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

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

1. The following comments on the proposed renewal of National Pollutant Discharge Elimination System ("NPDES") Permit No. NM0028355 are filed on behalf of three New Mexico citizen organizations: Concerned Citizens for Nuclear Safety ("CCNS"), Honor Our Pueblo Existence ("HOPE"), and the New Mexico Acequia Association ("NMAA").

I. STATEMENT OF FACTS

2. 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"). LANL's functions include design and development of nuclear weapons. Such functions involve use of radioactive and hazardous materials, the release of which would be dangerous to human health and the environment.

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

a. Renewal of Permit #NM0028355 should not include Outfall 051

4. LANL operates the Radioactive Liquid Waste Treatment Facility ("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.

5. The RLWTF treats both low-level and transuranic radioactive and hazardous liquid waste. Such wastes contain hazardous constituents and come within the definition of "solid waste" and "hazardous waste" under the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* ("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 the U.S. Environmental Protection Agency ("EPA").

6. 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). 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]." DP-1132 AR at 12732 (LANL letter to [Jerry] Schoeppner, Head, Groundwater Quality Bureau (Sept. 11, 2014)) (Exhibit WW).

7. Until late 2010, the RLWTF discharged to the environment certain pollutants that are regulated under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), through an outfall ("Outfall 051") into Effluent Canyon, a tributary to Mortandad Canyon. Outfall 051 is subject to LANL's NPDES, 33 U.S.C. § 1342, permit No. NM0028355, issued in 2014, which is now proposed for renewal.

8. 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" ("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).

9. The RLWTF has undergone several 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 a single one-day discharge of 80,798 liters of treated effluent on June 18, 2019.

10. The history of discharges from the RLWTF is shown in quarterly monitoring reports submitted by DOE to the NMED Ground Water Quality Bureau.[1]

[1] 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

11. 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 report[2] 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."[3]

12. The 1998 report emphasizes that the adoption of zero liquid discharge will cause elimination of the RCRA 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,

---

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, 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).

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

[3] *Id.*, Ex. A at v.

including engineering design standards. When the RLWTF implements zero liquid discharge, if the NPDES permit for Mortandad Canyon is deleted, current exemptions would not apply. RCRA-listed wastes are already administratively prohibited from the RLW [Radioactive Liquid Waste] stream. However, the potential for exposure to increased RCRA regulatory coverage with zero discharge underscores the need for better administration and documentation of compliance with WAC [Waste Acceptance Criteria] requirements."[4]

13. LANL's 1998 report states that the loss of the RCRA exemption was "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.[5]

14. In sum:

> [T]he loss of the NPDES permit at the RLWTF will cause the loss of the RCRA exemption for the RLWTF. RCRA regulatory oversight will increase at the RLWTF. NPDES regulatory oversight will decrease.[6]

Also:

> As regulatory requirements become more stringent and as the possibility of eliminating outfall 051 progresses, it will be important to have complete characterization of wastes discharged to the RLWTF. . . . If the outfall 051 NPDES permit is allowed to be deleted, operation of the RLWTF will fall

---

[4] *Id.*, Ex. A at 12.

[5] *Id.*, Ex. A at 32.

[6] *Id.*, Ex. A at Table 6.

> under RCRA guidelines. Management of waste at the source, including management of the waste generators' WAC [Waste Acceptance Criteria] and management of facility connections to the collection system, is a necessary part of this process. Specific monitoring regimes will be required by the RLWTF.[7]

15. If the RLWTF were regulated under RCRA, it would be subject to detailed 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 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 exemption.

16. After considering the impact of the RLWTF's loss of the RCRA exemptions, LANL advised NMED that zero liquid discharge was LANL's

[7] *Id.*, Ex. A at 37.

"ultimate goal."[8] LANL repeatedly so advised EPA.[9] NMED itself has stated publicly that elimination of Outfall 051 is a desirable goal.[10]

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

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

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

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

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

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

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

Reduction Program.[13] LANL asked EPA to delete from the NPDES permit outfalls that are "no longer in use."[14] LANL reported that outfall 001B was out of use and could be deleted.[15] LANL stated that outfall 03A028, associated with the closed PHERMEX facility, could be deleted.[16] The 2007 NPDES permit omitted Outfalls 001B and 03A028.[17] NMED itself has suggested that certain unused outfalls be deleted from the permit.[18] LANL's 2012 NPDES re-application omitted these outfalls.[19] The 2008 LANL Site-Wide Environmental Impact Statement

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

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

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

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

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

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

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

("SWEIS") reports the closing of several outfalls.[20] In 1999 there were 36 permitted outfalls; in 2005 there were 21. Further: "Thirty-five outfalls were removed from service as a result of efforts to reroute and consolidate flows and eliminate outfalls. . ."[21] From 1999 through 2005 RLWTF discharge volume has steadily decreased.[22] The 2008 SWEIS notes that elimination of RLWTF discharges would minimize the potential to mobilize contaminated sediments.[23]

19. However, LANL has consistently scheduled Outfall 051 to remain in the NPDES permit.[24] Despite the 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" for the RLWTF, LANL also put forth its theory that the "tanks" would be exempt from RCRA.[25]

---

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

[21] *Id*., Ex. JJ, SWEIS at 4-43.

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

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

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

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

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

21. LANL's 2012 NPDES permit renewal application sought a permit for 11 outfalls, one of which was Outfall 051.[29] LANL stated in the 2012 re-application that "[t]he configuration of the RLWTF and Outfall 051 will be changing in the next 5 years due to the construction of two new Concrete Evaporation Tanks at Technical Area (TA) 52 under the Zero Liquid Discharge (ZLD) Project."[30]

---

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

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

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

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

[30] *Id*., Ex. W at 7 of 9.

22. 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*.[31]

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."[32] EPA confirmed that "[t]he facility includes the outfall [051] in the application *in case the evaporator becomes unavailable* due to maintenance, malfunction, and/or capacity shortage."[33]

23. 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

---

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

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

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

> has constructed two Zero Liquid Discharge (ZLD) tanks that can passively evaporate treated effluent. The ZLD tanks are currently being processed for permitting under the NMED's Ground Water Discharge Permit program and are not currently in operation. Based on discharge records prior to November 2010, and with options of using the existing mechanical evaporator or new ZLD evaporation tanks, RLWTF would discharge to Outfall 051 only once or twice per week *if evaporation is not an option*.[34]

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

24. 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 w*ith new data for Outfalls 051* and 05A055 [High Explosives Wastewater Treatment Facility], *if discharges through these outfalls are initiated* during the life of the new permit."[35]

25. A mid-2014 LANL report states: "Discharges from Outfall 051 decreased significantly after the mid-1980s and effectively ended in late 2010."[36] In late 2014 NMED reported to EPA Region 6 that Outfall 051 had not discharged

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

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

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

since November 2010.[37] A LANL web site, NPDES Industrial Outfall Locations, states that "a mechanical evaporator was installed so no water has been discharged at Outfall 051 since November 2010."[38]

26. The NPDES Final Permit, dated August 12, 2014, refers to regulation of discharges from Outfall 051 *if discharges resume.*[39] 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."[40] Thus, EPA saw no urgency to determine the Outfall's compliance, since a discharge from Outfall 051 was not viewed as imminent.

27. Responding to an inquiry from CCNS, EPA Region 6 in 2015 indicated that it had issued a CWA (33 U.S.C. § 1342) permit for Outfall 051, which serves the RLWTF, even though the RLWTF has been "recently redesigned

---

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

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

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

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

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*).

28. EPA Region 6 then acknowledged that the CWA permit could give rise to the WWTU exemption, precluding RCRA regulation, but 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.

29. 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"), and 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 should one occur.

30. EPA then emphasized, again, that the fact that a permit would give the RLWTF an exemption from RCRA 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*).

31. 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).

32. In March 2019 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:

> (D)(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.

33. 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.

34. 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 ("GPD"). 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.

35. DOE and Triad stated in their application 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. They stated in their Outfall 051 Fact Sheet that the average flow rate is 0.020 MGD and the daily maximum flow is 0.040 MGD, with an estimated frequency of discharge of four days a week. *Id.* 7.

36. DOE and Triad's 2019 statements about the frequency and volume of discharge from Outfall 051 are inaccurate and are misstatements, since discharges from Outfall 051 ended in 2010 (with a single exception, termed an operational readiness discharge).

37. 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).

38. 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.

39. In November 2019, DOE submitted passages from the 2012 NPDES renewal application in NMED proceedings 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).

40. 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).

b. Other unused outfalls should not be included in a permit renewal:

41. Other outfalls are included in the permit renewal application, even though DOE and Triad 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.

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

c. Governing law precludes a permit for non-discharging outfalls:

43. 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.

44. 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).

45. 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).

46. 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) ("NPDES"); 40 C.F.R. §§ 260.10 (*Tank system, Wastewater treatment unit*), 40 C.F.R. §§ 264.1(g)(6). The cited provisions state:

> (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.

> 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).

47. 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]."

48. 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.[41] All parties discount such a situation as "highly unlikely." See ¶ 40, *supra*. At the same time, it is recognized that hazardous waste is currently, and foreseeably, managed by the RLWTF. See ¶ 6, *supra*.

49. EPA Region 6 stated that a NPDES permit was issued for Outfall 051 because a discharge "could occur," but the CWA contains no 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 terms, the *absence* of any discharge. But the extent 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). EPA's regulations define "discharge" to mean "[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

[41] 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 the occurrence of future discharges to unavailability of evaporation equipment or changes in capacity requirements. At the time of this discharge the Mechanical Evaporator was functioning.

051, nor any plan or proposal to commence to discharge through Outfall 051, there is no legal basis for a CWA permit authorizing such a discharge.

50. The question has been thoroughly litigated. EPA in 2003 issued CWA regulations for concentrated animal feeding operations ("CAFOs").[42] EPA's premise was that any large CAFO (as defined) has the *potential* to discharge, and so must obtain a NPDES permit:

> The 'duty to apply' provision is based on the presumption that every CAFO has a *potential to discharge* and therefore must seek coverage under an NPDES permit.[43]

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*).

---

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

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

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.

51. Despite that categorical ruling, after *Waterkeeper Alliance* EPA drafted new CAFO regulations, again seeking to regulate facilities that were not discharging—but supposedly had a "potential" to discharge.[44] EPA assumed that it could re*g*ulate "any person who discharges or proposes to discharge pollutants,"[45] and issued 2008 CAFO rules, containing objective criteria intended to identify facilities that were "proposing to discharge."[46, 47] EPA reasoned that "a CAFO proposes to discharge if based on an objective assessment it is designed,

---

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

[45] 71 Fed. Reg. at 37747-48.

[46] 71 Fed. Reg. at 37744, 37748; 73 Fed. Reg. at 70422 and 70423-25.

[47] 73 Fed. Reg. at 70423.

constructed, operated, or maintained such that a discharge will occur, not simply such that it might occur."[48] 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.

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

52. 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 tests, "proposes to discharge."[49] 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."[50] *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*

---

[48] 73 Fed. Reg. at 70423-24.

[49] 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).

[50] *Id.*, at 44496.

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.

53. To repeat, 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 jurisdiction to regulate only "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). Further, 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 apply equally 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 is not intended to authorize the permitting of a facility whose discharge has been terminated—such as the RLWTF.

54. At the same time, there is no dispute that the RLWTF manages hazardous waste, and RCRA directs that a facility managing hazardous waste must have a hazardous waste permit. 42 U.S.C. § 6925. Consequently, 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?

55. That question presents a possible conflict between two federal statutes, the CWA and RCRA. In 2017 EPA Region 6 resolved the conflict by expanding the application of the CWA beyond its clear limits—and, at the same time, expressly ignoring RCRA. That decision was error and should not be repeated.

56. Several 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).

57. Here, EPA 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, and (3) DOE had no intention to discharge through Outfall 051—EPA Region 6 in 2015 and again in

2017 strived to *create* a conflict with RCRA, reaching out, without any explanation or justification, to break through the jurisdictional limits of the CWA, holding that, because a discharge "could occur," the CWA somehow requires a permit for Outfall 051. EPA's expansive, and unsupported, interpretation of the CWA's jurisdiction created a supposed conflict with RCRA regulation of hazardous waste, triggering the WWTU exemption, and denying RCRA any effect.

58. The outcome of EPA's decision was a useless CWA permit, which regulates nothing, and the nullification of RCRA regulation, which EPA preempted by its useless CWA permit. EPA has defeated the purpose of two federal statutes.

59. 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.

60. Most basically, EPA 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).

61. Instead, EPA *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 were made without considering their impact on hazardous waste regulation, which was to nullify RCRA.

62. But EPA does not have discretion to formulate environmental policy in disregard of the enactments of Congress. EPA should follow the rulings of federal courts of appeals and the Supreme Court, holding that the CWA has jurisdiction only over an actual discharge, thus avoiding a statutory conflict. EPA should hold that, where the RLWTF neither discharges any pollutants nor proposes to do so, the CWA does not apply, and RCRA must apply to the RLWTF, which has extensive facilities for management of hazardous waste. EPA may not ignore the Supreme Court's admonition that courts (and by inference 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.

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 Commenters
Concerned Citizens for Nuclear Safety
Honor Our Pueblo Existence
New Mexico Acequia Association

October 15, 2020