntarily.” (at 74). EPA has no power except what Congress grants it, which is the power to regulate a discharge. 33 U.S.C. § 1342(a). The unlimited power that Region 6 imagines would violate the limits of the CWA and the doctrine of delegation of legislative authority. See ¶¶ 68-70, 78. The idea that EPA may veer outside the limits of its jurisdiction for a party who so “requests” would bring lawlessness and chaos to agency practice.

CONCLUSION

It is not for EPA to ignore the directions of the Supreme Court and erect obstacles to the congressionally-mandated 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 Outfall 051 and other non-discharging outfalls has no legal basis and should be denied.

Respectfully submitted,

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
Attorney for Petitioners
Concerned Citizens for Nuclear Safety
Honor Our Pueblo Existence
Veterans for Peace, Chapter #63

May 9, 2022