



Environmental Protection & Compliance Division
Los Alamos National Laboratory
PO Box 1663, K491
Los Alamos, New Mexico 87545
(505) 667-2211

National Nuclear Security Administration
Los Alamos Field Office
3747 West Jemez Road, A316
Los Alamos, New Mexico, 87545
(505) 667-5105/Fax (505) 667-5948

Date: **JAN 29 2018**

Symbol: EPC-DO: 18-004

LA-UR: 17-31429

Locates Action No.: NA

Ms. Michelle Hunter, Chief
Ground Water Quality Bureau
New Mexico Environment Department
Harold Runnels Building, Room N2261
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, NM 87502

Subject: Discharge Plan DP-1132 Quarterly Report, Fourth Quarter 2017, TA-50 Radioactive Liquid Waste Treatment Facility

Dear Ms. Hunter:

This letter from the U.S. Department of Energy and Los Alamos National Security, LLC (DOE/LANS) is the fourth quarter 2017 Discharge Plan DP-1132 report for the Technical Area (TA)-50 Radioactive Liquid Waste Treatment Facility (RLWTF). Since the first quarter of 1999, DOE/LANS have provided the New Mexico Environment Department (NMED) with voluntary quarterly reports containing analytical results from effluent and groundwater monitoring.

During the fourth quarter of 2017, no effluent was discharged to either National Pollutant Discharge Elimination System (NPDES) Outfall 051 or to the solar evaporative tank system (SET) at TA-52; all effluent was evaporated on-site at the mechanical evaporator system (MES).

Quarterly Monitoring Results, Mortandad Canyon Alluvial Groundwater Wells

Table 1.0 presents the analytical results from sampling conducted at Mortandad Canyon alluvial wells MCO-4B, MCO-6, and MCO-7 during the fourth quarter of 2017. No sample was collected from alluvial well MCO-3 because the well was damaged beyond repair during a flood event in September 2013. Samples were submitted to GEL Laboratories LLC for analysis. Analytical results from the sampling of intermediate and regional aquifer wells in Mortandad Canyon can be accessed online at the Intellus New Mexico environmental monitoring data web site (<http://www.intellusnmdata.com>).


TA-50 RLWTF Effluent Monitoring Results

No final weekly composite (FWC) samples were collected during the fourth quarter of 2017 because no effluent was discharged to Mortandad Canyon.

No final monthly composite (FMC) samples were collected during the fourth quarter of 2017 because no effluent was discharged to Mortandad Canyon.

Please contact Karen E. Armijo by telephone at (505) 665-7314 or by email at Karen.Armijo@nnsa.doe.gov, or Robert S. Beers by telephone at (505) 667-7969 or by email at bbeers@lanl.gov if you have questions regarding this report.

Sincerely,



Taunia S. Van Valkenburg
Group Leader

Sincerely,



Karen E. Armijo
Permitting and Compliance Program Manager

ARG/KEA/MTS/RSB: am

Copy: Shelly Lemon, NMED/SWQB, Santa Fe, NM, (E-File)
John E. Kieling, NMED/HWB, Santa Fe, NM, (E-File)
Stephen M. Yanicak, NMED/DOE/OB, (E-File)
Jody M. Pugh, NA-LA, (E-File)
Karen E. Armijo, NA-LA, (E-File)
Craig S. Leasure, PADOPS, (E-File)
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Randal S. Johnson, DESHF-TA55, (E-File)
Alvin M. Aragon, TA-55-RLW, (E-File)
John C. Del Signore, TA-55-RLW, (E-File)
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GROUND WATER

JAN 29 2018

BUREAU

Subject: Discharge Plan DP-1132 Quarterly Report, Fourth Quarter 2017, TA-50 Radioactive Liquid Waste Treatment Facility

Dear Ms. Hunter:

This letter from the U.S. Department of Energy and Los Alamos National Security, LLC (DOE/LANS) is the fourth quarter 2017 Discharge Plan DP-1132 report for the Technical Area (TA)-50 Radioactive Liquid Waste Treatment Facility (RLWTF). Since the first quarter of 1999, DOE/LANS have provided the New Mexico Environment Department (NMED) with voluntary quarterly reports containing analytical results from effluent and groundwater monitoring.

During the fourth quarter of 2017, no effluent was discharged to either National Pollutant Discharge Elimination System (NPDES) Outfall 051 or to the solar evaporative tank system (SET) at TA-52; all effluent was evaporated on-site at the mechanical evaporator system (MES).

Quarterly Monitoring Results, Mortandad Canyon Alluvial Groundwater Wells

Table 1.0 presents the analytical results from sampling conducted at Mortandad Canyon alluvial wells MCO-4B, MCO-6, and MCO-7 during the fourth quarter of 2017. No sample was collected from alluvial well MCO-3 because the well was damaged beyond repair during a flood event in September 2013. Samples were submitted to GEL Laboratories LLC for analysis. Analytical results from the sampling of intermediate and regional aquifer wells in Mortandad Canyon can be accessed online at the Intellus New Mexico environmental monitoring data web site (<http://www.intellusnmdata.com>).

Discharge Plan DP-1132 Quarterly Report
4th Quarter, 2017

Table 1.0. Mortandad Canyon Alluvial Well Sampling, 4th Quarter 2017.

| Sampling Location | Sample Field Prep (F/UF) ¹ | Sample Date | Perchlorate (µg/L) | NO ₃ +NO ₂ -N (mg/L) | TKN (mg/L) | NH ₃ -N (mg/L) | TDS (mg/L) | F (mg/L) |
|---|---------------------------------------|----------------------|-----------------------|--|-----------------------|---------------------------|----------------------|----------------------|
| MCO-3 | | Damaged ⁴ | Damaged ⁴ | Damaged ⁴ | Damaged ⁴ | Damaged ⁴ | Damaged ⁴ | Damaged ⁴ |
| MCO-4B | F | 11/13/2017 | 6.1 | 0.14 | 0.26 | 0.10 | 341 | 0.74 |
| MCO-6 | F | 11/13/2017 | 4.6 | 0.37 | 0.033U | 0.05 | 366 | 0.68 |
| MCO-7 | F | 11/14/2017 | 6.9 | 0.76 | 0.0913J | 0.10 | 326 | 0.92 |
| NM WQCC 3103 Groundwater Standards | | | NA² | 10 mg/L³ | NA² | NA² | 1000 mg/L | 1.6 mg/L |

Notes:

¹F means the sample was filtered. UF means the sample was not filtered.

²NA means that there is no NM WQCC 3103 standard for this analyte.

³The NM WQCC 3103 Groundwater Standard is for NO₃-N.

⁴Damaged means that the well was damaged beyond repair during a flood event in Mortandad Canyon in September 2013.

J flag indicates an estimated value.

U flag means the result was less than the analytical laboratory's Method Detection Limit (MDL).

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUND WATER DISCHARGE PERMIT (DP-1132)
FROM THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY



No. GWB 17-20 (P)

NOTICE OF HEARING OFFICER APPOINTMENT

On September 18, 2017, the Hearing Clerk received a Hearing Determination granted by the Cabinet Secretary of the New Mexico Environment Department, Butch Tongate, on September 18, 2017. The Cabinet Secretary hereby appoints Erin O. Anderson, Administrative Law Judge for the New Mexico Environment Department, to serve as Hearing Officer in this matter pursuant to 20.1.4.100(E)(2) NMAC. The Hearing Officer shall exercise all powers and duties granted under the New Mexico Environment Department Permit Procedures found in 20.1.4 NMAC and all other applicable law.



Butch Tongate, Cabinet Secretary
New Mexico Environment Department

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Notice of Hearing Officer Appointment** and **Notice of Docketing** was served on the following parties of record via the stated methods below on September 21, 2017:

First Class Mail and electronic mail:

Susan McMichael
PO Box 1663
MS A187
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov

Jon Block, Staff Attorney
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, New Mexico 87505
jblock@nmelc.org

Lindsay A. Lovejoy Jr., Attorney
3600 Cerrillos Rd., Unit 1001 A
Santa Fe, New Mexico 87507
lindsay@lindsaylovejoy.com

Hand delivery and electronic mail:

For the New Mexico Environment Department

John Verheul
Office of General Counsel
New Mexico Environment Department
1190 St. Francis Drive, Suite N-4050
Santa Fe, New Mexico 87505
John.verheul@state.nm.us



Linda Vigil, Hearing Clerk
New Mexico Environment Department

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUND WATER DISCHARGE PERMIT (DP-1132)
FROM THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY



No. GWB 17-20(P)

ENTRIES OF APPEARANCE

Stuart R. Butzier and Christina C. Sheehan of Modrall, Sperling, Roehl, Harris & Sisk, P.A. and Susan L. McMichael of Los Alamos National Laboratory's Office of Laboratory Counsel, hereby enter their appearances on behalf of Los Alamos National Security, LLC in the above-referenced matter.

In addition, Silas R. DeRoma hereby enters his appearance on behalf of the United States Department of Energy in the above-referenced matter.

Respectfully submitted,

STUART R. BUTZIER
CHRISTINA C. SHEEHAN
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Post Office Box 9318
Santa Fe, New Mexico 87504-9318
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stuart.butzier@modrall.com
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and

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Attorneys for Los Alamos National Security, LLC

SILAS R. DEROMA
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U.S. Department of Energy
National Nuclear Security Administration
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Los Alamos, NM 87544
silas.deroma@nnsa.doe.gov

Attorney for the U.S. Department of Energy

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2017, a copy of the foregoing "Entry of Appearance" was hand delivered to the following:

Linda Vigil
Hearing Clerk
New Mexico Environment Department
1190 Saint Francis Drive, Suite S-2103
Santa Fe, NM 87502
linda.vigil@state.nm.us

and served via electronic mail to the following:

New Mexico Environment Department
Office of General Counsel
John Verheul
1190 St. Francis Drive, Suite N-4050
Santa Fe, NM 87505
john.verheul@state.nm.us

Jon Block, Staff Attorney
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
jblock@nmelc.org

Lindsay A. Lovejoy Jr., Attorney
3600 Cerrillos Rd., Unit 1001 A
Santa Fe, NM 87507
lindsay@lindsaylovejoy.com

**NOTICE OF PUBLIC HEARING
NEW MEXICO ENVIRONMENT DEPARTMENT**

The New Mexico Environment Department (NMED) will hold a public hearing beginning at 9:00 a.m. on April 19, 2018, and continuing on as needed, at the Fuller Lodge Art Center, Pajarito Room, located at 2132 Central Avenue, in Los Alamos, New Mexico. This hearing is being held in lieu of the public hearing previously scheduled for January 17, 2018. The hearing will consider the proposed ground water discharge permit (Discharge Permit or DP-1132) prepared in response to a discharge plan submitted by the United States Department of Energy and Los Alamos National Security, LLC (DOE/LANS or Applicants). The Hearing Officer will provide opportunities for general oral statements or non-technical testimony from members of the public before the conclusion of the hearing.

Name of the Applicants: United States Department of Energy and Los Alamos National Security, LLC. (DOE/LANS)

Location of the Discharge: The discharge is located within Los Alamos National Laboratory (LANL), approximately 1.5 miles south of Los Alamos, New Mexico, in Sections 16, 17, 20, 21 and 22, Township 19N, Range 06E, Los Alamos County.

Activities Which Produce the Discharge: The Radioactive Liquid Waste Treatment Facility (RLWTF) is a wastewater treatment facility that receives and treats radioactive liquid waste (RLW) from waste generating locations at LANL. The Discharge Permit authorizes the use of the RLWTF's multiple systems and associated units, including: the influent collection system; the influent storage system, i.e., the Waste Management Risk Mitigation Facility (WMRM); the low-level radioactive liquid waste treatment system; the transuranic wastewater treatment system; and the secondary treatment system. RLW treatment processes include chemical treatment in a reaction tank, filtration, ion exchange, and reverse osmosis. The Discharge Permit authorizes the discharge of treated water via the Mechanical Evaporator System (MES) and the Solar Evaporative Tank (SET) at TA-52. The discharge of treated water at an outfall (Outfall 051) is authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued by the United States Environmental Protection Agency (EPA) pursuant to the federal Clean Water Act Section 402, 33 U.S.C § 1342.

Quality, Quantity, and Flow Characteristics of the Discharge: Up to 40,000 gallons per day may be discharged via the three processes identified above. The discharge may contain water contaminants with concentrations above the standards of 20.6.2.3103 NMAC and may contain toxic pollutants as defined in 20.6.2.7.WW NMAC.

Depth to Groundwater: Groundwater most likely to be affected ranges from depths of approximately one foot to 1,306 feet, and has a total dissolved solids concentration ranging from approximately 162 to 255 milligrams per liter.

Hearing Procedures: The hearing will be conducted pursuant to the NMED Permit Procedures regulations, 20.1.4 NMAC, and the NMED Ground and Surface Water Protection regulations, 20.6.2.3110 NMAC. Any member of the public may attend the hearing and present relevant non-

technical testimony, orally or in writing, and to examine witnesses testifying at the hearing. To be a party or to present technical testimony, a person must follow the procedures below:

Entry of Appearance Required to be a Party: Any person who wishes to be a party shall file with the Hearing Clerk, and serve upon all other parties of record, including NMED and the Applicants, an *Entry of Appearance* on or before **April 9, 2018**.

Statement of Intent to Present Technical Testimony Required: Any person who wishes to present technical evidence, data, or testimony at the hearing shall file with the Hearing Clerk and serve on the Applicants, NMED, and all other parties of record a *Statement of Intent to Present Technical Testimony* on or before **April 9, 2018**, pursuant to 20.6.2.3110.C NMAC. A timely filed Statement of Intent shall be considered an Entry of Appearance. The Statement of Intent must comply with the requirements in 20.1.4.300 NMAC and 20.6.2.3110.C NMAC and shall include: the name of the person filing the statement, whether the person filing the statement supports or opposes the proposed permit, the name/address/affiliation/work background/educational background of each witness, the estimated length of direct testimony of each witness, a list of exhibits to be offered into evidence at the hearing with a copy of each exhibit that is not already part of the Record Proper, a list of all technical materials – and information where the material can be obtained – relied upon by each witness in making a technical statement of fact or opinion and an explanation of the basis for such an opinion, and the full written direct testimony of each witness including any opinions to be offered by such witness and an explanation of the basis for that opinion.

Failure to file a timely Entry of Appearance or Statement of Intent to Present Technical Testimony shall preclude a person from being a party to the proceeding and from presenting technical testimony, but shall not preclude a person from presenting a general written or oral statement or non-technical testimony in the proceeding.

Final Determination on Permit by NMED: The Secretary of NMED will make a final determination approving, conditionally approving, or disapproving DP-1132 based on the administrative record for the permit application, public comment, and the public hearing.

Documents Filed with Hearing Clerk: All documents that need to be filed with the Hearing Clerk shall be submitted to: Pam Castaneda, Hearing Clerk, NMED, P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, New Mexico 87502, (505) 827-2425.

Documents Served on NMED: All documents that need to be served on NMED shall be sent to: John Verheul, NMED Office of General Counsel, 121 Tijeras Avenue NE, Ste 1000, Albuquerque, New Mexico 87102, or John.Verheul@state.nm.us.

Further Information and NMED Contact: For further information on DP-1132 and the public hearing, or to be placed on the facility-specific mailing list, please contact Steve Pullen, NMED Ground Water Quality Bureau (GWQB), P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, New Mexico 87502-5469, at (505) 827-2962, or at steve.pullen@state.nm.us. The administrative record and copies of the proposed permit can be viewed at the GWQB.

If any person requires assistance, an interpreter or auxiliary aid to participate in this process, please contact Pam Castaneda at (505) 827-2425, or submit a written request to Ms. Castaneda, at least ten (10) calendar days prior to the hearing at NMED, P.O. Box 5469, Santa Fe, New Mexico 87502, or Pam.Castaneda@state.nm.us.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Part 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact: Kristine Pintado, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@state.nm.us. If you believe that you have been discriminated against with respect to a NMED program or activity, you may contact the Non-Discrimination Coordinator identified above.

Transcripts of Hearing. Pursuant to 20.6.2.3110.J NMAC, NMED will make an audio recording of the hearing. If any person requests a written transcript or certified copy of the audio recording, the requestor shall pay the cost of the transcription or audio copying.

AVISO DE AUDIENCIA PÚBLICA
DEPARTAMENTO DEL MEDIO AMBIENTE DE NUEVO MÉXICO

El Departamento del Medio Ambiente de Nuevo México (NMED por su sigla en inglés) celebrará una audiencia pública que comenzará a las 9:00 de la mañana del 19 de abril de 2018, y que continuará como sea necesario, en el auditorio ubicado en la Sala Pajarito del Centro de Arte Fuller Lodge, cuya dirección es 2132 Central Avenue, Los Álamos, Nuevo México. Esta audiencia se llevará a cabo en lugar de la audiencia pública previamente programada para el 17 de enero de 2018. La audiencia considerará el permiso de descarga en aguas subterráneas propuesto (Permiso de Descarga o DP-1132), preparado en respuesta a un plan de descarga presentado por el Departamento de Energía de Estados Unidos y Los Alamos National Security, LLC (DOE/LANS o Solicitantes). El Funcionario de Audiencias dará oportunidades a los asistentes del público para presentar declaraciones orales generales o testimonio que no sea de carácter técnico antes de la conclusión de la audiencia.

Nombre de los Solicitantes: Departamento de Energía de Estados Unidos y Los Alamos National Security, LLC. (DOE/LANS)

Ubicación de la descarga: La descarga se encuentra dentro del Laboratorio Nacional Los Álamos (LANL), aproximadamente 1.5 millas al sur de Los Álamos, Nuevo México, en las Secciones 16, 17, 20, 21 y 22; Distrito Municipal (*Township*) 19N; Zona (*Range*) 06E; condado de Los Álamos.

Actividades que producen la descarga: La Planta de Tratamiento de Residuos Líquidos Radioactivos (RLWTF por su sigla en inglés) es una planta de tratamiento de aguas residuales que recibe y trata residuos líquidos radioactivos (RLW por su sigla en inglés) de los sectores generadores de residuos de LANL. El Permiso de Descarga autoriza el uso de múltiples sistemas y de unidades asociadas de la planta RLWTF, que incluyen: el sistema de recolección de afluentes; el sistema de almacenamiento de afluentes, que corresponde a las Instalaciones de Mitigación de Riesgo del Manejo de Residuos (WMRM por su sigla en inglés); el sistema de tratamiento de residuos líquidos de bajo nivel radioactivo; el sistema de tratamiento de aguas residuales transuránicas; y el sistema de tratamiento secundario. Los procesos de tratamiento de RLW incluyen tratamiento químico en un tanque de reacción, filtración, intercambio iónico y ósmosis inversa. El Permiso de Descarga autoriza la descarga del agua tratada por medio del Sistema Evaporador Mecánico (MES por su sigla en inglés) y el Tanque de Evaporación Solar (SET) en el Área Técnica TA-52. La descarga de agua tratada en un desagüe (Desagüe 051) está autorizada por un permiso del Sistema Nacional de Eliminación de Descargas de Contaminantes (NPDES por su sigla en inglés) otorgado por la Agencia de Protección Ambiental (EPA por su sigla en inglés) de Estados Unidos conforme a la Ley Federal de Agua Limpia, Sección 402, 33 U.S.C § 1342.

Calidad, cantidad y características del flujo de la descarga: Mediante los tres procesos antes identificados, se podrán descargar hasta 40,000 galones por día. La descarga podrá contener contaminantes del agua con concentraciones superiores a los estándares de 20.6.2.3103 NMAC y podrá contener contaminantes tóxicos según lo definido en 20.6.2.7.WW NMAC.

Profundidad a la que se encuentran las aguas subterráneas: Las aguas subterráneas con mayor probabilidad de ser afectadas se encuentran en un rango de profundidades de uno a 1,306 pies aproximadamente, y tienen una concentración de sólidos disueltos totales en un rango de 162 a 255 miligramos por litro aproximadamente.

Procedimientos seguidos en las audiencias: La audiencia se llevará a cabo conforme al reglamento de Procedimientos para obtener permisos del NMED, 20.1.4 NMAC, y el reglamento para la Protección de Aguas Subterráneas y Aguas Superficiales del NMED, 20.6.2.3110 NMAC. El público podrá asistir a la audiencia y presentar testimonio que no sea de carácter técnico, ya sea oralmente o por escrito, e interrogar a los testigos que declaren durante la audiencia. Para ser parte interesada o para presentar testimonio técnico, se deberán seguir los siguientes procedimientos:

Registro de comparecencia exigido para ser Parte interesada: Quienes deseen ser parte interesada deberán presentar ante la Secretaria de Audiencias, y notificar a todas las demás partes reconocidas, incluidos el NMED y los Solicitantes, un Registro de comparecencia (*Entry of Appearance*) a más tardar el **9 de abril de 2018**.

Declaración de intención de presentar testimonio técnico exigida: Quienes deseen presentar pruebas, datos o testimonio de carácter técnico durante la audiencia deberán presentar ante la Secretaria de Audiencias, y notificar a los Solicitantes, al NMED y a todas las demás partes reconocidas, una Declaración de intención de presentar testimonio técnico (*Statement of Intent to Present Technical Testimony*) a más tardar el **9 de abril de 2018**, conforme a 20.6.2.3110.C NMAC. Toda Declaración de intención oportunamente presentada se considerará como Registro de comparecencia. La Declaración de intención debe cumplir con los requisitos indicados en 20.1.4.300 NMAC y 20.6.2.3110.C NMAC, y debe incluir: el nombre de la persona que presenta la declaración; si la persona que presenta la declaración apoya o se opone al permiso propuesto; nombre/dirección/afiliación/antecedentes laborales/antecedentes educativos de cada testigo; la duración aproximada del testimonio directo de cada testigo; una lista de documentos u objetos de prueba que se ofrecerán como pruebas durante la audiencia, con una copia de cada documento u objeto de prueba que aún no forma parte del Registro Administrativo; una lista de todos los materiales técnicos –y la información sobre dónde se puede obtener el material– en los que se base cada testigo en su declaración de carácter técnico de hechos u opiniones y una explicación del fundamento de dicha opinión; y el testimonio directo completo por escrito de cada testigo, incluidas las opiniones que ofrecerá dicho testigo y una explicación del fundamento de esa opinión.

La falta de presentación oportuna de un Registro de comparecencia o de una Declaración de intención de presentar testimonio técnico impedirá que esa persona sea parte interesada del procedimiento y que presente testimonio técnico, pero no impedirá que esa persona presente una declaración de carácter general por escrito o en forma oral, o testimonio que no sea de carácter técnico durante el procedimiento.

Determinación final del NMED sobre el Permiso: El Secretario del NMED hará una determinación final de aprobar, aprobar condicionalmente o rechazar el DP-1132 según el

registro administrativo para la solicitud del permiso, los comentarios del público y la audiencia pública.

Documentos presentados ante la Secretaria de Audiencias: Todos los documentos que deban presentarse ante la Secretaria de Audiencias deberán enviarse a: Pam Castaneda, Hearing Clerk, NMED, P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, New Mexico 87502, (505) 827-2425.

Documentos entregados al NMED: Todos los documentos que deban entregarse al NMED deberán enviarse a: John Verheul, NMED Office of General Counsel, 121 Tijeras Avenue NE, Ste 1000, Albuquerque, New Mexico 87102, o John.Verheul@state.nm.us.

Información adicional y contacto con el NMED: Para obtener más información sobre el DP-1132 y la audiencia pública o para pedir que se le incluya en la lista de correos para instalaciones específicas, sírvase comunicarse con Steve Pullen, NMED Ground Water Quality Bureau (GWQB), P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, New Mexico 87502-5469, llamando al (505) 827-2962, o en steve.pullen@state.nm.us. El registro administrativo y las copias del permiso propuesto pueden examinarse en la Oficina de Calidad de las Aguas Subterráneas (GWQB).

Todo aquel que necesite asistencia, un intérprete o un dispositivo auxiliar para participar en este proceso deberá comunicarse con Pam Castaneda llamando al (505) 827-2855 o mediante un pedido escrito a la Srta. Castaneda al menos diez (10) días calendario antes de la audiencia a: NMED, P.O. Box 5469, Santa Fe, New Mexico 87502, o Pam.Castaneda@state.nm.us.

El NMED no discrimina por motivos de raza, color, origen nacional, discapacidad, edad o sexo en la administración de sus programas o actividades, según lo exigido por las leyes y los reglamentos correspondientes. El NMED es responsable de la coordinación de esfuerzos para el cumplimiento de las reglas y la recepción de indagaciones relativas a los requisitos de no discriminación implementados por 40 C.F.R. Parte 7, que incluye el Título VI de la Ley de Derechos Civiles de 1964, como fuera enmendado; la Sección 504 de la Ley de Rehabilitación de 1973; la Ley de Discriminación por Edad de 1975; el Título IX de las Enmiendas de Educación de 1972; y la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972. Si tiene preguntas sobre este aviso o sobre cualquier programa, política o procedimiento de no discriminación del NMED, puede comunicarse con la Coordinadora de No Discriminación: Kristine Pintado, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@state.nm.us. Si piensa que ha sido discriminado con respecto a un programa o actividad del NMED, puede comunicarse con la Coordinadora de No Discriminación antes indicada.

Transcripciones de la audiencia. Conforme a 20.6.2.3110.J NMAC, el NMED hará una grabación de audio de la audiencia. Si una persona solicita una transcripción escrita o una copia certificada del audio grabado, esa persona deberá pagar el costo de la transcripción o de la copia del audio.

**NEW MEXICO ENVIRONMENT DEPARTMENT
BEFORE THE SECRETARY OF THE ENVIRONMENT**

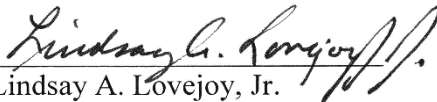
IN THE MATTER OF PROPOSED DISCHARGE)
PERMIT 1132 FOR THE RADIOACTIVE LIQUID)
WASTE TREATMENT FACILITY AT LOS ALAMOS)
NATIONAL LABORATORY, LOS ALAMOS,)
NEW MEXICO) NO. _____

ENTRY OF APPEARANCE

Lindsay A. Lovejoy, Jr. hereby enters his appearance in this matter as counsel for
Communities for Clean Water.

DATE AT: Santa Fe, New Mexico, this 16th day of March, 2018

Respectfully submitted,

BY: 
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CERTIFICATE OF SERVICE

The undersigned certifies that on March 16, 2018, two copies of the foregoing Entry of Appearance was served by hand delivery to Linda Vigil, Hearing Clerk, New Mexico Environment Department, 1190 St. Francis Drive, Suite S-2103, Santa Fe, NM 87502, and copies were emailed and send by U.S. Postal Service, First Class, pre-paid to:

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BY: 
Lindsay A. Lovejoy, Jr.

**NEW MEXICO ENVIRONMENT DEPARTMENT
BEFORE THE SECRETARY OF THE ENVIRONMENT**

IN THE MATTER OF PROPOSED DISCHARGE)
PERMIT 1132 FOR THE RADIOACTIVE LIQUID)
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NEW MEXICO) NO. _____

MOTION TO DISMISS DP-1132 PROCEEDING

I. INTRODUCTION

A. The parties: Communities for Clean Water.

Communities for Clean Water (“CCW”) is an alliance of five citizen organizations sited in five Northern New Mexico communities that surround Los Alamos, New Mexico, the home of Los Alamos National Laboratory (“LANL”) and the location of the Radioactive Liquid Waste Treatment Facility (“RLWTF”). These organizations are Tewa Women United of Santa Cruz, Honor Our Pueblo Existence of Española, Concerned Citizens for Nuclear Safety of Santa Fe, Amigos Bravos of Taos, and Partnership for Earth Spirituality of Albuquerque. Members of each of these organizations live within a few miles of the RLWTF and downstream from the facility and are exposed to the risk of illness and injury from releases of radioactive and hazardous materials from the RLWTF. Regulation of the RLWTF pursuant to the New Mexico Hazardous Waste Act, § 74-4-1 *et seq.* NMSA 1978 (“HWA”), as CCW seeks, would enhance its safe operation and the safety of members of CCW and nearby residents. Further, the positions advanced herein by CCW have been firmly presented by CCW in the course of public comments on the WQA permit in question.

B. Rationale and Relief Requested By This Motion.

CCW moves herein for dismissal of this proceeding on the ground that the activities and functions of the RLWTF at Technical Area 50 of LANL are outside the statutory jurisdiction of the Environment Department (“NMED”) under the Water Quality Act, § 74-6-1 *et seq.* NMSA 1978 (“WQA”). By its plain language, the WQA does not reach the RLWTF, because the RLWTF does not discharge, nor plan to discharge. Under the express terms of the WQA, a permit would be a nullity. Further, regulation under the WQA is precluded by the terms of that Act, because the RLWTF is subject to regulation under the HWA.

II. FACTS.

1. The RLWTF was constructed in the early 1960’s to treat, store, and dispose of radioactive liquids generated by several LANL facilities, whose waste liquids are transported to the RLWTF by pipes and trucks. ([AR 9, at 00117, 00123]. For some years, the RLWTF discharged treated water through Outfall 051 into a tributary of Mortandad Canyon, called Effluent Canyon. Discharges from Outfall 051 have been regulated by LANL’s permit under the National Pollutant Discharge Elimination System (“NPDES”). *See generally*, 33 U.S.C. § 1342.

2. LANL has operated the RLWTF on the basis that the RLWTF is exempt from regulation under the Hazardous Waste Act, § 74-4-1 *et seq.* NMSA 1978 (“HWA”), under the Wastewater Treatment Unit exception. *See generally*, 42 U.S.C. § 6903(27) (“NPDES”); 40 C.F.R. §§ 260.10 (*Tank system, Wastewater treatment unit*), 264.1(g)(6)). For example, liquid waste from the Plutonium Facility, PF-4, was sent to the RLWTF and was deemed exempt from hazardous waste regulation. [AR 164 at 02323].

3. Since the RLWTF was considered exempt from hazardous waste regulation, it followed that it was eligible for regulation under the WQA. A WQA provision states that the

WQA does not apply to any activity that is regulated by the HWA. § 74-6-12.B NMSA 1978. But if the facility were exempt, a WQA permit could be issued without conflicting with the HWA.

4. Consequently, NMED started this proceeding to issue a ground water discharge permit, DP-1132. NMED recognized that a public hearing would be required but initially lacked the resources for a hearing and obtained LANL's agreement to make quarterly reports. [AR 106 at 01432; AR 107 at 01435].

5. Against this regulatory background, LANL announced its commitment to eliminate discharges from the RLWTF. A 1998 LANL report¹ stated:

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.²

6. The Zero Discharge Working Group made a presentation on April 8, 1998 to LANL officials, outlining problems raised by continued release of radioactive liquid effluent. [AR 56 at 00860]. Therein, the Laboratory's Environmental Safety and Health and Environmental Management Divisions stated:

"We agree that the Laboratory should set a goal of zero discharge of radioactive liquid effluent to the environment. To reach this ambitious goal, ESH and EM Divisions will jointly initiate the Radioactive Liquid Waste Zero Discharge Project."

Id.

7. LANL told NMED that the project would include gas-fired evaporation units and, later, evaporative basins. [AR 99 at 01372; AR 208 at 03548]. LANL's 2008 Site-Wide Environmental Impact Statement ("SWEIS"), Appx. G, discusses the prospective "upgrade" of

1. ¹"Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility," Moss et al. (1998) (Ex. A to Request to Terminate NPDES Permit #NM0028355 to Outfall 051 for the Radioactive Liquid Waste Treatment Facility (June 17, 2016) (the "Request").

² *Id.* v (Ex. A).

the RLWTF.³ In one Record of Decision (“ROD”), DOE determined to pursue design of a Zero Liquid Discharge RLWTF.⁴ In a later ROD, DOE decided to construct and operate a new RLWTF and operate the Zero Liquid Discharge facility.⁵

8. Thus, in the late 2000’s, LANL rebuilt the RLWTF for “zero-liquid-discharge” operation. LANL intended to eliminate discharges through Outfall 051, except perhaps in an “emergency”:

“A new rad/liquid waste facility will be constructed within 3-5 years that will eventually discharge preferentially to the new evaporative basins or, under emergency, to Mortandad canyon under the NPDES permit and DP.”

[AR 208 at 03548].

9. LANL also advised NMED in 2010 that it was evaluating a trailer-mounted evaporation system with sufficient capacity so that evaporation exceeds effluent production.

[AR 243 at 04016].

10. A NMED inspection report in March 2012 states that LANL intended to use evaporation processes—the mechanical evaporator and solar evaporation tanks—to dispose of all liquid output from the RLWTF:

LANL has not discharged to the NPDES outfall for over a year and they are not intending to discharge due to the difficulty in treating the effluent to meet the NPDES copper limitations. Currently, the facility has been mechanically evaporating all effluent. The mechanical evaporators were determined not to require an air quality permit.

At the time of inspection, LANL was nearing completion of the uncovered Solar Evaporative tanks (SET). All treated effluent from the RLWTF will be discharged via a

³ SWEIS at G-60, G-73, G-83, G-88 (Ex. JJ).

⁴ 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).

⁵ 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).

3,500 foot single-lined gravity fed conveyance pipe (with welds every 500 feet) to the SET. LANL is anticipating having the as-built drawings for the SET completed by mid-May and would be looking at placing the SET on-line and commencing discharge approximately 3-4 months after that.”

[AR 290 at 08122] (March 20, 2012).

11. LANL responded to the NMED report, not contesting the description of its discharge plans but adding that “The strategic plan for DOE/LANS is to maintain all three effluent management options, including the capability of treating radioactive liquid waste to meet all NPDES limitations.” [AR 308 at 08223] (July 10, 2012).

12. Discharges from Outfall 051 ended in late 2010. A 2014 LANL report states: “Discharges from Outfall 051 decreased significantly after the mid-1980s and effectively ended in late 2010.”⁶ In late 2014 NMED reported to EPA Region 6 that Outfall 051 had not discharged since November 2010.⁷ 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.”⁸ Quarterly reports in the Administrative Record show that there has been no discharge since November 2010. [AR 246; AR 253; AR 255; AR 261; AR 273; AR 307; AR 309; AR 321; AR 359; AR 396; AR 419; AR 446; AR 458; AR 467; AR 492; AR 502; AR 510; AR 518; AR 520; AR 524; AR 528; AR 529; AR 533; AR 537; AR 529]. No discharges are planned. The facts are set forth in detail in the Request to Terminate NPDES

⁶ Isotopic evidence for reduction of anthropogenic hexavalent chromium in Los Alamos National Laboratory groundwater, 373 Chemical Geology 1, 4 (12 May 2014) (Ex. PP to the Request).

⁷ Letter, Yurdin to Dorries with Inspection Report, at 4th page (August 5, 2014) (Ex. QQ to Request).

⁸ LANL web site, NPDES Industrial Permit Outfall Locations, <http://www.lanl.gov/community-environmental-stewardship> (reviewed on Oct. 2, 2015) (Ex. RR to Request).

Permit #NM0028355 to Outfall 051 for the Radioactive Liquid Waste Treatment Facility (June 17, 2016), which is in the Record.

13. The discontinuance of discharges determines which regulatory regime applies to the RLWTF. The discharges of contaminated water that required regulation under the WQA and under the NPDES program have stopped. Thus, there is no longer any need or any basis to regulate such discharges.

14. Nevertheless, LANL has proceeded with the pending WQA Discharge Permit Application, dated February 14, 2012, which is clearly marked “Application for a new Discharge Permit—existing (unpermitted) facility” and which refers to discharges through Outfall 051:

Discharge to the environment is via NPDES Outfall #051, solar evaporation at the TA-52 Zero Liquid Discharge Solar Evaporation Tanks, or mechanical evaporation at TA-50-257.

[AR 280 at 5348]. In fact, such discharges stopped more than seven years ago.

15. Although there are no discharges, LANL demands that a discharge permit issue and insists that the RLWTF is, therefore, exempt from HWA regulation. For example, LANL has argued that it was inappropriate for the draft permit to impose conditions from the Hazardous Waste regulations, because LANL claimed the RLWTF was exempt:

General Comment No. 1, Permit Condition II.V, Page 6 (Definition of Secondary containment):

This permit condition defines “secondary containment” by incorporating (verbatim) the definition of “secondary containment” as that term is used under the New Mexico Hazardous Waste Regulations (NMAC 20.4.2.1 et seq.) and EPA rules under the Resource Conservation and Recovery Act of 1976 (“RCRA”, 42 U.S.C. § 6901 et seq.) at 40 C.F.R. § 264.193. This proposed condition is inappropriate for at least four reasons. First, the RLWTF is a wastewater treatment unit which is exempt from the requirements of 40 C.F.R. § 264.193 and 20.4.2.1 NMAC.

[AR 435 at 09794] (Dec. 12, 2013).

16. LANL has argued that:

RCRA contains very prescriptive requirements which NMED-GWQB is attempting to inject in the draft permit definition, to determine if tank or tank systems meet “secondary containment” requirements. . . . Because it is an exempt wastewater treatment unit, the existing RLWTF was not constructed to meet the RCRA requirements.

Id. LANL also commented that NMED could not lawfully use RCRA language concerning emergency plans. *Id.* 09799.

17. CCW has consistently argued that conversion of the RLWTF to “zero-liquid-discharge” operation would change its regulatory status and would require that the RLWTF have a RCRA permit under the HWA:

LANL has several reports going back to the 1970’s of its studies on the need and efficacy of turning the RLWTF into a “zero-liquid-discharge” facility. In its application, as well as previous studies of the RLWTF, LANL points to the fact that its discharges from the facility are already extremely minimal. Given the data that LANL has provided, it is questionable whether this facility should receive an NPDES permit or should be permitted as a RCRA hazardous waste processing facility.

[AR 431 at 09663].

18. In further comments, CCW maintained that “LANL should be forced to seek a Resource Conservation and Recovery Act permit for this facility as a hazardous waste treatment facility—and go to zero discharge within one year of issuance of the permit.” **[AR 434 at 09694]** (Dec. 12, 2013).

19. Later, CCW pointed out that the “Authorization to Discharge” language in the draft DP-1132 was not appropriate, since the RLWTF was a “zero-liquid-discharge” facility. CCW explained that the transfer of water within the RLWTF to the evaporator unit or to the evaporative tanks did not constitute a “discharge,” because it was not a release that may move toward ground water or interfere with health:

The Authorization to Discharge (sec. V.C) is unnecessary and should not be given to the Permittees, since no discharges are planned. The statements in section V.C, authorizing the Permittees to “discharge” into the Mechanical Evaporator System (“MES”) or the Solar Evaporative Tank (“SET”) System are not logical, because “discharge” is defined as a release that may move directly or indirectly into ground water or interfere with health, etc. (sec. II.G.) A discharge into the MES or the SET is not calculated to move into ground water or interfere with health. Further, the authorization to discharge through Outfall 051 is not proper, since the Permittees state that the RLWTF will be a “zero-discharge” facility; Permittees do not propose to make any discharges through Outfall 051 and should not be given authority to do so.

[AR 539 at 13690] (Nov. 23, 2015).

20. CCW contended that a groundwater discharge permit had improperly been used to avoid regulation under the HWA: “[W]e find that a discharge permit is only supportable where there is an actual discharge occurring or planned—a situation not present here.” [AR 539 at 13698] (Aug. 29, 2016). CCW emphasized that the unsupported discharge permit would give the RLWTF an undeserved exemption from hazardous waste regulation. [AR 539 at 13756-58] (Jan. 13, 2017).

21. The Ground Water Protection Bureau has, however, persisted in issuing a WQA permit. It has said that it rejects the idea of “zero discharge.” Further,

NMED considers discharges to the collection system of the RLWTF, discharges within the RLWTF treatment units, discharges to Outfall 051, discharges to the SET and even discharges to the mechanical evaporator system (MES) to all constitute “liquid discharges” and considers all of these discharges subject to WQCC regulatory authority.

[AR 390 at 09136]. A permit based upon such concepts would be contrary to law.

III. ARGUMENT.

22. Here, NMED seeks to issue a discharge permit (“DP-1132”) under the WQA for the RLWTF. For four principal reasons this discharge permit may not issue:

a. First, the RLWTF does not and will not *discharge* any water or contaminants. Without a discharge, NMED has no basis to issue a discharge permit. NMSA 1978, § 74-6-5(A)and (I).

b. Second, NMED has no authority to issue a WQA permit for a “possible” or “potential” discharge, where there is no actual discharge.

c. Third, a WQA permit for the RLWTF would be a nullity, because by law it would not become effective until there is a discharge, i.e.—never. A WQA permit that is not in effect may not be enforced for any purpose. The Legislature cannot have intended NMED to labor to produce a permit that has no effect.

d. Fourth, the RLWTF is a *hazardous waste management facility*, and the WQA by its own terms cannot apply. Under NMSA 1978, § 74-6-12(B), “[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act”

a. There can be no WQA permit where there is no discharge:

23.The WQA authorizes the Water Quality Control Commission (“WQCC”) *only* to require “a permit *for the discharge* of any water contaminant” (*emphasis supplied*):

By regulation, the commission may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant or for the disposal or reuse of septage or sludge.

NMSA 1978, § 74-6-5. The specific requirement, contained in the permitting rules, states:

DISCHARGE PERMIT REQUIRED

Unless otherwise provided by this Part, no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary. When a permit has been issued, discharges must be consistent with the terms and conditions of the permit. . . .

20.6.2.3104 NMAC.

24. Further, the WQA Regulations specifically describe a discharge plan as one that regulates releases of effluent or leachate “so that it may move directly or indirectly into ground water.” 20.6.2.3104 NMAC (*emphasis supplied*):

R. “discharge plan” means a description of any operational, monitoring, contingency, and closure requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water . . .

20.6.2.7 NMAC. “Ground water” is further defined by regulation:

Z. “ground water” means interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply . . .

Id.

25. Thus, the WQA applies only to an actual “discharge,” moving toward ground water, which, in turn, is defined as “interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply.”

26. But the RLWTF is now a “zero-liquid-discharge” facility. No water at all, and no contaminants, are being released or will be released. Therefore, nothing will be released which may move toward any water, much less water occurring in saturated earth material which is capable of entering a well in sufficient amounts to be utilized as a water supply. The WQA and its regulations only authorize NMED to regulate a facility that makes a discharge, as so defined. The RLWTF is not such a facility. An agency must follow its authorizing statute. *Albuquerque Cab Co. v. N.M. Public Regulation Commission*, 2014-NMSC-004, ¶ 11. Likewise, an agency must follow its own regulations. *Hillman v. Health & Social Services Department*, 1979-NMCA-007, ¶ 5, 92 N.M. 480, 590 P.2d179; *La Mesa Racetrack v. State Racing Commission*, 2013 N.M. App. Unpub. Lexis 95, ¶ 14.

27. Indeed, the draft permit now defines “discharge” in expansive language that far exceeds the governing regulations, contrary to the cases cited above:

G. Discharge- the intentional or unintentional release of an effluent or leachate which has the potential to move directly or indirectly into ground water or to be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property.

[AR 511 at 12980] (May 5, 2017).

28. In addition, NMED has improperly inserted language into DP-1132 to suggest that a statutory “discharge” is occurring or anticipated. These “Findings” regarding “discharges” are wholly without factual basis. Specifically:

In issuing this Discharge Permit, NMED finds:

The Permittees are discharging effluent or leachate from the Facility so that such effluent or leachate may move directly or indirectly into ground water within the meaning of 20.6.2.3104 NMAC.

The Permittees are discharging effluent or leachate from the Facility so that such effluent or leachate may move into ground water of the State of New Mexico which has an existing concentration of 10,000 mg/L or less of total dissolved solids (TDS) within the meaning of 20.6.2.3101.A NMAC

The discharge from the Facility is within or into a place of withdrawal of ground water for present or reasonably foreseeable future use within the meaning of the WQA, NMSA 1978, § 74-6-5.E.3, and the WQCC Regulations at 20.6.2.3103 NMAC.

The discharge from the Facility to Outfall 051 is subject to the exemption set forth in 20.6.2.3105F NMAC, to the extent that effective and enforceable effluent limitations (not including monitoring requirements) are imposed, unless the NMED Secretary determines that a hazard to public health may result.

[AR 511 at 12984] (May 5, 2017). The recitals that assert that effluent or leachate is now being discharged are unsupported and refuted by, among other things, the consistent quarterly reports that show no discharges.

29. The Draft Permit also contains an “authorization to discharge,” purportedly allowing LANL to “discharge” contaminated water from one tank to another within the RLWTF:

B. The Permittees are authorized to discharge up to 40,000 gpd of low-level and transuranic radioactive industrial waste water using a series of treatment processes as described in Section V(D) of this Discharge Permit in accordance with the Conditions set forth in Section VI of this Discharge Permit.

C. The Permittees are authorized to discharge up to 40,000 gpd of treated waste water, in accordance with the Conditions set forth in Section VI of this Discharge Permit. Discharges shall be to either the Mechanical Evaporator System (MES), the synthetically lined Solar Evaporation Tank System (SET), or through an outfall (Identified as Outfall 051) also regulated by a National Pollutant Discharge Elimination System (NPDES) permit (Permit No. NM0028355) issued by the United States Environmental Protection Agency [20.6.2.3104 NMAC, 20.6.2.3106C NMAC, 20.6.2.3109.C NMAC].

[AR 511 at 12984)]

30. These findings and authorizations are entirely bogus. It is known that discharges through Outfall 051 stopped in 2010 and are neither occurring nor planned. The purported “authorization” to make discharges through Outfall 051 is meaningless, because LANL has no plans to do so.

31. The other supposed “discharges” referred to in “Findings” and “Authorizations” are simply transfers among parts of the contained system of the RLWTF, transfers that leave the water and any contaminant isolated from the environment. Such so-called “discharges” involve no release to the environment or towards ground water, as the WQA requires. The idea that a transfer of water from one tank to another tank or evaporation unit in a contained facility, or back again—an action that makes no release to the environment or towards ground water even incrementally more likely—constitutes a “discharge” cannot be squared with the language of the WQA and its regulations.

32. LANL itself recognizes that a transfer to the evaporation tanks is no “discharge.” LANL has repeatedly asserted that a groundwater discharge permit would not be required for the evaporation tanks, because “there is no reasonable probability that liquid contained in the evaporation tanks would move into groundwater.” [AR 213 at 03655; see also AR 221 at 03704 and AR 256 at 05217]. Recitals about fantasy “discharges” are merely a fabricated predicate for a WQA permit that has no lawful basis.⁹

b. The WQA does not authorize a permit for a “possible” discharge.

33. DP-1132 cannot be justified on the theory that an unplanned discharge through Outfall 051 is *possible*. The WQA does not authorize a permit when NMED finds that a facility might *possibly* discharge, *e.g.*, from an accidental leak. The WQA authorizes a permit *only* for an actual “discharge.” NMED must stay within the bounds of the authority that the Legislature has given it—which does not include the regulation of hypothetical discharges.

34. Such regulation would make little sense. If the *possibility* of equipment failure called for a discharge permit, then NMED would need to issue a discharge permit for any pipe that connects a water tank to a power plant boiler, or to cooling towers, or to another treatment system, or to any other building. It is always *possible* that a pipe might leak. But only a “discharge” may be regulated. § 20.6.2.3104 NMAC. Under the WQA and its implementing

⁹ Indeed, the WQA makes it clear that management of water that is confined within a particular unit is not subject to the Water Quality Act. It denies application of the Act to water pollution that is “confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters”:

C. The Water Quality Act does not authorize the commission to adopt any regulation with respect to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters.

NMSA 1978, § 74-6-12.

regulations, NMED is not allowed to issue a discharge permit for a facility that does not discharge.

b. A permit for a non-discharging facility is entirely without effect.

35. The WQA authorizes the Water Quality Control Commission (“WQCC”) to require “a permit for the discharge of any water contaminant,” § 74-6-5.A NMSA 1978, and it specifies that “the term of the permit shall commence *on the date the discharge begins.*” § 74-6-5(I) NMSA 1978 (*emphasis supplied*). Regulations contain the same terms. 20.6.2.3109.H NMAC.

36. Since the permit term starts only with an *actual* discharge, a permit to a non-discharging facility never comes into effect. Here, Outfall 051 will indefinitely have ‘zero discharge’, *i.e.*, no discharge at all. *See generally: Request to Terminate NPDES Permit #NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility* (filed with the U.S. EPA Region 6 Regional Administrator on June 20, 2016).¹⁰ DP-1132, upon issuance, will be a nullity, and it will continue indefinitely to be a nullity.

37. When a permit is not in effect, it cannot be enforced; *i.e.*, there is no penalty for violation of its requirements. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46, *aff’d in part, rev’d in part on other grounds*, 2004-NMSC-931, 136 N.M. 367, 98 P.3d 1017.

38. CCW respectfully submits that the New Mexico Legislature did not enact the WQA to assign NMED the task of promulgating a nullity.

c. The WQA does not apply to a facility regulated under the HWA.

39. The proposed permit, DP-1132, would be issued under the WQA. Conflicts between the WQA and the HWA, which implements the Resource Conservation and Recovery Act, 42

¹⁰ A copy of this filing with a complete set of the referenced attachments is in the possession of the Office of General Counsel of NMED, as it was provided as a courtesy to the office of the Secretary on June 20, 2016.

U.S.C. § 6921 *et seq.* (“RCRA”), in New Mexico, are mediated by a provision in the WQA, which states that a facility that is subject to the HWA cannot be regulated by the WQA:

B. The Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978], the Ground Water Protection Act [Chapter 74, Article 6B NMSA 1978] or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge.

NMSA 1978, § 74-6-12.B. Thus, “The Water Quality Act is a separate regulatory scheme and does not overlap the Hazardous Waste Act.” *Schwartzman, Inc. v. Atchison, T. & S.F. Ry.*, 857 F. Supp. 838, 847 n. 4 (D.N.M. 1994).

40. LANL expressly acknowledges that the RLWTF manages hazardous waste, as defined in regulations under the HWA.¹¹ Normally, such a facility is required to have a permit issued under RCRA or the parallel state law, here, the HWA: Since it receives, stores, and treats wastes which contain hazardous constituents and constitute “solid waste” and “hazardous waste” under RCRA, 42 U.S.C. § 6903(5) and (27), the RLWTF must have a permit under RCRA or an authorized state program. 42 U.S.C. § 6925, 40 C.F.R. § 270.1(c).

41. Yet, the RLWTF has no RCRA permit. LANL relies upon a statutory RCRA exemption, 42 U.S.C. § 6903(27), for discharges from facilities regulated under the NPDES and a regulatory exemption for a “wastewater treatment unit” *See generally*, 40 C.F.R. §§ 260.10 (*Tank system, Wastewater treatment unit*), 264.1(g)(6). LANL claims that the RLWTF constitutes a Wastewater Treatment Unit, exempt from regulation under RCRA and the HWA.

¹¹ LANL concedes 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[.]” LANL has expressly stated that, “The RLWTF satisfies each of these conditions[.]” The RLWTF [r]eceives and treats a small amount of hazardous wastewater[.]” Comments, Dec. 12, 2013, Encl. 3 at 1. Moreover, LANL has told NMED that, “[A]ll units at the TA-50 RLWTF . . . have been characterized as a SWMU or AOC and are therefore subject to regulation under the [HWA Consent Order].” LANL letter to [Jerry] Schoeppner, Head, Groundwater Quality Bureau, September 11, 2014.

42. As NMED itself has stated, the availability of the Wastewater Treatment Unit exemption depends upon the RLWTF discharging through a Clean Water Act outfall:

4.6 TA-50 RADIOACTIVE LIQUID WASTE TREATMENT FACILITY The Permittees shall discharge all treated wastewater from the TA-50 Radioactive Liquid Waste Treatment Facility (RLWTF) through the outfall permitted under Section 402 of the federal Clean Water Act, or as otherwise authorized by the terms of an applicable Clean Water Act permit that regulates the treatment and use of wastewater. If the Permittees intentionally discharge through a location other than the permitted outfall or as otherwise authorized, they will fail to comply with this requirement, and as a consequence the wastewater treatment unit exemption under 40 CFR § 264.1(g)(6) will no longer apply to the RLWTF. The Permittees shall not accept listed hazardous wastes as specified at 40 CFR Part 261 Subpart D at the RLWTF.

2010 LANL HWA permit at 86.

43. However, the discharges stopped quite a while ago. The Clean Water Act applies only to a “discharge of any pollutant, or combination of pollutants.” 33 U.S.C. § 1342(a)(1). A discharge is “[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. Where there is no discharge, there is no basis for an NPDES permit. *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486, 505 (2d Cir. 2005); *see also National Pork Producers Council v. U.S. Environmental Protection Agency*, 635 F.3d 738, 750 (5th Cir. 2011). Without a NPDES permit, there is no waste water treatment unit exemption from RCRA. Here, there is no discharge; there is no basis for an NPDES permit; thus, there can be no RCRA exemption. Without an exemption, RCRA (*i.e.*, HWA) regulation is required.

45. It is not within NMED’s discretion to exempt the RLWTF from the HWA by, *e.g.*, issuing a WQA permit to excuse compliance with the HWA. Regulation of hazardous wastes is governed by federal law. RCRA, as a congressional enactment, is the supreme law of the land. U.S. Const., Art. VI, Cl. 2. Further, NMED has represented to the U.S. Environmental

Protection Agency (“EPA”) that New Mexico’s HWA program is “equivalent to, consistent with, and no less stringent than the federal program” under RCRA. EPA therefore authorized New Mexico under 42 U.S.C. § 6926(b) to operate the state’s HWA program in lieu of RCRA. *See generally*, New Mexico: Final Authorization of State Hazardous Waste Management Program Revision, 72 Fed. Reg. 46165 (Aug. 17, 2007).

44. The WQA states that, if a facility is an “activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act,” such a facility cannot be regulated by the WQA. NMSA 1978, § 74-6-12.B.

45. LANL knew that the RLWTF’s transition to zero-liquid-discharge operation would spell the end of a NPDES discharge permit and, consequently, of the Wastewater Treatment Unit exemption from the HWA:

Under RCRA, wastewater treatment facilities that are subject to NPDES permit limits may qualify for exemption from certain RCRA requirements, including engineering design standards. When the RLWTF implements zero liquid discharge, if the NPDES permit for Mortandad Canyon is deleted, current exemptions would not apply. RCRA-listed wastes are already administratively prohibited from the RLW 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.¹²

46. LANL noted that loss of the RCRA exemption was an “important consideration” in its planning, and:

Loss of this exemption would mean that the RLWTF would be required to meet additional RCRA regulatory guidelines regarding waste treatment practices. RCRA guidelines regarding waste treatment at the RLWTF would focus on concentrations of metals and organics in the RO [reverse osmosis] concentrate stream and sludges produced at the RLWTF. The RLWTF would need to manage the constituents in the waste stream and so have much better knowledge of, and control over, wastes discharged to it for treatment.¹³

¹² *Id.* 12 (Ex. A to Request).

¹³ *Id.* 32.

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.¹⁴

47. Nevertheless, LANL established zero liquid discharge from the RLWTF as its “ultimate goal.”¹⁵ LANL repeatedly so stated.¹⁶ NMED has stated publicly that elimination of Outfall 051 is a desirable goal.¹⁷

48. Under the WQA, where RCRA regulation is required, the WQA cannot apply. § 74-6-12(B) NMSA 1978. Therefore, no WQA permit may be issued, and this proceeding must be dismissed.

IV. CONCLUSION.

49. There is no basis in law or fact for issuing this WQA permit. The RLWTF has changed fundamentally since this proceeding began. Plainly, LANL now has no plan to discharge water from the contained system of the RLWTF so that it can move toward ground water. The permit originally sought is no longer appropriate or lawful. However, the functions of the RLWTF clearly include the management of hazardous wastes; the HWA applies to those activities, and under New Mexico law the WQA can have no application. The proceeding must be dismissed.

50. The outcome sought by LANL and NMED would nullify environmental regulation of the RLWTF. There would be no regulation under the WQA, because there would be no

¹⁴ *Id.* Table 6.

¹⁵ Letter, Hanson and Rae to Bustamante, Sept. 3, 1998 (Ex. B to Request).

¹⁶ Letter, Erikson and Baca to Coleman, March 18, 1999 (Ex. C to request); Letter, Rae to Coleman, Dec. 22, 1999 (Ex. D to Request); Letter, Rae to Coleman, June 13, 2000 (Ex. E to Request).

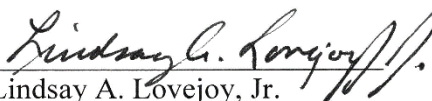
¹⁷ See Letter, Yanicak to Coghlan, May 12, 1999, at 2 (Ex. F to Request).

discharges, and DP-1132 would be without effect. Moreover, even if it were in effect, DP-1132 primarily regulates discharges from the RLWTF, in contrast to a HWA permit, which regulates all aspects of hazardous waste management. Moreover, under LANL's plan, there likewise would be no regulation under the HWA, because NMED's issuance of a WQA permit stands as an obstacle to applying the HWA to the RLWTF. For a facility of such importance, that outcome is highly unfortunate—and also illegal.

Wherefore, CCW requests that this motion be granted, that NMED withdraw DP-1132 and direct the Hazardous Waste Bureau to begin regulation of the RLWTF under the provisions of the New Mexico Hazardous Waste Act and the federal Resource Conservation and Recovery Act.

DATE AT: Santa Fe, New Mexico, this 16th day of March, 2018

Respectfully submitted,

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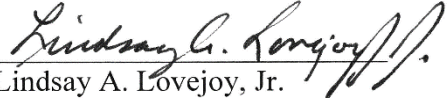
CERTIFICATE OF SERVICE

The undersigned certifies that on March 16, 2018, two copies of the foregoing motion was served by hand delivery to Linda Vigil, Hearing Clerk, New Mexico Environment Department, 1190 St. Francis Drive, Suite S-2103, Santa Fe, NM 87502, and copies were emailed and send by U.S. Postal Service, First Class, pre-paid to:

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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUNDWATER DISCHARGE PERMIT (DP-1132)
FOR THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY



No. GWB 17-20 (P)

ENTRY OF APPEARANCE

The undersigned counsel, John Verheul, hereby enters his appearance in this matter on behalf of the New Mexico Environment Department, Ground Water Quality Bureau.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUNDWATER DISCHARGE PERMIT (DP-1132)
FOR THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY

No. GWB 17-20 (P)

NEW MEXICO ENVIRONMENT DEPARTMENT'S
RESPONSE IN OPPOSITION TO COMMUNITIES FOR CLEAN WATER'S
MOTION TO DISMISS DP-1132 PROCEEDING

Pursuant to 20.1.4.200.D NMAC, the New Mexico Environment Department (the "Department" or "NMED") submits this response in opposition to Communities for Clean Water's ("CCW") Motion to Dismiss DP-1132 Proceeding (the "Motion"). The issuance of a discharge permit for the Radioactive Liquid Waste Treatment Facility ("RLWTF") is fully within the Secretary's authority under the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 ("WQA"). The Motion is without merit and should be denied for the reasons set forth below.

BACKGROUND

The focus of the proceeding under which CCW's Motion was filed is the draft discharge permit (DP-1132) associated with an application submitted by the United States Department of Energy and Los Alamos National Security, LLC (the "Applicants") to discharge treated wastewater from the Applicants' RLWTF located at Los Alamos National Laboratory ("LANL"). [AR 12975-13035].

Construction of the RLWTF began in 1961, and the processing of liquid waste began in 1963. On April 3, 1996, the Department notified the Applicants that a discharge permit was required. [AR 00013-00015]. The Application consists of the materials submitted by the Applicants on August 16, 1996 [AR 00112-00532], an updated application submitted to NMED

on February 14, 2012 [AR 05336-08003], an amendment to the application submitted to NMED on August 10, 2012 [AR 08268-08313], supplemental information submitted on June 3, 2016 [AR 13272-13355], and materials contained in the administrative record prior to issuance of DP-1132. NMED advised the Applicants in January 2000 that there was significant public interest in DP-1132, and that a public hearing would be held. However, due to staff constraints and time requirements for a full review of all materials submitted, no hearing was scheduled at that time, and subsequently the discharge permit was never issued. [AR 01437-01441]. DP-1132 was first public noticed in draft form on August 4, 2003. [AR 02159-02161]. A revised draft DP-1132 was public noticed on April 18, 2005 [AR 02881-02902], then another draft on June 10, 2005. [AR 02911-02919]. In January 2016, the Applicants submitted a draft Closure Plan for inclusion into DP-1132. [AR 13255-13258]. On May 5, 2017, the Department issued a public notice for the draft DP-1132 that is the subject of this hearing. [AR 13481-13796]. On March 2, 2018, the Department re-noticed the draft Discharge Permit, and included the correct, September 2016 version of the closure plan contained therein (the May 5, 2017 notice inadvertently and mistakenly included a prior version of the closure plan).

The draft DP-1132 authorizes the discharge of treated effluent to three locations; the Mechanical Evaporator System (“MES”) located near Building 50-01, the SET, or through an outfall in Effluent Canyon (Outfall 051), which is a tributary to Mortendad Canyon. The MES is co-located with the RLWTF and disposes of treated effluent via mechanical evaporation. This natural gas fired evaporator has been the sole disposal method for the RLWTF for the past several years. The SET system is associated with the RLWTF but located at TA-52. Approximately 3500 feet of high-density polyethylene transfer piping connect the SET and the RLWTF. The SET is a concrete, synthetically-lined impoundment designed to receive treated effluent from the RLWTF

for disposal by evaporation. The SET was constructed and has not yet been put into service pending issuance of this Discharge Permit. [AR 12975-13035]. Outfall 051 was the Applicants' sole discharge option until the construction of the MES. No discharges have occurred at that outfall since 2010. Outfall 051 is regulated by a National Pollutant Discharge Elimination System ("NPDES") permit (Permit No. NM0028355) issued by the United States Environmental Protection Agency ("EPA"). The Applicants maintain the NPDES permit as a discharge option. [AR 13212-13232].

ARGUMENT

I. The Secretary Has the Authority to Require and Issue Discharge Permits to Prevent Water Pollution Where There Exists the Possibility of a Discharge

A. The Purpose of the WQA is to Prevent Water Pollution

The WQA is the primary statutory mechanism by which groundwater in New Mexico is protected. The objective of the WQA is "to abate and *prevent* water pollution." *Bokum Res. Corp. v. New Mexico Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546, 555 (emphasis added). The WQA directs the New Mexico Water Quality Control Commission ("WQCC") to "adopt, promulgate and publish regulations to *prevent* or abate water pollution in the state." NMSA 1978, § 74-6-4(E) (emphasis added). Pursuant to this statutory directive, the WQCC has adopted such regulations. *See* 20.6.2 NMAC.

B. The Secretary Has the Authority to Require and Issue Discharge Permits

The WQA provides the WQCC with the authority "to adopt regulations requiring that permits for discharge of a water contaminant be obtained from a constituent agency." NMSA 1978, § 74-6-5(A); *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 16, 140 N.M. 464, 469, 143. "With regard to a permit, however, the Act grants authority directly to constituent agencies." *Phelps Dodge*, 2006-NMCA-115, ¶ 16. NMED is a

constituent agency of the WQCC. NMSA 1978, § 74-6-2(K)(1). The WQA expressly authorizes NMED, as a constituent agency, to issue a permit, issue a permit with conditions, deny a permit, or modify a permit. NMSA 1978, § 74-6-5(M), (N). Permitting actions by NMED are reviewable by the WQCC in response to a petition filed by “any person who participated in the permitting action.” NMSA 1978, § 74-6-5(O).

The implementing regulations of the WQA, as adopted and promulgated by the WQCC pursuant to its authority under the WQA, state that “no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary.” 20.6.2.3104 NMAC. The phrase “may move directly or indirectly” means that NMED, as a constituent agency of the WQCC, has the authority to require a discharge permit from any person, if the activities of that person may result in one or more water contaminants moving directly or indirectly into groundwater. That phrase is not unique to Section 3104, it is repeated six times throughout the regulations. *See* 20.6.2.7.R NMAC; 20.6.2.3104 NMAC; 20.6.2.3105 NMAC; 20.6.2.3105 NMAC.

C. The Possibility of a Discharge Triggers the Secretary’s Authority to Require and Issue a Discharge Permit

CCW asserts that, since the RLWTF is designed as a “zero-discharge” facility, there can be no possible discharges, and therefore the Secretary is without authority to issue a discharge permit. Motion at ¶¶ 22-34. Indeed, CCW’s comments submitted on the draft DP-1132 in 2015 attempt to make a similar point. [AR 13690]. This assertion is incorrect for several reasons.

First, nowhere in the WQA or its implementing regulations is a discharge required to be actual, or already occurring, for a permit to be issued. CCW implies that a discharge must be “planned” in order for a discharge permit to be issued. Motion at ¶ 30 (“It is known that discharges

through Outfall 051 ... are neither occurring nor planned”). The words “shall cause or allow” in 20.6.2.3104 NMAC contemplate that such discharge may occur simply as a result of the activities of the person, and that there is no requirement that such discharges be planned, ongoing, or intentional. Contrary to CCW’s assertions, it is the potential for the discharge of water contaminants that may move into groundwater that triggers the authority of the WQA, and thus the Secretary’s authority to issue a discharge permit. As such, CCW’s assertion that “NMED has no authority to issue a WQA permit for a ‘possible’ or ‘potential’ discharge” is plainly wrong.

Second, in order to prevent water pollution, as is the purpose of the WQA and its implementing regulations, it is necessary to contemplate and acknowledge the possibility of failures of mechanical systems and correlated operations. CCW appears certain that there will never be a discharge from the RLWTF. Motion at ¶ 26 (“No water at all, and no contaminants, are being released or will be released.”). While the confidence CCW places in the permittees is commendable, it is hard to understand how CCW can predict the future operations of the RLWTF with such certainty, and conclude there will never be an event that would lead to an unplanned or emergency discharge. Yet the Applicants have repeatedly stated that emergency discharges remain a possibility in the event of a system failure. They argued this as recently as this year, before the EPA’s Environmental Appeals Board (“EAB”). See *In re Los Alamos National Security, LLC, and the U.S. Department of Energy*, NPDES Appeal No. 17-05, slip op. at 5-6 (EAB Mar. 14, 2018) (attached as Exhibit 1). The Applicants argued in that case that discharges to Outfall 051 pursuant to their NPDES permit would be necessary in the event that the “Mechanical Evaporator and/or Zero Liquid Discharge tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory’s] scope/mission.” *Id.* The EAB agreed, holding that discharges to Outfall 051 would be necessary if certain equipment

became unavailable due to maintenance, malfunction or capacity shortage, and were therefore indeed a possibility. *Id* at 1. One of CCW's member organizations, Concerned Citizens for Nuclear Safety ("CCNS"), made similar arguments before the EAB in the aforementioned proceeding as CCW makes now - namely that a discharge permit should not be issued when there has not been a discharge since 2010 and no future discharges are planned. *Id* at 6. The EAB found that the Regional EPA Administrator's denial of CCNS' request to terminate the NPDES permit in this context did not constitute error or abuse of discretion. *Id* at 19.

Similarly, discharges to the SET and MET are not without the potential for failure, and resultant discharge. NMED made that determination years ago in the "Authorization to Discharge" section of the draft DP-1132. [AR 13690]. NMED has issued many permits that limit discharges to evaporative systems, and therefore are designed as "zero discharge" (to surface or groundwater), as a mechanism in which to avoid the impact of the discharge on groundwater. Examples include power plants and many small-scale systems associated with mobile home parks and car washes. Two examples of evaporative-only facilities regulated with a WQA discharge permit are the Alamogordo Brackish Water RO Plant (DP-1827) and the PNM San Juan Generating Station (DP-1327).¹ As explained *supra*, as well as in responses to comments in 2017 [AR 13815-13824], NMED chooses to retain its authority to regulate such systems, as no system is infallible. Granting CCW's Motion would severely undermine NMED's authority to continue requiring and enforcing discharge permits such as these.

It would be unreasonable for NMED to only have the authority to regulate a discharge that is planned, regular, or already occurring if the purpose of the WQA is to prevent and abate water pollution. Were that so, then the purpose would solely be to abate water pollution that has already

¹ A complete list of discharge permits issued by the NMED Ground Water Quality Bureau Pollution Prevention Section is available at <https://www.env.nm.gov/gwb/NMED-GWQB-PollutionPrevention.htm>.

occurred, as prevention clearly implies taking proactive regulatory action prior to the activities or potential failures which may result in water pollution. To interpret the WQA otherwise, as CCW does in its Motion, leads to an absurd result – that the Secretary only has authority to regulate once pollution has already occurred. Statutes must be construed according to the purpose for which they were enacted and not in a manner which leads to absurd or unreasonable results. *State v. Romero*, 2002-NMCA-106, ¶ 8, 132 N.M. 745, 747.

II. CCW is in the Wrong Forum to Argue that the RLWTF Should be Regulated Pursuant to the Hazardous Waste Act

CCW argues that the RLWTF should be regulated by NMED pursuant to the Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 (“HWA”). Motion at ¶¶ 39-48. Again, this argument is premised on CCW’s incorrect assertion that there will never be a discharge from the RLWTF. Motion at ¶ 26 (“No water at all, and no contaminants, are being released or will be released.”). NMED has independent authority under the WQA to issue, or propose to issue, a discharge permit for this facility separate and aside from any obligation CCW perceives NMED to have under the HWA. CCW argues that this proceeding should be dismissed because NMED does not have authority to regulate such activities that would fall under the Hazardous Waste Act, based on the statutory provisions found in NMSA 1978, § 74-6-12(B). Motion at ¶¶ 22, 48. Specifically, Section 74-6-12(B) states: “[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge.”

Section 74-6-12(B) is not applicable because NMED is not attempting to use the WQA to regulate an “...activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act.” The activities and conditions addressed by DP-1132

are specifically included the WQA and its implementing regulations, and there are specific regulatory provisions approved by the WQCC to address such events. As can be found in 20.6.2.3104 NMAC and as discussed *supra*, the Ground and Surface Water Protection Regulations allow for the regulation of discharges of “effluent or leachate” which “may move directly or indirectly into ground water” via the requirement of a discharge permit. The discharge permit DP-1132 is being used for precisely such regulation, the activities and conditions it regulates are not specifically provided for in the HWA.

In any case, discharge permit hearings are an inappropriate venue for arguments related to HWA jurisdiction.

CONCLUSION

The purpose of the WQA is to prevent and abate water pollution. The Secretary of Environment has the authority to require a discharge permit at the RLWTF, and to issue such a permit pursuant to the WQA, because it is the possibility of a discharge which triggers that authority. Granting this Motion would undermine that authority with respect to many discharge permits presently in effect. For the foregoing reasons, CCW’s Motion should be denied.

Respectfully submitted,

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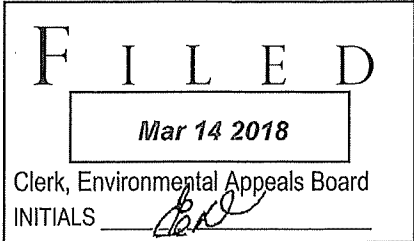
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(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, within sixty (60) days of the issuance of this opinion, of any typographical or other formal errors, in order that corrections may be made before publication.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)
In re:)
)
Los Alamos National Security,)
LLC and the U.S. Department of) NPDES Appeal No. 17-05
Energy)
)
Permit No. NM0028355)
_____)

[Decided March 14, 2018]

FINAL DECISION

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

**IN RE LOS ALAMOS NATIONAL SECURITY, LLC AND THE
U.S. DEPARTMENT OF ENERGY**

NPDES Appeal No. 17-05

FINAL DECISION

Decided March 14, 2018

Syllabus

Concerned Citizens for Nuclear Safety (“Concerned Citizens”) filed an Informal Appeal with the Environmental Appeals Board (“Board”) under 40 C.F.R. § 124.5(b) seeking review of the U.S. Environmental Protection Agency Region 6’s (“Region”) denial of Concerned Citizens’ request to terminate as to one outfall – referred to as Outfall 051 – a National Pollutant Discharge Elimination System (“NPDES”) permit issued for operations at the Los Alamos National Laboratory in New Mexico (“Los Alamos Laboratory”).

The Region issued the permit in 2014 (“2014 Permit”) authorizing Los Alamos National Security, LLC and the U.S. Department of Energy to continue discharges from eleven sanitary and/or industrial outfalls at the Los Alamos Laboratory, including the discharge of treated wastewater from the Radioactive Liquid Waste Treatment Facility through Outfall 051. In its Informal Appeal, Concerned Citizens alleges that the Region erred in denying its subsequent request to terminate the 2014 Permit as to Outfall 051 because the Los Alamos Laboratory has not discharged liquid waste from that Outfall since 2010. Concerned Citizens asserts that permit termination is appropriate under 40 C.F.R. § 122.64(a)(4), which provides that after an NPDES permit is issued, “[a] change in any condition” requiring a reduction or elimination of any discharge is cause for permit termination. In response, the Region argues that Concerned Citizens failed to establish a change in any condition justifying permit termination.

Held: The Region did not clearly err or abuse its discretion in denying Concerned Citizens’ request to terminate the 2014 Permit as to Outfall 051. When the Region issued the 2014 Permit, discharges from Outfall 051 had not occurred since 2010 and would only be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage. Under these circumstances, the record supports the Region’s determination that Concerned Citizens failed to establish a change in any condition after

the Region issued the 2014 Permit justifying permit termination pursuant to 40 C.F.R. § 122.64(a)(4). The Board therefore denies the Informal Appeal.

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Ward:

I. STATEMENT OF THE CASE

Concerned Citizens for Nuclear Safety (“Concerned Citizens”) filed this Informal Appeal under 40 C.F.R. § 124.5(b) seeking review of the denial of its request to terminate as to one outfall – Outfall 051 – a National Pollutant Discharge Elimination System (“NPDES”) permit issued for operations at the Los Alamos National Laboratory (“Los Alamos Laboratory”). *See* Concerned Citizens for Nuclear Safety Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) (“Informal Appeal”) (Sept. 14, 2017); Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. NM0028355 (Aug. 12, 2014) (“2014 Permit”) (Administrative Record (“A.R.”) II).¹ The U.S. Environmental Protection Agency Region 6 (“Region”) issued the permit in 2014 authorizing Los Alamos National Security, LLC and the U.S. Department of Energy (“Permittees”) to continue discharges from eleven sanitary and/or industrial outfalls at the Los Alamos Laboratory, including discharges of treated wastewater from the Radioactive Liquid Waste Treatment Facility (“Treatment Facility”) through

¹ In responding to the Informal Appeal, the Region attached an index to the administrative record. *See* “Index to EPA Region 6 Administrative Record (A.R.)” (Oct. 18, 2017). The Region’s Index lists five documents, each identified with a Roman numeral (I-V). This decision will cite these documents using the Roman numeral assigned by the Region along with the title of the document. In addition, one of the documents in the administrative record provided by the Region, A.R. IV, is Concerned Citizens’ request to terminate with respect to Outfall 051 filed with the Regional Judicial Officer in June 2016 and then resubmitted to the Region 6 Acting Regional Administrator in March 2017 (discussed in section III.C. of this decision). *See* Letter from Lindsay A. Lovejoy, Jr., Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, Counsel for Concerned Citizens, to Samuel Coleman, P.E., Acting Administrator, U.S. EPA Region 6 (Mar. 9, 2017) (enclosing Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility) (June 17, 2016) (“Termination Request”). The Termination Request attaches multiple exhibits. This decision cites to these exhibits as “Ex. __ to Termination Request.”

Outfall 051. *See* 2014 Permit Pt. I at 6. Concerned Citizens participated in the permitting process leading up to the issuance of the 2014 Permit.

In the current appeal, Concerned Citizens alleges that the Region erred in denying its subsequent request to terminate the 2014 Permit as to Outfall 051 because the Los Alamos Laboratory has not discharged liquid waste from that outfall since 2010. *See* Informal Appeal at 1. Concerned Citizens asserts that permit termination is appropriate under 40 C.F.R. § 122.64(a)(4), which provides that after a permit is issued, “[a] change in any condition” requiring a reduction or elimination of any discharge is cause for permit termination. *See id.* at 3-11. In response, the Region argues that Concerned Citizens failed to establish a change in any condition justifying permit termination. *See* EPA Response to Concerned Citizens for Nuclear Safety’s Informal Appeal of EPA’s Denial of Request to Terminate Permit Authorization (Oct. 18, 2017) (“Region’s Response”).

We conclude that the Region did not clearly err or abuse its discretion. The record supports the Region’s determination that Concerned Citizens failed to establish a change in a condition justifying permit termination after the Region issued the 2014 Permit. The Informal Appeal is therefore denied.

II. REGULATORY HISTORY

EPA’s consolidated permitting regulations provide detailed procedures for EPA’s issuance or renewal of permits under NPDES and other permit programs. Those regulations require EPA to issue a draft permit, seek public comment, hold a public hearing where there is significant public interest in the draft permit, and respond to significant comments received when a final permit decision is issued. *See* 40 C.F.R. §§ 124.6-.12, .17. The regulations specify the procedures and grounds for an appeal of a permit decision at 40 C.F.R. § 124.19. After EPA issues an NPDES permit, however, 40 C.F.R. § 124.5 allows “any interested person” to request termination under that regulation only for the reasons listed in 40 C.F.R. § 122.64. In particular, section 124.5 states, in part:

(a) Permits * * * may be modified, revoked and reissued, or terminated, either at the request of any interested person * * * or upon the [Region’s²] initiative. However, permits may *only* be

² The regulations use the term “Director” to describe the permitting authority. 40 C.F.R. § 124.2 (defining “Director”). The permitting authority here is EPA’s Regional Administrator for Region 6. The Board will therefore refer to the Region in places where

*** terminated for the reasons specified in *** [40 C.F.R.]
§ 122.64 ***.

40 C.F.R. § 124.5 (emphasis added). And 40 C.F.R. § 122.64 in turn identifies four bases for “terminating a permit during its term:”

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

40 C.F.R. § 122.64(a).

Concerned Citizens’ Informal Appeal relies on the fourth basis for termination at 40 C.F.R. § 122.64(a)(4) – where there has been “[a] change in any condition” since permit issuance.

III. *FACTUAL HISTORY*

To best understand the issue raised by Concerned Citizens – that there has been “[a] change in any condition” after the Region issued the 2014 Permit – we

the regulations use the term “Director.” *See id.* (“When there is no approved State *** program, and there is an EPA administered program, ‘Director’ means the Regional Administrator.”).

describe in detail below the Treatment Facility, the process leading to issuance of the 2014 Permit, and Concerned Citizens' subsequent termination request.

A. *The Los Alamos Laboratory*

The Los Alamos Laboratory is located on forty square miles in Los Alamos County in north-central New Mexico, approximately sixty miles north-northeast of Albuquerque. See Los Alamos National Laboratory NPDES Permit Re-Application, Permit No. NM0028355 at ¶ 3.0 (Feb. 2012) ("2012 Permit Re-Application") (A.R. I) and attached 2012 NPDES Re-Application Outfall Fact Sheet for Outfall 051 ("2012 Re-Application Fact Sheet – Outfall 051") (A.R. I.A.). The Los Alamos Laboratory provides for "stockpile stewardship" and engages in "extensive basic research in physics, chemistry, metallurgy, mathematics, computers, earth sciences, and electronics." 2012 Permit Re-Application at ¶ 3.1.

B. *The 2012 Permit Re-Application and the 2014 Permit*

In February 2012, the Los Alamos National Security, LLC and the U.S. Department of Energy submitted an application for renewal of the Los Alamos Laboratory's then-existing NPDES permit, issued in August 2007, to authorize continued discharges from eleven outfalls, including discharges from the Treatment Facility to the Facility's one Outfall, Outfall 051. See 2012 Permit Re-Application at ¶ 4.0 & Table 4.1. The Treatment Facility treats low-level and transuranic radioactive liquid waste from various locations at the Laboratory. 2012 Re-Application Fact Sheet – Outfall 051 at 1.

Prior to 2010, treated wastewater from the Treatment Facility was regularly discharged to Outfall 051. See 2012 Permit Re-Application at ¶ 2.0; 2012 Re-Application Fact Sheet – Outfall 051 at 1, 5. As the Permittees stated in their 2012 Re-Application, however, the Treatment Facility "ha[d] not discharged to Outfall 051 since November 2010" due to changes in facility operations prior to re-application, including the use of a mechanical evaporator. See 2012 Re-Application Fact Sheet – Outfall 051 at 5. The Permittees also identified the anticipated construction of two new solar evaporation tanks – referred to as "Zero Liquid Discharge" tanks – that would serve the same function as the mechanical evaporator of receiving treated effluent from the Treatment Facility. See *id.* at 5, 7. Permittees nevertheless requested re-permitting of Outfall 051, "so that the [Treatment Facility] can maintain the capability to discharge to the outfall *should* the Mechanical Evaporator and/or Zero Liquid Discharge * * * tanks become unavailable due to maintenance, malfunction, and/or there is an increase in

treatment capacity caused by changes in [the Laboratory's] scope/mission." *Id.* at 5 (emphasis added). Permittees further noted that "[a] grab sample [of the effluent] will be collected from Outfall 051 *when/if* the [Treatment Facility] discharges effluent through the [O]utfall." *Id.* (emphasis added). *See also* Form 2C to the 2012 Permit Re-Application at 6-14 (same).

In June 2013, the Region issued a public notice of the draft permit seeking public comment. *See* NPDES Permit No. NM0028355 Response to Comments at 2 (Aug. 4, 2014) ("Response to Comments") (A.R. III). The Region's Fact Sheet accompanying the 2013 draft permit stated: "The effluent is evaporated through a mechanical evaporator and has no discharge since November 2010. [Los Alamos Laboratory] includes the outfall in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage." NPDES Permit No. NM0028355, Fact Sheet for the Draft [NPDES] Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN to Termination Request) (emphasis added).

In their August 2013 comments on the draft permit, the Permittees reiterated that "the * * * [Treatment Facility has] not discharged [to Outfall 051] since November 2010 as a result of using the mechanical evaporator" and that it sought to re-permit the Outfall in the event that the mechanical evaporator or now constructed evaporation tanks (once permitted and in use) were not functioning: "Based on discharge records prior to November 2010, and with options of using the existing mechanical evaporator or new [Zero Liquid Discharge] evaporation tanks, [the Treatment Facility] would discharge to Outfall 051 only once or twice per week *if* evaporation is not an option." Letter from Alison M. Dorries, Division Leader, Environmental Protection Division, Los Alamos National Security, LLC, and Gene E. Turner, Environmental Permitting Manager, Los Alamos Field Office, Department of Energy, to Diane Smith, U.S. EPA Region 6 Permit Processing Team, Enclosure 1 at 3 (Aug. 13, 2013) (emphasis added) ("Los Alamos Laboratory Comments on 2013 Draft Permit") (Ex. OO to Termination Request).

Further, because Los Alamos Laboratory anticipated that future discharges to Outfall 051 – if they were to resume – were likely to be intermittent, its August 2013 comments requested modification of a provision in the draft permit's continuous flow monitoring requirements for Outfall 051: "[The Treatment Facility] has not discharged since November 2010. *If* discharges to the Outfall 051 resume, it is estimated that [Treatment Facility] would only discharge intermittently * * *." *Id.* at 7 (emphasis added).

Although Concerned Citizens apparently filed comments on other parts of the draft permit, no commenter objected to the 2014 Permit's continued authorization of discharges through Outfall 051 during the comment period on the draft permit.³ *See generally* Response to Comments.

The Region issued its 2014 permit determination on August 12, 2014. In the Region's August 2014 Response to Comments on the draft permit, the Region agreed that continuous monitoring was not necessary because the Treatment Facility had not discharged to Outfall 051 since November 2010 and would only discharge intermittently even "if discharges resume." Response to Comments at 17. Consequently, although the 2014 Permit includes discharge parameters for Outfall 051, the Permit requires only that a one-time grab sample be taken "*if* a discharge occurs at Outfall 051." 2014 Pt. I.E. at 26 (emphasis added).

The deadline for filing a petition for review of the Region's 2014 Permit renewal decision with the Board was in September 2014. 40 C.F.R. § 124.19(a).⁴ Neither Concerned Citizens nor any other party filed a petition for review with the Board under 40 C.F.R. § 124.19 objecting to the inclusion of Outfall 051 in the 2014 Permit. However, Permittees filed a petition for review with the Board challenging the 2014 Permit's imposition of monitoring and sampling requirements for selenium at a different outfall (Outfall 03A048). At the request of the parties, the Board dismissed the petition after the Region removed the disputed permit

³ In its response to Concerned Citizens' Informal Appeal, the Region represents that Concerned Citizens joined another organization, Communities for Clean Water, in submitting comments on the 2013 draft permit and that the Region responded to those comments. *See* Region's Response at 14 (citing Response to Comments at 9-13). The Region states that these comments did not raise the issue of whether the permit should authorize discharges from Outfall 051. *Id.* In its Reply to the Region's Response, Concerned Citizens indicates that the Region correctly characterized Concerned Citizens' participation during the public comment period. *See* Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) at 16 (Nov. 3, 2017).

⁴ Under 40 C.F.R. § 124.19(a), any person filing comments on the draft permit or participating in a public hearing on the draft permit may file a petition for review with the Board within thirty days after the Region serves notice of issuance of a permit. 40 C.F.R. § 124.19(a)(2)-(3).

provision. *See In re Los Alamos Nat'l Lab.*, NPDES Appeal No. 14-02 (EAB Apr. 27, 2015) (Order Dismissing Petition for Review).

C. *Concerned Citizens' 2015 Letter Challenging Issuance of 2014 Permit and 2016 Termination Request*

A little over a year later, in November 2015, new attorneys representing Concerned Citizens sent a letter to the Region questioning the need for the 2014 Permit. *See* Letter from Stacey Dwyer, Associate Director, U.S. EPA Region 6, NPDES Permits and TMDL Branch, to Lindsay A. Lovejoy, Jr., Attorney at Law, 3600 Cerrillos Rd., Santa Fe, NM (Dec. 18, 2015) (“Region’s 2015 Response Letter”) (Ex. UU to Termination Request) (referencing Concerned Citizens’ Nov. 2015 letter). Concerned Citizens did not request termination of the 2014 Permit and instead asked for the Region’s justification for issuance of the Permit in the first instance. In particular, the letter stated that because the Treatment Facility has been designed to eliminate all discharges and there have been no discharges since 2010, there was no need for the Permit, and, pursuant to federal case law, the Region lacked jurisdiction under the Clean Water Act to have issued the 2014 Permit for Outfall 051. *Id.* at 1-2; *see also* Ex. 7 to Informal Appeal (attaching Concerned Citizens’ Nov. 2015 letter).

In response, the Region stated that it had re-examined its permit file and determined that it would not alter its permit determination. Region’s 2015 Response Letter. Although no discharges had occurred since 2010, the Region stated, in part, that: “[Los Alamos Laboratory] specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. In its application, [Los Alamos Laboratory] indicated that under certain circumstances, e.g.[,] maintenance, malfunction, and/or capacity shortage, a discharge could occur and permit authorization would be needed.” *Id.* at 1. The Region also disagreed that it lacked jurisdiction to issue a permit for potential discharges where, as here, the permittee requested coverage “for a possible future discharge.” *Id.* at 2.

In June 2016, Concerned Citizens filed with the Regional Judicial Officer a request to terminate the 2014 Permit with respect to Outfall 051 pursuant to 40 C.F.R. §§ 124.5 and 122.64(a)(4).⁵ *See* Termination Request (June 17, 2016) (A.R. IV). As noted above, section 124.5 allows any person to request termination

⁵ Concerned Citizens did not allege that 40 C.F.R. § 122.64(a)(1)-(3) served as a basis for termination.

of an NPDES permit during its term based on: “(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a). In particular, Concerned Citizens stated that, since at least 1998, Los Alamos Laboratory had engaged in an effort to eliminate liquid discharges from the Treatment Facility to Outfall 051. *See* Termination Request at 3-11 (citing *Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility*, David Moss, et. al., Los Alamos National Laboratory, at vi (June 1998) (Ex. A to Termination Request) (recommending a “phased transition toward zero liquid discharge” through Outfall 051). Concerned Citizens further noted that as a result of these efforts, the Treatment Facility had not discharged any wastes through Outfall 051 since November 2010. *Id.* at 10-11.

Concerned Citizens also acknowledged that in the 2012 Permit Re-Application, Permittees had “expressly requested a permit [for Outfall 051] only for a possible discharge” and as a “fallback” for “use in possible contingencies.” *See Id.* at 9; *see also id.* at 10 (stating that 2012 Permit Re-Application sought leave to provide effluent characteristics for Outfall 051 only “*if discharges * * * are initiated* during the life of the new permit”), 11 (stating that the final permit refers to regulation of discharges from Outfall 051 “*if discharges resume*”) (emphasis in original). Nevertheless, because no discharges had occurred since 2010, Concerned Citizens asserted that Los Alamos Laboratory had no need for or intention of discharging through Outfall 051. *Id.* at 11. Given the continued lack of any discharges from Outfall 051, Concerned Citizens asserted that termination was justified under 40 C.F.R. § 122.64(a)(4). *See id.* at 17 (asserting that the permit must be terminated “due to lack of discharge”).

Concerned Citizens further argued that EPA lacked the authority under the Clean Water Act (“CWA”) to issue a permit for potential discharges that could occur sometime in the future. *Id.* at 12-15. Finally, Concerned Citizens suggested that Los Alamos Laboratory sought to maintain Outfall 051 as a permitted discharge for the Treatment Facility because coverage under the 2014 Permit allows Los Alamos Laboratory to obtain a Waste Water Treatment Unit exemption under another federal law, the Resource Conservation and Recovery Act (“RCRA”), and loss of the exemption would require Los Alamos Laboratory to meet additional RCRA requirements. *Id.* at 3-6 (citing RCRA § 1004(27), 42 U.S.C. § 6903(27); 40 C.F.R. §§ 260.10, 264.1(g)(6)).

On March 2, 2017, the Regional Judicial Officer dismissed Concerned Citizens' termination request for lack of jurisdiction under 40 C.F.R. § 124.5, but stated that Concerned Citizens could proceed with the matter before the Regional Administrator. *See In re Concerned Citizens for Nuclear Safety (CCNS) Request to Terminate NPDES Permit #NM0028355 (Permit) for Los Alamos Nat'l Lab. Radioactive Liquid Waste Treatment Facility*, (RJO, Mar. 2, 2017) (referencing June 2016 Termination Request).⁶ Thereafter, on March 9, 2017, Concerned Citizens resubmitted its termination request to the Regional Administrator. *See Letter from Lindsay A. Lovejoy, Jr., Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, Counsel for Concerned Citizens, to Samuel Coleman, P.E., Acting Administrator, U.S. EPA Region 6 (Mar. 9, 2017) (A.R. IV) (enclosing Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility (June 17, 2016))*.

D. Region 6's Denial of Concerned Citizens' Termination Request

In August 2017, the Region denied Concerned Citizens' request pursuant to 40 C.F.R. § 124.5(b).⁷ The Region determined that Concerned Citizens' request to terminate the 2014 Permit as to Outfall 051 was not justified because Concerned Citizens failed to demonstrate that there had been "[a] change in any condition" after the 2014 Permit was issued justifying termination under 40 C.F.R. § 122.64(a)(4). *See Letter from William K. Honker, Director, Water Division, U.S. EPA Region 6, to Lindsay A. Lovejoy, Jr., Attorney at Law, and Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, New Mexico Environmental Law Center, Counsel for Concerned Citizens (Aug. 16, 2017) ("Region 6 Letter") (A.R. V)*. The Region also rejected Concerned Citizens' assertion that EPA lacked

⁶ Although the Regional Judicial Officer's Order is not part of the administrative record identified by the Region, the Board takes official notice of it as a public document. *See, e.g., In re Donald Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004) (explaining that information in the public domain is subject to official notice by the Board); *In re City of Denison*, 4 E.A.D. 414, 419 n.8 (EAB 1992) (taking official notice of administrative order not part of proceeding before Board).

⁷ 40 C.F.R. § 124.5(b) states, in pertinent part, that "[i]f the [Region] decides that the [termination] request is not justified, he or she shall send the requester a brief written response giving a reason for the decision."

the authority under the CWA to issue the NPDES permit for potential discharges. *Id.* at 2. Finally, the Region concluded that “[w]hether or not issuance of NPDES permit coverage might trigger the RCRA [Waste Water Treatment Unit] regulatory exemption has no bearing on EPA’s NPDES permitting decisions, which must be based on the requirements of the CWA and implementing regulations.” *Id.* at 3.

E. *Informal Appeal to the Board*

On September 14, 2017, Concerned Citizens timely filed an Informal Appeal with the Board under 40 C.F.R. § 124.5(b) seeking review of the Region’s denial of Concerned Citizens’ termination request.⁸ On September 21, 2017, the Board issued an Order for Additional Briefing requiring that the Region file a response to the Informal Appeal and requesting that the parties address certain issues in their replies. Thereafter, on September 25, 2017, the Board issued an order granting the parties’ request to extend deadlines for the Region’s and the Permittees’ responses as well as Concerned Citizens’ reply. The Permittees and the Region filed responses on October 16 and 18, 2017, respectively.⁹ Concerned Citizens filed a reply on November 3, 2017, and requested oral argument.¹⁰ On

⁸ Under 40 C.F.R. § 124.5(b), denials of requests for termination “may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts.”

⁹ See Letter from Susan L. McMichael, Attorney, Office of Laboratory Counsel, Los Alamos National Laboratory, and Silas R. DeRoma, Field Office Counsel, U.S. Department of Energy, to Clerk of the Board, U.S. EPA Environmental Appeals Board, and enclosed Aff. of Michael Thomas Saladen, Environmental Manager at LANL (Oct. 12, 2017); EPA Response to Concerned Citizens for Nuclear Safety’s Informal Appeal of EPA’s Denial of Request to Terminate Permit Authorization (Oct. 18, 2017) (“Region’s Response”).

¹⁰ Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b).

February 22, 2018, the Board heard oral argument in this case.¹¹ For the reasons stated below, the Board denies Concerned Citizens' Informal Appeal.¹²

III. STANDARD OF REVIEW

Unlike the procedures governing Board review of permit determinations under 40 C.F.R. § 124.19, the regulations governing informal appeals from the denial of a request to terminate a permit under 40 C.F.R. § 124.5 do not specify the Board's standard of review. Upon consideration, the Board will adopt for informal appeals the same standard used for appeals of permit determinations under 40 C.F.R. § 124.19. Specifically, a party seeking review under 40 C.F.R. § 124.5 must demonstrate that the Region's determination was based on either a finding of fact or conclusion of law that was clearly erroneous or was an abuse of discretion. *See* 40 C.F.R. § 124.19(a)(4)(i)(A)-(B).¹³ The issues that may arise in a proceeding under 40 C.F.R. § 124.5 are not necessarily different or less significant than the issues that arise in a proceeding under 40 C.F.R. § 124.19. Where, as here, the Board has decided to consider an informal appeal under 40 C.F.R. § 124.5, *see supra* note 12, the issues presented warrant Board consideration under the same standard of review as issues arising in proceedings under 40 C.F.R. § 124.19. Moreover, adopting this standard will serve administrative efficiency and will provide for consistency in addressing future appeals to the Board whether formal

¹¹ Concerned Citizens, the Region, and Permittees (Los Alamos National Security, LLC and the U.S. Department of Energy) all participated in oral argument. *See* EAB Hearing Transcript ("Tr.") (Feb. 22, 2018).

¹² Under 40 C.F.R. § 124.5(b), the "appeal shall be considered denied if the Environmental Appeals Board takes no action on the letter within 60 days after receiving it." The Board's September 21 and 25 orders constituted sufficient "action" necessary to keep this matter alive beyond the sixtieth day, allowing the Board to now address this Informal Appeal on the merits. *See In re Waste Techs. Indus.*, 5 E.A.D. 646, 655 n.13 (EAB 1995) (order for supplemental briefing is sufficient action for purposes of the sixty-day period specified in 40 C.F.R. § 124.5(b)).

¹³ This standard is in keeping with the Board's other review on the merits of an informal appeal under 40 C.F.R. § 124.5. *See, e.g., In re Waste Tech. Inds.*, 5 E.A.D. 646 (EAB 1995). Although the Board in *Waste Technologies* did not explicitly address the standard of review for informal appeals, the Board found that the permit issuer "committed no error" in its permit determination and adequately justified that determination. *Id.* at 662-63.

or informal. *Cf.* 40 C.F.R. § 124.19(n) (stating that the Board “may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal”).

IV. ANALYSIS

A. *The Region Did Not Clearly Err or Abuse its Discretion in Denying the Termination Request*

In this Informal Appeal, Concerned Citizens asserts that permit termination proceedings are appropriate for the reason specified in 40 C.F.R. § 122.64(a)(4) because “no discharges of water or pollutants are planned or expected for Outfall 051, and no such discharges have occurred since November 2010.” Informal Appeal at 3.

Under 40 C.F.R. § 122.64(a)(4), a cause for “terminating [an NPDES] permit during its term” includes: “[a] change in any condition that requires either a temporary or permanent reduction or elimination of any discharge * * * controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a)(4). As noted, the regulation states plainly that termination is an action that occurs “during [the permit’s] term.” *Id.* Therefore, “[a] change” for purposes of termination is one that occurs after permit issuance. *See also* 40 C.F.R. § 122.62(a)(1) (similarly requiring certain “changes” to have “occurred after permit issuance” to allow modification of a permit). And to read “[a] change” for purposes of termination some other way would effectively write the phrase “during its term” out of 40 C.F.R. § 122.64(a). The Informal Appeal, however, does not allege “[a] change in any condition” at Outfall 051 since issuance of the 2014 Permit. Indeed, in quoting the language of this provision, Concerned Citizens omits the reference to “[a] change in any condition.” *See* Informal Appeal at 3 (quoting only the portion of section 122.64(a)(4) referring to the “elimination of any discharge * * * controlled by the permit.”). Thus, on its face, the Informal Appeal fails to demonstrate that the Region clearly erred or abused its discretion in denying the request to terminate.

The record supports the Region’s determination that there has not been “[a] change in any condition” at Outfall 051 since issuance of the 2014 Permit. Although not explicitly stated, Concerned Citizens appears to suggest that the passage of additional time since issuance of the 2014 Permit by itself constitutes a sufficient basis for termination. *See id.* at 5. However, when Permittees applied for renewal of their permit, they advised the Region that discharges from

Outfall 051 had not occurred “since November 2010” and would only be necessary “*should* the Mechanical Evaporator and/or Zero Liquid Discharge * * * tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory’s] scope/mission.” 2012 Re-Application Fact Sheet at 5 (emphasis added).¹⁴ As the Region explained in the Fact Sheet accompanying the 2013 draft permit, “[Los Alamos Laboratory] includes [Outfall 051] in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage.” NPDES Permit No. NM0028355, Fact Sheet for the Draft [NPDES] Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN to Termination Request) (emphasis added). And when the Region issued the 2014 Permit, it reiterated that discharges from Outfall 051 had not occurred “since November 2010,” imposing certain monitoring requirements only “if discharges resume.” Response to Comments at 17; *see also* 2014 Permit Part I.E. at 26 (requiring that Permittees take a one-time grab sample of effluent from Outfall 051 “*if* a discharge occurs”) (emphasis added). Thus, the passage of additional time without a discharge from Outfall 051 since issuance of the 2014 Permit was expected, was made known during the permit proceeding, and does not amount to a change in any condition justifying termination. Under these circumstances, the Informal Appeal fails to demonstrate the Region clearly erred or abused its discretion in denying the termination request.

In its Reply, Concerned Citizens makes conclusory claims that there have in fact been “massive and obvious” changes to the Treatment Facility and its operation that, according to Concerned Citizens, justify termination of the 2014 Permit for Outfall 051 under 40 C.F.R. § 122.64(a)(4). Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) (“Concerned Citizens Reply”) (Nov. 3, 2017) at 7. However, these alleged changes – the use of a mechanical evaporator and the anticipated use of the Zero Liquid Discharge tanks designed to reduce or eliminate discharges from the Treatment

¹⁴ *See also* 2012 Re-Application Fact Sheet, Form 2C at 6-14 (same). Form 2C of the 2012 Re-Application Fact Sheet states further that an effluent sample “will be collected from Outfall 051 *when/if* the [Treatment Facility] discharges effluent to Mortandad Canyon.” *Id.* (emphasis added). Further, in their comments on the 2013 draft permit, Permittees stated that “[*i/f*] discharges to the Outfall 051 resume, it is estimated that [Treatment Facility] would only discharge intermittently.” Los Alamos Laboratory Comments on 2013 Draft Permit at 7 (emphasis added).

Facility – were identified in the 2012 Permit Re-Application and the Region’s Fact Sheet for the 2013 draft permit prior to the 2014 Permit’s issuance. Thus, they do not reflect “[a] change in any condition” since issuance of the 2014 Permit warranting termination pursuant to 40 C.F.R. § 122.64(a)(4).¹⁵

And maintaining the integrity and finality of the permitting process for permittees and other stakeholders requires Concerned Citizens to show that there has been “[a] change in any condition” since issuance of the 2014 Permit. When EPA is deciding whether to issue or renew a permit, the public is given a full opportunity to participate in and challenge any aspect of the permit. EPA’s permitting regulations direct EPA to issue a draft permit, to seek public comment for no less than thirty days, to hold a public hearing where there is a significant degree of public interest in a draft permit, and to issue a response to significant comments received at the time the final permit is issued. 40 C.F.R. § 124.6 - .12, .17. The public in turn is required to raise “all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the comment period.” *Id.* § 124.13. And under section 124.19, a party may seek to challenge any condition of a final permit so long as it files a petition for review with the Board within thirty days of issuance. *See id.* § 124.19(a)(3), (4).

Once the permit is issued, however, the regulations at 40 C.F.R. § 122.64(a) and § 124.5 specify that EPA may only terminate a permit during its term for one of four listed reasons. Initially, EPA’s permitting regulations applicable to state NPDES programs allowed the Agency to terminate a permit for cause, “including, but not limited to,” “[a] change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.” *State Program Elements Necessary for Participation in the NPDES*, 37 Fed. Reg. 28,390, 28,397 (Dec. 22, 1972). EPA included identical language in promulgating regulations applicable to federal NPDES programs in 1973. *See National Pollution Discharge Elimination System*, 38 Fed. Reg. 13,528, 13,533 (May 22, 1973). In 1979,

¹⁵ During oral argument, Concerned Citizens objected to any finding that its termination request was untimely because the issues raised in that request were not raised during the proceedings leading to issuance of the 2014 Permit. Tr. at 61-62. The Board’s decision, however, is not based on any finding that the termination request was untimely, but rather the Region’s finding that the request fails to demonstrate a basis for termination because there has been no “change of any condition” since permit issuance under 40 C.F.R. § 122.64(a)(4).

however, EPA revised the regulations to remove the phrase “including, but not limited to” so as to allow for termination “only in certain limited circumstances.” *See National Pollution Discharge Elimination System; Revision of Regulations*, 44 Fed. Reg. 32,854, 32,868, 32,912 (June 7, 1979). In addition, the Agency agreed with commenters that the causes for permit modification should be listed separately from the “more ‘severe’ measure” of termination. *Id.* In 1980, when EPA issued consolidated regulations governing its permitting programs, it expressed the expectation that the bases for termination in 40 C.F.R. § 122.64(a) would not be read broadly. *See Consolidated Permit Regulations*, 45 Fed. Reg. 33,290, 33,316 (May 19, 1980). Further, although the proposed rule included “other good cause” as a ground for termination, EPA chose not to include this as a basis for termination in the 1980 consolidated regulations because it was too “vague and open ended.” *Id.* at 33,317. The limited scope of 40 C.F.R. § 122.64(a) has remained unchanged for almost forty years now.

And the more abbreviated process EPA must follow before denying a request to terminate (as opposed to the process for issuing or renewing a permit) further supports the point that a request to terminate was not intended to be a basis to reopen the original permit decision. EPA does not need to issue a public notice or provide an opportunity for comment before denying a request to terminate. Instead, EPA need only “send the requester a brief written response giving a reason for the decision” not to terminate. 40 C.F.R. § 124.5(b); *see also id.* § 124.10(a)(2).

Notably, although much of the Informal Appeal focuses on Concerned Citizens’ assertion that the Region erred in issuing the 2014 Permit in the first instance,¹⁶ it does not seek, nor could it seek, to challenge the 2014 Permit now. And it fails to demonstrate that the Region erred or abused its discretion in denying the request to terminate the 2014 Permit under 40 C.F.R. § 122.64(a)(4). Instead, Concerned Citizens may raise the issues it raises here, or any other issue it chooses, in any future permit renewal process for the Los Alamos Laboratory when the 2014 Permit expires in September 2019, and file a petition for review with the Board

¹⁶ *See, e.g.,* Informal Appeal at 2 (contesting the Region’s “issuance of an NPDES permit” for possible discharges from Outfall 051), 2-3 (stating that the Region’s position that it may “issue an NPDES permit” for possible discharges is “in error”), 5 (discussing EPA’s limited authority under the CWA to “issue NPDES permits” for potential discharges), and 7-8 (challenging the Region’s position that it can “issue an NPDES permit” at the request of the owner or operator) (emphasis added).

from any future permit at that time under 40 C.F.R. § 124.19. *See also* Tr. at 40-41.¹⁷

B. Concerned Citizens' Contention That Permittees Never Disclosed that Discharges to Outfall 051 Might Not Occur is Untimely and Not Supported by the Record Here

In its Reply, Concerned Citizens argues further that it could not have contested the 2014 Permit at the time the Permit was issued, implying that Los Alamos Laboratory never disclosed the possibility that discharges to Outfall 051 might not occur. *See* Concerned Citizens Reply at 8. Specifically, Concerned Citizens now asserts that during the 2014 Permitting process, Los Alamos Laboratory expressed an intent to make use of Outfall 051. *Id.* (claiming that during the permitting process Los Alamos Laboratory represented that “discharges through Outfall 051 would be required”). From there, Concerned Citizens argues that it relied on Los Alamos Laboratory’s representations that it intended to discharge from Outfall 051 and thus could not have raised an earlier challenge to the 2014 Permit. *See id.* at 8-12.

However, Concerned Citizens did not make this argument before filing its Reply or otherwise claim that termination was appropriate under 40 C.F.R. § 122.64(a)(2) because of a “failure * * * to disclose” or “misrepresentation of any relevant facts” during the 2014 permitting process. And because this argument is raised for the first time in Concerned Citizens’ Reply, it is beyond the scope of the Informal Appeal and is therefore untimely. *Cf. In re Russell City Energy Ctr. LLC*, 15 E.A.D. 1, 53 (EAB 2010) (declining to consider new issues raised for the first time in a reply brief); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9

¹⁷ Because the Region did not clearly err or abuse its discretion in finding that there has been no “change in any condition,” the Board does not address the Region’s further argument that any such change must be of a condition “that requires *** elimination of any discharge *** (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a)(4); *see* Region’s Response at 6-7.

(EAB 1999) (new issues raised in reply briefs are equivalent to late-filed appeals and are thus untimely).

Even had Concerned Citizens timely raised this argument, however, the argument is contradicted by the record here. Although Permittees acknowledged during the application process that the use of the mechanical evaporator had resulted in no discharges from Outfall 051 since 2010, Permittees nevertheless sought a permit for continued discharges under certain circumstances. As discussed above, the permitting record for the 2014 Permit made clear that discharges from Outfall 051 would only be necessary if the mechanical evaporator or Zero Liquid Discharge tanks become unavailable due to malfunction, maintenance, or capacity shortage. Indeed, the permitting record refers to Outfall 051 requirements in multiple places as applying only “if” discharges resume. Thus, contrary to Concerned Citizens’ assertion, the record alerted the public to the fact that discharges might not occur at all.

This argument is also at odds with Concerned Citizens’ own prior statements. As early as November 2015, Concerned Citizens raised concerns about the 2014 Permit demonstrating its understanding that Permittees had sought and the Region had issued the 2014 Permit covering Outfall 051, even though it was known that there had been no discharges since 2010. *See* Region’s 2015 Response Letter (Ex. UU to Termination Request) (referencing Concerned Citizens’ Nov. 2015 letter). Further, in its termination request, Concerned Citizens acknowledged that the Permittees had stated that there had been no discharges to Outfall 051 since 2010 and had expressly requested a permit for Outfall 051 “only for a possible discharge,” and as a “fallback” for use in possible contingencies. *See* Termination Request at 9; *see also id.* at 10 (stating that 2012 Permit Re-Application sought leave to provide effluent characteristics for Outfall 051 only “*if discharges * * * are initiated* during the life of the new permit”), 11 (stating that the final permit refers to regulation of discharges from Outfall 051 “*if discharges resume*”) (emphasis in original). In short, there is no merit in Concerned Citizens’ argument that the Permittees never disclosed the possibility that discharges from Outfall 051 might not occur at all, as Concerned Citizens’ own submissions demonstrate.¹⁸

¹⁸ In a post-argument brief, Concerned Citizens now contends that it could not have known during the comment period on the draft permit that the Zero Liquid Discharge tanks had been constructed, and on that basis, claims termination is appropriate. *See* Concerned Citizens for Nuclear Safety Post-Argument Submission Pursuant to 40 C.F.R. §§ 124.2 and

V. CONCLUSION

For the reasons stated above, the Board concludes that Concerned Citizens has not established that the Region clearly erred or abused its discretion in denying Concerned Citizens' request to terminate the 2014 Permit for Outfall 051. Concerned Citizens' Informal Appeal is therefore denied.¹⁹

So ordered.

124.5(b) at 7 (Feb. 27, 2018). The Board did not grant the parties leave to file post-argument briefs but instead only directed the filing of publicly-available information regarding the status of the State permitting process for the Zero Liquid Discharge tanks, Tr. at 67-68, and this argument raised for the first time in a post-argument brief is untimely. In any event, regardless of when the Zero Liquid Discharge tanks were constructed, the permitting record – and specifically the 2012 Permit Re-Application and the Region's Fact Sheet for the 2013 draft permit – alerted the public that with either the mechanical evaporator or the Zero Liquid Discharge tanks, discharges might not occur at all.

¹⁹ Because we conclude that the Region did not clearly err or abuse its discretion in denying the termination request, we do not need to address Concerned Citizens' argument that EPA lacked authority under the CWA to issue a permit for potential discharges.

CERTIFICATE OF SERVICE

I certify that copies of the forgoing *Final Decision* in the matter of Los Alamos National Security, LLC and the Department of Energy, NPDES Appeal No. 17-05, were sent to the following persons in the manner indicated:

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Dated: MAR 14 2010



Annette Duncan
Administrative Specialist

COPY

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUND WATER DISCHARGE PERMIT (DP-1132)
FROM THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY

No. GWB 17-20(P)

LOS ALAMOS NATIONAL SECURITY, LLC AND
THE UNITED STATES DEPARTMENT OF ENERGY'S
RESPONSE TO MOTION TO DISMISS DP-1132 PROCEEDING

I. INTRODUCTION

Los Alamos National Security, LLC (“LANS”) and the United States Department of Energy (“DOE”) (together referred to as “Applicants”) submit this Response to Motion to Dismiss DP-1132 Proceeding filed by Communities for Clean Water (“CCW”). As explained herein, CCW’s Motion is without merit and should be denied because it is wrong on both the facts and the law. First, in arguing that the New Mexico Environment Department (“NMED”) lacks jurisdiction to proceed on draft Discharge Permit 1132 (“DP 1132”) CCW mistakenly assumes there are no discharges that NMED may regulate under the Water Quality Act (“WQA”) and regulations adopted thereunder. *See* Point III.A herein. Second, despite requesting a hearing on DP 1132 and therefore arguably waiving its arguments that DP 1132 should be withdrawn and proceedings thereon dismissed, CCW offers extraordinarily narrow interpretations of the WQA and regulations thereunder that both are legally incorrect and contrary to decades of established administration of the ground water program by NMED. *See* Point III.B herein. Third, CCW’s arguments to the effect that the Radioactive Liquid Waste Treatment Facility (“RLWTF”) should be regulated by NMED’s Hazardous Waste Bureau (“HWB”) under the

Hazardous Waste Act (“HWA”) and related programs it administers, and that this Hearing Officer should direct HWB to do so, are misplaced in that they are beyond the scope of this discharge program proceeding and made to the wrong audience, as is most clearly demonstrated by CCW’s own prior actions of raising the issues before the HWB in the separate permitting matter. *See* Point III.C herein.

Finally, the flawed nature of CCW’s arguments have already been exposed in a highly analogous and overlapping context, wherein the Environmental Protection Agency (“EPA”) flatly rejected arguments by one of CCW’s constituent groups that EPA had no jurisdiction to issue LANS and DOE a National Pollution Discharge Elimination System (“NPDES”) permit under Section 402 of the Clean Water Act (CWA) for the same purported reasons that there supposedly will be no discharges from Outfall 051 (the same outfall to be covered by DP 1132), and that the same RLWTF, for the same reasons that are offered in CCW’s Motion herein, supposedly does not qualify for the wastewater treatment exemption from the federal Resource Conservation and Recovery Act (“RCRA”). *See* Point III.D herein. For all of these compelling reasons, CCW’s Motion to Dismiss should be denied, and Applicants respectfully request that the Hearing Officer enter a pre-hearing order denying the Motion and correspondingly limiting the scope of the coming public hearing on DP 1132 (that CCW itself requested) to the actual ground water discharge permit issues properly before this Hearing Officer. *See* Point IV herein.

II. FACTS

A. Disputation of the Facts Offered By CCW

The asserted “facts” offered by CCW are mostly irrelevant, are dated, or are legal arguments masquerading as facts. These are set forth in numbered paragraphs 1 through 21 in CCW’s Motion, and each are addressed here.

1. Applicants do not dispute the facts set forth in paragraph 1.
2. Applicants do not dispute the facts set forth in paragraph 2, but state that they are not relevant or germane to this discharge permit hearing under NMED's ground water program.
3. Applicants dispute the assertions in paragraph 3, which at the most consist of irrelevant legal suppositions on CCW's part and are not facts.
4. Applicants dispute that the facts offered in paragraph 4 are a "consequence" of the legal suppositions in paragraph 3, and state that the facts are dated and irrelevant.
5. Applicants dispute that the twenty year old report referenced in paragraph 5 announced a commitment to eliminate discharges or were made against a regulatory background that paragraph 5 fails to clearly delineate, and state that the reference in any event is both dated and irrelevant to this proceeding.
6. Applicants dispute CCW's characterization of the twenty year old presentation referenced in paragraph 6, and state that the reference in any event is dated and irrelevant to this proceeding.
7. Applicants do not dispute the approximately decade-old references in paragraph 7, but state that they are not an offering of relevant facts.
8. Applicants dispute the misleading offerings in paragraph 8, which speculate without any basis about Los Alamos National Laboratories' ("LANL") intentions, and on their face the offerings do not support CCW's assertion that "LANL rebuilt the RLWTF for 'zero-liquid-discharge' operation," since CCW acknowledges discharges may occur in emergencies through Outfall 051 and would eventually occur "preferentially" to evaporative units.

9. Applicants do not dispute the facts in paragraph 9, but state that they are irrelevant.
10. Applicants dispute CCW's speculation about what LANL intended as supposedly gleaned from an NMED inspection report from 2012, but otherwise does not dispute the quoted language from the 2012 report, which is both dated and irrelevant.
11. Applicants dispute CCW's self-serving characterization in paragraph 11 that LANL's response to NMED's report did not contest the description of its discharge plans, particularly given that the quoted statement attributed to LANL—which Applicants do not dispute—directly contradicts CCW's supposition that LANL intended the RLWTF would be a “zero-liquid-discharge” operation” as CCW asserted incorrectly in paragraph 8.
12. Applicants dispute CCW's unfounded speculative inference that because discharges from Outfall 051 have not occurred since late 2010, “[n]o discharges are planned.” Applicants also object to CCW's improper attempt to incorporate by reference certain facts that supposedly are set forth in detail in a request CCW made to terminate Applicants' NPDES permit applicable to Outfall 051 on similar grounds being asserted herein, which request was denied by EPA as discussed below in Point III.D.
13. Applicants dispute the assertions in paragraph 13, which at the most consist of irrelevant legal suppositions on CCW's part and are not facts.
14. Other than objecting to CCW's use of the term “[n]evertheless” and the legal argument implicit therein, Applicants do not dispute the facts stated in paragraph 14.
15. Applicants object to CCW's assertions in paragraph 15 about what LANL “demands” or “has argued” in relation to the HWA and regulations, and state that the facts

- asserted are irrelevant to this discharge permit proceeding as explained more fully below in Point III.C. Applicants do not dispute the language quoted in paragraph 15.
16. Applicants do not dispute the facts stated in paragraph 16, but state that they are irrelevant to this discharge permit proceeding.
 17. Applicants object to CCW's apparent suggestion that this Hearing Officer should consider assertions previously argued by CCW, as set forth in paragraph 17, as fact. They are not. Moreover, inasmuch as the arguments relate to the HWA and RCRA, they are irrelevant in this discharge permit proceeding, as discussed in Point III.C.
 18. Applicants object to CCW's reference—in a section of its Motion purporting to state facts—to its own self-serving "comments" in which it made the ultimate "boot-strap" argument that since CCW supposes an intent by LANL not to discharge, LANL "should be forced" to get a RCRA permit and "go to zero discharge within one year of issuance of the permit." These are not facts; they are ill-considered comments of CCW, and they are irrelevant to this discharge proceeding as discussed in Point III.C.
 19. Applicants object to CCW's further reference in paragraph 19 to its own legal arguments. These, too, are not facts, and the arguments themselves are premised on the same misunderstanding of facts and misstatements of law that cause CCW's Motion to be fatally flawed, as explained more fully in Points III.A and III.B herein.
 20. Applicants object to CCW's contentions that again masquerade as fact in its Motion. The CCW arguments in paragraph 20, which unjustifiably attribute an improper intent to NMED and/or LANL to avoid regulation under the HWA, are not facts and are irrelevant for the reasons discussed in Point III.C.

21. Applicants object to CCW's characterization of NMED as "persist[ing] in issuing a WQA permit," and CCW's intended inference that NMED rejects CCW's "zero discharge" position and justifies DP-1132 based upon quoted interpretations that CCW argues, incorrectly, are contrary to law. These are not facts, and instead are arguments advanced by CCW that unjustifiably are designed to put NMED in a false light. In fact, the underlying positions attributed to NMED in paragraph 21 are fundamentally sound, as discussed more fully in Points III.A and III.B herein.

B. Additional Pertinent Facts

1. Applicants intend to discharge treated effluent from Outfall 051, as set forth in the Affidavit of Robert C. Mason, the Facility Operations Director for nuclear support facilities at LANL. *See* Exhibit 1.
2. A CCW member has filed arguments to the effect that RLWTF should be regulated under the HWA and RCRA in a proceeding pending before the HWB. *See* Exhibit 2.
3. The Request to Terminate NPDES Permit #NM0028355 to Outfall 051 for the [RLWTF] (June 17, 2016), which is referred to in paragraph 12 of CCW's offered facts, was in fact denied by EPA, which rejected the arguments of one of CCW's constituent organizations to the same effect as advanced by CCW here, i.e., that EPA lacked jurisdiction to issue the permit under the CWA due since RLWTF supposedly is a zero discharge facility that is not eligible for the wastewater treatment exemption under RCRA. *See* Exhibit 3.
4. EPA's decision at Exhibit 3 was affirmed on appeal by an administrative appeal board that hears appeals from EPA decisions in Washington, D.C., based on procedural grounds. *See* Exhibit 4.

III. ARGUMENT

A. CCW's Motion Should Be Denied Because It Is Premised on Incorrect Facts

CCW's Motion is fatally flawed because it is entirely premised on CCW's erroneous suppositions and assertions that RLWTF is and will be, upon issuance of DP-1132 a "zero discharge" facility. CCW posits that, as a "zero discharge" facility, RLWTF may not be regulated under the WQA and the discharge permitting program administered by NMED, and that any discharge permit issued to Applicants would be a "nullity." *But see* Additional Fact No. 1 under II.B above and the Affidavit Robert C. Mason, attached as Exhibit 1 hereto.

The basis of CCW's "zero discharge" notion centers in part on the lack of discharges from Outfall 051 in recent years, although CCW's own Motion reflects an understanding that Outfall 051 may be used in emergencies. Moreover, as set forth in the Affidavit of Robert C. Mason:

RLWTF is a mission-critical LANL facility that treats low-level and transuranic liquid wastewater from processes at various generator facilities throughout the Laboratory. Outfall 051 is an integral component of RLWTF, and the Laboratory intends to discharge from this outfall. Discharge through the outfall is necessary for operational flexibility so that the RLWTF can maintain the capability to discharge should the Mechanical Evaporator System (MES) and/or Solar Evaporation Tanks (SET) become unavailable due to maintenance or malfunction and/or should there be an increase in treatment capacity caused by changes in LANL scope/mission. RLWTF must maintain operational flexibility and readiness to meet the Laboratory's mission demands.

Mason Affid., par. 7 (the Mason Affidavit is attached as Exhibit 1). This expression of intent from LANL's Facility Operations Director for nuclear and support facilities at LANL establishes, in no uncertain terms, that CCW's supposition that LANL intends no discharges is wrong, and on that basis alone, CCW's Motion must be denied.

Indeed, the express terms of DP 1132, in Section V.C, Authorization to Discharge, allows wastewater to be discharged to three different systems: the MES, the SET and Outfall 051. The

MES is a natural gas-fired mechanical evaporator. The SET—a two-cell, synthetically lined tank constructed in 2012—is sometimes referred to as a Zero Liquid Discharge (ZLD) solar evaporation tank. Outfall 051 is an outfall from a pipe system directly to Effluent Canyon. CCW’s reliance on the fact that one of the three authorized discharge points is called a ZLD, and its extrapolation from that and an assemblage of dated references in the record to asserting without basis that the RLWTF is a “zero discharge” facility, is false and misleading.¹

B. CCW Grossly Understates NMED’s Ground Water Program Authority

Remarkably, CCW takes the position that NMED has no authority to issue ground water discharge permit for discharges to the MES, SET and Outfall 051 if there is no intention for there to be releases that may reach groundwater. This interpretation, which again makes an incorrect assumption about intentions, is surprising coming from an environmental organization. It reflects that CCW’s end-game is to use the DP 1132 hearing it requested not to offer helpful public comments on DP 1132, but instead as a means to try and advance a policy position that is beyond the limited scope of the permit hearing it requested: namely, that permitting the RLWTF under the HWA would be more desirable from the perspective of CCW’s constituents than permitting it under the WQA. *See* Point III.C.

The extraordinarily narrow interpretation of NMED’s permitting authority under the WQA and implementing regulations to the effect that there needs to be an intention to discharge is, moreover, legally unsupportable. The WQA fundamentally defines a “source” to mean “a building, structure, facility or installation from which there is *or may be*, a discharge of water contaminants directly *or indirectly* into water.” 1978 NMSA, 74-6-2(L) (emphases added). In turn, the Act defines a “water contaminant” to mean “any substance that could alter if discharged

¹ The intention of both Applicants and NMED that discharges are contemplated is underscored by Condition VI.C.8 in DP 1132, which would require water tightness testing within 180 days of the effective date of the permit for the conveyance to Outfall 051.

or spilled the physical, chemical, biological or radiological qualities of water.” 1978 NMSA, 74-6-2(B) (emphasis added). These central building blocks of the WQA are worded in a way that clearly reflects a deliberate legislative choice not to construe the concept of regulated discharges under the Act as narrowly as CCW proposes.

Based on the express terms of the WQA, NMED justifiably defines “discharge” in Section II.G of DP 1132 to include the “intentional *or unintentional* release of an effluent or leachate which has the *potential* to move directly or indirectly into ground water.” (Emphases added). Accordingly, even if the intended discharges authorized by DP 1132 “through Outfall 051” to Effluent Canyon as discussed in Point III.A were disregarded, and only the discharges to the MES and SET evaporator systems were to be considered, CCW’s position is still flawed, because it is the “potential” for a discharge to get to ground water that matters, regardless of intent.

The notion that NMED’s regulatory permitting authority under the groundwater protection program only arises if and when there is an *actual* release, as CCW argues, is fundamentally contrary to the central objective of the WQA to *prevent*—and not just *abate*—after-the-fact ground water degradation. *See Bokum Resources Corp. v. New Mexico Water Quality Control Comm’n*, 93 N.M. 546, 555, 603 P.2d 285, 284 (1979). If the Legislature, and the Water Quality Control Commission (WQCC) that adopted regulations under the WQA, intended only to permit facilities once those potential sources *actually* release water contaminants, then New Mexico’s discharge permitting program to protect ground water from becoming contaminated would be rendered ineffective, and the after-the-fact abatement program adopted by the WQCC would be all that is needed. This reading of the WQA and its regulations is not shared by NMED.

NMED has understood the fundamental groundwater protection and prevention mandate of the WQCC for decades, and has pursued its groundwater protection program under the WQA accordingly. The GWQB's permitting files are replete with examples of groundwater discharge permits issued by NMED under the WQA where the coverage of the permit includes, in whole or part, facilities involving water that is conveyed or stored in man-made systems such as pipelines, tanks or lined ponds and other structures, facilities or installations. In a very many of these examples, the company to which the permit has been issued may believe and/or intend that no groundwater will ever actually receive or otherwise be impacted by its facilities as a result of water and contaminant control practices. A conclusion by the GWQB that NMED has no authority to issue a discharge permit for the RLWTF would undermine a substantial portion of the GWQB's permitting program and place in doubt many long-standing permits issued or renewed to manufacturing, mining and other important potential sources for the preventative protection of New Mexico's groundwater resources. Such a conclusion would be troubling in a state with limited water resources. CCW's offered interpretations of the WQA should be rejected.

C. CCW's Hazardous Waste Permitting Positions Are Pending Before the Hazardous Waste Bureau, Which CCW Omits, and Are Addressed to the Wrong Forum in This Discharge Permit Proceeding

CCW provides no logical reason, much less persuasive legal authority, for the central proposition that this Hearing Officer should conclude, in the context of the discharge permit hearing CCW requested, that this DP 1132 proceeding should not go forward, and instead the Hearing Officer should direct the HWB to permit the RLWTF under the HWA. Meanwhile, the WQA-based regulations provide, at 20.6.2.3108 NMAC, a process for the NMED Secretary to decide whether to hold a hearing on a proposed discharge plan, and once it so decides, the

Secretary may appoint a hearing officer under 20.6.2.3110.A NMAC to carry out the function of performing a “fair and impartial proceeding” under 20.6.2.3110.E on the draft permit. Nowhere is it contemplated that a Hearing Officer may withdraw a discharge permitting proceeding and direct a separate NMED bureau to pursue a different permit proceeding under a different law. CCW’s arguments in its Motions are simply directed to the wrong forum.

Moreover, without disclosing that it has done so in its Motion to Dismiss, a constituent member of CCW in fact has already directed substantially the same hazardous waste permitting-related arguments to the HWB in a separate proceeding before the very agency which CCW would have this Hearing Officer give direction. *See* Additional Fact No. 2 under II.B above and Exhibit 2 hereto, at comment 4. This discharge permitting hearing is not, for example, the proper forum for CCW to consider or decide whether the RLWTF qualifies for the wastewater treatment exemption under RCRA. CCW’s attempts to distract this Hearing Officer from the task at hand, which is to conduct a fair, impartial and orderly proceeding on DP 1132 under the WQA and the ground water permitting program, is unwarranted, and CCW’s unsupported suggestion that the Hearing Officer should withdraw DP 1132 based on hazardous waste program-related arguments and give the requested direction to HWB are frivolous and should be rejected.

D. Denying CCW’s Motion Is Appropriate Here, Just as It Was Appropriate for EPA to Deny Similar Challenges to EPA’s Jurisdiction to Issue the NPDES Permit for Outfall 051 Brought By CCW’s Constituent Organization

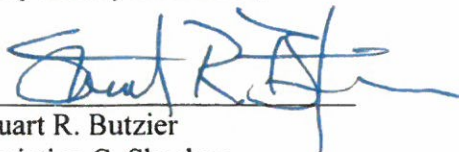
In addition to not disclosing the pendency of CCW’s positions before the HWB, CCW likewise has not disclosed the outcome of analogous positions it presented to the EPA despite referring to and attempting to incorporate by reference into its Motion to Dismiss CCW’s constituent organization’s Request to Terminate NPDES Permit #NM0028355 to Outfall 051 for the [RLWTF] (June 17, 2016). *See* Motion, at pp. 5-6, par. 12. This request, which argued that

EPA lacked authority under the Clean Water Act to include Outfall 051 within LANL's Section 402 NPDES permit because the RLWTF supposedly is a "zero discharge" facility, was soundly rejected by the EPA in a decision that has been affirmed on procedural grounds on appeal. *See* Additional Fact Nos. 3 and 4 under II.B above, and Exhibits 3 and 4 hereto. The EPA decision at Exhibit 3 provides closely analogous reasoning supporting the rejection of CCW's Motion in this proceeding.

IV. THE ORDER DENYING CCW'S MOTION COULD LIMIT THE HEARING

In conclusion, the Hearing Officer should deny CCW's Motion to Dismiss. Moreover, Applicants anticipate that CCW likely will attempt to use the DP 1132 hearing to try and delve into matters addressed in its Motion that are beyond the permissible scope of a discharge permit hearing, an approach concerning which Applicants hereby state a continuing objection. Accordingly, Applicants hereby invoke the Hearing Officer's 20.6.2.3110 NMAC authority to avoid delay and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues properly arising in the proceeding. Specifically, Applicants request that the order denying CCW's Motion to Dismiss also establish that the hearing on DP 1132 is not a proper forum for CCW to attempt to interject its hazardous waste permitting positions through the testimony of its witnesses, the cross examination of Applicants' witnesses or in post-hearing submissions at or after the conclusion of the hearing. Without such an order, Applicants expect that CCW will interject confusion into the public hearing process that will cause undue complications, unnecessary arguments of counsel that will be repetitive of the briefing on CCW's Motion, and attendant distractions and delays.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2018, a copy of the foregoing "Statement of Intent to Present Technical Testimony" was hand delivered to the following:

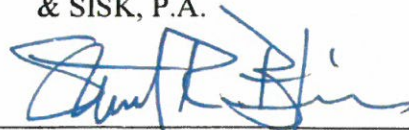
Pam Castaneda
Hearing Clerk
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and served via electronic mail to the following:

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Stuart R. Butzier

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AFFIDAVIT OF ROBERT CLIFFORD MASON

1. I, Robert Clifford Mason, am an employee of Los Alamos National Security, LLC at the Los Alamos National Laboratory (LANL). I have been employed at LANL since 2006.
2. I am currently employed as the Facility Operations Director (FOD) for nuclear and support facilities at LANL Technical Areas (TA) 03, 50, 55, and 63. I have served in this capacity for 12 years.
3. As a FOD, I am responsible for managing and overseeing operations at the TA-50 Radioactive Liquid Waste Treatment Facility (RLWTF). I am responsible for facility-related engineering, maintenance, and treatment operations, as well as RLWTF safety, environmental, and waste services.
4. I am familiar with Outfall 051 associated with RLWTF. The Laboratory has been operating the RLWTF under NPDES Permit #NM0028355 (NPDES Permit) since 1978. The permit is issued by the U.S. Environmental Protection Agency to the U.S. Department of Energy (DOE) and Los Alamos National Security, LLC (LANS) as co-permittees for the Los Alamos National Laboratory. The NPDES Permit authorizes the Laboratory to discharge from eleven (11) sanitary and/or industrial outfalls, including the discharge of treated radioactive liquid waste from the RLWTF through Outfall 051 into Effluent Canyon, a tributary to Mortandad Canyon. The NPDES Permit has been renewed multiple times and was last re-issued on August 12, 2014.
5. As stated in the 2012 NPDES Permit Re-Application Outfall Fact Sheet, permit coverage for Outfall 051 explicitly included *"re-permit the outfall so that the RLWTF can maintain the capability to discharge 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"* (See page 5 of the 2012 Permit Re-Application Outfall Fact Sheet, which is included as Attachment 1).
6. Outfall 051 is also regulated by New Mexico Environment Department (NMED) under the New Mexico Water Quality Act at NMSA 1978, §§76-6-1 *et. seq.*, and New Mexico Water Quality Regulations at 20.6.2.1 NMAC through issuance of a Ground Water Discharge Permit. In 2012, the Laboratory submitted a renewal application for a Ground-Water Discharge Permit (DP-1132). The application cited the same discharge paths as are discussed in the NPDES 2012 application: the Mechanical Evaporator System (MES), Solar Evaporator Tank System (SET) also referred to as the Zero Liquid Discharge Tanks, and Outfall 051. The DP-1132 requires the Laboratory to meet the requirements of Permit Condition VI.A.8, which include, among other items, contains water tightness testing of the conveyance pipelines from the RLWTF to the SET and Outfall 051.
7. RLWTF is a mission-critical LANL facility that treats low-level and transuranic liquid wastewater from processes at various generator facilities throughout the Laboratory. Outfall 051 is an integral component of RLWTF, and the Laboratory intends to discharge from this



2012 NPDES PERMIT RE-APPLICATION
OUTFALL FACT SHEET

| Outfall ID No. | Outfall Location | Outfall Category | Receiving Stream |
|----------------|------------------|---|--|
| 051 | TA-50-1 | Radioactive Liquid Waste Treatment Facility (RLWTF) | Effluent Canyon, a Tributary to Mortandad Canyon |

SOURCE OF DISCHARGE

Outfall 051 is located at TA-50 and discharges treated radioactive liquid wastewater effluent from the Radioactive Liquid Waste Treatment Facility (RLWTF) at TA-50-1 into Effluent Canyon, a tributary of Mortandad Canyon. Table 1 identifies the location of the RLWTF and provides a description of influent sources that it receives.

Table 1
Sources for Discharge to Outfall 051

| TA | Bldg | Description |
|----|------|---|
| 50 | 1 | Radioactive Liquid Waste Treatment Facility <ul style="list-style-type: none"> - Process water from radiochemistry laboratories, duct washing systems, radiological areas, boilers, and process areas. - Cooling water from systems located in radiological areas. - Storm and surface water (including samples) collected from sumps, manholes, and vaults. - Environmental Restoration (ER) waste water generated by groundwater monitoring and sampling activities at performed at LANL. |

Figure 1 provides a process flow diagram for the RLWTF.

WATER TREATMENT PROCESS

The RLWTF treats low-level and transuranic (TRU) radioactive liquid wastewater delivered from processes at various generator facilities to TA-50 by underground collection system or by tanker truck. All wastewater discharged into the RLWTF must comply with the facility's Waste Acceptance Criteria and must have a completed/approved Waste Profile Form (Appendix N). The NPDES sample point for this outfall allows for the collection of a sample after the final treatment process. The RLWTF includes two different treatment processes as follows:

- **Low-Level RLW Treatment Process** - Low-level influent is received at the facility through the Radioactive Liquid Waste Collection System (see Appendix J, K) where it is routed through a pH adjustment chamber and collected in the influent tanks. RLW is fed from the influent tanks to the clarifiers where it is treated by chemical precipitation and flocculation (sodium hydroxide, magnesium hydroxide, ferric chloride, sulfate, or other chemicals) to remove silica and radionuclides. The clarified water is drawn off and filtered. The RLW may then be treated by ion exchange or is sent to a Reverse Osmosis (RO) unit. The RO permeate (treated water) is routed to effluent storage tanks prior to being discharged to the effluent evaporator, TA-52 solar evaporation tanks (anticipated to be operational within the next 5 years), or the NPDES outfall. Effluent may also be shipped by tanker truck to the TA-53 solar evaporation basins/tanks. If the effluent is discharged to Outfall 051 it is further treated with ion exchange to remove copper/zinc and may have magnesium/calcium salts added to adjust the hardness prior to discharge. Secondary waste treatment processes are also included for RO concentrate (Secondary RO) and sludge (vacuum filter/dewatering). These

processes result in recycle streams back to the influent tanks and to other process units, and concentrated and solid waste streams shipped as low-level radioactive waste.

- **TRU RLW Treatment Process** - TRU RLW is received at the facility through an underground, doubled walled pipe collection system from TA-55 (see Appendix J, K) and is collected at the TA-50-66 influent tanks. The TRU influent is routed from TA-50-66 to the treatment tank in Room 60 where it is treated by chemical precipitation (sodium hydroxide) to remove radionuclides. Solids from the tank are collected in a sludge tank, allowed to settle, and are then solidified with cement in a drum tumbler. The cement drums are shipped and disposed of as TRU waste. The treated water is routed to the low-level treatment plant for either additional treatment or for storage pending shipment off-site for LLW disposal.

The water treatment codes provided in Table 2 have been assigned to this outfall.

Table 2
Water Treatment Codes Assigned to the RLWTF and Outfall 051

| Treatment Code | Treatment Process | Description |
|----------------|-----------------------------------|--|
| 1F | Evaporation | Waste Reduction Evaporator, Effluent Evaporator, and Solar Evaporation Tanks |
| 1G | Flocculation | Clarifiers |
| 1O | Mixing | Various |
| 1S | Reverse Osmosis (Hyperfiltration) | RO Units |
| 1U | Sedimentation (Settling) | Sludge |
| 1Q | Multimedia Filtration | Pressure and Cartridge Filters used for Particulate Removal |
| 1R | Rapid Sand Filtration | Gravity Media Filter for Particulate Removal |
| 2C | Chemical Precipitation | Sodium hydroxide, magnesium hydroxide, magnesium sulfate, sodium aluminate, co-polymer, and ferric sulfate are used to promote precipitation of radionuclides and silica removal |
| 2G | Coagulation | Clarifiers |
| 2J | Ion Exchange | Perchlorate, copper, and zinc removal |
| 2K | Neutralization | Influent and Room 60 Neutralization |
| 5Q | Landfill | Drums of TRU and LLW Waste |
| 5U | Vacuum Filtration | Vacuum filter for LLW sludge |

TREATMENT CHEMICALS AND POTENTIAL CONTAMINANTS

The water treatment processes identified in Table 2 utilize chemicals to control pH, promote precipitation, and flocculation. Table 3 identifies the treatment chemicals that are used at the RLWTF.

Table 3
Treatment Chemicals Used at the RLWTF

| Source | Reason for Use/Frequency | Hazardous Substances from Form 2C, Table 2C-4 |
|----------------------|--|---|
| Sodium Hydroxide 25% | pH Adjustment, Promote Precipitation/Flocculation, and Membrane Cleaning | Sodium Hydroxide |
| Ferric Sulfate | Promote Precipitation/Flocculation | Ferric Sulfate |
| Magnesium Hydroxide | Promote Precipitation/Flocculation | NA |
| Carbon Dioxide | Adjust pH | NA |
| Magnesium Sulfate | Precipitation/Flocculation | NA |

**Table 3 (continued)
 Treatment Chemicals Used at the RLWTF**

| Source | Reason for Use/Frequency | Hazardous Substances from Form 2C, Table 2C-4 |
|------------------------|---------------------------------------|---|
| EDTA | Membrane Cleaning | EDTA |
| Sodium bisulfite | Membrane Cleaning | Sodium Bisulfite |
| Dishwashing Soap | Membrane Cleaning | NA |
| Ionac SR-6 | Ion Exchange Resin | NA |
| Hydrochloric Acid | Reduce pH | Hydrochloric Acid |
| Solid Sodium Hydroxide | Precipitation/Flocculation | Sodium Hydroxide |
| SCU | Ion Exchange Media | NA |
| SCP | Ion Exchange Media | NA |
| Sodium Aluminate | Precipitation/Flocculation | NA |
| WEST W-126 | Ionic Co-polymer used as a Flocculent | 2-Propanoic Acid |

Table 4 identifies the contaminants listed on the Waste Profile Forms for the influent waste streams received by the RLWTF for treatment.

**Table 4
 Potential Contaminants Associated with the RLWTF Influent**

| Waste Stream Type | Description | Hazardous Substances from Form 2C, Table 2C-4 Identified on WPFs ¹ | Detected in Outfall 051 Discharge (Aug 07 – Jun 10) |
|-------------------|---|---|--|
| Process | Discharged from laboratories, radiological areas and process areas. | acetic acid ammonia ammonium bifluoride ammonium carbonate ammonium chloride ammonium fluoride ammonium hydroxide benzene chloroform chromic acid cupric chloride cupric sulfate endrin EDTA ferric chloride ferric nitrate ferric sulfate ferrous ammonium sulfate ferrous chloride ferrous sulfate formaldehyde formic acid heptachlor hydrochloric acid hydrofluoric acid lead nitrate nitric acid phenol phosphoric acid potassium dichromate potassium hydroxide potassium permanganate sodium dodecylbenzenesulfonate sodium fluoride sodium hydroxide sodium hypochlorite sodium nitrite sodium phosphate (dibasic) sulfuric acid uranyl nitrate zinc chloride zinc nitrate zinc sulfate | Chloroform ² Chromium ³ Copper ⁴ Lead ⁵ |
| ER | Discharged from groundwater drilling and remediation projects. | acrolein ammonia aniline benzoic acid Dieldrin endosulfan endrin ethyl benzene Naphthalene Phenol Toluene xylene | Naphthalene ⁶ Phenol ⁷ |

Table 4 (continued)
Potential Contaminants Associated with the RLWTF Influent

| Waste Stream Type | Description | Hazardous Substances from Form 2C, Table 2C-4 Identified on WPFs ¹ | | Detected in Outfall 051 Discharge (Aug 07 – Jun 10) |
|-------------------|---|---|----------------------------------|---|
| Storm Water | Discharged from sumps, manholes, and vaults. ^{8,9} | Ammonia chloroform | nitric acid trichloroethylene | Chloroform ² |

- NOTE: The wastewater influent received by the RLWTF is not RCRA listed hazardous waste.
- Chloroform was detected twelve (12) times at concentrations ranging from 0.000283 – 0.0546 mg/L.
- Chromium was detected one (1) time at a concentration of 0.001 mg/L.
- Copper was detected thirty five (35) times at concentrations ranging from 0.0102 – 0.24 mg/L.
- Lead was detected on (1) time at a concentration of 0.0076 mg/L.
- Naphthalene was detected two (2) times at concentrations of 0.000372 – 0.000933 mg/L.
- Phenol was detected on (1) time at a concentration of 0.0177 mg/L.
- Ammonia, chloroform, and trichloroethylene were detected in storm water collected from TRU/LLW storage dome sumps located at TA-54 and sent to the RLWTF for treatment. These detections are likely due to residual cleaning chemicals and/or the presence of asphalt.
- The nitric acid is used as a preservation chemical for storm water and surface water samples that are managed at TA-59. Unused sample material is poured down the RLW drain to the collection system.

POTENTIAL POLLUTANTS

The treatment chemicals and treated RLWTF effluent constitute the pollutant load that could potential discharge to Outfall 051. Table 5 identifies the Table 2C-4 constituents that will potentially be discharged to the outfall.

Table 5
Potential Pollutants Discharged to Outfall 051

| Description | Hazardous Substances Required to be Listed on the NPDES Permit Application Form 2C | | |
|--|--|--------------------------|--------------------------------|
| TA-50 RLWTF Treated Effluent Outfall 051 | acetic acid | EDTA | potassium hydroxide |
| | acrolein | ferric chloride | potassium permanganate |
| | ammonia | ferric nitrate | sodium bisulfite |
| | ammonium bifluoride | ferric sulfate | sodium dodecylbenzenesulfonate |
| | ammonium carbonate | ferrous ammonium sulfate | sodium fluoride |
| | ammonium chloride | ferrous chloride | sodium hydroxide |
| | ammonium fluoride | ferrous sulfate | sodium hypochlorite |
| | ammonium hydroxide | formaldehyde | sodium nitrite |
| | aniline | formic acid | sodium phosphate (dibasic) |
| | benzene | heptachlor | sulfuric acid |
| | benzoic acid | hydrochloric acid | toluene |
| | chloroform | hydrofluoric acid | trichloroethylene |
| | chromic acid | lead nitrate | uranyl nitrate |
| | cupric chloride | naphthalene | xylene |
| | cupric sulfate | nitric acid | zinc chloride |
| | dieldrin | phenol | zinc nitrate |
| | endosulfan | phosphoric acid | zinc sulfate |
| | endrin | potassium bichromate | 2-propanoic acid |
| | ethylbenzene | | |

DISCHARGE RATE AND FREQUENCY

The average daily flow rates for the sources that discharge to Outfall 051 are provided in Table 6.

Table 6
Source Flow Rates/Frequencies to Outfall 051

| Operation/Source | Average Flow (Gallon/Day) | Treatment Code |
|------------------|---------------------------|---|
| RLWTF | 19,700 | 1G, 1O, 1S, 1Q, 1R 1U, 2J, 1F, 2K, 2C, 5Q, 5U |

SAMPLING AND ANALYSIS FOR RE-APPLICATION

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.

A composite sample for the Form 2C Constituents will be collected from Outfall 051 when/if the RWLTF discharges effluent to it. See the attached Discharge Monitoring Report Outfall Summary for the analytical data collected prior to November 2010.

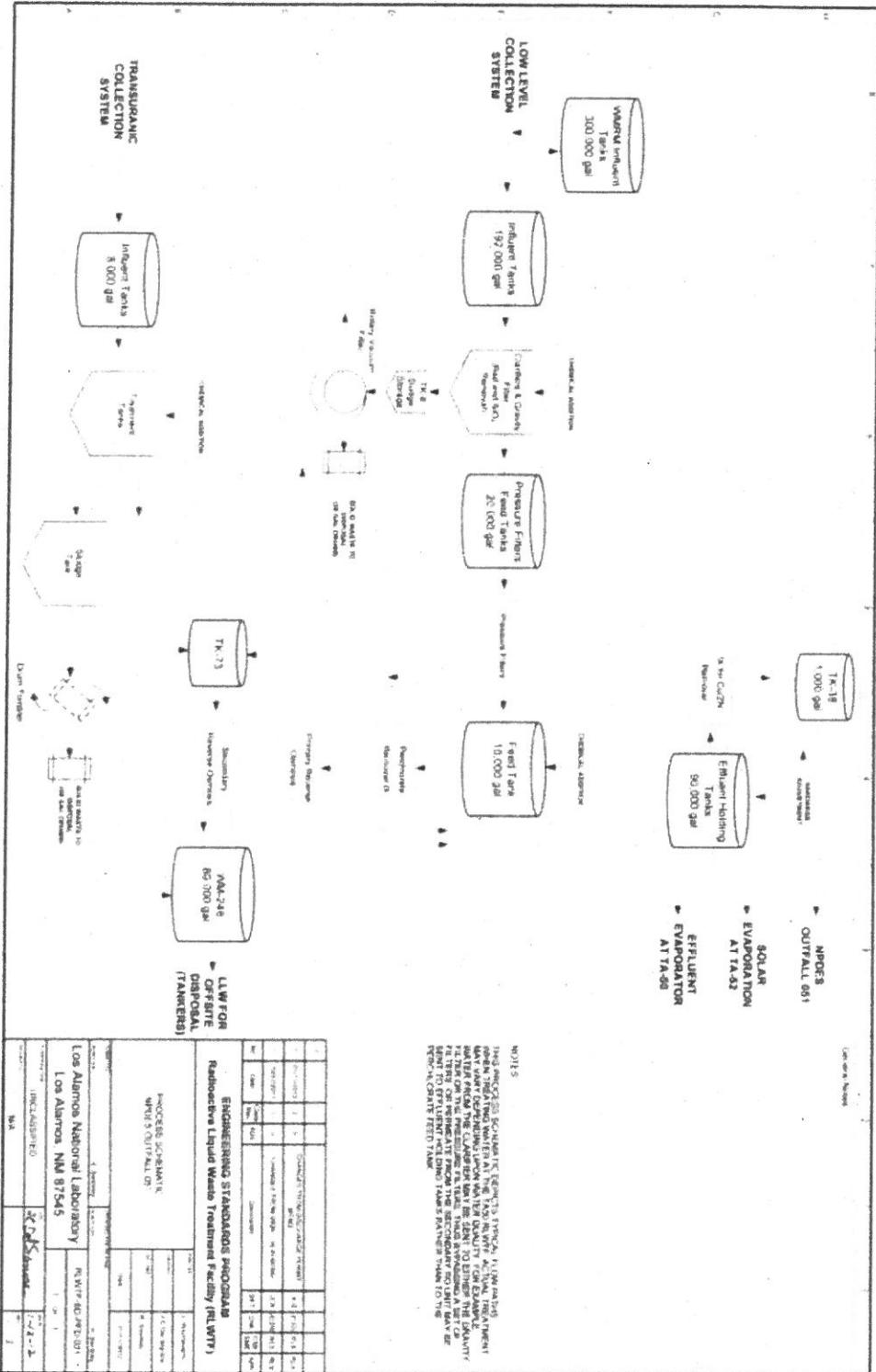
ANALYTICAL RESULTS PROVIDED

- NPDES Discharge Monitoring Reports (DMRs) from August 2007 – July 2011.
- Material Safety Data Sheets for treatment chemicals.

ADDITIONAL INFORMATION

- Latitude – 35°51'54"
- Longitude – 106°17'54"

Figure 1
Process Flow Diagram for the Radioactive Liquid Waste Treatment Facility



NOTES
 THIS PROCESS SCHEMATIC REPRESENTS THE TYPICAL TREATMENT OF LOW LEVEL WASTE AT THE LAS ANIMAS ACTUAL TREATMENT FACILITY. THE SCHEMATIC DOES NOT INDICATE THE EXACT LOCATION OF THE WASTE TANKS OR THE EXACT LOCATION OF THE WASTE TANKS. THE SCHEMATIC DOES NOT INDICATE THE EXACT LOCATION OF THE WASTE TANKS. THE SCHEMATIC DOES NOT INDICATE THE EXACT LOCATION OF THE WASTE TANKS. THE SCHEMATIC DOES NOT INDICATE THE EXACT LOCATION OF THE WASTE TANKS.

| NO. | DESCRIPTION | DATE | BY | APP'D. |
|-----|-------------|----------|-------------------|-------------|
| 1 | DESIGNED BY | 11/08/08 | J. J. [Signature] | [Signature] |
| 2 | DESIGNED BY | 11/08/08 | J. J. [Signature] | [Signature] |
| 3 | DESIGNED BY | 11/08/08 | J. J. [Signature] | [Signature] |
| 4 | DESIGNED BY | 11/08/08 | J. J. [Signature] | [Signature] |
| 5 | DESIGNED BY | 11/08/08 | J. J. [Signature] | [Signature] |

ENGINEERING STANDARDS PROGRAM
 Radioactive Liquid Waste Treatment Facility (RLWTF)

PROCESS SCHEMATIC
 NPDES OUTFALL 051

Los Alamos National Laboratory
 Los Alamos, NM 87545

INTEGRATED

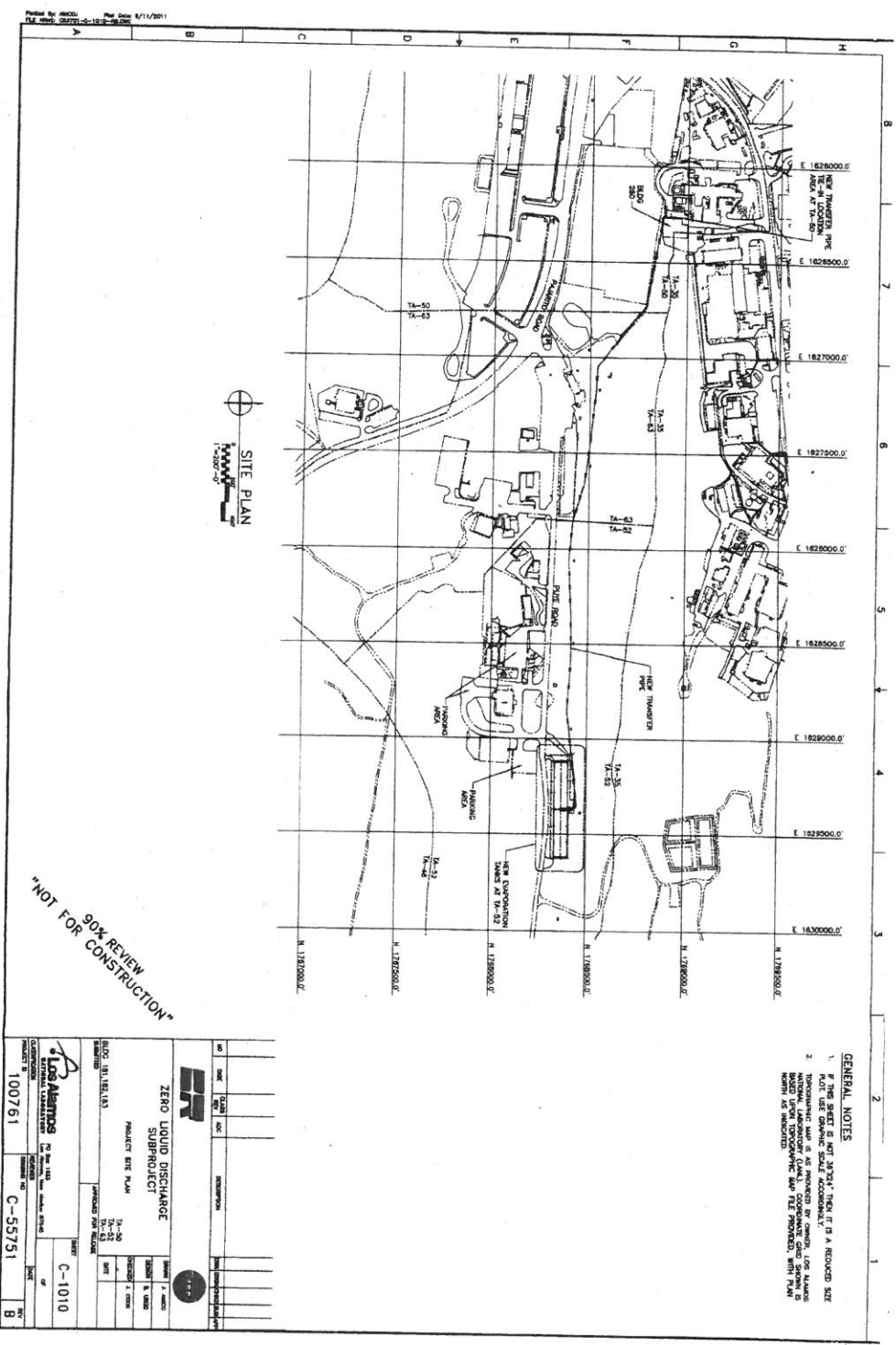
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Form 2C Section IV.B - Improvements

ZERO LIQUID DISCHARGE PROJECT

The 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 Project. These evaporation tanks will receive fully treated effluent from the RLWTF and will reduce the volume of treated effluent discharged to Outfall 051. The evaporation tanks will be connected to the RLWTF by a transfer pipe line that will be approximately 0.75 miles long. Figures 2 and 3 provide copies of the 90% review design drawings for the transfer line and evaporation tanks.

Figure 2
 Transfer Line from the RLWTF to the Evaporation Tanks at TA-52 (90% Design Drawing)



Concerned Citizens for Nuclear Safety

P. O. Box 31147
Santa Fe, NM 87594-1147
505 986-1973
www.nuclearactive.org

September 22, 2017

By email to: neelam.dhawan@state.nm.us

Neelam Dhawan, LANL Program Manager
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, NM 87505

Re: Public Comments and Hearing Request about the Class 3 Permit
Modification Request - as required by the Settlement Agreement between
the New Mexico Environment Department and the Permittees for
Los Alamos National Laboratory

Dear Ms. Dhawan:

This letter responds to the notice dated July 23, 2017, seeking comment on a proposed class 3 major modification to the Hazardous Waste Act permit dated December 30, 2010, for Los Alamos National Laboratory.

Concerned Citizens for Nuclear Safety ("CCNS"), a Santa Fe-based non-governmental organization, submits the following comments to the New Mexico Environment Department ("NMED") about the Class 3 hazardous waste permit modification request for Los Alamos National Laboratory ("LANL"), submitted by the Permittees (Department of Energy ("DOE") and Los Alamos National Security, LLC ("LANS")), as required by the Settlement Agreement of U.S. District Court for the District of New Mexico (Case No. 10-01251) between NMED and the Permittees.

CCNS was formed in the spring of 1988 to address community concerns about the proposed transportation of LANL radioactive and hazardous waste on St. Francis Drive in Santa Fe to the yet-to-be-opened Waste Isolation Pilot Plant ("WIPP"). Our mission is *to protect all living beings and the environment from the effects of radioactive and other hazardous materials now and in the future.* CCNS



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

Since its founding nearly 30 years ago, CCNS has actively participated in the hazardous waste permit ("HWP") process for LANL, beginning with a permit modification request ("PMR") to reopen the radioactive and hazardous waste incinerator. After years of grassroots organizing, outreach to the media, participating in the public hearing and litigation, the plans to reopen the incinerator were quashed.

CCNS is concerned about the current PMR. It is voluminous and complex. It is also the product of closed-door negotiations and agreements between NMED and the Permittees to settle an outstanding lawsuit. Our experience with such PMRs and other Resource Conservation and Recovery Act ("RCRA") documents, negotiated privately between the regulator and the regulated party, is that public review and comment result in minimal changes. Examples include the 2005 Compliance Order on Consent ("2005 Consent Order"), the 2016 Consent Order, and the 2012 non-binding Framework Agreement.

https://www.env.nm.gov/HWB/documents/LANL_Framework_Agreement.pdf These agreements are not as protective of human health and the environment as PMRs that are developed through a public process. For example, the Framework Agreement set the stage for the Permittees to ship non-compliant explosive waste to WIPP resulting in a three year shutdown and a possible \$1 billion cleanup.

Also, the negotiating parties here have vested interests in assuring that the Settlement Agreement provisions are implemented without changes. *See*, PMR Attachment A, Settlement Agreement, pp. 3, 5.¹ Public comments carry little weight against these vested interests negotiated behind closed doors.

Further, since they were negotiated, the proposed modifications have no evidentiary basis in the administrative record and/or the hearing record, as detailed below. CCNS respectfully requests a public hearing on issues that

¹ ¶6 ("If the Environment Department issues a final modified Permit that is substantially identical to the proposed modified Permit, no Party shall challenge the modified Permit in any forum."); ¶14 ("In the event of a disagreement between the Parties concerning the performance of any aspect of this Settlement Agreement, the dissatisfied Party shall provide the other party with notice of the dispute and a request for negotiations.... If the parties are unable to resolve the dispute through negotiations, the disputed issues shall be referred to the federal magistrate for mediation."); and ¶15 ("If the Parties are unable to resolve their disagreement pursuant to Paragraph 14, their remedies shall be as follows: (a) If the dispute occurs during the time that this matter is stayed, the sole remedy shall be to ask the Court to lift the stay and establish a schedule for further proceedings with regard to any claims concerning any matter as to which a Party failed to act. All Parties reserve all defenses relating to this litigation if the stay is lifted.").

remain unresolved after public comments and NMED's issuance of a draft permit.

Pursuant to 74-6-5(G) NMSA and 20.6.2.3108(K) NMAC, CCNS requests a public hearing on these issues:

1. Proposed Additions of Section 1.4.2 "Integration with Consent Order," Section 1.4.2.1 "MDAs G, H, and L," and Section 1.4.2.2 "Public Participation."

CCNS opposes the proposed language in the PMR for three Sections in Part I.

a. CCNS objects to the proposal to depart from the RCRA definition for "regulated unit." The PMR apparently seeks to change the criteria for monitoring, cleanup, and closure of landfills. The HWA regulations are clear – regulated units "must comply with the requirements of §§ 264.91 through 264.100 in lieu of 264.101 for purposes of detecting, characterizing and responding to releases to the uppermost aquifer." The language in the proposed additions does not reflect the RCRA requirements. The 2005 Consent Order and the 2010 HWP should have required the Permittees to meet "the requirements of §§ 264.91 through 100 for detecting, characterizing and responding to releases to the uppermost aquifer." Under the regulatory language, in planning cleanup and closure, we would know more about the spreading contamination below Technical Area 54, where MDAs G, H, and L are located. The improper use of "alternative requirements" cannot attain protection of our precious drinking water. Allowing the contamination to continue to spread and contaminate additional water is unconscionable.

b. Problems we encountered while researching the applicable documents in preparation of these comments. We urge NMED to correct these problems at their earliest convenience:

- i. On October 12, 2016, the DOE Environmental Management, Los Alamos Field Office (EM-LA), wrote to the NMED regarding "Withdrawal of Three Corrective Measures Evaluations and Suggested Priorities for New Mexico Environment Review of Documents," in order to withdraw the Corrective Measures Evaluations (CME) for MDAs G, H, and L. Now there are no due dates for these documents. See Enclosure 2 2005 Consent Order Work Deliverable Ties to 2016 Consent Order Appendix C Campaigns to the letter.

- ii. The MDA G Remedy Completion Report was due December 31, 2015 under the 2005 Consent Order. Now, under the 2016 Consent Order, there is no due date, only "n/a" in the column entitled "Extension Request; Denial Date (if applicable)". The MDA L Remedy Completion Report was due December 4, 2015; again there is no due date, only "n/a" in the due date column. It appears that MDA H has fallen off the list.
- iii. The proposed language addresses MDA G, H, and L, but MDA H is missing from the 2016 Consent Order. NMED must explain this omission of MDA H and the inconsistencies must be corrected.

2. Proposed Changes to Section 1.8 "Definitions."

- a. CCNS objects to the proposed definition of "Consent Order," which refers only to the incomplete and inadequate 2016 Compliance Order on Consent. CCNS has grave concerns about the current Consent Order.
- b. Many items found in the 2005 Compliance Order on Consent were omitted from the 2016 version.

For example, Table III-1 *Explosive Compounds (Including Propellants, Pyrotechnics, and Degradation Products)* was omitted from the 2016 "Consent Order." See pp. 37-38 of March 1, 2006 Consent Order (Revised October 29, 2012). The listing of 15 constituents required for sampling and analysis is missing from the 2016 Consent Order. As a result, DOE is no longer required to sample for explosive compounds. NMED must explain the omission and the inconsistencies must be corrected.

- c. CCNS objects to the proposed change to limit the definition of a "Regulated Unit." The HWP definition must reflect the full Resource Conservation and Recovery Act ('RCRA') definition found in 40 CFR § 264.90(a)(2). NMED does not have the authority to omit the full definition. The permit should read:

"A surface impoundment, waste pile, and land treatment unit or landfill that receives hazardous waste after July 26, 1982 (hereinafter referred to as a 'regulated unit') must comply with the requirements of §§ 264.91 through 264.100 in lieu of 264.101 for purposes of detecting, characterizing and responding to releases to the uppermost aquifer. The

financial responsibility requirements of § 264.101 apply to regulated units.”

The plain language of the RCRA definition is clear. For regulated units, the requirements of 40 CFR §§ 265.91 through 264.100 are to be followed to detect, characterize, and respond to releases to the uppermost aquifer. Alternative requirements do not apply to regulated units.

- d. Further, we encountered another problem in searching for the current language in the HWP. We note that the May 2017 version of Section 1.8 omits the definition of “regulated unit.” Further, after a quick search for a definition of “regulated unit” in Parts I through 11, we found the definition has been omitted throughout. When was the definition of “regulated unit” removed from the permit?
 - e. NMED must explain this omission of the definition of “regulated unit” from the May 2017 version of the HWP. The inconsistencies must be corrected as soon as possible.
 - f. Further, in 2010 the Applicants/Permittees stipulated that “they agree to the terms of Part 1 of the Proposed Permit except Section ... 1.8 (definitions of “Hazardous Waste Management Unit” and “Permitted Unit”).” ¶154, Hearing Officer’s Report, p. 38. They did not object to the definition of “regulated unit.”
3. Section 1.9.1 “Duty to Comply.” CCNS supports the deletion of the second and third paragraphs to this section.
4. Removal of Section 4.6 “Radioactive Liquid Waste Treatment Facility.”

CCNS objects to the removal of Section 4.6. The Radioactive Liquid Waste Treatment Facility (“RLWTF”) is a hazardous waste management unit and must be regulated by RCRA.

The PMR states that section 4.6, the paragraph imposing nominal constraints upon the RLWTF, is proposed to be deleted, because the Permittees undertook to evaporate wastewater only in authorized locations (a promise that CCNS accepts) and, “in addition, RLWTF is fully regulated under multiple other authorities” (at 5), a statement that is utterly unfounded. The supposed authorities are:

- (a) a ground water discharge permit (DP-1132) under the New Mexico Water Quality Act, § 74-6-1 *et seq.* NMSA 1978 (“WQA”),
- (b) a National Pollutant Discharge Elimination System (“NPDES”) permit under the federal Clean Water Act, 33 U.S.C. § 1311 *et seq.* (“CWA”), and
- (c) the 2016 Compliance Order on Consent under the Hazardous Waste Act, § 74-4-1 *et seq.* NMSA 1978 (“HWA”).

These assertions are false and constitute a smokescreen, engineered to induce NMED to forego its statutory duty to regulate the RLWTF under the HWA, a statute that NMED is duty-bound to apply to the RLWTF pursuant to the HWA and EPA’s delegation of authority to enforce RCRA, 42 U.S.C. § 6901 *et seq.*

It is known that the RLWTF stores and treats hazardous wastes. Permittees have 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 . . .” They have expressly stated that, “The RLWTF satisfies each of these conditions[.]” The RLWTF [r]eceives and treats a small amount of hazardous wastewater[.]” LANS/DOE Comments on DP-1132, Dec. 12, 2013, Encl. 3 at 1. Since it receives, stores, and treats wastes which contain hazardous constituents, and so constitute “solid waste” and “hazardous waste” under RCRA, 42 U.S.C. § 6903(5), (27), the RLWTF must have a permit under RCRA or an authorized state program. 42 U.S.C. § 6925, 40 C.F.R. § 270.1(c). If the RLWTF had that permit, it would be subject, *inter alia*, to detailed protective RCRA requirements, calling for, *e.g.*, a public permitting process for approval of any new construction (40 C.F.R. § 270.10(f)), assurances of the engineering integrity of tank systems (40 C.F.R. §§ 264.190-.200), and completeness of closure planning (40 C.F.R. §§ 264.110-.120).

But the Permittees argue that RCRA regulation is unnecessary because of other regulatory systems. They do not say that other systems legally preclude the HWA, but even if they did, they would be wrong.

The fundamental fact is that there are no discharges of water or contaminants, either current or planned, from the RLWTF. Since the 1990s, LANL has planned to reconstruct the RLWTF, stating that its “ultimate goal” was to terminate any discharges through Outfall 051, through which wastewater was historically discharged. (Letter, Hanson and Rae to Bustamante, Sept. 3, 1998). That goal has been achieved. LANL proceeded with its reconstruction and completed the “new” RLWTF as a “zero-liquid-discharge” facility. (Letters, Erikson and Baca to Coleman, March 18, 1999; Rae to Coleman, Dec. 22, 1999; Rae to Coleman, June 13, 2000). Thus, liquid waste is either dewatered and drummed, or processed through evaporation, leaving a sludge that is removed for land disposal. LANL ended discharges from Outfall 051 in November 2010. (February 2012 Los Alamos National Laboratory, NPDES Permit No.

NM0028355, 2012 NPDES Permit Re-Application, concerning Outfall 051, and Form 2C). The RLWTF has made no discharges since then, and LANL does not plan or expect to make any discharges from the RLWTF.

Still, Permittees assert that the WQA renders HWA regulation unnecessary. NMED is currently considering the issuance of a discharge permit, DP-1132. But the Water Quality Act, and the proposed discharge permit, have no legal effect here.

First, it is clear that a state statute, such as the WQA, cannot limit the application of a federal law, such as RCRA. U.S. Const. Art. VI, Cl. 2 (Supremacy Clause).

Next, the WQA has no application here, because the RLWTF will not *discharge* any water or contaminants. Without a discharge, there is no basis for a discharge permit. 74-6-5(A), (I) NMSA 1978. Specifically, the law authorizes *only* “a permit for the discharge of any water contaminant.” 74-6-5(A) NMSA 1978. Regulations define a “discharge plan” as a plan “for any discharge of effluent or leachate which may move directly or indirectly into ground water.” 20.6.2.R NMAC. See also 20.6.2.3104 NMAC. A transfer of water from one tank to another tank within a contained facility, after which the water and its contaminants remain isolated from the environment, does not meet this definition.

Nor does the WQA authorize a permit for a “possible” discharge, based upon someone’s concern that a facility might leak. NMED is not allowed to issue a discharge permit for a facility that does not discharge. The WQA specifically directs that a permit for a non-discharging facility is a futility. Section 74-6-5(I) NMSA 1978 states: “[T]he term of the permit shall commence on the date the discharge begins.” *Id.* (*emphasis supplied*). See also 20.6.2.3109.H NMAC. Here, that will never happen, because Outfall 051 will have no discharge, and DP-1132 will never take effect. Moreover, the RLWTF is a *hazardous waste management facility*. Under 74-6-12(B) NMSA 1978, “[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act . . . ”

Next, Permittees state that the federal Clean Water Act will regulate the RLWTF. However, an NPDES permit likewise provides no effective regulation. The existing CWA permit is now under review by the EPA Environmental Appeals Board. The fundamental issue is that the CWA only authorizes “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a). Thus, EPA may only issue a permit when there is an actual “discharge” of a pollutant. There is no discharge from the RLWTF, present or planned.

Recent decisions confirm that, absent an actual or intended discharge, EPA has no authority to issue a permit under the NPDES. *See: Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005); *National Pork Producers Council v. U.S. Environmental Protection Agency*, 635 F.3d 738 (5th Cir. 2011). Other decisions support this conclusion: *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988). Thus, the NPDES permit for Outfall 051 cannot be regarded as effective regulation of the RLWTF.

Last, the Permittees assert that the inclusion of various elements of the RLWTF as solid waste management units (“SWMUs”) and areas of concern (“AOCs”) in the 2016 Consent Order should be regarded as effective regulation. However, the 2016 Consent Order only regulates the cleanup of releases of hazardous waste – it does not constitute ongoing regulation of an operating facility. The “Consent Order sets forth a process for characterizing the nature and extent of Contaminant releases, characterizing the risks to human health and the environment resulting from these releases, and mitigating unacceptable risks. This process includes the planning and implementation of corrective actions and the reporting of results.” (2016 Consent Order at II.D.1) In contrast, RCRA, and in New Mexico the HWA, constitute systems for the regulation of operating hazardous waste management units – which is what the RLWTF is – and Permittees’ bogus claims that other regulatory systems achieve that result are wholly unfounded.

Further, the Hearing Officer’s Report in 2010 is clear – the RLWTF should be regulated by RCRA. We direct the Department’s attention to the attached Exhibit “A” to CCNS Comments about LANL Class 3 PMR, which provides excerpts from the October 7, 2010 Hearing Officer’s Report regarding Section 4.6. *See* Section 6, starting on p. 115 through 118, and 203 – 206). ¶¶555 – 558 Findings of Fact.² ¶¶ 193 – 198 Conclusions of Law.³

² ¶ “555. EPA construes the wastewater treatment unit exemption at 40 C.F.R. §264.1(g)(6) to require that the wastewater treatment unit discharge treated wastewater exclusively through the Clean Water Act-regulated outfall, and that diversion to other points of discharge voids the exemption. NMED Ex. 3 at 38-39; *see* NMED Ex. 78; NMED Ex. 79; NMED Ex. 80.”

¶ “556. The Department agrees with the EPA interpretation of the wastewater treatment unit exemption at 40 C.F.R. § 264.1(g)(6) as set forth above. NMED Ex. 3 at 38; *see* Finding #465.”

¶ “557. On at least 5 occasions, the Applicants have diverted treated wastewater from the Treatment Facility into tanks (or impoundments) for evaporation at TA-53 rather than through the outfall into Mortandad Canyon. NMED Ex. 3 at 39; NMED Ex. 81; Grieggs Test. Tr. vol. 3, p. 584, lines 3-4.”

¶ “558. **By letter dated January 17, 2008, the Department determined that because the Applicants had diverted treated wastewater from the Treatment Facility into the evaporation tanks, the Treatment Facility was no longer subject to the wastewater treatment unit**

In 2010, the Department held that the RLWTF is subject to RCRA regulation. The only material change since then is that discharges through Outfall 051 have ceased entirely, eliminating the basis for any NPDES permit and, consequently, eliminating the foundation of the wastewater treatment unit exemption. Yet now NMED seems to have concluded that a facility that was subject to RCRA regulation in 2010 is somehow free to operate without any such regulation. Such a determination would appear to be a textbook case of arbitrary and capricious decision making.

5. Proposed changes to Part 9: "Closure;" Attachment G: "Closure Plans;" and Attachment J "Hazardous Waste Management Units."

CCNS objects to the proposed changes to these Parts. We are confused about the deletion of low-level radioactive waste in the Attachment G Closure Plans. While the Permittees may claim that they know the inventory, nevertheless, we know that the disposal records for the operating units are incomplete. Reference to low-level waste and its disposal must be retained in the HWP, as well as the Consent Order.

exemption at 40 C.F.R. § 264.1 (g)(6). The letter directed the Applicants to submit a hazardous waste permit application for the Treatment Facility. NMED Ex. 220; *see also* Grieggs Test. Tr. vol. 2, p. 474, line 3 top. 476, line 13." [Emphasis added.]

³ ¶ "193. **EPA's interpretation of the wastewater treatment unit exemption in 40 C.F.R. § 264.1(g)(6) is entitled to considerable weight.** *Chevron U.S.A., Inc. v. Natural Res. Def Council*, 467 U.S. 837, 844 (1984), reh 'g denied, 468 U.S. 1227 (1984)." [Emphasis added.]

¶ "194. The Department's interpretation of the wastewater treatment exemption in the hazardous waste regulations is entitled to "substantial weight." *Sierra Club v. NM Mining Comm'n*, 2001-NMCA-047, if 17, 130 N.M. 497, 501, 27 P.3d 984, 988; *see* Conclusion of Law #14."

¶ "195. The Department's interpretation of the wastewater treatment exemption in the hazardous waste regulations is a "legal question[] that implicate[s] special agency expertise [and] the determination of fundamental policies within the scope of the agency's statutory function," and it is therefore entitled to "a heightened degree of deference" *Sierra Club v. NM Mining Comm'n*, 2003-NMSC-005, ¶ 25, 133 N.M. 97, 106, 61 P.3d 806, 815; *see* Conclusion of Law #15."

¶ "196. **Based on the record, the Department in its discretion could reasonably conclude that the Treatment Facility is no longer subject to the wastewater treatment unit exemption.** *See* Findings 467-479." [Emphasis added.]

¶ "197. If the Treatment Facility were used to treat listed waste, the treated effluent would remain hazardous waste. 40 C.F.R. § 261.3(c)(1) (2009), incorporated by 20.4.1.200 NMAC."

¶ "198. No party has met the burden of showing that any condition in Part 4 of the Proposed Permit is inadequate, improper, or invalid. *See* 20.1.4.400.A(1) NMAC."

CCNS objects to Section 9.1.1 about closure of MDAs G, H, and L. We understand that MDAs H and L are closed. A question arises as to why H and L are included in the HWP if they are not operating/active units.

Further, is Area G an operating/active unit? What is its status?

CCNS objects to the omission of listing the specific pits, shafts, or trenches for TA-54 "G," TA-54 "H," and TA-54 "L" in Attachment J, and Table J-1. Allowing "unspecified pits, trenches, or shafts" could allow "unspecified pits, trenches, or shafts" to disappear from the regulatory scheme - similar to the omission of MDA H from the 2016 Consent Order.

In conclusion, as stated above, this is a voluminous and complicated PMR. More than 60 days will be needed for the public to provide informed public comments to NMED on the next iteration of the PMR.

Thank you for your careful consideration of our comments. Please contact us with any questions or comments.

Sincerely,

Joni Arends, Executive Director
Concerned Citizens for Nuclear Safety
jarends@nuclearactive.org



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

August 16, 2017

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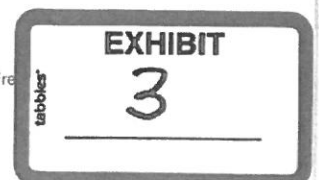
RE: Request to Terminate NPDES Permit #NM0028355 as to Outfall #051
for Radioactive Liquid Waste Treatment Facility

Dear Mr. Lovejoy and Mr. Jantz:

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

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

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



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

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

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

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

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

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

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

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

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

Sincerely,

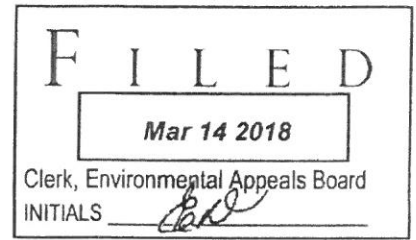


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(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, within sixty (60) days of the issuance of this opinion, of any typographical or other formal errors, in order that corrections may be made before publication.

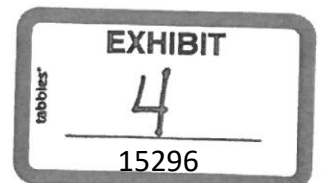
**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)
In re:)
)
Los Alamos National Security,)
LLC and the U.S. Department of) NPDES Appeal No. 17-05
Energy)
)
Permit No. NM0028355)
_____)

[Decided March 14, 2018]

FINAL DECISION

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.



**IN RE LOS ALAMOS NATIONAL SECURITY, LLC AND THE
U.S. DEPARTMENT OF ENERGY**

NPDES Appeal No. 17-05

FINAL DECISION

Decided March 14, 2018

Syllabus

Concerned Citizens for Nuclear Safety (“Concerned Citizens”) filed an Informal Appeal with the Environmental Appeals Board (“Board”) under 40 C.F.R. § 124.5(b) seeking review of the U.S. Environmental Protection Agency Region 6’s (“Region”) denial of Concerned Citizens’ request to terminate as to one outfall – referred to as Outfall 051 – a National Pollutant Discharge Elimination System (“NPDES”) permit issued for operations at the Los Alamos National Laboratory in New Mexico (“Los Alamos Laboratory”).

The Region issued the permit in 2014 (“2014 Permit”) authorizing Los Alamos National Security, LLC and the U.S. Department of Energy to continue discharges from eleven sanitary and/or industrial outfalls at the Los Alamos Laboratory, including the discharge of treated wastewater from the Radioactive Liquid Waste Treatment Facility through Outfall 051. In its Informal Appeal, Concerned Citizens alleges that the Region erred in denying its subsequent request to terminate the 2014 Permit as to Outfall 051 because the Los Alamos Laboratory has not discharged liquid waste from that Outfall since 2010. Concerned Citizens asserts that permit termination is appropriate under 40 C.F.R. § 122.64(a)(4), which provides that after an NPDES permit is issued, “[a] change in any condition” requiring a reduction or elimination of any discharge is cause for permit termination. In response, the Region argues that Concerned Citizens failed to establish a change in any condition justifying permit termination.

Held: The Region did not clearly err or abuse its discretion in denying Concerned Citizens’ request to terminate the 2014 Permit as to Outfall 051. When the Region issued the 2014 Permit, discharges from Outfall 051 had not occurred since 2010 and would only be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage. Under these circumstances, the record supports the Region’s determination that Concerned Citizens failed to establish a change in any condition after

the Region issued the 2014 Permit justifying permit termination pursuant to 40 C.F.R. § 122.64(a)(4). The Board therefore denies the Informal Appeal.

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Ward:

I. STATEMENT OF THE CASE

Concerned Citizens for Nuclear Safety (“Concerned Citizens”) filed this Informal Appeal under 40 C.F.R. § 124.5(b) seeking review of the denial of its request to terminate as to one outfall – Outfall 051 – a National Pollutant Discharge Elimination System (“NPDES”) permit issued for operations at the Los Alamos National Laboratory (“Los Alamos Laboratory”). *See* Concerned Citizens for Nuclear Safety Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) (“Informal Appeal”) (Sept. 14, 2017); Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. NM0028355 (Aug. 12, 2014) (“2014 Permit”) (Administrative Record (“A.R.”) II).¹ The U.S. Environmental Protection Agency Region 6 (“Region”) issued the permit in 2014 authorizing Los Alamos National Security, LLC and the U.S. Department of Energy (“Permittees”) to continue discharges from eleven sanitary and/or industrial outfalls at the Los Alamos Laboratory, including discharges of treated wastewater from the Radioactive Liquid Waste Treatment Facility (“Treatment Facility”) through

¹ In responding to the Informal Appeal, the Region attached an index to the administrative record. *See* “Index to EPA Region 6 Administrative Record (A.R.)” (Oct. 18, 2017). The Region’s Index lists five documents, each identified with a Roman numeral (I-V). This decision will cite these documents using the Roman numeral assigned by the Region along with the title of the document. In addition, one of the documents in the administrative record provided by the Region, A.R. IV, is Concerned Citizens’ request to terminate with respect to Outfall 051 filed with the Regional Judicial Officer in June 2016 and then resubmitted to the Region 6 Acting Regional Administrator in March 2017 (discussed in section III.C. of this decision). *See* Letter from Lindsay A. Lovejoy, Jr., Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, Counsel for Concerned Citizens, to Samuel Coleman, P.E., Acting Administrator, U.S. EPA Region 6 (Mar. 9, 2017) (enclosing Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility) (June 17, 2016) (“Termination Request”). The Termination Request attaches multiple exhibits. This decision cites to these exhibits as “Ex. __ to Termination Request.”

Outfall 051. *See* 2014 Permit Pt. I at 6. Concerned Citizens participated in the permitting process leading up to the issuance of the 2014 Permit.

In the current appeal, Concerned Citizens alleges that the Region erred in denying its subsequent request to terminate the 2014 Permit as to Outfall 051 because the Los Alamos Laboratory has not discharged liquid waste from that outfall since 2010. *See* Informal Appeal at 1. Concerned Citizens asserts that permit termination is appropriate under 40 C.F.R. § 122.64(a)(4), which provides that after a permit is issued, “[a] change in any condition” requiring a reduction or elimination of any discharge is cause for permit termination. *See id.* at 3-11. In response, the Region argues that Concerned Citizens failed to establish a change in any condition justifying permit termination. *See* EPA Response to Concerned Citizens for Nuclear Safety’s Informal Appeal of EPA’s Denial of Request to Terminate Permit Authorization (Oct. 18, 2017) (“Region’s Response”).

We conclude that the Region did not clearly err or abuse its discretion. The record supports the Region’s determination that Concerned Citizens failed to establish a change in a condition justifying permit termination after the Region issued the 2014 Permit. The Informal Appeal is therefore denied.

II. REGULATORY HISTORY

EPA’s consolidated permitting regulations provide detailed procedures for EPA’s issuance or renewal of permits under NPDES and other permit programs. Those regulations require EPA to issue a draft permit, seek public comment, hold a public hearing where there is significant public interest in the draft permit, and respond to significant comments received when a final permit decision is issued. *See* 40 C.F.R. §§ 124.6-.12, .17. The regulations specify the procedures and grounds for an appeal of a permit decision at 40 C.F.R. § 124.19. After EPA issues an NPDES permit, however, 40 C.F.R. § 124.5 allows “any interested person” to request termination under that regulation only for the reasons listed in 40 C.F.R. § 122.64. In particular, section 124.5 states, in part:

(a) Permits * * * may be modified, revoked and reissued, or terminated, either at the request of any interested person * * * or upon the [Region’s²] initiative. However, permits may *only* be

² The regulations use the term “Director” to describe the permitting authority. 40 C.F.R. § 124.2 (defining “Director”). The permitting authority here is EPA’s Regional Administrator for Region 6. The Board will therefore refer to the Region in places where

*** terminated for the reasons specified in *** [40 C.F.R.]
§ 122.64 ***.

40 C.F.R. § 124.5 (emphasis added). And 40 C.F.R. § 122.64 in turn identifies four bases for “terminating a permit during its term:”

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

40 C.F.R. § 122.64(a).

Concerned Citizens’ Informal Appeal relies on the fourth basis for termination at 40 C.F.R. § 122.64(a)(4) – where there has been “[a] change in any condition” since permit issuance.

III. *FACTUAL HISTORY*

To best understand the issue raised by Concerned Citizens – that there has been “[a] change in any condition” after the Region issued the 2014 Permit – we

the regulations use the term “Director.” *See id.* (“When there is no approved State *** program, and there is an EPA administered program, ‘Director’ means the Regional Administrator.”).

describe in detail below the Treatment Facility, the process leading to issuance of the 2014 Permit, and Concerned Citizens' subsequent termination request.

A. *The Los Alamos Laboratory*

The Los Alamos Laboratory is located on forty square miles in Los Alamos County in north-central New Mexico, approximately sixty miles north-northeast of Albuquerque. See Los Alamos National Laboratory NPDES Permit Re-Application, Permit No. NM0028355 at ¶ 3.0 (Feb. 2012) ("2012 Permit Re-Application") (A.R. I) and attached 2012 NPDES Re-Application Outfall Fact Sheet for Outfall 051 ("2012 Re-Application Fact Sheet – Outfall 051") (A.R. I.A.). The Los Alamos Laboratory provides for "stockpile stewardship" and engages in "extensive basic research in physics, chemistry, metallurgy, mathematics, computers, earth sciences, and electronics." 2012 Permit Re-Application at ¶ 3.1.

B. *The 2012 Permit Re-Application and the 2014 Permit*

In February 2012, the Los Alamos National Security, LLC and the U.S. Department of Energy submitted an application for renewal of the Los Alamos Laboratory's then-existing NPDES permit, issued in August 2007, to authorize continued discharges from eleven outfalls, including discharges from the Treatment Facility to the Facility's one Outfall, Outfall 051. See 2012 Permit Re-Application at ¶ 4.0 & Table 4.1. The Treatment Facility treats low-level and transuranic radioactive liquid waste from various locations at the Laboratory. 2012 Re-Application Fact Sheet – Outfall 051 at 1.

Prior to 2010, treated wastewater from the Treatment Facility was regularly discharged to Outfall 051. See 2012 Permit Re-Application at ¶ 2.0; 2012 Re-Application Fact Sheet – Outfall 051 at 1, 5. As the Permittees stated in their 2012 Re-Application, however, the Treatment Facility "ha[d] not discharged to Outfall 051 since November 2010" due to changes in facility operations prior to re-application, including the use of a mechanical evaporator. See 2012 Re-Application Fact Sheet – Outfall 051 at 5. The Permittees also identified the anticipated construction of two new solar evaporation tanks – referred to as "Zero Liquid Discharge" tanks – that would serve the same function as the mechanical evaporator of receiving treated effluent from the Treatment Facility. See *id.* at 5, 7. Permittees nevertheless requested re-permitting of Outfall 051, "so that the [Treatment Facility] can maintain the capability to discharge to the outfall *should* the Mechanical Evaporator and/or Zero Liquid Discharge * * * tanks become unavailable due to maintenance, malfunction, and/or there is an increase in

treatment capacity caused by changes in [the Laboratory's] scope/mission." *Id.* at 5 (emphasis added). Permittees further noted that "[a] grab sample [of the effluent] will be collected from Outfall 051 *when/if* the [Treatment Facility] discharges effluent through the [O]utfall." *Id.* (emphasis added). *See also* Form 2C to the 2012 Permit Re-Application at 6-14 (same).

In June 2013, the Region issued a public notice of the draft permit seeking public comment. *See* NPDES Permit No. NM0028355 Response to Comments at 2 (Aug. 4, 2014) ("Response to Comments") (A.R. III). The Region's Fact Sheet accompanying the 2013 draft permit stated: "The effluent is evaporated through a mechanical evaporator and has no discharge since November 2010. [Los Alamos Laboratory] includes the outfall in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage." NPDES Permit No. NM0028355, Fact Sheet for the Draft [NPDES] Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN to Termination Request) (emphasis added).

In their August 2013 comments on the draft permit, the Permittees reiterated that "the * * * [Treatment Facility has] not discharged [to Outfall 051] since November 2010 as a result of using the mechanical evaporator" and that it sought to re-permit the Outfall in the event that the mechanical evaporator or now constructed evaporation tanks (once permitted and in use) were not functioning: "Based on discharge records prior to November 2010, and with options of using the existing mechanical evaporator or new [Zero Liquid Discharge] evaporation tanks, [the Treatment Facility] would discharge to Outfall 051 only once or twice per week *if* evaporation is not an option." Letter from Alison M. Dorries, Division Leader, Environmental Protection Division, Los Alamos National Security, LLC, and Gene E. Turner, Environmental Permitting Manager, Los Alamos Field Office, Department of Energy, to Diane Smith, U.S. EPA Region 6 Permit Processing Team, Enclosure 1 at 3 (Aug. 13, 2013) (emphasis added) ("Los Alamos Laboratory Comments on 2013 Draft Permit") (Ex. OO to Termination Request).

Further, because Los Alamos Laboratory anticipated that future discharges to Outfall 051 – if they were to resume – were likely to be intermittent, its August 2013 comments requested modification of a provision in the draft permit's continuous flow monitoring requirements for Outfall 051: "[The Treatment Facility] has not discharged since November 2010. *If* discharges to the Outfall 051 resume, it is estimated that [Treatment Facility] would only discharge intermittently * * *." *Id.* at 7 (emphasis added).

Although Concerned Citizens apparently filed comments on other parts of the draft permit, no commenter objected to the 2014 Permit's continued authorization of discharges through Outfall 051 during the comment period on the draft permit.³ *See generally* Response to Comments.

The Region issued its 2014 permit determination on August 12, 2014. In the Region's August 2014 Response to Comments on the draft permit, the Region agreed that continuous monitoring was not necessary because the Treatment Facility had not discharged to Outfall 051 since November 2010 and would only discharge intermittently even "if discharges resume." Response to Comments at 17. Consequently, although the 2014 Permit includes discharge parameters for Outfall 051, the Permit requires only that a one-time grab sample be taken "if a discharge occurs at Outfall 051." 2014 Pt. I.E. at 26 (emphasis added).

The deadline for filing a petition for review of the Region's 2014 Permit renewal decision with the Board was in September 2014. 40 C.F.R. § 124.19(a).⁴ Neither Concerned Citizens nor any other party filed a petition for review with the Board under 40 C.F.R. § 124.19 objecting to the inclusion of Outfall 051 in the 2014 Permit. However, Permittees filed a petition for review with the Board challenging the 2014 Permit's imposition of monitoring and sampling requirements for selenium at a different outfall (Outfall 03A048). At the request of the parties, the Board dismissed the petition after the Region removed the disputed permit

³ In its response to Concerned Citizens' Informal Appeal, the Region represents that Concerned Citizens joined another organization, Communities for Clean Water, in submitting comments on the 2013 draft permit and that the Region responded to those comments. *See* Region's Response at 14 (citing Response to Comments at 9-13). The Region states that these comments did not raise the issue of whether the permit should authorize discharges from Outfall 051. *Id.* In its Reply to the Region's Response, Concerned Citizens indicates that the Region correctly characterized Concerned Citizens' participation during the public comment period. *See* Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) at 16 (Nov. 3, 2017).

⁴ Under 40 C.F.R. § 124.19(a), any person filing comments on the draft permit or participating in a public hearing on the draft permit may file a petition for review with the Board within thirty days after the Region serves notice of issuance of a permit. 40 C.F.R. § 124.19(a)(2)-(3).

provision. *See In re Los Alamos Nat'l Lab.*, NPDES Appeal No. 14-02 (EAB Apr. 27, 2015) (Order Dismissing Petition for Review).

C. *Concerned Citizens' 2015 Letter Challenging Issuance of 2014 Permit and 2016 Termination Request*

A little over a year later, in November 2015, new attorneys representing Concerned Citizens sent a letter to the Region questioning the need for the 2014 Permit. *See* Letter from Stacey Dwyer, Associate Director, U.S. EPA Region 6, NPDES Permits and TMDL Branch, to Lindsay A. Lovejoy, Jr., Attorney at Law, 3600 Cerrillos Rd., Santa Fe, NM (Dec. 18, 2015) (“Region’s 2015 Response Letter”) (Ex. UU to Termination Request) (referencing Concerned Citizens’ Nov. 2015 letter). Concerned Citizens did not request termination of the 2014 Permit and instead asked for the Region’s justification for issuance of the Permit in the first instance. In particular, the letter stated that because the Treatment Facility has been designed to eliminate all discharges and there have been no discharges since 2010, there was no need for the Permit, and, pursuant to federal case law, the Region lacked jurisdiction under the Clean Water Act to have issued the 2014 Permit for Outfall 051. *Id.* at 1-2; *see also* Ex. 7 to Informal Appeal (attaching Concerned Citizens’ Nov. 2015 letter).

In response, the Region stated that it had re-examined its permit file and determined that it would not alter its permit determination. Region’s 2015 Response Letter. Although no discharges had occurred since 2010, the Region stated, in part, that: “[Los Alamos Laboratory] specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. In its application, [Los Alamos Laboratory] indicated that under certain circumstances, e.g., maintenance, malfunction, and/or capacity shortage, a discharge could occur and permit authorization would be needed.” *Id.* at 1. The Region also disagreed that it lacked jurisdiction to issue a permit for potential discharges where, as here, the permittee requested coverage “for a possible future discharge.” *Id.* at 2.

In June 2016, Concerned Citizens filed with the Regional Judicial Officer a request to terminate the 2014 Permit with respect to Outfall 051 pursuant to 40 C.F.R. §§ 124.5 and 122.64(a)(4).⁵ *See* Termination Request (June 17, 2016) (A.R. IV). As noted above, section 124.5 allows any person to request termination

⁵ Concerned Citizens did not allege that 40 C.F.R. § 122.64(a)(1)-(3) served as a basis for termination.

of an NPDES permit during its term based on: “(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a). In particular, Concerned Citizens stated that, since at least 1998, Los Alamos Laboratory had engaged in an effort to eliminate liquid discharges from the Treatment Facility to Outfall 051. *See* Termination Request at 3-11 (citing *Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility*, David Moss, et. al., Los Alamos National Laboratory, at vi (June 1998) (Ex. A to Termination Request) (recommending a “phased transition toward zero liquid discharge” through Outfall 051). Concerned Citizens further noted that as a result of these efforts, the Treatment Facility had not discharged any wastes through Outfall 051 since November 2010. *Id.* at 10-11.

Concerned Citizens also acknowledged that in the 2012 Permit Re-Application, Permittees had “expressly requested a permit [for Outfall 051] only for a possible discharge” and as a “fallback” for “use in possible contingencies.” *See Id.* at 9; *see also id.* at 10 (stating that 2012 Permit Re-Application sought leave to provide effluent characteristics for Outfall 051 only “*if discharges * * * are initiated during the life of the new permit*”), 11 (stating that the final permit refers to regulation of discharges from Outfall 051 “*if discharges resume*”) (emphasis in original). Nevertheless, because no discharges had occurred since 2010, Concerned Citizens asserted that Los Alamos Laboratory had no need for or intention of discharging through Outfall 051. *Id.* at 11. Given the continued lack of any discharges from Outfall 051, Concerned Citizens asserted that termination was justified under 40 C.F.R. § 122.64(a)(4). *See id.* at 17 (asserting that the permit must be terminated “due to lack of discharge”).

Concerned Citizens further argued that EPA lacked the authority under the Clean Water Act (“CWA”) to issue a permit for potential discharges that could occur sometime in the future. *Id.* at 12-15. Finally, Concerned Citizens suggested that Los Alamos Laboratory sought to maintain Outfall 051 as a permitted discharge for the Treatment Facility because coverage under the 2014 Permit allows Los Alamos Laboratory to obtain a Waste Water Treatment Unit exemption under another federal law, the Resource Conservation and Recovery Act (“RCRA”), and loss of the exemption would require Los Alamos Laboratory to meet additional RCRA requirements. *Id.* at 3-6 (citing RCRA § 1004(27), 42 U.S.C. § 6903(27); 40 C.F.R. §§ 260.10, 264.1(g)(6)).

On March 2, 2017, the Regional Judicial Officer dismissed Concerned Citizens' termination request for lack of jurisdiction under 40 C.F.R. § 124.5, but stated that Concerned Citizens could proceed with the matter before the Regional Administrator. *See In re Concerned Citizens for Nuclear Safety (CCNS) Request to Terminate NPDES Permit #NM0028355 (Permit) for Los Alamos Nat'l Lab. Radioactive Liquid Waste Treatment Facility*, (RJO, Mar. 2, 2017) (referencing June 2016 Termination Request).⁶ Thereafter, on March 9, 2017, Concerned Citizens resubmitted its termination request to the Regional Administrator. *See Letter from Lindsay A. Lovejoy, Jr., Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, Counsel for Concerned Citizens, to Samuel Coleman, P.E., Acting Administrator, U.S. EPA Region 6 (Mar. 9, 2017) (A.R. IV) (enclosing Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility (June 17, 2016))*.

D. Region 6's Denial of Concerned Citizens' Termination Request

In August 2017, the Region denied Concerned Citizens' request pursuant to 40 C.F.R. § 124.5(b).⁷ The Region determined that Concerned Citizens' request to terminate the 2014 Permit as to Outfall 051 was not justified because Concerned Citizens failed to demonstrate that there had been "[a] change in any condition" after the 2014 Permit was issued justifying termination under 40 C.F.R. § 122.64(a)(4). *See Letter from William K. Honker, Director, Water Division, U.S. EPA Region 6, to Lindsay A. Lovejoy, Jr., Attorney at Law, and Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, New Mexico Environmental Law Center, Counsel for Concerned Citizens (Aug. 16, 2017) ("Region 6 Letter") (A.R. V)*. The Region also rejected Concerned Citizens' assertion that EPA lacked

⁶ Although the Regional Judicial Officer's Order is not part of the administrative record identified by the Region, the Board takes official notice of it as a public document. *See, e.g., In re Donald Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004) (explaining that information in the public domain is subject to official notice by the Board); *In re City of Denison*, 4 E.A.D. 414, 419 n.8 (EAB 1992) (taking official notice of administrative order not part of proceeding before Board).

⁷ 40 C.F.R. § 124.5(b) states, in pertinent part, that "[i]f the [Region] decides that the [termination] request is not justified, he or she shall send the requester a brief written response giving a reason for the decision."

the authority under the CWA to issue the NPDES permit for potential discharges. *Id.* at 2. Finally, the Region concluded that “[w]hether or not issuance of NPDES permit coverage might trigger the RCRA [Waste Water Treatment Unit] regulatory exemption has no bearing on EPA’s NPDES permitting decisions, which must be based on the requirements of the CWA and implementing regulations.” *Id.* at 3.

E. *Informal Appeal to the Board*

On September 14, 2017, Concerned Citizens timely filed an Informal Appeal with the Board under 40 C.F.R. § 124.5(b) seeking review of the Region’s denial of Concerned Citizens’ termination request.⁸ On September 21, 2017, the Board issued an Order for Additional Briefing requiring that the Region file a response to the Informal Appeal and requesting that the parties address certain issues in their replies. Thereafter, on September 25, 2017, the Board issued an order granting the parties’ request to extend deadlines for the Region’s and the Permittees’ responses as well as Concerned Citizens’ reply. The Permittees and the Region filed responses on October 16 and 18, 2017, respectively.⁹ Concerned Citizens filed a reply on November 3, 2017, and requested oral argument.¹⁰ On

⁸ Under 40 C.F.R. § 124.5(b), denials of requests for termination “may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts.”

⁹ See Letter from Susan L. McMichael, Attorney, Office of Laboratory Counsel, Los Alamos National Laboratory, and Silas R. DeRoma, Field Office Counsel, U.S. Department of Energy, to Clerk of the Board, U.S. EPA Environmental Appeals Board, and enclosed Aff. of Michael Thomas Saladen, Environmental Manager at LANL (Oct. 12, 2017); EPA Response to Concerned Citizens for Nuclear Safety’s Informal Appeal of EPA’s Denial of Request to Terminate Permit Authorization (Oct. 18, 2017) (“Region’s Response”).

¹⁰ Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b).

February 22, 2018, the Board heard oral argument in this case.¹¹ For the reasons stated below, the Board denies Concerned Citizens' Informal Appeal.¹²

III. STANDARD OF REVIEW

Unlike the procedures governing Board review of permit determinations under 40 C.F.R. § 124.19, the regulations governing informal appeals from the denial of a request to terminate a permit under 40 C.F.R. § 124.5 do not specify the Board's standard of review. Upon consideration, the Board will adopt for informal appeals the same standard used for appeals of permit determinations under 40 C.F.R. § 124.19. Specifically, a party seeking review under 40 C.F.R. § 124.5 must demonstrate that the Region's determination was based on either a finding of fact or conclusion of law that was clearly erroneous or was an abuse of discretion. *See* 40 C.F.R. § 124.19(a)(4)(i)(A)-(B).¹³ The issues that may arise in a proceeding under 40 C.F.R. § 124.5 are not necessarily different or less significant than the issues that arise in a proceeding under 40 C.F.R. § 124.19. Where, as here, the Board has decided to consider an informal appeal under 40 C.F.R. § 124.5, *see supra* note 12, the issues presented warrant Board consideration under the same standard of review as issues arising in proceedings under 40 C.F.R. § 124.19. Moreover, adopting this standard will serve administrative efficiency and will provide for consistency in addressing future appeals to the Board whether formal

¹¹ Concerned Citizens, the Region, and Permittees (Los Alamos National Security, LLC and the U.S. Department of Energy) all participated in oral argument. *See* EAB Hearing Transcript ("Tr.") (Feb. 22, 2018).

¹² Under 40 C.F.R. § 124.5(b), the "appeal shall be considered denied if the Environmental Appeals Board takes no action on the letter within 60 days after receiving it." The Board's September 21 and 25 orders constituted sufficient "action" necessary to keep this matter alive beyond the sixtieth day, allowing the Board to now address this Informal Appeal on the merits. *See In re Waste Techs. Indus.*, 5 E.A.D. 646, 655 n.13 (EAB 1995) (order for supplemental briefing is sufficient action for purposes of the sixty-day period specified in 40 C.F.R. § 124.5(b)).

¹³ This standard is in keeping with the Board's other review on the merits of an informal appeal under 40 C.F.R. § 124.5. *See, e.g., In re Waste Tech. Inds.*, 5 E.A.D. 646 (EAB 1995). Although the Board in *Waste Technologies* did not explicitly address the standard of review for informal appeals, the Board found that the permit issuer "committed no error" in its permit determination and adequately justified that determination. *Id.* at 662-63.

or informal. *Cf.* 40 C.F.R. § 124.19(n) (stating that the Board “may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal”).

IV. ANALYSIS

A. *The Region Did Not Clearly Err or Abuse its Discretion in Denying the Termination Request*

In this Informal Appeal, Concerned Citizens asserts that permit termination proceedings are appropriate for the reason specified in 40 C.F.R. § 122.64(a)(4) because “no discharges of water or pollutants are planned or expected for Outfall 051, and no such discharges have occurred since November 2010.” Informal Appeal at 3.

Under 40 C.F.R. § 122.64(a)(4), a cause for “terminating [an NPDES] permit during its term” includes: “[a] change in any condition that requires either a temporary or permanent reduction or elimination of any discharge * * * controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a)(4). As noted, the regulation states plainly that termination is an action that occurs “during [the permit’s] term.” *Id.* Therefore, “[a] change” for purposes of termination is one that occurs after permit issuance. *See also* 40 C.F.R. § 122.62(a)(1) (similarly requiring certain “changes” to have “occurred after permit issuance” to allow modification of a permit). And to read “[a] change” for purposes of termination some other way would effectively write the phrase “during its term” out of 40 C.F.R. § 122.64(a). The Informal Appeal, however, does not allege “[a] change in any condition” at Outfall 051 since issuance of the 2014 Permit. Indeed, in quoting the language of this provision, Concerned Citizens omits the reference to “[a] change in any condition.” *See* Informal Appeal at 3 (quoting only the portion of section 122.64(a)(4) referring to the “elimination of any discharge * * * controlled by the permit.”). Thus, on its face, the Informal Appeal fails to demonstrate that the Region clearly erred or abused its discretion in denying the request to terminate.

The record supports the Region’s determination that there has not been “[a] change in any condition” at Outfall 051 since issuance of the 2014 Permit. Although not explicitly stated, Concerned Citizens appears to suggest that the passage of additional time since issuance of the 2014 Permit by itself constitutes a sufficient basis for termination. *See id.* at 5. However, when Permittees applied for renewal of their permit, they advised the Region that discharges from

Outfall 051 had not occurred “since November 2010” and would only be necessary “*should* the Mechanical Evaporator and/or Zero Liquid Discharge * * * tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory’s] scope/mission.” 2012 Re-Application Fact Sheet at 5 (emphasis added).¹⁴ As the Region explained in the Fact Sheet accompanying the 2013 draft permit, “[Los Alamos Laboratory] includes [Outfall 051] in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage.” NPDES Permit No. NM0028355, Fact Sheet for the Draft [NPDES] Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN to Termination Request) (emphasis added). And when the Region issued the 2014 Permit, it reiterated that discharges from Outfall 051 had not occurred “since November 2010,” imposing certain monitoring requirements only “if discharges resume.” Response to Comments at 17; *see also* 2014 Permit Part I.E. at 26 (requiring that Permittees take a one-time grab sample of effluent from Outfall 051 “*if* a discharge occurs”) (emphasis added). Thus, the passage of additional time without a discharge from Outfall 051 since issuance of the 2014 Permit was expected, was made known during the permit proceeding, and does not amount to a change in any condition justifying termination. Under these circumstances, the Informal Appeal fails to demonstrate the Region clearly erred or abused its discretion in denying the termination request.

In its Reply, Concerned Citizens makes conclusory claims that there have in fact been “massive and obvious” changes to the Treatment Facility and its operation that, according to Concerned Citizens, justify termination of the 2014 Permit for Outfall 051 under 40 C.F.R. § 122.64(a)(4). Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) (“Concerned Citizens Reply”) (Nov. 3, 2017) at 7. However, these alleged changes – the use of a mechanical evaporator and the anticipated use of the Zero Liquid Discharge tanks designed to reduce or eliminate discharges from the Treatment

¹⁴ *See also* 2012 Re-Application Fact Sheet, Form 2C at 6-14 (same). Form 2C of the 2012 Re-Application Fact Sheet states further that an effluent sample “will be collected from Outfall 051 *when/if* the [Treatment Facility] discharges effluent to Mortandad Canyon.” *Id.* (emphasis added). Further, in their comments on the 2013 draft permit, Permittees stated that “[*i*]f discharges to the Outfall 051 resume, it is estimated that [Treatment Facility] would only discharge intermittently.” Los Alamos Laboratory Comments on 2013 Draft Permit at 7 (emphasis added).

Facility – were identified in the 2012 Permit Re-Application and the Region’s Fact Sheet for the 2013 draft permit prior to the 2014 Permit’s issuance. Thus, they do not reflect “[a] change in any condition” since issuance of the 2014 Permit warranting termination pursuant to 40 C.F.R. § 122.64(a)(4).¹⁵

And maintaining the integrity and finality of the permitting process for permittees and other stakeholders requires Concerned Citizens to show that there has been “[a] change in any condition” since issuance of the 2014 Permit. When EPA is deciding whether to issue or renew a permit, the public is given a full opportunity to participate in and challenge any aspect of the permit. EPA’s permitting regulations direct EPA to issue a draft permit, to seek public comment for no less than thirty days, to hold a public hearing where there is a significant degree of public interest in a draft permit, and to issue a response to significant comments received at the time the final permit is issued. 40 C.F.R. § 124.6 - .12, .17. The public in turn is required to raise “all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the comment period.” *Id.* § 124.13. And under section 124.19, a party may seek to challenge any condition of a final permit so long as it files a petition for review with the Board within thirty days of issuance. *See id.* § 124.19(a)(3), (4).

Once the permit is issued, however, the regulations at 40 C.F.R. § 122.64(a) and § 124.5 specify that EPA may only terminate a permit during its term for one of four listed reasons. Initially, EPA’s permitting regulations applicable to state NPDES programs allowed the Agency to terminate a permit for cause, “including, but not limited to,” “[a] change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.” *State Program Elements Necessary for Participation in the NPDES*, 37 Fed. Reg. 28,390, 28,397 (Dec. 22, 1972). EPA included identical language in promulgating regulations applicable to federal NPDES programs in 1973. *See National Pollution Discharge Elimination System*, 38 Fed. Reg. 13,528, 13,533 (May 22, 1973). In 1979,

¹⁵ During oral argument, Concerned Citizens objected to any finding that its termination request was untimely because the issues raised in that request were not raised during the proceedings leading to issuance of the 2014 Permit. Tr. at 61-62. The Board’s decision, however, is not based on any finding that the termination request was untimely, but rather the Region’s finding that the request fails to demonstrate a basis for termination because there has been no “change of any condition” since permit issuance under 40 C.F.R. § 122.64(a)(4).

however, EPA revised the regulations to remove the phrase “including, but not limited to” so as to allow for termination “only in certain limited circumstances.” See *National Pollution Discharge Elimination System; Revision of Regulations*, 44 Fed. Reg. 32,854, 32,868, 32,912 (June 7, 1979). In addition, the Agency agreed with commenters that the causes for permit modification should be listed separately from the “more ‘severe’ measure” of termination. *Id.* In 1980, when EPA issued consolidated regulations governing its permitting programs, it expressed the expectation that the bases for termination in 40 C.F.R. § 122.64(a) would not be read broadly. See *Consolidated Permit Regulations*, 45 Fed. Reg. 33,290, 33,316 (May 19, 1980). Further, although the proposed rule included “other good cause” as a ground for termination, EPA chose not to include this as a basis for termination in the 1980 consolidated regulations because it was too “vague and open ended.” *Id.* at 33,317. The limited scope of 40 C.F.R. § 122.64(a) has remained unchanged for almost forty years now.

And the more abbreviated process EPA must follow before denying a request to terminate (as opposed to the process for issuing or renewing a permit) further supports the point that a request to terminate was not intended to be a basis to reopen the original permit decision. EPA does not need to issue a public notice or provide an opportunity for comment before denying a request to terminate. Instead, EPA need only “send the requester a brief written response giving a reason for the decision” not to terminate. 40 C.F.R. § 124.5(b); see also *id.* § 124.10(a)(2).

Notably, although much of the Informal Appeal focuses on Concerned Citizens’ assertion that the Region erred in issuing the 2014 Permit in the first instance,¹⁶ it does not seek, nor could it seek, to challenge the 2014 Permit now. And it fails to demonstrate that the Region erred or abused its discretion in denying the request to terminate the 2014 Permit under 40 C.F.R. § 122.64(a)(4). Instead, Concerned Citizens may raise the issues it raises here, or any other issue it chooses, in any future permit renewal process for the Los Alamos Laboratory when the 2014 Permit expires in September 2019, and file a petition for review with the Board

¹⁶ See, e.g., Informal Appeal at 2 (contesting the Region’s “issuance of an NPDES permit” for possible discharges from Outfall 051), 2-3 (stating that the Region’s position that it may “issue an NPDES permit” for possible discharges is “in error”), 5 (discussing EPA’s limited authority under the CWA to “issue NPDES permits” for potential discharges), and 7-8 (challenging the Region’s position that it can “issue an NPDES permit” at the request of the owner or operator) (emphasis added).

from any future permit at that time under 40 C.F.R. § 124.19. *See also* Tr. at 40-41.¹⁷

B. *Concerned Citizens' Contention That Permittees Never Disclosed that Discharges to Outfall 051 Might Not Occur is Untimely and Not Supported by the Record Here*

In its Reply, Concerned Citizens argues further that it could not have contested the 2014 Permit at the time the Permit was issued, implying that Los Alamos Laboratory never disclosed the possibility that discharges to Outfall 051 might not occur. *See* Concerned Citizens Reply at 8. Specifically, Concerned Citizens now asserts that during the 2014 Permitting process, Los Alamos Laboratory expressed an intent to make use of Outfall 051. *Id.* (claiming that during the permitting process Los Alamos Laboratory represented that “discharges through Outfall 051 would be required”). From there, Concerned Citizens argues that it relied on Los Alamos Laboratory’s representations that it intended to discharge from Outfall 051 and thus could not have raised an earlier challenge to the 2014 Permit. *See id.* at 8-12.

However, Concerned Citizens did not make this argument before filing its Reply or otherwise claim that termination was appropriate under 40 C.F.R. § 122.64(a)(2) because of a “failure * * * to disclose” or “misrepresentation of any relevant facts” during the 2014 permitting process. And because this argument is raised for the first time in Concerned Citizens’ Reply, it is beyond the scope of the Informal Appeal and is therefore untimely. *Cf. In re Russell City Energy Ctr. LLC*, 15 E.A.D. 1, 53 (EAB 2010) (declining to consider new issues raised for the first time in a reply brief); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9

¹⁷ Because the Region did not clearly err or abuse its discretion in finding that there has been no “change in any condition,” the Board does not address the Region’s further argument that any such change must be of a condition “that requires *** elimination of any discharge *** (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a)(4); *see* Region’s Response at 6-7.

(EAB 1999) (new issues raised in reply briefs are equivalent to late-filed appeals and are thus untimely).

Even had Concerned Citizens timely raised this argument, however, the argument is contradicted by the record here. Although Permittees acknowledged during the application process that the use of the mechanical evaporator had resulted in no discharges from Outfall 051 since 2010, Permittees nevertheless sought a permit for continued discharges under certain circumstances. As discussed above, the permitting record for the 2014 Permit made clear that discharges from Outfall 051 would only be necessary if the mechanical evaporator or Zero Liquid Discharge tanks become unavailable due to malfunction, maintenance, or capacity shortage. Indeed, the permitting record refers to Outfall 051 requirements in multiple places as applying only “if” discharges resume. Thus, contrary to Concerned Citizens’ assertion, the record alerted the public to the fact that discharges might not occur at all.

This argument is also at odds with Concerned Citizens’ own prior statements. As early as November 2015, Concerned Citizens raised concerns about the 2014 Permit demonstrating its understanding that Permittees had sought and the Region had issued the 2014 Permit covering Outfall 051, even though it was known that there had been no discharges since 2010. *See* Region’s 2015 Response Letter (Ex. UU to Termination Request) (referencing Concerned Citizens’ Nov. 2015 letter). Further, in its termination request, Concerned Citizens acknowledged that the Permittees had stated that there had been no discharges to Outfall 051 since 2010 and had expressly requested a permit for Outfall 051 “only for a possible discharge,” and as a “fallback” for use in possible contingencies. *See* Termination Request at 9; *see also id.* at 10 (stating that 2012 Permit Re-Application sought leave to provide effluent characteristics for Outfall 051 only “*if discharges * * * are initiated during the life of the new permit*”), 11 (stating that the final permit refers to regulation of discharges from Outfall 051 “*if discharges resume*”) (emphasis in original). In short, there is no merit in Concerned Citizens’ argument that the Permittees never disclosed the possibility that discharges from Outfall 051 might not occur at all, as Concerned Citizens’ own submissions demonstrate.¹⁸

¹⁸ In a post-argument brief, Concerned Citizens now contends that it could not have known during the comment period on the draft permit that the Zero Liquid Discharge tanks had been constructed, and on that basis, claims termination is appropriate. *See* Concerned Citizens for Nuclear Safety Post-Argument Submission Pursuant to 40 C.F.R. §§ 124.2 and

V. CONCLUSION

For the reasons stated above, the Board concludes that Concerned Citizens has not established that the Region clearly erred or abused its discretion in denying Concerned Citizens' request to terminate the 2014 Permit for Outfall 051. Concerned Citizens' Informal Appeal is therefore denied.¹⁹

So ordered.

124.5(b) at 7 (Feb. 27, 2018). The Board did not grant the parties leave to file post-argument briefs but instead only directed the filing of publicly-available information regarding the status of the State permitting process for the Zero Liquid Discharge tanks, Tr. at 67-68, and this argument raised for the first time in a post-argument brief is untimely. In any event, regardless of when the Zero Liquid Discharge tanks were constructed, the permitting record – and specifically the 2012 Permit Re-Application and the Region's Fact Sheet for the 2013 draft permit – alerted the public that with either the mechanical evaporator or the Zero Liquid Discharge tanks, discharges might not occur at all.

¹⁹ Because we conclude that the Region did not clearly err or abuse its discretion in denying the termination request, we do not need to address Concerned Citizens' argument that EPA lacked authority under the CWA to issue a permit for potential discharges.

CERTIFICATE OF SERVICE

I certify that copies of the forgoing *Final Decision* in the matter of Los Alamos National Security, LLC and the Department of Energy, NPDES Appeal No. 17-05, were sent to the following persons in the manner indicated:

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Dated: MAR 14 2018



Annette Duncan
Administrative Specialist

**NEW MEXICO ENVIRONMENT DEPARTMENT
BEFORE THE SECRETARY OF THE ENVIRONMENT**

IN THE MATTER OF PROPOSED DISCHARGE)
PERMIT 1132 FOR THE RADIOACTIVE LIQUID)
WASTE TREATMENT FACILITY AT LOS)
ALAMOS NATIONAL LABORATORY,) NO.GWB-17-20(P)
LOS ALAMOS, NEW MEXICO)

REPLY BRIEF ON MOTION TO DISMISS DP-1132 PROCEEDING

I. INTRODUCTION

This memorandum is submitted on behalf of Communities for Clean Water (“CCW”), a party to this proceeding, in response to memoranda filed herein by the New Mexico Environment Department’s Office of General Counsel (“NMED Br.”) and Applicants Los Alamos National Security, LLC and the U.S. Department of Energy (“LANL Br.”).

II. ARGUMENT

1. This case, as briefed by NMED and LANL, presents a stark issue whether the administration of environmental laws in this State shall be governed by the laws enacted by the Legislature, which authorize issuance of a permit for a groundwater discharge, or by the will of appointed officials, who wish to issue a permit despite the absence of any discharge.

2. This proceeding involves the issuance, or not, of a permit under the Water Quality Act, NMSA 1978, § 74-6-1 *et seq.* (“WQA”), the *sole function* of which, in this case, would be to block application of the Hazardous Waste Act, NMSA 1978, § 74-4-1 *et seq.* (“HWA”), to LANL’s Radioactive Liquid Waste Treatment Facility (“RLWTF”).

3. By statute, the WQA does not apply to activities or conditions that are regulated by the HWA:

The Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act . . .

4. Thus, a determination by the New Mexico Environment Department (“NMED”) to issue a permit under the WQA to the RLWTF functions as a determination that the HWA does not apply to the RLWTF.

5. The WQA authorizes the issuance of “a permit for the discharge of any water contaminant.” NMSA 1978, § 74-6-5.A. It does not authorize the issuance of a permit for a non-discharging facility. The RLWTF is not currently discharging any water or contaminants that would be regulated under the WQA—no water of any kind, in fact. LANL has no plan or intent to discharge any such water or contaminant. LANL and NMED propose, however, that this statutory limitation be disregarded.

6. Under NMSA 1978, § 74-6-5.I (“for new discharges, the term of the permit shall commence on the date the discharge begins”), the term of the proposed permit would never begin. Thus, the *only function* of the proposed discharge permit, DP-1132, is to supply LANL with an exemption from the HWA. This is not a legitimate purpose for the issuance of a WQA permit.

7. CCW has sought dismissal of this proceeding on the basis that no lawful and effective result can ensue from it. LANL, desiring the exemption from HWA regulation, opposes dismissal. NMED, supporting LANL’s position, does likewise. LANL and NMED, in their briefs, recognizing the absence of any discharge to regulate, suggest various other purposes for

the proposed permit. These claims ignore the statutory terms. This proceeding should be dismissed.

8. The key issue is whether NMED may lawfully issue a discharge permit for a facility that is not currently discharging, and where there is no plan or intent to make any discharge regulated by the WQA. Counsel for NMED asserts that this may be done: “[T]here is no requirement that such discharges be planned, ongoing, or intentional.” NMED Br. 5. LANL argues that the requirement of an intention to discharge is an “extraordinarily narrow interpretation of NMED’s permitting authority” and “legally unsupportable.” LANL Br. 8.

9. But NMED’s own regulations require an *intent* to discharge, to commence a permitting proceeding:

NOTICE OF INTENT TO DISCHARGE:

A. Any person *intending to make a new water contaminant discharge* or to alter the character or location of an existing water contaminant discharge . . . shall file a notice with the ground water quality bureau of the department for discharges that may affect ground water . . .

20.6.2.1201.A NMAC (*emphasis supplied*).

Such a notice of the *intent to discharge* commences a permitting proceeding. 20.6.2.1201.D NMAC.

10. Other regulations similarly require an intent to discharge:

APPLICATION FOR DISCHARGE PERMITS AND RENEWALS:

B. Any person who *intends to begin, after June 18, 1977, discharging* any of the water contaminants listed in 20.6.2.3103 NMAC or any toxic pollutant so that they may move directly or indirectly into ground water shall notify the secretary giving the information enumerated in Subsection B of 20.6.2.1201 NMAC; the secretary shall, within 60 days, notify such person if a discharge permit is required . . .

20.6.2.3106.B NMAC (*emphasis supplied*).

11. Floundering in the search for a legal basis for a discharge permit here, NMED counsel claims that the language, “shall cause or allow,” in 20.6.2.3104 NMAC conveys regulatory authority over unintended discharges. NMED Br. 5. To the contrary, the words “cause or allow” clearly denote action by the person involved. Moreover, the regulation expressly requires him or her to cause or allow a “discharge,” 20.6.2.3104 NMAC, and this situation does not involve any unintended discharges, or any other kind of discharge.

12. Thus, it is incorrect to argue, as NMED counsel does, that “it is the potential for the discharge of water contaminants that may move into groundwater that triggers the authority of the WQA, and thus the Secretary’s authority to issue a discharge permit.” NMED Br. 5. A “potential” discharge is not a discharge. There is no statutory or regulatory authority to license a “potential” discharge. Similarly, LANL claims that the statutory definitions of “source” as one “from which there is or may be a discharge” and of “water contaminant” as “any substance that could alter [the qualities of water] if discharged or spilled”—mean that no actual or intended discharge is required for a permit. LANL Br. 8-9. The supposed conclusion plainly does not follow, and the cited language does nothing to refute the clear statutory requirement that the agency may only issue a “permit *for the discharge* of any water contaminant.” NMSA 1978 , § 74-6-5.A.

13. The federal courts have made clear, faced with a statute that similarly authorizes the licensing of a “discharge,” that the agency has no authority to license or regulate a “possible” or “potential” discharge:

“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, Inc. v. U.S. EPA, 399 F.3d 486,505 (2d Cir. 2005).

14. Still, LANL claims that, in fact, “Applicants intend to discharge treated effluent from Outfall 051” citing the attached affidavit of one Robert C. Mason. LANL Br. 6. The Mason Affidavit says that “the Laboratory intends to discharge from this Outfall,” but Mr. Mason continues, making clear that he means only *possible* discharges, which *might or might not* occur in possible circumstances that, apparently, have never arisen in more than seven years of operation and cannot be planned or expected in the future:

“Discharge through the outfall is necessary for operational flexibility so that the RLWTF can maintain the capability to discharge should the Mechanical Evaporator System (MES) and/or Solar Evaporation Tank (SET) become unavailable due to maintenance or malfunction and/or should there be an increase in treatment capacity caused by changes in LANL scope/mission.”

Id. at ¶ 7.

15. LANL’s further claim that “water tightness testing” pursuant to DP-1132 requires a “discharge” from Outfall 051 ignores the fact that such testing is completely unnecessary in the absence of this invalid permit. LANL Br. at 8, note 1. Moreover, such testing could clearly be conducted using uncontaminated water.

16. Unable to identify any discharge, NMED counsel ranges wide, urging that the WQA has the overall purpose of preventing water pollution, which purpose justifies issuance of a discharge permit, even without any discharge occurring or intended, asserting that it is “unreasonable for NMED to only have the authority to regulate a discharge that is planned, regular, or already occurring.” NMED Br. at 6. LANL offers the same argument. LANL Br. at 9. Such claims disregard the express limitations on NMED’s authority stated in the statute, which *only* authorizes NMED to issue a “permit *for the discharge* of any water contaminant”---per NMSA 1978 , § 74-6-5.A—not a permit for a facility that potentially *might* discharge.

17. When faced with a similar argument—that the broad purpose of the federal Clean Water Act to prevent pollution should authorize the EPA to issue permits to facilities that had the “potential” to discharge, the federal courts have refused, emphasizing the express limitations contained in the Act:

“CAFOs [Concentrated Animal Feeding Operations] have the potential to discharge pollutants. See Preamble to the Final Rule at 7202 (“The ‘duty to apply’ provision is based on the presumption that every CAFO has a potential to discharge.”). While we appreciate the policy considerations underlying the EPA’s approach in the CAFO Rule, however, we are without authority to permit it because it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only actual discharges - not potential discharges, and certainly not point sources themselves.”

Waterkeeper, 399 F.3d at 505.

18. The New Mexico courts likewise enforce explicit statutory limits:

“The primary goal in interpreting a statute is to give effect to the Legislature’s intent.” *T-N-T Taxi*, 2006-NMSC-016, ¶ 5. We look first to the Legislature’s language, giving effect to the plain meaning of the words used, unless doing so would lead to absurdity, contradiction, or injustice.”

Albuquerque Cab Co. v. N.M. Pub. Regulation Comm’n, 2014-NMSC-004, 10, 317 P.3d 837, 839.

19. The assertion that to limit regulation to actual discharges would be “ineffective” in protecting groundwater, LANL Br. at 9, misses the main point: Regulation of *discharges* is the strategy that the Legislature has adopted, and it is not for NMED to flout the Legislature’s directions. Significantly, the federal National Pollutant Discharge Elimination System adopts the same strategy, with undoubtedly great effect. 33 U.S.C. § 1342.

20. NMED and LANL entirely ignore the fact that a WQA permit to a facility that is not currently discharging (*e.g.*, a supposed “potential” discharge) is, by statute, *without effect* unless and until a discharge occurs, if it ever does. NMSA 1978, § 74-6-5.I. Such terms refute any inference of a statutory authority to regulate a “potential” discharge.

21. NMED claims that it would be “absurd” to follow the statutory language that authorizes only regulation of an actual “discharge.” NMED Br. at 7. NMED’s position would sanction all manner of disobedience to the Acts of the Legislature and place administrative agencies outside the law. This agency should not claim such extra-legal powers.

22. Finally, we are told that “NMED has issued many permits” governing discharges to evaporative systems and that the Bureau’s “files are replete with examples” of permits for facilities that are thought not to affect groundwater. Compare NMED Br. at 6 and LANL Br. at 10. Such permits are not in the Record of this matter, and if they do not regulate a *discharge towards groundwater*, their validity is plainly nonexistent.

23. LANL and NMED claim that EPA’s Environmental Appeals Board denied a request to terminate a similar permit. However, it is not correct that the EPA Appeals Board agreed that certain discharges would be necessary, as NMED and LANL argue. NMED Br. at 5-6; LANL Br. at 6. That Board, instead, imposed a novel rule of timeliness in denying the appeal and expressly refused to decide whether the agency may regulate a “potential” discharge. LANL Ex. at 19, note 19. The EPA proceeding is not over. But, as for a permit for a “potential” discharge under federal law, CCW will rely upon the decisions of federal courts of appeals:

“[T]he Clean Water Act gives the EPA jurisdiction to regulate and control only actual discharges - not potential discharges, and certainly not point sources themselves.”

Waterkeeper, 399 F.3d at 505.

“These cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. Accordingly, the EPA's authority is limited to the regulation of CAFOs that discharge. Any attempt to do otherwise exceeds the EPA's statutory authority.”

National Pork Producers Council v. U.S. EPA, 635 F.3d 738, 751 (5th Cir. 2011).

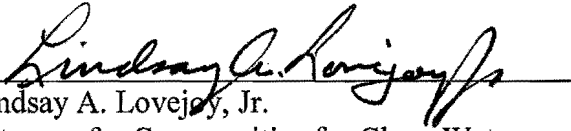
24. NMED counsel argues that NMSA 1978, § 74-6-12.B, which bars the WQA from regulating “any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act,” cannot apply here, because NMED is not seeking to regulate any such activities. NMED Br. at 7-8. This is clearly incorrect. The RLWTF manages hazardous waste. CCW Br. at 15. This would normally require a HWA permit (*id.*); but LANL relies upon an exemption. *Id.* The exemption is predicated upon continued discharges from Outfall 051, as expressly stated *by this Agency* in its HWA permit for LANL. *Id.* at 16. It is uncontroverted that such discharges have ended. *Id.* at 5. The proposed permit, DP-1132, clearly seeks to regulate activities at the RLWTF, such as the SET tank system. Since the basis for the HWA exemption has now ended, the HWA must apply to the RLWTF, and under the explicit terms of NMSA 1978, § 74-6-12.B, the WQA may not regulate it.

25. CCW understands that the Hearing Officer is not required to “direct” the Hazardous Waste Bureau to permit the RLWTF under the Hazardous Waste Act. LANL Br. at 10. It would suffice here that the process to issue a permit for a non-discharging facility be dismissed.

III. CONCLUSION

26. LANL asks for a system under which the RLWTF would have essentially no environmental regulation. The WQA, like the federal Clean Water Act, regulates *discharges*—and there are *no discharges*, present or planned. The illegitimate WQA permit that LANL seeks would regulate nothing and could not protect the environment. At the same time, that WQA permit confers an exemption from HWA regulation—the only oversight of LANL’s management of hazardous waste at the RLWTF. Such a result is the answer to LANL’s dream of freedom from environmental regulation. The Environment Department should not authorize such an unlawful result.

Respectfully submitted,

A handwritten signature in black ink, reading "Lindsay A. Lovejoy, Jr.", written over a horizontal line.

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Certificate of Service

The undersigned certifies that on April 6, 2018, a copy of the foregoing Reply Brief was served by hand delivery to:

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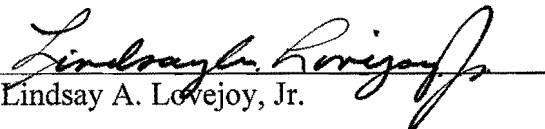
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**NEW MEXICO ENVIRONMENT DEPARTMENT
BEFORE THE SECRETARY OF THE ENVIRONMENT**



IN THE MATTER OF PROPOSED DISCHARGE)
PERMIT 1132 FOR THE RADIOACTIVE LIQUID)
WASTE TREATMENT FACILITY AT LOS)
ALAMOS NATIONAL LABORATORY,)
LOS ALAMOS, NEW MEXICO)

NO.GWB-17-20(P)

FOIA

COPY

**NOTICE OF INTENT TO PRESENT TESTIMONY;
ENTRY OF APPEARANCE; OBJECTION TO RECORD**

Pursuant to 20.1.4.300 NMAC, Communities for Clean Water (“CCW”) hereby gives notice concerning its participation in the forthcoming hearing:

1. CCW hereby enters its appearance as a party in this proceeding in accordance with 20.1.4.300.B NMAC. CCW is represented in this proceeding by Lindsay A. Lovejoy, Jr., and Joni Arends, Executive Director of Concerned Citizens for Nuclear Safety, as an organizational member of CCW. Additionally, Jonathan Block, Staff Attorney, New Mexico Environmental Law Center, will also appear and provide assistance to Mr. Lovejoy.

2. CCW has filed a Motion to Dismiss this proceeding based upon the Environment Department’s lack of any statutory authority to issue a ground water discharge permit to the Radioactive Liquid Waste Treatment Facility (“RLWTF”) at Los

Alamos National Laboratory (“LANL”), because there is no discharge at present or planned. The motion has been briefed and awaits ruling.

3. CCW considers that, even if the Department were to issue the proposed permit, it would have no effect in the absence of any discharge.

4. Consequently, CCW has determined that it is not useful to present technical testimony in this hearing, and it will not present such testimony.

5. CCW notes that this proceeding should not go forward until a number of redactions and amendments have been made to the Administrative Record which currently contains documents and communications that are settlement privileged and confidential from the federal case, *DOE v. Curry*, and omits documents that are properly part of the record in this case. Under this circumstance, the Administrative Record should not be filed with the Hearing Officer – and should be immediately removed from public access – until the redactions and amendments have been completed – including obtaining the return of unlawfully distributed confidential and privileged documents from any persons to whom they may have been provided. Technically, a new hearing date should be set once the proper record is available to the public for inspection a reasonable time prior to hearing.

6. Regardless of the final timing of this proceeding due to the need to correct the Administrative Record, CCW intends to present testimony by lay witnesses in opposition to the issuance of the proposed permit, DP-1132, and, as necessary, concerning the propriety and completeness of the Administrative Record in this proceeding.

Respectfully submitted:



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The undersigned certifies that on April 9, 2018, a copy of the foregoing Notice of Intent to Present Testimony; Entry of Appearance was served by hand to:

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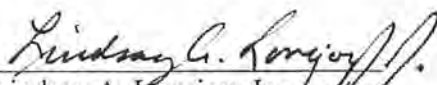
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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES DEPARTMENT OF ENERGY AND
LOS ALAMOS NATIONAL SECURITY, LLC FOR A
GROUNDWATER DISCHARGE PERMIT (DP-1132)
FOR THE RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY

No. GWB 17-20 (P)

**NEW MEXICO ENVIRONMENT DEPARTMENT'S NOTICE OF SUPPLEMENTAL
EXHIBITS TO ITS RESPONSE IN OPPOSITION TO COMMUNITIES FOR CLEAN
WATER'S MOTION TO DISMISS DP-1132 PROCEEDING**

Pursuant to 20.1.4.200.D NMAC, the New Mexico Environment Department (the "Department" or "NMED") submits two additional exhibits to its response in opposition to Communities for Clean Water's ("CCW") Motion to Dismiss DP-1132 Proceeding (the "Motion").

On March 16, 2018, CCW filed the Motion; On April 2, 2018, NMED filed its Response to the Motion. In its Response, NMED stated that "NMED has issued many permits that limit discharges to evaporative systems, and therefore are designed as 'zero discharge' (to surface or groundwater)," and cited as examples DP-1327 and DP-1827. Response at 6. In its Reply, filed on April 6, 2018, CCW notes that those discharge permits "are not in the Record of this matter." Reply at ¶ 22.

In order that the Hearing Officer may have all the information required to decide on this Motion, NMED hereby submits the public records DP-1327 as NMED Exhibit 2, and DP-1827 as NMED Exhibit 3. The relevant language describing the nature of the discharge is on page 1 of each permit (i.e. – "This Discharge Permit allows for disposal of the RO concentrate (reject) volume of 350,000 gpd which will be discharged to three double synthetically-lined impoundments equipped with leak detection for disposal by evaporation.").

Respectfully submitted,

**NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL**

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RYAN FLYNN
Secretary, Department

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June 5, 2013

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| Certified Fee | |
| Return Receipt Fee (Endorsement Required) | |
| Restricted Delivery Fee (Endorsement Required) | |

OFFICIAL

Gregory Smith, 1
PNM San Juan C
PO Box 227
Waterflow, NM

RE: Discharge Permit Renewal and Modification, DP-1327, San Juan Generating Station—Power Plant

Dear Mr. Smith:

The New Mexico Environment Department (NMED) issues the enclosed Discharge Permit Renewal and Modification, DP-1327, to Public Service Company of New Mexico (permittee) pursuant to the New Mexico Water Quality Act (WQA), NMSA 1978 §§74-6-1 through 74-6-17, and the New Mexico Water Quality Control Commission (WQCC) Regulations, 20.6.2 NMAC.

The Discharge Permit contains terms and conditions that shall be complied with by the permittee and are enforceable by NMED pursuant to Section 20.6.2.3104 NMAC, WQA, NMSA 1978 §74-6-5 and §74-6-10. Please be aware that this Discharge Permit may contain conditions that require the permittee to implement operational, monitoring or closure actions by a specified deadline. Such conditions are listed at the beginning of the operational, monitoring and closure plans of this Discharge Permit.

Issuance of this Discharge Permit does not relieve the permittee of the responsibility to comply with the WQA, WQCC Regulations, and any other applicable federal, state and/or local laws and regulations, such as zoning requirements and nuisance ordinances.

Gregory Smith, DP-1327
June 5, 2013
Page 2


Pursuant to Paragraph (4) of Subsection H of 20.6.2.3109 NMAC, the term of the Discharge Permit shall be five years from the effective date. The term of this Discharge Permit will end on June 5, 2018.

NMED requests that the permittee submit an application for renewal (or renewal and modification) at least 180 days prior to the date the Discharge Permit term ends.

An invoice for the Discharge Permit Fee of \$11,500.00 is being sent under separate cover. Payment of the Discharge Permit Fee must be received by NMED within 30 days of the date the Discharge Permit is issued.

If you have any questions, please contact John Hall at (505) 827-1049. Thank you for your cooperation during this Discharge Permit review.

Sincerely,


Jerry Schoeppner, Chief
Ground Water Quality Bureau

JS:JH

Encs: Discharge Permit Renewal and Modification, DP-1327
Ground Water Discharge Permit Monitoring Well Construction and Abandonment
Conditions, Revision 1.1, March 2011

cc: Robert Italiano, District Manager, NMED District II (permit – electronic copy)
NMED Farmington Field Office (permit – electronic copy)
John Romero, Office of the State Engineer (permit – electronic copy)
John Hale, Alvarado Square, MS 2104, Albuquerque, NM 87158 (permit/enclosures)

GROUND WATER DISCHARGE PERMIT RENEWAL AND MODIFICATION San Juan Generating Station, DP-1327

I. INTRODUCTION

The New Mexico Environment Department (NMED) issues this Discharge Permit Renewal and Modification (Discharge Permit), DP-1327, to Public Service Company of New Mexico (permittee) pursuant to the New Mexico Water Quality Act (WQA), NMSA 1978 §§74-6-1 through 74-6-17, and the New Mexico Water Quality Control Commission (WQCC) Regulations, 20.6.2 NMAC.

NMED's purpose in issuing this Discharge Permit, and in imposing the requirements and conditions specified herein, is to control the discharge of water contaminants from the San Juan Generating Station (facility) into ground and surface water, so as to protect ground and surface water for present and potential future use as domestic and agricultural water supply and other uses and protect public health. In issuing this Discharge Permit, NMED has determined that the requirements of Subsection C of 20.6.2.3109 NMAC have been met.

The activities which produce the discharge, the location of the discharge, and the quantity, quality and flow characteristics of the discharge are briefly described as follows:

Up to 2,600,000 gallons per day of process waters, storm water, recovery trench return water and miscellaneous process upset-related surface flows from an 1,800-megawatt coal-fired electrical generating plant are discharged to 17 cells or ponds/basins, including North Evaporation Cells 2-3, South Evaporation Cells 1-5, Process Pond 1 (A & B), Process Pond 2 (A & B), Process Pond 3 (A, B & C), Coal Pile 1&2 Runoff Basin, Runoff Basin Pre-pond, and Coal Pile 3&4 Runoff Basin. The evaporation cells are for final disposal through evaporation. The process ponds operate as holding ponds for water prior to reuse within the facility. The Coal Pile Runoff Basins and Pre-pond operate to catch storm water runoff and plant process upsets so the water can be transferred to the plant process ponds for use. All process ponds are plumbed to enable transfer of water from one pond to any other for management of water at the facility. Discharges include: brine concentrator wastes, pond cleanings, boiler cleanings, sump cleanings, recovery trench return water, clarifier blow down, drain upsets and blow down from the sulfur dioxide removal system (SDRS), limestone preparation area drains, power block drains including area wash down and pump seal water blow down and upset flows, neutralized demineralizer wastes, storm water, boiler blow down, cooling tower blow down, treated domestic effluent, ash system upsets and overflows, and intermittent flows from coal pile runoff basins. Up to 150 gallons per day of domestic wastewater from the facility's guard shack is discharged to a septic-tank/leachfield system. The permittee is authorized to maintain up to 150,000 cubic yards of plant generated residual waste onsite for disposal provided that applicable closure and financial assurance requirements in this permit are met. The modification consists of adding the discharge of the recovery trench return water to the South Evaporation Cells, the incorporation of discharges associated with DP-157 and DP-176 (discussed below), and the authorization to maintain up to 150,000 cubic yards of plant generated residual waste onsite for disposal. The facility is located approximately 15 miles west of Farmington, in Sections 17 and 20, Township 30N, Range 15W, San Juan County. Ground water most likely to be impacted by the discharge occurs in saturated

alluvium along the Westwater Arroyo at depths between 10 and 40 feet, and has a total dissolved solids concentration ranging from 4,000 milligrams per liter to 13,000 milligrams per liter.

The original Discharge Permit was issued on July 31, 2002. This Discharge Permit Renewal and Modification incorporates Discharge Permit DP-157 (discharges to Coal Pile 1&2 Runoff Basin) issued on May 7, 1981 and subsequently renewed or modified on April 18, 1986, October 25, 1991, June 11, 1997, and June 5, 2003; and Discharge Permit DP-176 (discharges to Coal Pile 3&4 Runoff Basin) issued on June 23, 1983 and subsequently renewed or modified on December 8, 1987, June 28, 1988, June 28, 1993, September 23, 1997, and June 5, 2003. The permittee's application consists of the materials submitted by the permittee dated February 1, 2007 and additional information received on May 30, 2007 (submitted on PNM's behalf by Metric Corporation), October 22, 2007, and December 8, 2011. The discharge shall be managed in accordance with all conditions and requirements of this Discharge Permit.

Pursuant to Section 20.6.2.3109 NMAC, NMED reserves the right to require a Discharge Permit Modification in the event NMED determines that the requirements of 20.6.2 NMAC are being or may be violated or the standards of Section 20.6.2.3103 NMAC are being or may be violated. This may include a determination that structural controls and/or management practices approved under this Discharge Permit are not protective of ground water quality, and that more stringent requirements to protect and/or remediate ground water quality may be required by NMED. These requirements may include: lining/relining lagoons; changing waste management practices; expanding monitoring requirements; installing an advanced treatment system(s); and/or implementing abatement of water pollution.

Issuance of this Discharge Permit does not relieve the permittee of the responsibility to comply with the WQA, WQCC Regulations, and any other applicable federal, state and/or local laws and regulations, such as zoning requirements and nuisance ordinances.

The following abbreviations may be used in this Discharge Permit:

| Abbreviation | Explanation | Abbreviation | Explanation |
|--------------------|-----------------------------------|----------------|----------------------------------|
| BOD ₅ | biochemical oxygen demand (5-day) | NTU | nephelometric turbidity units |
| CFR | Code of Federal Regulations | Org | organisms |
| Cl | chloride | TDS | total dissolved solids |
| LADS | land application data sheet(s) | TKN | total Kjeldahl nitrogen |
| mg/L | milligrams per liter | total nitrogen | TKN+NO ₃ -N |
| mL | milliliters | TRC | Total Residual Chlorine |
| NMAC | New Mexico Administrative Code | TSS | total suspended solids |
| NMED | New Mexico Environment Department | WQA | New Mexico Water Quality Act |
| NMSA | New Mexico Statutes Annotated | WQCC | Water Quality Control Commission |
| NO ₃ -N | nitrate-nitrogen | | |

II. FINDINGS

In issuing this Discharge Permit, NMED finds:

1. The permittee is discharging effluent or leachate from the facility so that such effluent or leachate may move directly or indirectly into ground water within the meaning of Section 20.6.2.3104 NMAC.
2. The permittee is discharging effluent or leachate from the facility so that such effluent or leachate may move into ground water of the State of New Mexico which has an existing concentration of 10,000 milligrams per liter or less of total dissolved solids within the meaning of Subsection A of 20.6.2.3101 NMAC.
3. The discharge from the facility is not subject to any of the exemptions of Section 20.6.2.3105 NMAC.

III. CONDITIONS

The following conditions shall be complied with by the permittee and are enforceable by NMED. The permittee is authorized to discharge water contaminants subject to the following conditions:

OPERATIONAL PLAN

| # | Terms and Conditions |
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| 1. | The permittee shall implement the following operational plan to ensure compliance with Title 20, Chapter 6, Parts 1 and 2 NMAC. [20.6.2.3106.C NMAC, 20.6.2.3107 NMAC] |
| 2. | The permittee shall operate in a manner such that standards and requirements of Sections 20.6.2.3101 and 20.6.2.3103 NMAC are not violated. [20.6.2.3101 NMAC, 20.6.2.3103 NMAC] |
| 3. | <p>The permittee is authorized to discharge up to 2,600,000 gallons per day of process waters, storm water, recovery trench return water, and miscellaneous process upset-related surface flows from a 1,800-megawatt coal-fired electrical generating plant to seven evaporation cells, seven process ponds, and two coal pile runoff basins as follows:</p> <p>a) North Evaporation Cells 2-3 and South Evaporation Cells 1-5: Waste streams include brine concentrator wastes, clarifier blow down, thickener blow down, process pond water, plant upset water, pond cleanings, boiler cleanings, sump cleanings, recovery trench return water, and SDRS blow down. All evaporative cells are constructed with 100-mil high density polyethylene (HDPE) liners. The north cells utilize ground water monitoring wells for leak detection while the south cells are equipped with French drain leak detection systems.</p> <p>b) Process Pond 1 (A & B), Process Pond 2 (A & B), and Process Pond 3 (A, B & C): Waste streams include cooling tower blow down, wash down water, floor drain water, overflows and upsets from the entire plant, coal pile runoff basin water,</p> |

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| | <p>storm water flows, neutralizer regeneration waste, and treated domestic effluent. Process ponds are plumbed such that water from any process pond can be transferred to any other process pond. Pond 1 (A & B) is constructed with a soil-cement liner, Pond 2 (A & B) and Pond 3 (A, B, & C) are constructed with 100-mil HDPE liners. Pond 1 (A & B), Pond 2 (A & B), and Pond 3 (A, B, & C) utilize monitoring wells for leak detection.</p> <p>c) Coal Pile Runoff Basins and Pre-pond (Coal Piles 1&2 and Coal Piles 3&4): Waste streams include secondary crusher wash down water, reclaim sump water, ash system wash down water and upsets, and miscellaneous process upset-related surface flows. The basins are constructed with a 15-inch minimum compacted clay liner. The Runoff Basin Pre-pond is synthetically lined with HDPE. The coal pile runoff basins utilize monitoring wells for leak detection.</p> <p>The permittee is authorized to discharge up to 150 gallons per day of domestic wastewater from the facility's guard shack to a septic-tank/leachfield system.</p> <p>The permittee is authorized to maintain up to 150,000 cubic yards of plant generated residual waste onsite for disposal provided that applicable closure and financial assurance requirements in this permit are met. [20.6.2.3104 NMAC, 20.6.2.3106 NMAC]</p> |
| 4. | <p>The evaporation cell, process pond, and runoff basin liners shall be maintained in such a manner as to avoid conditions which could affect the structural integrity of the cells/ponds/basins and/or their liners. Such conditions include, but are not limited to:</p> <ul style="list-style-type: none"> • Erosion damage; • Animal activity/damage; • The presence of vegetation, such as; aquatic plants, weeds, woody shrubs or trees growing within five feet of the cell/pond/basin edge or within the cell/pond/basin itself; • Evidence of seepage; • Evidence of berm subsidence; and/or • The presence of large pieces or large quantities of debris in the cell/pond/basin. <p>The permittee shall visually inspect the cells/ponds/basins and surrounding berms on a monthly basis to ensure proper maintenance. Vegetation growing around the cells/ponds/basins shall be routinely controlled by mechanical removal in a manner that is protective of the cell/pond/basin liner. Any evidence of damage to the cell/pond/basin berm or liner shall be reported to NMED immediately upon discovery. [20.6.2.3107 NMAC]</p> |
| 5. | <p>The permittee shall maintain a minimum of two feet of freeboard between the liquid level in the cells/ponds/basins and the top elevation of the liners at all times. [20.6.2.3107 NMAC, 20.6.2.3109 NMAC]</p> |
| 6. | <p>The permittee shall operate the recovery trench system continuously, except as maintenance and repairs necessitate. [20.6.2.3107 NMAC]</p> |

MONITORING, REPORTING, AND OTHER REQUIREMENTS

| # | Terms and Conditions |
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| 7. | The permittee shall conduct the following monitoring, reporting, and other requirements listed below. [20.6.2.3107 NMAC] |
| 8. | <p>METHODOLOGY – Unless otherwise approved in writing by NMED, the permittee shall conduct sampling and analysis in accordance with the most recent edition of the following documents:</p> <ul style="list-style-type: none"> a) American Public Health Association, Standard Methods for the Examination of Water and Wastewater (18th, 19th or current) b) U.S. Environmental Protection Agency, Methods for Chemical Analysis of Water and Waste c) U.S. Geological Survey, Techniques for Water Resources Investigations of the U.S. Geological Survey d) American Society for Testing and Materials, Annual Book of ASTM Standards, Part 31. Water e) U.S. Geological Survey, et al., National Handbook of Recommended Methods for Water Data Acquisition f) Federal Register, latest methods published for monitoring pursuant to Resource Conservation and Recovery Act regulations g) Methods of Soil Analysis: Part 1. Physical and Mineralogical Methods; Part 2. Microbiological and Biochemical Properties; Part 3. Chemical Methods, American Society of Agronomy <p>[Subsection B of 20.6.2.3107 NMAC]</p> |
| 9. | <p>The permittee shall submit quarterly monitoring reports to NMED for the most recently completed quarterly period by the 1st of February, May, August and November each year.</p> <p>Quarterly monitoring shall be performed during the following periods:</p> <ul style="list-style-type: none"> • January 1st through March 31st (first quarter) – due by May 1st • April 1st through June 30th (second quarter) – due by August 1st • July 1st through September 30th (third quarter) – due by November 1st • October 1st through December 31st (fourth quarter) – due by February 1st <p>Monitoring requirements detailed in this Discharge Permit are summarized on the sheet titled <i>Summary of Required Actions, Monitoring and Reporting</i>. [20.6.2.3107 NMAC]</p> |
| 10. | <p>The permittee shall determine the monthly volume of wastewater discharged by the facility by recording the discharged wastewater volumes at the following locations by the indicated methods:</p> <ul style="list-style-type: none"> • Process Pond 3A inlet—record readings for the one inlet line totalizing flow meter (this discharge represents volumes discharged to all process ponds) • South Evaporation Cells—record readings for the three inlet line totalizing flow meters that discharge into these cells |

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| | <ul style="list-style-type: none"> • North Evaporation Cells—record readings for the two inlet line totalizing flow meters that discharge into Cells 2 and 3 (Cell 1 is no longer in use) • Coal Pile Runoff Basins 3 and 4—record readings for the one transfer line totalizing flow meter to Process Pond 3C • Coal Pile Runoff Basins—Use standard engineering methods to estimate discharge volumes into these basins • All locations listed above—any estimated volumes of wastewater transferred into a listed location by vacuum truck or other method. <p>Monthly discharge volumes shall be recorded and submitted for each location listed above. The sum of the monthly discharges for each location listed above shall represent the facility discharge. The monthly meter readings and monthly discharge volumes shall be submitted to NMED in the quarterly monitoring reports. The flow meter shall be calibrated to within +/- 10% of actual flow and kept operational at all times. [20.6.2.3107 NMAC, 20.6.2.3109 NMAC]</p> |
| 11. | <p>The permittee shall perform monthly inspections of the French drain leak detection systems for the South Evaporation Cells. Summaries of inspection reports shall be submitted to NMED in the quarterly monitoring reports. [20.6.2.3107 NMAC]</p> |
| 12. | <p>Once prior to the expiration date of this Discharge Permit, NMED shall have the option to require the permittee to temporarily remove the dedicated pump from each monitoring well to provide access for a complete well inspection by NMED personnel. NMED shall establish the inspection date and provide at least 60 days notice to the permittee by certified mail. Dedicated pumps shall be removed at least 48 hours prior to NMED inspection to allow adequate settling time for sediment agitated from pump removal. [20.6.2.3107 NMAC]</p> |
| 13. | <p>Within 18 months of the effective date of this Discharge Permit (by DATE), the permittee shall install one new monitoring well and one piezometer, likely to be located on BLM property. The permittee shall install:</p> <ul style="list-style-type: none"> • One monitoring well (MW-Westwater) hydrologically upgradient of both the generating station and areas affected by mining, and • One Piezometer (PZ-RTWW3) located 300 to 400 feet hydrologically downgradient of the capture trench. <p>All monitoring well and piezometer locations shall be approved by NMED prior to installation. The well shall be completed in accordance with the attachment titled <i>Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions</i>, Revision 1.1, March 2011. Construction and lithologic logs shall be submitted to NMED within 30 days of well and piezometer completion. [20.6.2.3107 NMAC]</p> |
| 14. | <p>Following well development and no more than five days after installation of the new monitoring well required by this Discharge Permit, the permittee shall sample ground water in the new wells and analyze the samples for arsenic (As), boron (B), cadmium (Cd), calcium (Ca), chloride (Cl), chromium (Cr), cobalt (Co), copper (Cu), fluoride (F), iron (Fe), lead (Pb), magnesium (Mg), manganese (Mn), molybdenum (Mo), nickel (Ni), potassium (K), selenium (Se), , sodium (Na), uranium (U), carbonate (CO₃), bicarbonate</p> |

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| | <p>(HCO₃), nitrate (NO₃), sulfate (SO₄), total dissolved solids (TDS), and pH. The permittee shall sample:</p> <ul style="list-style-type: none"> • MW-Westwater, intended to be located hydrologically upgradient of both the generating station and areas affected by mining and <p>Ground water sample collection, preservation, transport and analysis shall be performed according to the following procedure:</p> <ol style="list-style-type: none"> a) measure the depth-to-ground water from the top of well casing to the nearest hundredth of a foot; b) purge three well volumes of water from the well prior to sample collection; c) obtain samples from the well for analysis; d) properly prepare, preserve and transport samples; and e) analyze samples in accordance with the methods authorized in this Discharge Permit. <p>Depth-to-water measurements, analytical results, including the laboratory QA/QC summary report, and a facility layout map showing the location and number of each well shall be submitted to NMED within 45 days of the installation of the monitoring well and piezometer. [20.6.2.3107 NMAC]</p> |
| 15. | <p>Within 60 days of well completion, the permittee shall survey all wells and piezometer approved by NMED for Discharge Permit monitoring purposes to a U.S. Geological Survey (USGS) or other permanent benchmark. Survey data shall include northing, easting and elevation to the nearest hundredth of a foot or in accordance with the "Minimum Standards for Surveying in New Mexico" (12.8.2 NMAC). A survey elevation shall be established at the top-of-casing, with a permanent marking indicating the point of survey. The survey shall be completed and certified by a licensed New Mexico professional surveyor. Depth-to-water shall be measured to the nearest hundredth of a foot in all surveyed wells and piezometer, and the data shall be used to develop a map showing the location of all monitoring wells and piezometer and the direction and gradient of ground water flow at the facility. The data and map of ground water flow direction at the facility shall be submitted to NMED within 30 days of survey completion. [20.6.2.3107 NMAC]</p> |
| 16. | <p>The permittee shall perform quarterly ground water sampling in 24 monitoring wells/boreholes/piezometer and analyze the samples for arsenic (As), boron (B), cadmium (Cd); calcium (Ca), chloride (Cl), chromium (Cr), cobalt (Co), copper (Cu), fluoride (F), iron (Fe), lead (Pb), magnesium (Mg), manganese (Mn), molybdenum (Mo), nickel (Ni), potassium (K), selenium (Se), sodium (Na), uranium (U), carbonate (CO₃), bicarbonate (HCO₃), nitrate (NO₃), sulfate (SO₄), total dissolved solids (TDS), and pH. The permittee shall sample:</p> <ul style="list-style-type: none"> • MW-Westwater, intended to be located hydrologically upgradient of both the generating station and areas affected by mining; • KPC, intended to be screened in, and representative of, the aquifer contained in the Pictured Cliffs Formation; • QNT, intended to be located hydrologically upgradient of both the generating station and areas affected by mining; |

- M1, (Borehole to Pictured Cliffs Formation--normally dry), intended to intercept leakage from Process Pond 1;
- M2, (Borehole to Pictured Cliffs Formation--normally dry), intended to intercept leakage from Process Pond 2;
- M3.1, intended to be located hydrologically downgradient of Process Pond 3;
- M3.2, intended to be located hydrologically downgradient of Process Pond 3;
- M3.3, intended to be located hydrologically downgradient of Process Pond 3;
- QAL1, intended to be located in a buried surface drainage and hydrologically downgradient of the south process contaminant sources;
- QAL2, intended to be located in a buried surface drainage and hydrologically downgradient of the central process contaminant sources;
- QAL3, intended to be located in a buried surface drainage and hydrologically downgradient of the north process contaminant sources;
- QAL4, intended to be located in a buried surface drainage and hydrologically downgradient of Process Pond 2;
- MW4, intended to be located hydrologically downgradient of south process contaminant sources that potentially impact groundwater in the Duck Pond Arroyo;
- NEP1 (Borehole to Pictured Cliffs Formation--normally dry), intended to intercept leakage from North Evaporation Cell 1;
- NEP2 (Borehole to Pictured Cliffs Formation--normally dry), intended to intercept leakage from North Evaporation Cell 2;
- NEP3, (Borehole to Pictured Cliffs Formation—contains groundwater), intended to detect impacts from North Evaporation Cells;
- NEP4, (Borehole to Pictured Cliffs Formation—contains groundwater), intended to detect impacts from North Evaporation Cells;
- NEP5 (Borehole to Pictured Cliffs Formation--normally dry), intended to intercept leakage from North Evaporation Cell 2;
- CBI, intended to detect impacts from Coal Pile 3&4 Runoff Basin;
- CBII, intended to detect impacts from Coal Pile 3&4 Runoff Basin;
- RTWS1, intended to be located within recovery trench;
- RTWE2, intended to be located 200 feet hydrologically upgradient of recovery trench;
- RTWW2, intended to be located 100 feet hydrologically downgradient of recovery trench; and
- PZ-RTWW3, intended to be located 300-400 feet hydrologically downgradient of recovery trench (depth-to-ground water measurement only).

Ground water sample collection, preservation, transport and analysis shall be performed according to the following procedure:

- a) measure the depth-to-ground water from the top of well/piezometer casing to the nearest hundredth of a foot;
- b) purge three well volumes of water from the well prior to sample collection, unless low formation yield or insufficient water volume in the well makes it impracticable to purge the three volumes, in which case, collect samples using a proper low-flow sampling procedure or by purging the well once and allowing the water level to recover prior to

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| | <p>sample collection;</p> <p>c) obtain samples from the well for analysis;</p> <p>d) properly prepare, preserve and transport samples; and</p> <p>e) analyze samples in accordance with the methods authorized in this Discharge Permit.</p> <p>Depth-to-water measurements, analytical results, including the laboratory QA/QC summary report, and a facility layout map showing the location and number of each well and piezometer shall be submitted to NMED in the quarterly monitoring reports. [20.6.2.3107 NMAC]</p> |
| 17. | <p>The permittee shall develop a ground water elevation contour map on a quarterly basis using the monitoring well and piezometer survey data and quarterly depth-to-water measurements required by this Discharge Permit. The ground water elevation contour map shall depict the ground water flow direction based on the ground water elevation contours. The data and ground water elevation contour maps shall be submitted to NMED in the quarterly monitoring reports. [20.6.2.3107 NMAC]</p> |
| 18. | <p>The permittee shall sample wastewater sources on a semi-annual basis. The permittee shall obtain one composite liquid sample from each pond group (North Evaporation Cells, South Evaporation Cells, Process Ponds) by combining equal volumes of grab samples collected from each cell and individual grab samples from Cooling Towers 1&2, Cooling Tower 3, Cooling Tower 4, Coal Pile 1&2 Runoff Basin, Runoff Basin Pre-pond Coal Pile 3&4 Runoff Basin, and the recovery trench sump. Samples shall be analyzed for the following parameters: arsenic (As), boron (B), cadmium (Cd), calcium (Ca), chloride (Cl), chromium (Cr), cobalt (Co), copper (Cu), fluoride (F), iron (Fe), lead (Pb), magnesium (Mg), manganese (Mn), molybdenum (Mo), nickel (Ni), potassium (K), selenium (Se), sodium (Na), uranium (U), carbonate (CO₃), bicarbonate (HCO₃), nitrate (NO₃), sulfate (SO₄), total dissolved solids (TDS), and pH. Samples shall be properly prepared, preserved, transported and analyzed in accordance with the methods authorized in this Discharge Permit. Analytical results shall be submitted to NMED in the monitoring reports due by May 1st and November 1st. [20.6.2.3107 NMAC]</p> |
| 19. | <p>The permittee shall log all time periods when the recovery trench system is not operating. A copy of the log shall be submitted to NMED in the quarterly monitoring reports. [20.6.2.3107 NMAC]</p> |

CONTINGENCY PLAN

| # | Terms and Conditions |
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| 20. | <p>In the event that monitoring indicates ground water standards are violated during the term of this Discharge Permit, upon closure of the facility or during post-closure monitoring, the permittee may be required to submit to NMED a corrective action plan that proposes additional measures to mitigate damage from the discharge including, at a minimum, source control measures and an implementation schedule. The permittee may be required to abate water pollution pursuant to Sections 20.6.2.4000 through 20.6.2.4115 NMAC, if the corrective action plan will not result in compliance with the standards and requirements set forth in Section 20.6.2.4103 NMAC. [20.6.2.1203 NMAC, 20.6.2.4105.A(8) NMAC]</p> |

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| 21. | In the event of a spill or release that is not authorized under this Discharge Permit, the permittee shall initiate the notifications and corrective actions as required in Section 20.6.2.1203 NMAC. The permittee shall take immediate corrective action to contain and remove or mitigate the damage caused by the discharge. Within 24 hours after discovery of the discharge, the permittee shall verbally notify NMED and provide the information required by Paragraph (1) of Subsection A of 20.6.2.1203 NMAC. Within 7 days of discovering the discharge, the permittee shall submit a written report to NMED verifying the oral notification and providing any additional information or changes. The permittee shall submit a corrective action report within 15 days after discovery of the discharge. [20.6.2.1203 NMAC] |
| 22. | In the event NMED or the permittee identifies any other failures of the Discharge Permit or system not specifically noted herein, NMED may require the permittee to develop for NMED approval contingency plans and schedules to cope with the failures. [20.6.2.3107.A(10) NMAC] |
| 23. | In the event that a minimum of two feet of freeboard cannot be maintained in the cells/ponds/basins at all times, the permittee shall submit a corrective action plan for NMED approval within 30 days of the date when the two feet of freeboard limit was initially exceeded. [20.6.2.3107 NMAC, 20.6.2.3109 NMAC] |
| 24. | In the event that inspection findings reveal significant damage likely to affect the ability of the lined cells/ponds/basins to contain contaminants, the permittee shall submit a corrective action plan for the repair or replacement of the liners to NMED for approval within 30 days of discovery by the permittee or following notification from NMED that significant liner damage is evident. [20.6.2.3107 NMAC, 20.6.2.3109 NMAC] |
| 25. | In the event that leachate is discovered in the French drain leak detection systems of the South Evaporation Cells, the permittee shall sample the leachate and analyze it for arsenic (As), boron (B), cadmium (Cd), calcium (Ca), chloride (Cl), chromium (Cr), cobalt (Co), copper (Cu), fluoride (F), iron (Fe), lead (Pb), magnesium (Mg), manganese (Mn), molybdenum (Mo), nickel (Ni), potassium (K), selenium (Se), sodium (Na), uranium (U), carbonate (CO ₃), bicarbonate (HCO ₃), nitrate (NO ₃), sulfate (SO ₄), total dissolved solids (TDS), and pH. If the analytical results demonstrate that the leachate is chemically similar to the wastewater in the impoundments the permittee shall follow the contingency plan outlined in the January 29, 2007 renewal application and submit the analytical results along with a corrective action plan for NMED approval within 30 days of receiving analytical results. [20.6.2.3107 NMAC, 20.6.2.3109 NMAC] |
| 26. | In the event leaks are detected from the North Evaporation Cells, Process Ponds, or Coal Pile Runoff Basins the permittee shall follow the contingency plan outlined in the January 29, 2007 renewal application and submit a corrective action plan to NMED within 30 days of discovering the leak. [20.6.2.3107 NMAC, 20.6.2.3109 NMAC] |
| 27. | In the event that information available to NMED indicates that a well(s) is not appropriately constructed to effectively monitor ground water quality, contains insufficient water to allow the collection of representative ground water samples, or is not completed in a manner that is protective of ground water quality, the permittee shall install a replacement well(s) within 90 days of notification from NMED. Replacement well location(s) shall be approved by NMED prior to installation and completed in accordance with the attachment titled <i>Ground Water Discharge Permit Monitoring Well Construction and Abandonment</i> |

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| | <p><i>Conditions</i>, Revision 1.0, July 2008. Construction and lithologic logs shall be submitted to NMED within 30 days of well completion.</p> <p>Upon completion of the replacement monitoring well(s), the monitoring well(s) requiring replacement shall be properly plugged and abandoned. The well(s) shall be plugged and abandoned in accordance with the abandonment details in the attachment titled <i>Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions</i>, Revision 1.0, July 2008, and any applicable local, state, and federal regulations. Documentation describing the plugging and abandonment procedures, including photographic documentation, shall be submitted to NMED within 30 days of completed well abandonment. [20.6.2.3107 NMAC]</p> |
| 28. | <p>In the event that ground water flow information obtained pursuant to this Discharge Permit indicates that a monitoring well(s) was not installed hydrologically downgradient of the intended discharge location(s), the permittee shall install a replacement well(s) within 90 days of notification from NMED. The well location(s) shall be approved by NMED prior to installation and completed in accordance with the attachment titled <i>Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions</i>, Revision 1.0, July 2008. Construction and lithologic logs shall be submitted to NMED within 30 days of well completion. [20.6.2.3107 NMAC]</p> |

CLOSURE PLAN

| # | Terms and Conditions |
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| 29. | <p>Ground water impacts have occurred in the shallow alluvial Shumway Arroyo aquifer due to San Juan Generating Station operations. Therefore, NMED is imposing closure, post-closure activities, and financial assurance requirements (Conditions 29 to 32) to ensure proper closure of all evaporation cells, process ponds, coal pile runoff basins, and any other wastewater related infrastructure to prevent future ground water impacts resulting from releases of ground water contaminants. Additionally, these conditions are imposed to ensure operation of the facility's ground water capture trench and the facility's ground water monitoring system until such time that all impacted ground water from the northern boundary of the plant to the capture trench located downgradient of the plant is intercepted and disposed, and all ground water monitoring wells are plugged and abandoned. For the purposes of this permit, collectively, the activities in this paragraph are referred to as "Complete Closure").</p> <p>Upon cessation of discharges to each evaporation cell, process pond, and/or coal pile runoff basin, the permittee shall implement the relevant parts of the initial closure-plan outline submitted in the January 29, 2007 renewal application and the detailed closure plan as described below in condition 30. Additionally, after all wastewater related infrastructure is closed, the permittee shall perform the following post-closure activities:</p> <ul style="list-style-type: none"> a) Continue operation of the ground water capture trench and ground water monitoring system (except for any monitoring wells or boreholes closed with NMED approval in accordance with the attachment titled <i>Ground Water Discharge Permit Monitoring</i> |

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| | <p><i>Well Construction and Abandonment Conditions</i>, Revision 1.1, March 2011 as necessitated by the closure of any evaporation cells, process ponds, coal pile runoff basins, and any other wastewater related infrastructure) until WQCC ground water standards or background concentrations have been met for at least eight consecutive quarters. All continuing post-closure monitoring data and results shall be submitted to NMED in accordance with the monitoring section of this discharge permit.</p> <p>b) Following notification from NMED that post-closure activities may cease, the permittee shall plug and abandon all remaining monitoring well(s) and borehole(s) in accordance with the attachment titled <i>Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions</i>, Revision 1.1, March 2011.</p> <p>When Complete Closure and all required post-closure activities have been completed, the permittee may request to terminate the Discharge Permit. [20.6.2.3107.A(11) NMAC]</p> |
| 30. | <p><u>Submission of Detailed Plan for Complete Closure:</u> Within 9 months of the effective date of this Discharge Permit (by March 5, 2014), the permittee shall submit a detailed closure plan with sufficient detail to estimate the cost of Complete Closure of all wastewater related infrastructure for financial assurance. The detailed closure plan shall address the steps necessary to close (and the proposed order of closure for) the evaporation cells, process ponds, coal pile runoff basins, and any other wastewater related infrastructure. The detailed closure plan shall contain plans and specifications signed and stamped by a New Mexico professional engineer for construction of the store-and-release covers for the Evaporation Cells, process ponds, and coal pile runoff basins along with a schedule of time durations for construction and completion that is not based on a specific date. Further, the detailed closure plan shall address de-watering (as necessary), characterization of wastes to be disposed on-site, restoration of vegetation, and ongoing maintenance for all evaporation cell, process pond, coal pile runoff basin store and release covers and all post-closure activities and plugging and abandonment of monitoring wells.</p> <p>The detailed closure plan shall also provide sufficient detail to estimate the cost of operating, maintaining, and closing the capture trench and ground water monitoring system. Inherent in this detail is an estimate of the time (after the cessation of facility operation) that the capture trench and ground water monitoring system will have to remain in place and in operation, i.e., until WQCC ground water standards or background concentrations have been met for at least eight consecutive quarters.</p> |
| 31. | <p><u>Submission of Detailed Estimate for Complete Closure Cost for Financial Assurance Purposes:</u> Within 15 months of the effective date of this Discharge Permit (by September 5, 2014), the permittee shall submit a detailed cost estimate ("Estimate") based on the initial closure-plan outline submitted in the January 29, 2007 renewal application and the detailed closure plan for Complete Closure required by Conditions 29 and 30 above. The Estimate shall be based on the cost of hiring a third party to conduct Complete Closure. The Estimate shall include direct costs associated with all third party implementation of the closure plan, contingency costs in the amount of 15 percent of the direct costs, the cost of</p> |

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| | <p>an independent project manager and contract administration, and NMED oversight and administration costs, including indirect costs. The Estimate shall forecast the worst case scenario for Complete Closure over the five year period of this permit; if a new permit is not issued after five years, the Estimate for the worst case scenario shall be updated annually each year after five years and any financial assurance shall be adjusted accordingly.</p> <p>The Estimate shall be adjusted for inflation over the five year period for Complete Closure and shall project the amount needed for each of the five years for the worst case scenario for all activities included in Complete Closure.</p> |
| 32. | <p><u>Submission of Financial Assurance:</u> Within 21 months of the effective date of this Discharge Permit (by March 5, 2015), the permittee shall submit to NMED for approval a draft of its proposed financial assurance instrument(s) that meet the requirements below.</p> <ul style="list-style-type: none">a) The amount of financial assurance shall be sufficient to cover the cost of implementing Complete Closure as described in the closure plan and cost estimate required by Conditions 29, 30 and 31 of this Discharge Permit. The permittee shall not propose any form of self-guarantee. The financial assurance shall ensure that funds will be available to implement Complete Closure if at any time the permittee is unable, unwilling, or otherwise fails to implement any portion of the closure plan as required by this Discharge Permit. If the form of financial assurance entails incremental costs of maintaining it, i.e., costs for a trustee, the amount of the financial assurance shall be increased to include all such costs.b) Within 30 days after NMED approves the draft financial assurance proposal, the permittee shall execute the financial assurance instrument and submit it to NMED for final acceptance.c) NMED shall be named as the sole beneficiary in each financial assurance instrument(s).d) Within 30 days of execution, NMED acceptance, and implementation of the financial assurance instrument(s), the permittee shall establish a trust to receive and disburse funds, which may arise as the result of forfeiture of financial assurance. The trust shall name NMED as the beneficiary. The trust agreement shall be in a form satisfactory to the State Board of Finance and shall be subject to approval by the Governor pursuant to NMSA 1978, § 46-4-1 through 9. The trust shall be maintained until the Complete Closure has occurred, NMED has released the financial assurance, and NMED has agreed to terminate this permit. Upon forfeiture of financial assurance, the forfeited amount shall be deposited directly into the trust and shall be used for any activities or costs related to Complete Closure.e) The permittee may propose alternative financial assurance instruments from time to time subject to NMED's prior written approval and acceptance. The permittee shall |

not replace any approved financial assurance instrument without NMED's prior written approval.

- f) The financial assurance instrument(s) shall remain in effect until Complete Closure and final termination of this permit and shall remain in place at all times, including lapses in discharge permit coverage, late discharge permit renewal or temporary shutdown of facilities covered under DP-1327 unless released by NMED in writing.
- g) The financial assurance shall include a method for adjustments due to changes in inflation, new technologies, and NMED approved revisions to the closure plan based on continued investigations or other information and shall be adjusted no less frequently than every five years such that, at all times, the amount of financial assurance provided by the permittee shall be sufficient to perform Complete Closure at any time during the following five years from the update. Should circumstances warrant more frequent adjustments, NMED may require them in writing and the permittee shall make the adjustment within 180 days.
- h) No more than once every 12 months the permittee may request that NMED review remaining activities required for Complete Closure including alternate closure activities that NMED has approved. The request for review shall describe the activities which have been completed and shall contain an updated cost estimate for remaining Complete Closure activities. If NMED approves the description of activities which have been completed, the remaining activities of Complete Closure, and the cost estimate for remaining Complete Closure activities, NMED will notify the permittee of appropriate adjustments that the permittee may make to the amount of financial assurance.
- i) The financial assurance shall be evaluated, and if necessary, revised to comply with applicable WQCC financial assurance regulations, if and when such regulations are promulgated and become effective.
- j) Cancellation or Non-renewal: Each financial assurance instrument shall require the financial assurance provider to give at least 120 days written notice to NMED and the permittee prior to cancellation or non-renewal of the financial assurance instrument. If such notice is received, the permittee shall propose an alternate financial assurance mechanism to NMED within 30 days of the notice. If NMED approves the alternate financial assurance mechanism, the permittee shall execute it and submit it to NMED for final acceptance within 60 days of cancellation. If the permittee fails to obtain alternate financial assurance acceptable to NMED within 60 days, the current financial assurance shall be subject to forfeiture.
- k) Forfeiture: If NMED determines that implementation of all or any part of Complete Closure is required and that the permittee is unable or unwilling or will otherwise fail to conduct all or any part of Complete Closure as required by this Discharge Permit, then NMED may proceed with forfeiture of all or part of the financial

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| | <p>assurance. Prior to beginning a forfeiture proceeding, NMED will provide written notice, by certified mail return receipt requested, to the permittee and to all financial assurance providers, if applicable, informing them of the determination to forfeit all or a portion of the financial assurance, provided that if NMED's access to the financial assurance is threatened due to time constraints, NMED may begin a forfeiture proceeding, and provide written notice contemporaneously with that proceeding. The written notice will state the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the total cost of performing Complete Closure, in accordance with this Discharge Permit and all applicable laws and regulations. NMED will also advise the permittee and all financial assurance providers, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, without limitation, an agreement by the permittee, by a financial assurance provider, or by an NMED approved third party, to perform Complete Closure in accordance with this Discharge Permit and all applicable laws and regulations, and a demonstration that such person has the financial ability and technical qualifications to do so. All financial assurance forfeited shall become immediately payable to the trust or as otherwise provided in the NMED approved instrument. Forfeited funds shall be used to perform Complete Closure. If the forfeited amount is insufficient, the permittee shall be liable for the remaining costs. If the amount forfeited is more than necessary, the excess amount shall be refunded to the person from whom it was collected.</p> <p>l) The financial assurance shall be released or modified when NMED determines that all activities of Complete Closure have been performed according to the closure plan requirements of this Discharge Permit and the Discharge Permit has been terminated. [20.6.2.3107A(11) NMAC]</p> |
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GENERAL TERMS AND CONDITIONS

| # | Terms and Conditions |
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| 33. | <p>RECORD KEEPING – The permittee shall maintain a written record of the following information:</p> <ul style="list-style-type: none"> a) Information and data used to complete the application for this Discharge Permit. b) Records of any releases (commonly known as “spills”) not authorized under this Discharge Permit and reports submitted pursuant to 20.6.2.1203 NMAC. c) Records of the operation, maintenance, and repair of all facilities/equipment used to treat, store or dispose of wastewater. d) Facility record drawings (plans and specifications) showing the actual construction of the facility and bear the seal and signature of a licensed New Mexico professional engineer. e) Copies of monitoring reports completed and/or submitted to NMED pursuant to this Discharge Permit. f) The volume of wastewater or other wastes discharged pursuant to this Discharge Permit. g) Ground water quality and wastewater quality data collected pursuant to this Discharge |

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| | <p>Permit.</p> <ul style="list-style-type: none"> h) Copies of construction records (well log) for all ground water monitoring wells required to be sampled pursuant to this Discharge Permit. i) Records of the maintenance, repair, replacement or calibration of any monitoring equipment or flow measurement devices required by this Discharge Permit. j) Data and information related to field measurements, sampling, and analysis conducted pursuant to this Discharge Permit. The following information shall be recorded and shall be made available to NMED upon request: <ul style="list-style-type: none"> i) The dates, location and times of sampling or field measurements; ii) The name and job title of the individuals who performed each sample collection or field measurement; iii) The sample analysis date of each sample; iv) The name and address of the laboratory, and the name of the signatory authority for the laboratory analysis; v) The analytical technique or method used to analyze each sample or collect each field measurement; vi) The results of each analysis or field measurement, including raw data; vii) The results of any split, spiked, duplicate or repeat sample; and viii) A copy of the laboratory analysis chain-of-custody as well as a description of the quality assurance and quality control procedures used. <p>The written record shall be maintained by the permittee at a location accessible during a facility inspection by NMED for a period of at least five years from the date of application, report, collection or measurement and shall be made available to the department upon request. [Subsections A and D of 20.6.2.3107 NMAC]</p> |
| 34. | <p>INSPECTION and ENTRY – The permittee shall allow inspection by NMED of the facility and its operations which are subject to this Discharge Permit and the WQCC regulations. NMED may upon presentation of proper credentials, enter at reasonable times upon or through any premises in which a water contaminant source is located or in which are located any records required to be maintained by regulations of the federal government or the WQCC.</p> <p>The permittee shall allow NMED to have access to and reproduce for their use any copy of the records, and to perform assessments, sampling or monitoring during an inspection for the purpose of evaluating compliance with this Discharge Permit and the WQCC regulations.</p> <p>Nothing in this Discharge Permit shall be construed as limiting in any way the inspection and entry authority of NMED under the WQA, the WQCC Regulations, or any other local, state or federal regulations. [Subsection D of 20.6.2.3107 NMAC, NMSA 1978, §§ 74-6-9.B and 74-6-9.E]</p> |
| 35. | <p>DUTY to PROVIDE INFORMATION – The permittee shall, upon NMED’s request, allow for NMED’s inspection/duplication of records required by this Discharge Permit and/or furnish to NMED copies of such records. [Subsection D of 20.6.2.3107 NMAC]</p> |

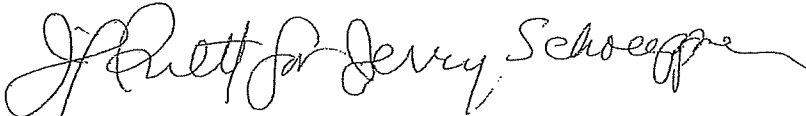
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| 36. | <p>MODIFICATIONS and/or AMENDMENTS – In the event the permittee proposes a change to the facility or the facility’s discharge that would result in a change in the volume discharged; the location of the discharge; or in the amount or character of water contaminants received, treated or discharged by the facility, the permittee shall notify NMED prior to implementing such changes. The permittee shall obtain approval (which may require modification of this Discharge Permit) by NMED prior to implementing such changes. [Subsection C of 20.6.2.3107 NMAC, Subsections E and G of 20.6.2.3109 NMAC]</p> |
| 37. | <p>PLANS and SPECIFICATIONS – In the event the permittee is proposing to construct a wastewater system or change a process unit of an existing system such that the quantity or quality of the discharge will change substantially from that authorized by this Discharge Permit, the permittee shall submit construction plans and specifications to NMED for the proposed system or process unit prior to the commencement of construction.</p> <p>In the event the permittee implements changes to the wastewater system authorized by this Discharge Permit which result in only a minor effect on the character of the discharge, the permittee shall report such changes (including the submission of record drawings, where applicable) as of January 1 and June 30 of each year to NMED. [Subsections A and C of 20.6.2.1202 NMAC]</p> |
| 38. | <p>CIVIL PENALTIES – Any violation of the requirements and conditions of this Discharge Permit, including any failure to allow NMED staff to enter and inspect records or facilities, or any refusal or failure to provide NMED with records or information, may subject the permittee to a civil enforcement action. Pursuant to WQA 74-6-10(A) and (B), such action may include a compliance order requiring compliance immediately or in a specified time, assessing a civil penalty, modifying or terminating the Discharge Permit, or any combination of the foregoing; or an action in district court seeking injunctive relief, civil penalties, or both. Pursuant to WQA 74-6-10(C) and 74-6-10.1, civil penalties of up to \$15,000 per day of noncompliance may be assessed for each violation of the WQA 74-6-5, the WQCC Regulations, or this Discharge Permit, and civil penalties of up to \$10,000 per day of noncompliance may be assessed for each violation of any other provision of the WQA, or any regulation, standard, or order adopted pursuant to such other provision. In any action to enforce this Discharge Permit, the permittee waives any objection to the admissibility as evidence of any data generated pursuant to this Discharge Permit. [20.6.2.1220 NMAC, NMSA 1978, §§ 74-6-10 and 74-6-10.1]</p> |
| 39. | <p>CRIMINAL PENALTIES – No person shall:</p> <ol style="list-style-type: none"> 1) make any false material statement, representation, certification or omission of material fact in an application, record, report, plan or other document filed, submitted or required to be maintained under the WQA; 2) falsify, tamper with or render inaccurate any monitoring device, method or record required to be maintained under the WQA; or 3) fail to monitor, sample or report as required by a permit issued pursuant to a state or federal law or regulation. <p>Any person who knowingly violates or knowingly causes or allows another person to violate the requirements of this condition is guilty of a fourth degree felony and shall be</p> |

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| | <p>sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who is convicted of a second or subsequent violation of the requirements of this condition is guilty of a third degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who knowingly violates the requirements of this condition or knowingly causes another person to violate the requirements of this condition and thereby causes a substantial adverse environmental impact is guilty of a third degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who knowingly violates the requirements of this condition and knows at the time of the violation that he is creating a substantial danger of death or serious bodily injury to any other person is guilty of a second degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. [20.6.2.1220 NMAC, NMSA 1978, §§ 74-6-10.2.A through 74-6-10.2.F]</p> |
| 40. | <p>COMPLIANCE with OTHER LAWS – Nothing in this Discharge Permit shall be construed in any way as relieving the permittee of the obligation to comply with all applicable federal, state, and local laws, regulations, permits or orders. [NMSA 1978, § 74-6-5.L]</p> |
| 41. | <p>RIGHT to APPEAL – The permittee may file a petition for review before the WQCC on this Discharge Permit. Such petition shall be in writing to the WQCC within thirty days of the receipt of postal notice of this Discharge Permit and shall include a statement of the issues to be raised and the relief sought. Unless a timely petition for review is made, the decision of NMED shall be final and not subject to judicial review. [20.6.2.3112 NMAC, NMSA 1978, § 74-6-5.O]</p> |
| 42. | <p>TRANSFER of DISCHARGE PERMIT – Prior to the transfer of any ownership, control, or possession of this facility or any portion thereof, the permittee shall:</p> <ol style="list-style-type: none"> 1) notify the proposed transferee in writing of the existence of this Discharge Permit; 2) include a copy of this Discharge Permit with the notice; and 3) deliver or send by certified mail to NMED a copy of the notification and proof that such notification has been received by the proposed transferee. <p>Until both ownership and possession of the facility have been transferred to the transferee, the permittee shall continue to be responsible for any discharge from the facility. [20.6.2.3111 NMAC]</p> |
| 43. | <p>PERMIT FEES – Payment of permit fees (\$11,500) is due at the time of Discharge Permit approval. Permit fees shall be paid in a single payment or shall be paid in equal installments on a yearly basis over the term of the Discharge Permit. Single payments shall be remitted to NMED no later than 30 days after the Discharge Permit effective date. Initial installment payments shall be remitted to NMED no later than 30 days after the Discharge Permit effective date; subsequent installment payments shall be remitted to NMED no later than the anniversary of the Discharge Permit effective date.</p> <p>Permit fees are associated with <u>issuance</u> of this Discharge Permit. Nothing in this Discharge Permit shall be construed as relieving the permittee of the obligation to pay all permit fees assessed by NMED. A permittee that ceases discharging or does not commence discharging from the facility during the term of the Discharge Permit shall pay all permit fees assessed by NMED. An approved Discharge Permit shall be suspended or</p> |

San Juan Generating Station, DP-1327
June 5, 2013
Page 19

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| terminated if the facility fails to remit an installment payment by its due date. [Subsection F of 20.6.2.3114 NMAC, NMSA 1978, § 74-6-5.K] |
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EFFECTIVE DATE: June 5, 2013
EXPIRATION DATE: June 5, 2018



JERRY SCHOEPPNER
Chief, Ground Water Quality Bureau
New Mexico Environment Department



SUSANA MARTINEZ
Governor

JOHN A. SANCHEZ
Lieutenant Governor

NEW MEXICO
ENVIRONMENT DEPARTMENT

Harold Runnels Building
1190 St. Francis Drive
P.O. Box 5469, Santa Fe, New Mexico 87502-5469
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www.nmenv.state.nm.us



RYAN FLYNN
Secretary

BUTCH TONGATE
Deputy Secretary

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

May 18, 2015

Brian Cesar, Public Works Director
City of Alamogordo
2600 N. Florida Ave.
Alamogordo, NM 88310

RE: Discharge Permit, DP-1827, Brackish Water Reverse Osmosis Facility

Dear Mr. Cesar:

The New Mexico Environment Department (NMED) issues the enclosed Discharge Permit DP-1827, to the City of Alamogordo (permittee) pursuant to the New Mexico Water Quality Act (WQA), NMSA 1978 §§74-6-1 through 74-6-17, and the New Mexico Water Quality Control Commission (WQCC) Regulations, 20.6.2 NMAC.

The Discharge Permit contains terms and conditions that shall be complied with by the permittee and are enforceable by NMED pursuant to Section 20.6.2.3104 NMAC, WQA, NMSA 1978 §74-6-5 and §74-6-10. Please be aware that this Discharge Permit may contain conditions that require the permittee to implement operational, monitoring or closure actions by a specified deadline. Such conditions are listed at the beginning of the operational, monitoring and closure plans of this Discharge Permit.

Issuance of this Discharge Permit does not relieve the permittee of the responsibility to comply with the WQA, WQCC Regulations, and any other applicable federal, state and/or local laws and regulations, such as zoning requirements and nuisance ordinances.

Pursuant to Paragraph (4) of Subsection H of 20.6.2.3109 NMAC, the term of the Discharge Permit shall be seven years from the effective date (May 18, 2015) or five years from the date the discharge commences, whichever occurs first. Prior to discharging, written notification shall be given to NMED stating the date the discharge is to commence.

NMED Exhibit 3

15355

Brian Cesar, DP-1827
May 18, 2015
Page 2

NMED requests that the permittee submit an application for renewal (or renewal and modification) at least 180 days prior to the date the Discharge Permit term ends.

An invoice for the Discharge Permit Fee of \$6,900 is being sent under separate cover. Payment of the Discharge Permit Fee must be received by NMED within 30 days of the date the Discharge Permit is issued.

If you have any questions, please contact Steve Huddleson at (505) 827-2936. Thank you for your cooperation during this Discharge Permit review.

Sincerely,



Phyllis Bustamante, Acting Chief
Ground Water Quality Bureau

PB:SMH:smh

encs: Discharge Permit, DP-1827
Ground Water Discharge Permit Conditions for Synthetically Lined Lagoons – Liner
Material and Site Preparation, Revision 0.0, May 2007
Ground Water Discharge Permit Monitoring Well Construction and Abandonment
Conditions, Revision 1.1, March 2011

cc: Michael Kesler, Acting District Manager, NMED District # III (electronic copy)
NMED Alamogordo Field Office (electronic copy)
John Romero, Office of the State Engineer (electronic copy)

GROUND WATER DISCHARGE PERMIT
Brackish Water Reverse Osmosis Treatment Facility, DP-1827

I. INTRODUCTION

The New Mexico Environment Department (NMED) issues this Discharge Permit, DP-1827, Brackish Water Reverse Osmosis Treatment Facility (BWRO or Facility) to the City of Alamogordo (Permittee) pursuant to the New Mexico Water Quality Act (WQA), NMSA 1978 §§74-6-1 through 74-6-17, and the New Mexico Water Quality Control Commission (WQCC) Regulations, 20.6.2 NMAC.

NMED's purpose in issuing this Discharge Permit, and in imposing the requirements and conditions specified herein, is to control the discharge of water contaminants from the Facility into ground and surface water, so as to protect ground and surface water for present and potential future use as domestic and agricultural water supply and other uses and protect public health. In issuing this Discharge Permit, NMED has determined that the requirements of Subsection C of 20.6.2.3109 NMAC have been or will be met. Pursuant to Section 20.6.2.3104 NMAC, it is the responsibility of the Permittee to comply with the terms and conditions of this Discharge Permit; failure may result in an enforcement action by NMED (20.6.2.1220 NMAC).

The activities which produce the discharge, the location of the discharge, and the quantity, quality and flow characteristics of the discharge are briefly described as follows:

Up to 1,000,000 gallons per day (gpd) of brackish water will be delivered by pipeline to the Facility from the Snake Tank Well Field (Well No. 5) and treated by reverse osmosis (RO) to remove total dissolved solids (TDS). The RO treatment process removes TDS from the raw water and produces a high quality, low TDS permeate stream that will be introduced into the City of Alamogordo public water system to supplement supply during high usage periods. This Discharge Permit allows for disposal of the RO concentrate (reject) volume of 350,000 gpd which will be discharged to three double synthetically-lined impoundments equipped with leak detection for disposal by evaporation.

The discharge contains water contaminants or toxic pollutants that may be elevated above the standards of 20.6.2.3103 NMAC and/or include the presence of toxic pollutants as defined in Subsection WW of 20.6.2.7 NMAC.

The Facility is to be located at 501 LaVelle Road in Alamogordo, in Section 36, Township 16 South, Range 09 East, Otero County, on the former City of Alamogordo municipal landfill which operated from the late 1950's until 1988. Ground water most likely to be affected is at a depth of approximately 73 feet below ground surface and has a total dissolved solids concentration of approximately 6,400 milligrams per liter.

The application consists of the application submitted by CDM Smith (consultant), on behalf of the City of Alamogordo dated September 23, 2014 and materials contained in the administrative record prior to issuance of this Discharge Permit including:

- Final Phase I Environmental Site Assessment Report, August 1, 2003; Prepared for NMED Remediation Oversight Section; TetraTech EMI, Inc.;
- Final Phase 2 Environmental Site Assessment Report, October 18, 2004; Prepared for NMED Remediation Oversight Section; TetraTech EMI, Inc.;
- Final Focused Environmental Investigation Report, November 12, 2014; Prepared for City of Alamogordo; CDM Smith, Inc.;
- Geotechnical Engineering Report, July 31, 2014; Terracon Consultants, Inc.; and
- Geotechnical Report, Addendum 1, August 15, 2014; Terracon Consultants, Inc..

The discharge shall be managed in accordance with all conditions and requirements of this Discharge Permit.

Pursuant to Section 20.6.2.3109 NMAC, NMED reserves the right to require a Discharge Permit Modification in the event NMED determines that the requirements of 20.6.2 NMAC are being or may be violated or the standards of Section 20.6.2.3103 NMAC are being or may be violated. This may include a determination that structural controls and/or management practices approved under this Discharge Permit are not protective of ground water quality, and that more stringent requirements to protect ground water quality may be required by NMED. The Permittee may be required to implement abatement of water pollution and remediate ground water quality.

Issuance of this Discharge Permit does not relieve the Permittee of the responsibility to comply with the WQA, WQCC Regulations, and any other applicable federal, state and/or local laws and regulations, such as zoning requirements and nuisance ordinances.

The following acronyms and abbreviations may be used in this Discharge Permit:

| Abbreviation | Explanation | Abbreviation | Explanation |
|--------------|---------------------------------|--------------|-----------------------------------|
| CFR | Code of Federal Regulations | NMAC | New Mexico Administrative Code |
| Cl | Chloride | NMED | New Mexico Environment Department |
| EPA | Environmental Protection Agency | NMSA | New Mexico Statutes Annotated |
| gpd | Gallons per day | TDS | Total dissolved solids |
| mg/L | Milligrams per liter | WQA | Water Quality Act |
| mL | Milliliters | WQCC | Water Quality Control Commission |

II. FINDINGS

In issuing this Discharge Permit, NMED finds:

1. The Permittee is discharging effluent or leachate from the Facility so that such effluent or leachate may move directly or indirectly into ground water within the meaning of Section 20.6.2.3104 NMAC.
2. The Permittee is discharging effluent or leachate from the Facility so that such effluent or leachate may move into ground water of the State of New Mexico which has an existing concentration of 10,000 mg/L or less of TDS within the meaning of Subsection A of 20.6.2.3101 NMAC.
3. The discharge from the Facility is not subject to any of the exemptions of Section 20.6.2.3105 NMAC.

III. CONDITIONS

NMED issues this Discharge Permit for the discharge of water contaminants subject to the following conditions. Pursuant to 20.6.2.3104 NMAC, it is the responsibility of the Permittee to ensure that discharges authorized by this Discharge Permit are consistent with the terms and conditions herein.

A. Operational Plan

| # | Terms and Conditions |
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| 1. | The Permittee shall implement the following operational plan to ensure compliance with Title 20, Chapter 6, Parts 1 and 2 NMAC. [Subsection C of 20.6.2.3109 NMAC] |
| 2. | The Permittee shall operate in a manner such that standards and requirements of Sections 20.6.2.3101 and 20.6.2.3103 NMAC are not violated. [20.6.2.3101 NMAC, 20.6.2.3103 NMAC, Subsection C of 20.6.2.3109 NMAC] |
| 3. | The Permittee is authorized to discharge up to 350,000 gallons per day of concentrate wastewater from a reverse osmosis water treatment system to three double synthetically-lined impoundments equipped with leak detection for disposal by total evaporation. [20.6.2.3104 NMAC, Subsection C of 20.6.2.3106 NMAC, Subsection C of 20.6.2.3109 NMAC] |

Operating Conditions with Implementation Deadlines

| # | Terms and Conditions |
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| 4. | Prior to discharging from the Facility, the Permittee shall submit written notification to |

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| | <p>NMED stating the date the discharge is to commence.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsection H of 20.6.2.3109 NMAC]</p> |
| 5. | <p>The Permittee will submit to NMED for review the 60% Design when it becomes available including proposed vapor/collection systems for the Facility process building and evaporative impoundments. A minimum of 180 days prior to construction of the BWRO Facility the Permittee shall submit to NMED for review final construction plans and specifications including vapor/collection systems and monitoring schedules for the Facility process building and evaporative impoundments. The construction plans and specifications shall bear the seal and signature of a licensed New Mexico professional engineer (pursuant to New Mexico Engineering and Surveying Practice Act and the rules promulgated under that authority), include supporting design calculations. The submitted documentation shall include the following elements:</p> <ul style="list-style-type: none"> a) Details for the construction of the evaporative impoundment and liner consistent with the attachment titled <i>Ground Water Discharge Permit Conditions for Synthetically Lined Lagoons – Liner Material and Site Preparation</i>, Revision 0.0, May 2007; b) Details of the vapor collection/abatement system and proposed vapor monitoring program; c) Settlement analysis and basis of geotechnical design for the evaporative impoundments; d) Design calculations for the capacity and evaporative potential of the evaporative impoundment. The impoundment(s) shall be designed to dispose of the permitted discharge volume by evaporation such that two feet of freeboard is preserved at all times. Seasonal discharge patterns may be considered in the design calculations; e) Flow meters to measure the volume of wastewater discharged to the evaporative impoundments; f) Specifications for all equipment, materials and installation procedures to be used in the construction of the evaporative impoundments, holding tanks and lines; and g) Fences around the evaporative impoundments to control access by the general public and animals. The fences shall consist of a minimum of six-foot chain link or field fencing, and locking gates. <p>Prior to constructing the evaporative impoundments and its associated components, the Permittee shall obtain written verification from NMED that the plans and specifications meet the requirements of this Discharge Permit.</p> <p>[Subsections A and C 20.6.2.1202 NMAC, Subsection C of 20.6.2.3106 NMAC, Subsection C of 20.6.2.3107 NMAC, NMSA 1978, §§ 61-23-1 through 61-23-32]</p> |
| 6. | <p>Prior to discharging to the evaporative impoundments, the Permittee shall complete construction in accordance with the final construction plans and specifications required by this Discharge Permit. The Permittee shall notify NMED at least five working days prior to commencement of construction to allow NMED personnel to be onsite for inspection.</p> |

| # | Terms and Conditions |
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| | <p>The Permittee shall submit record drawings that bear the seal and signature of a licensed New Mexico professional engineer (pursuant to the New Mexico Engineering and Surveying Practice Act and the rules promulgated under that authority) for the constructed evaporative impoundments to NMED within 30 days of completion.</p> <p>[Subsections A and C of 20.6.2.1202 NMAC, Subsection C of 20.6.2.3109 NMAC, NMSA 1978, §§ 61-23-1 through 61-23-32]</p> |
| 7. | <p>Prior to discharging from the Facility, the Permittee shall submit an up-to-date scaled map(s) of the entire Facility to NMED. The map(s) shall be developed using information obtained from a survey of the entire Facility. The map(s) shall be drawn to a scale such that all necessary information is plainly shown and labeled. The map shall include the following elements:</p> <ul style="list-style-type: none"> • a graphical scale; • a north arrow; • the effective date of the map; • all components of the wastewater treatment [and disposal] system; • all re-use areas and associated distribution pipelines; • all ground water monitoring wells; • all backflow prevention methods/devices; and • all flow measurement devices. <p>The survey shall be performed to a U.S. Geological Survey (USGS) or other permanent benchmark. Survey data shall include northing, easting and shall be in accordance with the "Minimum Standards for Surveying in New Mexico" (12.8.2 NMAC). A survey elevation shall be established with a permanent marking indicating the point of survey. The completed survey shall bear the seal and signature of a licensed New Mexico professional surveyor (pursuant to New Mexico Engineering and Surveying Practice Act and the rules promulgated under that authority).</p> <p>Any element that cannot be directly shown due to its location inside of existing structures, or because it is buried without surface identification, shall be on the map in a schematic format and identified as such.</p> <p>[Subsection C of 20.6.2.3106 NMAC, Subsection A of 20.6.2.3107 NMAC, NMSA 1978, §§ 61-23-1 through 61-23-32]</p> |
| 8. | <p>Prior to discharging from the Facility, the Permittee shall install three monitoring wells:</p> <ul style="list-style-type: none"> • One monitoring well (MW-1) located hydrologically upgradient of the entire Facility; • One monitoring well (MW-2) located 20 to 50 feet hydrologically downgradient of evaporative impoundments; and • One monitoring well (MW-3) located 20 to 50 feet hydrologically downgradient of evaporative impoundments. |

| # | Terms and Conditions |
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| | <p>All monitoring well locations shall be approved by NMED prior to installation. The wells shall be completed in accordance with the attachment titled <i>Ground Water Quality Bureau Monitoring Well Construction and Abandonment Conditions</i>, Revision 1.1, March 2011. Construction and lithologic logs shall be submitted to NMED within 60 days of well completion.</p> <p>[20.6.2.3107 NMAC]</p> |
| 9. | <p>Following installation of the new monitoring wells required by this Discharge Permit, and prior to initiating discharge, the Permittee shall establish baseline conditions by sampling ground water in the new wells and analyzing the samples for the constituents for which numeric standards are provided under 20.6.2.3103 NMAC and toxic pollutants identified in 20.6.2.7.WW NMAC.</p> <p>Ground water sample collection, preservation, transport and analysis shall be performed according to the following procedure, or the Permittee may submit an alternative Sampling and Analysis Plan for approval by NMED:</p> <ul style="list-style-type: none"> a) Measure the depth-to-ground water from the top of the well casing to the nearest hundredth of a foot; b) Purge three well volumes of water from the well prior to sample collection; c) Obtain samples from the well for analysis; d) Properly prepare, preserve and transport samples; and e) Analyze samples in accordance with the methods authorized in this Discharge Permit. <p>Depth-to-water measurements, analytical results, including the laboratory Quality Assurance/Quality Control (QA/QC) summary report, and a Facility layout map showing the location and number of each well shall be submitted to NMED within 60 days of the installation of the monitoring wells.</p> <p>[20.6.2.3107 NMAC]</p> |
| 10. | <p>Prior to discharging from the Facility, the Permittee shall survey all wells approved by NMED for Discharge Permit monitoring purposes to a USGS or other permanent benchmark. Survey data shall include northing, easting and elevation to the nearest hundredth of a foot or in accordance with the "Minimum Standards for Surveying in New Mexico" (12.8.2 NMAC). A survey elevation shall be established at the top-of-casing, with a permanent marking indicating the point of survey. The survey shall be completed and certified by a licensed New Mexico professional surveyor. Depth-to-water shall be measured to the nearest hundredth of a foot in all surveyed wells, and the data shall be used to develop a map showing the location of all monitoring wells and the direction and gradient of ground water flow at the Facility. The data and map of ground water flow direction at the facility shall be submitted to NMED within 60 days of survey completion.</p> |

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| | [20.6.2.3107 NMAC] |

Operational Conditions

| # | Terms and Conditions |
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| 11. | <p>The Permittee shall operate and maintain three double synthetically-lined impoundments with leak detection systems for the purpose of storing and evaporating concentrate wastewater generated from the Facility. The Permittee shall maintain the impoundment liner(s) in such a manner as to avoid conditions which could affect the structural integrity of the impoundment(s) and/or impoundment liner(s). Such conditions include or may be characterized by the following:</p> <ul style="list-style-type: none"> • erosion damage; • animal burrows or other damage; • the presence of vegetation including aquatic plants, weeds, woody shrubs or trees growing within five feet of the top inside edge of a sub-grade impoundment, within five feet of the toe of the outside berm of an above-grade impoundment, or within the impoundment itself; • the presence of large debris or large quantities of debris in the impoundment; • evidence of seepage; and • evidence of berm subsidence. <p>Vegetation growing around the impoundment shall be routinely controlled by mechanical removal in a manner that is protective of the impoundment liner. The Permittee shall visually inspect the impoundment(s) and surrounding berms on a monthly basis to ensure proper maintenance. In the event that inspection reveals any evidence of damage that threatens the structural integrity of an impoundment berm or liner, or that may result in an unauthorized discharge, the Permittee shall enact the contingency plan set forth in this Discharge Permit.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]</p> |
| 12. | <p>The Permittee shall preserve a minimum of two feet of freeboard between the liquid level in the impoundment(s) and the elevation of the top of the impoundment liner. In the event that the Permittee determines that two feet of freeboard cannot be preserved in the impoundment, the Permittee shall enact the contingency plan set forth in this Discharge Permit.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]</p> |
| 13. | <p>Concentrate wastewater discharged to the impoundments shall not exceed the following limitations: < 2 pH units and > 12.5 pH units.</p> |

| # | Terms and Conditions |
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| | [20.6.2.3109 NMAC] |
| 14. | <p>The Permittee shall inspect the leak detection systems on a weekly basis for the presence of liquid. The Permittee shall keep a log of the inspection findings and repairs made. The inspection log, including a statement whether or not liquids were observed in the leak detection systems, shall be submitted to NMED in the semi-annual monitoring reports.</p> <p>[20.6.2.3107 NMAC]</p> |
| 15. | <p>The Permittee shall conduct monitoring of the soil vapor collection systems in accordance with the plan submitted to NMED in Condition 4b.</p> <p>[20.6.2.3107 NMAC]</p> |
| 16. | <p>Once prior to the expiration date of this Discharge Permit, NMED shall have the option to perform downhole inspections of all monitoring wells identified in this Discharge Permit. NMED shall establish the inspection date and provide at least 60 days notice to the Permittee by certified mail. The Permittee shall have any existing dedicated pumps removed at least 48 hours prior to NMED inspection to allow adequate settling time of sediment agitated from pump removal.</p> <p>Should the Facility not have existing dedicated pumps, but decide to install pumps in any of the monitoring wells, NMED shall be notified at least 90 days prior to pump installation so that a downhole well inspection(s) can be scheduled prior to pump placement.</p> <p>[20.6.2.3107 NMAC]</p> |
| 17. | <p>The Permittee shall maintain fences around the impoundments to control access by the general public and animals. The fences shall consist of a minimum of six-foot chain link or field fencing and locking gates. Fences shall be maintained throughout the term of this Discharge Permit.</p> <p>[Subsections B and C of 20.6.2.3109 NMAC]</p> |
| 18. | <p>The Permittee shall maintain signs indicating that the concentrate wastewater at the Facility is not potable. Signs shall be posted at the Facility entrance and other areas where there is potential for public contact with reject concentrate from the reverse osmosis water treatment system. All signs shall be printed in English and Spanish, and remain visible and legible for the term of this Discharge Permit.</p> <p>[Subsections B and C of 20.6.2.3109 NMAC]</p> |

B. MONITORING AND REPORTING

| # | Terms and Conditions |
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| 19. | <p>The Permittee shall conduct the following monitoring, reporting, and other requirements listed below in accordance with the monitoring requirements of this Discharge Permit.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]</p> |
| 20. | <p>METHODOLOGY – Unless otherwise approved in writing by NMED, the Permittee shall conduct sampling and analysis in accordance with the most recent edition of the following documents:</p> <ul style="list-style-type: none"> a) American Public Health Association, Standard Methods for the Examination of Water and Wastewater (18th, 19th or current) b) U.S. Environmental Protection Agency, Methods for Chemical Analysis of Water and Waste c) U.S. Geological Survey, Techniques for Water Resources Investigations of the U.S. Geological Survey d) American Society for Testing and Materials, Annual Book of ASTM Standards, Part 31. Water e) U.S. Geological Survey, et al., National Handbook of Recommended Methods for Water Data Acquisition f) Federal Register, latest methods published for monitoring pursuant to Resource Conservation and Recovery Act regulations g) Methods of Soil Analysis: Part 1. Physical and Mineralogical Methods; Part 2. Microbiological and Biochemical Properties; Part 3. Chemical Methods, American Society of Agronomy <p>[Subsection B of 20.6.2.3107 NMAC]</p> |
| 21. | <p>The Permittee shall perform quarterly ground water sampling in the three (3) monitoring wells established in Condition 8 of this permit and analyze the samples for volatile and semi-volatile organic compounds, major cations and anions and as directed by NMED for specific constituents identified in baseline sampling conducted pursuant to Condition 8 of this permit;</p> <ul style="list-style-type: none"> • One monitoring well (MW-1) located hydrologically upgradient of the entire Facility; • One monitoring well (MW-2) located 20 to 50 feet hydrologically downgradient of evaporative impoundments; and • One monitoring well (MW-3) located 20 to 50 feet hydrologically downgradient of evaporative impoundments. |

| # | Terms and Conditions |
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| | <p>Ground water sample collection, preservation, transport and analysis shall be performed according to the following procedure, or the Permittee may submit an alternative Sampling and Analysis Plan for approval by NMED:</p> <ul style="list-style-type: none"> a) Measure the depth-to-ground water from the top of well casing to the nearest hundredth of a foot; b) Purge three well volumes of water from the well prior to sample collection; c) Obtain samples from the well for analysis; d) Properly prepare, preserve and transport samples; and e) Analyze samples in accordance with the methods authorized in this Discharge Permit. <p>Depth-to-water measurements, analytical results, including laboratory QA/QC summary report, and a Facility layout map showing the location and number of each well shall be submitted to NMED in the semi-annual monitoring reports.</p> <p>[20.6.2.3107 NMAC]</p> |
| 22. | <p>The Permittee shall collect a composite wastewater sample from each impoundment on a semi-annual basis from a representative location within each evaporative impoundment. The composite sample shall consist of a minimum of six equal aliquots collected around the entire perimeter of the evaporative impoundment and thoroughly mixed. The composite sample shall be analyzed on an annual basis for all Section 20.6.2.3103 NMAC constituents. Samples shall be properly prepared; preserved, transported and analyzed in accordance with the methods authorized in this Discharge Permit. Analytical results shall be submitted to NMED in the semi-annual monitoring reports.</p> <p>[20.6.2.3103 NMAC and Subsection A of 20.6.2.3107 NMAC]</p> |
| 23. | <p>The Permittee shall submit semi-annual monitoring reports to NMED for the most recently completed semi-annual period by the 1st of February and August each year.</p> <p>All monitoring required by this permit shall be submitted as follows:</p> <ul style="list-style-type: none"> • January 1st through June 30th (Q1 and Q2) – due by August 1st; and • July 1st through December 31st (Q3 and Q4) – due by February 1st <p>The reports shall include discharge volumes to the three impoundments, impoundment area inspection logs, leak detection inspection logs, analytical results from representative concentrate wastewater samples from the three double synthetically-lined impoundments, and analytical results from groundwater monitoring.</p> |

| # | Terms and Conditions |
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| | [Subsection A of 20.6.2.3107 NMAC] |
| 24. | <p>The Permittee shall develop a ground water elevation contour map on a quarterly basis using the monitoring well survey data and depth-to-water measurements as required by this Discharge Permit. The ground water elevation contour map shall depict the ground water flow direction based on the ground water elevation contours. The data and ground water elevation contour maps shall be submitted to NMED in the semi-annual monitoring reports.</p> <p>[20.6.2.3107 NMAC]</p> |
| 25. | <p>The Permittee shall measure the monthly volume of concentrate wastewater discharged from the water treatment system to the three double synthetically-lined impoundments. The monthly meter readings and calculated monthly and average daily discharge volumes from the the water treatment system shall be submitted to NMED in the semi-annual monitoring reports. The flow meters shall be kept operational at all times.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsections C and H of 20.6.2.3109 NMAC]</p> |
| 26. | <p>All flow meters shall be capable of having their accuracy ascertained under actual working (field) conditions. A field calibration method shall be developed for each flow meter and that method shall be used to check the accuracy of each respective meter. Field calibrations shall be performed upon repair or replacement of a flow measurement device and, at a minimum, within 90 days of the effective date of this Discharge Permit (by August 18), and then on an annual basis.</p> <p>Flow meters shall be calibrated to within plus or minus 10 percent of actual flow, as measured under field conditions. Field calibrations shall be performed by an individual knowledgeable in flow measurement and in the installation/operation of the particular device in use. A flow meter calibration report shall be prepared for each flow measurement device at the frequency calibration is required. The flow meter calibration report shall include the following information:</p> <ul style="list-style-type: none"> a) Location and meter identification; b) Method of flow meter field calibration employed; c) Measured accuracy of each flow meter prior to adjustment indicating the positive or negative offset as a percentage of actual flow as determined by an in-field calibration check; d) Measured accuracy of each flow meter following adjustment, if necessary, indicating the positive or negative offset as a percentage of actual flow of the meter; and e) Any flow meter repairs made during the previous year or during field calibration. <p>The Permittee shall maintain records of flow meter calibration(s) at a location accessible for review by NMED during Facility inspections.</p> |

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| | [Subsection A of 20.6.2.3107 NMAC, Subsections C and H of 20.6.2.3109 NMAC] |
| 27. | <p>The Permittee shall visually inspect flow meters on a monthly basis for evidence of malfunction. If a visual inspection indicates a flow meter is not functioning as required by this Discharge Permit, the Permittee shall repair or replace the meter within 30 days of discovery. For <i>repaired</i> meters, the Permittee shall submit a report to NMED with the next monitoring report following the repair that includes a description of the malfunction; a statement verifying the repair; and a flow meter field calibration report completed in accordance with the requirements of this Discharge Permit. For <i>replacement</i> meters, the Permittee shall submit a report to NMED with the next monitoring report following the replacement that includes a design schematic for the device and a flow meter field calibration report completed in accordance with the requirements of this Discharge Permit.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]</p> |

C. CONTINGENCY PLAN

| # | Terms and Conditions |
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| 28. | <p>In the event that ground water monitoring indicates that a ground water quality standard identified in Section 20.6.2.3103 NMAC is exceeded; the total nitrogen concentration in ground water is greater than 10 mg/L; or a toxic pollutant (defined in Subsection WW of 20.6.2.7 NMAC) is present in a ground water sample and in any subsequent ground water sample collected from a monitoring well required by this Discharge Permit, the Permittee shall enact the following contingency plan:</p> <p>Within 60 days of the subsequent sample analysis date, the Permittee shall propose measures to ensure that the exceedance of the standard or the presence of a toxic pollutant will be mitigated by submitting a corrective action plan to NMED for approval. The corrective action plan shall include a description of the proposed actions to control the source and an associated completion schedule. The plan shall be enacted as approved by NMED.</p> <p>Once invoked (whether during the term of this Discharge Permit; or after the term of this Discharge Permit and prior to the completion of the Discharge Permit closure plan requirements), this condition shall apply until the Permittee has fulfilled the requirements of this condition and ground water monitoring confirms for a minimum of two years of consecutive ground water sampling events that the standards of Section 20.6.2.3103 NMAC are not exceeded and toxic pollutants are not present in ground water.</p> |

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| | <p>The Permittee may be required to abate water pollution pursuant to Sections 20.6.2.4000 through 20.6.2.4115 NMAC, should the corrective action plan not result in compliance with the standards and requirements set forth in Section 20.6.2.4103 NMAC within 180 days of confirmed ground water contamination.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsection E of 20.6.2.3109 NMAC]</p> |
| 29. | <p>In the event that ground water flow information obtained pursuant to this Discharge Permit indicates that a monitoring well(s) is not located hydrologically downgradient of the discharge location(s) it is intended to monitor, the Permittee shall install a replacement well(s) within 120 days following notification from NMED. The Permittee shall survey the replacement monitoring well(s) within 150 days following notification from NMED.</p> <p>Replacement well location(s) shall be approved by NMED prior to installation and completed in accordance with the attachment titled Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions, Revision 1.1, March 2011. The Permittee shall submit construction and lithologic logs, survey data and a ground water elevation contour map within 30 days following well completion.</p> <p>[Subsection A of 20.6.2.3107 NMAC]</p> |
| 30. | <p>In the event that information available to NMED indicates that a well(s) is not constructed in a manner consistent with the attachment titled Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions, Revision 1.1, March 2011; contains insufficient water to effectively monitor ground water quality; or is not completed in a manner that is protective of ground water quality, the Permittee shall install a replacement well(s) within 120 days following notification from NMED.</p> <p>The Permittee shall survey the replacement monitoring well(s) within 150 days following notification from NMED.</p> <p>Replacement well location(s) shall be approved by NMED prior to installation and completed in accordance with the attachment titled Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions, Revision 1.1, March 2011. The Permittee shall submit construction and lithologic logs, survey data and a ground water elevation contour map to NMED within 60 days following well completion.</p> <p>Upon completion of the replacement monitoring well(s), the monitoring well(s) requiring replacement shall be properly plugged and abandoned. Well plugging, abandonment and documentation of the abandonment procedures shall be completed in accordance with the attachment titled Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions, Revision 1.1, March 2011, and all applicable local, state, and</p> |

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| | <p>federal regulations. The well abandonment documentation shall be submitted to NMED within 60 days of completion of well plugging activities.</p> <p>[Subsection A of 20.6.2.3107 NMAC]</p> |
| 31. | <p>In the event that inspection findings reveal significant damage likely to affect the structural integrity of the impoundment(s) or its ability to contain contaminants, the permittee shall propose the repair or replacement of the impoundment by submitting a corrective action plan to NMED for approval. The plan shall be submitted to NMED within 30 days after discovery by the Permittee or following notification from NMED that significant damage is evident. The corrective action plan shall include a schedule for completion of corrective actions and the Permittee shall initiate implementation of the plan following approval by NMED.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]</p> |
| 32. | <p>In the event that a minimum of two feet of freeboard cannot be preserved in the impoundment(s), the Permittee shall take actions authorized by this Discharge Permit and all applicable local, state, and federal regulations to restore the required freeboard.</p> <p>In the event that two feet of freeboard cannot be restored within a period of 72 hours following discovery, the Permittee shall propose actions to be immediately implemented to restore two feet of freeboard by submitting a short-term corrective action plan to NMED for approval. Examples of short-term corrective actions include: removing excess wastewater from the impoundment through pumping and hauling; or reducing the volume of wastewater discharged to the impoundment. The plan shall include a schedule for completion of corrective actions and shall be submitted within 15 days following the date when the two feet of freeboard limit was initially discovered. The Permittee shall initiate implementation of the plan following approval by NMED.</p> <p>In the event that the short-term corrective actions fail to restore two feet of freeboard, the Permittee shall propose permanent corrective actions in a long-term corrective action plan submitted to NMED within 90 days following failure of the short-term corrective action plan. Examples include: the installation of an additional storage impoundment, or a significant/permanent reduction in the volume of wastewater discharged to the impoundment. The plan shall include a schedule for completion of corrective actions and implementation of the plan shall be initiated following approval by NMED.</p> <p>[Subsection A of 20.6.2.3107 NMAC]</p> |
| 33. | <p>In the event that a release (commonly known as a "spill") occurs that is not authorized under this Discharge Permit, the Permittee shall take measures to mitigate damage from the unauthorized discharge and initiate the notifications and corrective actions required in Section 20.6.2.1203 NMAC and summarized below.</p> |

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| | <p>Within 24 hours following discovery of the unauthorized discharge, the Permittee shall verbally notify NMED and provide the following information:</p> <ul style="list-style-type: none"> a) The name, address, and telephone number of the person or persons in charge of the facility, as well as of the owner and/or operator of the Facility; b) The name and address of the Facility; c) The date, time, location, and duration of the unauthorized discharge; d) The source and cause of unauthorized discharge; e) A description of the unauthorized discharge, including its estimated chemical composition; f) The estimated volume of the unauthorized discharge; and g) Any actions taken to mitigate immediate damage from the unauthorized discharge. <p>Within one week following discovery of the unauthorized discharge, the Permittee shall submit written notification to NMED with the information listed above and any pertinent updates.</p> <p>Within 15 days following discovery of the unauthorized discharge, the Permittee shall submit a corrective action report/plan to NMED describing any corrective actions taken and/or to be taken relative to the unauthorized discharge that includes the following:</p> <ul style="list-style-type: none"> a) A description of proposed actions to mitigate damage from the unauthorized discharge. b) A description of proposed actions to prevent future unauthorized discharges of this nature. c) A schedule for completion of proposed actions. <p>In the event that the unauthorized discharge causes or may with reasonable probability cause water pollution in excess of the standards and requirements of Section 20.6.2.4103 NMAC, and the water pollution will not be abated within 180 days after notice is required to be given pursuant to Paragraph (1) of Subsection A of 20.6.2.1203 NMAC, the Permittee may be required to abate water pollution pursuant to Sections 20.6.2.4000 through 20.6.2.4115 NMAC.</p> <p>Nothing in this condition shall be construed as relieving the Permittee of the obligation to comply with all requirements of Section 20.6.2.1203 NMAC.</p> <p>[20.6.2.1203 NMAC]</p> |
| 34. | <p>In the event that NMED or the Permittee identifies any failures of the discharge plan or this Discharge Permit not specifically noted herein, NMED may require the Permittee to submit a corrective action plan and a schedule for completion of corrective actions to</p> |

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| | <p>address the failure(s). Additionally, NMED may require a Discharge Permit modification to achieve compliance with 20.6.2 NMAC.</p> <p>[Subsection A of 20.6.2.3107 NMAC, Subsection E of 20.6.2.3109 NMAC]</p> |

D. CLOSURE PLAN

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| 35. | <p>In the event the Facility, or a component of the Facility, is proposed to be permanently closed, upon ceasing discharging, the Permittee shall perform the following closure measures:</p> <p>Within 180 days of ceasing discharge to the impoundment(s), the Permittee shall complete the following closure measures:</p> <ol style="list-style-type: none"> a) Remove or plug all lines leading to the impoundment(s) so that a discharge can no longer occur. b) Drain and/or evaporate all liquids from the impoundment(s) and dispose of all solids in accordance with all local, state, and federal regulations. c) Remove all liners, vapor collection systems and leak detection components. d) Collect one composite soil sample from beneath each pond liner and submit for laboratory analysis of metals, sulfate, uranium/radium, and as directed by NMED. e) Fill the impoundment(s) with suitable fill. f) Re-grade the impoundment(s) site to blend with surface topography, promote positive drainage and prevent ponding. g) Continue ground water monitoring as required by this Discharge Permit for two years after closure to confirm the absence of ground water contamination. If monitoring results show that the ground water standards in Section 20.6.2.3103 NMAC or additional analytes as required by NMED are being violated, the permittee shall implement the contingency plan required by this Discharge Permit. h) Following notification from NMED that post-closure monitoring may cease, the Permittee shall plug and abandon the monitoring well(s) in accordance with the attachment titled <i>Ground Water Quality Bureau Monitoring Well Construction and Abandonment Conditions</i>, Revision 1.1, March 2011. <p>When all closure and post-closure requirements have been met, the Permittee may submit a written request for termination of the Discharge Permit to NMED.</p> <p>[Subsection A of 20.6.2.3107 NMAC, 40 CFR Part 503]</p> |

E. GENERAL TERMS AND CONDITIONS

| # | Terms and Conditions |
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| 36. | <p>RECORD KEEPING - The Permittee shall maintain a written record of the following information:</p> <ul style="list-style-type: none"> a) Information and data used to complete the application for this Discharge Permit. b) Records of any releases (commonly known as "spills") not authorized under this Discharge Permit and reports submitted pursuant to 20.6.2.1203 NMAC. c) Records of the operation, maintenance, and repair of all facilities/equipment used to treat, store or dispose of wastewater. d) Facility record drawings (plans and specifications) showing the actual construction of the Facility and bear the seal and signature of a licensed New Mexico professional engineer. e) Copies of monitoring reports completed and/or submitted to NMED pursuant to this Discharge Permit. f) The volume of wastewater or other wastes discharged pursuant to this Discharge Permit. g) Ground water quality and wastewater quality data collected pursuant to this Discharge Permit. h) Copies of construction records (well log) for all ground water monitoring wells required to be sampled pursuant to this Discharge Permit. i) Records of the maintenance, repair, replacement or calibration of any monitoring equipment or flow measurement devices required by this Discharge Permit. j) Data and information related to field measurements, sampling, and analysis conducted pursuant to this Discharge Permit. The following information shall be recorded and shall be made available to NMED upon request: <ul style="list-style-type: none"> i. The dates, location and times of sampling or field measurements; ii. The name and job title of the individuals who performed each sample collection or field measurement; iii. The sample analysis date of each sample; iv. The name and address of the laboratory, and the name of the signatory authority for the laboratory analysis; v. The analytical technique or method used to analyze each sample or collect each field measurement; vi. The results of each analysis or field measurement, including raw data; vii. The results of any split, spiked, duplicate or repeat sample; and viii. A copy of the laboratory analysis chain-of-custody as well as a description of the quality assurance and quality control procedures used. <p>The written record shall be maintained by the Permittee at a location accessible during a Facility inspection by NMED for a period of at least five years from the date of</p> |

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| | <p>application, report, collection or measurement and shall be made available to the department upon request.</p> <p>[Subsections A and D of 20.6.2.3107 NMAC]</p> |
| 37. | <p>INSPECTION and ENTRY – The Permittee shall allow inspection by NMED of the Facility and its operations which are subject to this Discharge Permit and the WQCC regulations. NMED may upon presentation of proper credentials, enter at reasonable times upon or through any premises in which a water contaminant source is located or in which are located any records required to be maintained by regulations of the federal government or the WQCC.</p> <p>The Permittee shall allow NMED to have access to and reproduce for their use any copy of the records, and to perform assessments, sampling or monitoring during an inspection for the purpose of evaluating compliance with this Discharge Permit and the WQCC regulations.</p> <p>Nothing in this Discharge Permit shall be construed as limiting in any way the inspection and entry authority of NMED under the WQA, the WQCC Regulations, or any other local, state or federal regulations.</p> <p>[Subsection D of 20.6.2.3107 NMAC, NMSA 1978, §§ 74-6-9.B and 74-6-9.E]</p> |
| 38. | <p>DUTY to PROVIDE INFORMATION - The Permittee shall, upon NMED's request, allow for NMED's inspection/duplication of records required by this Discharge Permit and/or furnish to NMED copies of such records.</p> <p>[Subsection D of 20.6.2.3107 NMAC]</p> |
| 39. | <p>MODIFICATIONS and/or AMENDMENTS – In the event the Permittee proposes a change to the Facility or the Facility's discharge that would result in a change in the volume discharged; the location of the discharge; or in the amount or character of water contaminants received, treated or discharged by the Facility, the Permittee shall notify NMED prior to implementing such changes. The Permittee shall obtain approval (which may require modification of this Discharge Permit) by NMED prior to implementing such changes.</p> <p>[Subsection C of 20.6.2.3107 NMAC, Subsections E and G of 20.6.2.3109 NMAC]</p> |
| 40. | <p>PLANS and SPECIFICATIONS – In the event the Permittee is proposing to construct a wastewater system or change a process unit of an existing system such that the quantity or quality of the discharge will change substantially from that authorized by this Discharge Permit, the Permittee shall submit construction plans and specifications to NMED for the proposed system or process unit prior to the commencement of construction.</p> |

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| | <p>In the event the Permittee implements changes to the wastewater system authorized by this Discharge Permit which result in only a minor effect on the character of the discharge, the Permittee shall report such changes (including the submission of record drawings, where applicable) as of January 1 and June 30 of each year to NMED.</p> <p>[Subsections A and C of 20.6.2.1202 NMAC, NMSA 1978, §§ 61-23-1 through 61-23-32]</p> |
| 41. | <p>CIVIL PENALTIES - Any violation of the requirements and conditions of this Discharge Permit, including any failure to allow NMED staff to enter and inspect records or facilities, or any refusal or failure to provide NMED with records or information, may subject the Permittee to a civil enforcement action. Pursuant to WQA 74-6-10(A) and (B), such action may include a compliance order requiring compliance immediately or in a specified time, assessing a civil penalty, modifying or terminating the Discharge Permit, or any combination of the foregoing; or an action in district court seeking injunctive relief, civil penalties, or both. Pursuant to WQA 74-6-10(C) and 74-6-10.1, civil penalties of up to \$15,000 per day of noncompliance may be assessed for each violation of the WQA 74-6-5, the WQCC Regulations, or this Discharge Permit, and civil penalties of up to \$10,000 per day of noncompliance may be assessed for each violation of any other provision of the WQA, or any regulation, standard, or order adopted pursuant to such other provision. In any action to enforce this Discharge Permit, the Permittee waives any objection to the admissibility as evidence of any data generated pursuant to this Discharge Permit.</p> <p>[20.6.2.1220 NMAC, NMSA 1978, §§ 74-6-10 and 74-6-10.1]</p> |
| 42. | <p>CRIMINAL PENALTIES – No person shall: make any false material statement, representation, certification or omission of material fact in an application, record, report, plan or other document filed, submitted or required to be maintained under the WQA; falsify, tamper with or render inaccurate any monitoring device, method or record required to be maintained under the WQA; or fail to monitor, sample or report as required by a permit issued pursuant to a state or federal law or regulation.</p> <p>Any person who knowingly violates or knowingly causes or allows another person to violate the requirements of this condition is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who is convicted of a second or subsequent violation of the requirements of this condition is guilty of a third degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who knowingly violates the requirements of this condition or knowingly causes another person to violate the</p> |

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| | <p>requirements of this condition and thereby causes a substantial adverse environmental impact is guilty of a third degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who knowingly violates the requirements of this condition and knows at the time of the violation that he is creating a substantial danger of death or serious bodily injury to any other person is guilty of a second degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15.</p> <p>[20.6.2.1220 NMAC, NMSA 1978, §§ 74-6-10.2.A through 74-6-10.2.F]</p> |
| 43. | <p>COMPLIANCE with OTHER LAWS - Nothing in this Discharge Permit shall be construed in any way as relieving the Permittee of the obligation to comply with all applicable federal, state, and local laws, regulations, permits or orders.</p> <p>[NMSA 1978, § 74-6-5.L]</p> |
| 44. | <p>RIGHT to APPEAL - The Permittee may file a petition for review before the WQCC on this Discharge Permit. Such petition shall be in writing to the WQCC within thirty days of the receipt of postal notice of this Discharge Permit and shall include a statement of the issues to be raised and the relief sought. Unless a timely petition for review is made, the decision of NMED shall be final and not subject to judicial review.</p> <p>[20.6.2.3112 NMAC, NMSA 1978, § 74-6-5.O]</p> |
| 45. | <p>TRANSFER of DISCHARGE PERMIT - Prior to the transfer of any ownership, control, or possession of this Facility or any portion thereof, the Permittee shall: notify the proposed transferee in writing of the existence of this Discharge Permit; include a copy of this Discharge Permit with the notice; and deliver or send by certified mail to NMED a copy of the notification and proof that such notification has been received by the proposed transferee.</p> <p>Until both ownership and possession of the Facility have been transferred to the transferee, the Permittee shall continue to be responsible for any discharge from the Facility.</p> <p>[20.6.2.3111 NMAC]</p> |
| 46. | <p>PERMIT FEES - Payment of permit fees is due at the time of Discharge Permit approval. Permit fees shall be paid in a single payment or shall be paid in equal installments on a yearly basis over the term of the Discharge Permit. Single payments shall be remitted to NMED no later than 30 days after the Discharge Permit effective date. Initial installment payments shall be remitted to NMED no later than 30 days after the Discharge Permit effective date; subsequent installment payments shall be remitted to NMED no later than the anniversary of the Discharge Permit effective date.</p> |

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| | <p>Permit fees are associated with issuance of this Discharge Permit. Nothing in this Discharge Permit shall be construed as relieving the Permittee of the obligation to pay all permit fees assessed by NMED. A Permittee that ceases discharging or does not commence discharging from the Facility during the term of the Discharge Permit shall pay all permit fees assessed by NMED. An approved Discharge Permit shall be suspended or terminated if the Facility fails to remit an installment payment by its due date.</p> <p>[Subsection F of 20.6.2.3114 NMAC, NMSA 1978, § 74-6-5.K]</p> |

V. PERMIT TERM & SIGNATURE

EFFECTIVE DATE: May 18, 2015

TERM ENDS: Seven years from the effective date (i.e. Date) or five years from the date the discharge commences, whichever occurs first.

[Subsection H of 20.6.2.3109 NMAC, NMSA 1978, § 74-6-5.I]



PHYLLIS BUSTAMANTE
Acting Chief, Ground Water Quality Bureau
New Mexico Environment Department

Ground Water Discharge Permit Conditions for Synthetically Lined Lagoons – Liner Material and Site Preparation

These Conditions represent minimum liner material and site preparation requirements for wastewater treatment, storage and evaporation lagoons. These requirements do not apply to lagoons storing hazardous wastes or high strength waste. The Ground Water Quality Bureau may impose additional requirements (e.g., double-lined lagoons with leak detection) for facilities discharging hazardous or high strength waste to lagoons through the development of specific Discharge Permit conditions for such facilities.

Liner Material Requirements:

1. The liner shall be chemically compatible with any material that will contact the liner.
2. The liner material shall be resistant to deterioration by sunlight if any portion of the liner will be exposed.
3. Synthetic liner material shall be of sufficient thickness to have adequate tensile strength and tear and puncture resistance. Under no circumstances shall a synthetic liner material less than 40 mils in thickness be accepted. Any liner material shall be certified by a licensed New Mexico professional engineer and approved by the New Mexico Environment Department (NMED) prior to its installation.

Lagoon Design and Site Preparation Requirements:

1. The system shall be certified by a licensed New Mexico professional engineer and approved by NMED prior to installation.
2. Inside slopes shall be a maximum of 3 (horizontal): 1 (vertical), and a minimum of 4 (horizontal); 1 (vertical).
3. Lagoon volume shall be designed to allow for a minimum of 24 inches of freeboard.
4. The liner shall be installed with sufficient liner material to accommodate shrinkage due to temperature changes. Folds in the liner are not acceptable.
5. To a depth of at least six inches below the liner, the sub-grade shall be free of sharp rocks, vegetation and stubble. In addition, liners shall be placed on a sub-grade of sand or fine soil. The surface in contact with the liner shall be smooth to allow for good contact between liner and sub-grade. The surface shall be dry during liner installation.
6. Sub-grade shall be compacted to a minimum of 90% of standard proctor density.
7. The minimum dike width shall be eight feet to allow vehicle traffic for maintenance.
8. The base of the pond shall be as uniform as possible and shall not vary more than three inches from the average finished elevation.
9. Synthetic liners shall be anchored in an anchor trench in the top of the berm. The trench shall be a minimum of 12 inches wide, 12 inches deep and shall be set back at least 24 inches from the inside edge of the berm.
10. If the lagoon is installed over areas of decomposing organic materials or shallow ground water, a liner vent system shall be installed.
11. Any opening in the liner through which a pipe or other fixture protrudes shall be properly sealed. Liner penetrations shall be detailed in the construction plans and record drawings.
12. A synthetic liner shall not be installed in temperatures below freezing.
13. The liner shall be installed or supervised by an individual that has the necessary training and experience as required by the liner manufacturer.
14. All manufacturer's installation and field seaming guidelines shall be followed.
15. All synthetic liner seams shall be field tested by the installer and verification of the adequacy of the seams shall be submitted to NMED along with the record drawings.
16. Concrete slabs installed on top of the synthetic liner for operational purposes shall be completed in accordance with manufacturer and installer recommendations to ensure liner integrity.

Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions

These conditions identify construction and abandonment requirements for installation of water table monitoring wells under ground water Discharge Permits issued by the NMED's Ground Water Quality Bureau (GWQB). Proposed locations of monitoring wells required under Discharge Permits and requests to use alternate installation and/or construction methods for water table monitoring wells shall be submitted to the GWQB for approval prior to drilling and construction.

General Drilling Specifications:

1. All well drilling activities shall be performed by an individual with a current and valid well driller license issued by the State of New Mexico in accordance with 19.27.4 NMAC.
2. Drilling methods that allow for accurate determinations of water table locations shall be employed. All drill bits, drill rods, and down-hole tools shall be thoroughly cleaned immediately prior to the start of drilling. The borehole diameter shall be drilled a minimum of 4 inches larger than the casing diameter to allow for the emplacement of sand and sealant.
3. After completion, the well shall be allowed to stabilize for a minimum of 12 hours before development is initiated.
4. The well shall be developed so that formation water flows freely through the screen and is not turbid, and all sediment and drilling disturbances are removed from the well.

Well Specifications (see attached monitoring well schematic):

5. Schedule 40 (or heavier) polyvinyl chloride (PVC) pipe, stainless steel pipe, carbon steel pipe, or pipe of an alternate appropriate material that has been approved for use by NMED shall be used as casing. The casing shall have an inside diameter not less than 2 inches. The casing material selected for use shall be compatible with the anticipated chemistry of the ground water and appropriate for the contaminants of interest at the facility. The casing material and thickness selected for use shall have sufficient collapse strength to withstand the pressure exerted by grouts used as annular seals and thermal properties sufficient to withstand the heat generated by the hydration of cement-based grouts. Casing sections shall be joined using welded, threaded, or mechanically locking joints; the method selected shall provide sufficient joint strength for the specific well installation. The casing shall extend from the top of the screen to at least one foot above ground surface. The top of the casing shall be fitted with a removable cap, and the exposed casing shall be protected by a locking steel well shroud. The shroud shall be large enough in diameter to allow easy access for removal of the cap. Alternatively, monitoring wells may be completed below grade. In this case, the casing shall extend from the top of the screen to 6 to 12 inches below the ground surface; the monitoring wells shall be sealed with locking, expandable well plugs; a flush-mount, watertight well vault that is rated to withstand traffic loads shall be emplaced around the wellhead; and the cover shall be secured with at least one bolt. The vault cover shall indicate that the wellhead of a monitoring well is contained within the vault.
6. A 20-foot section (maximum) of continuous-slot, machine slotted, or other manufactured PVC or stainless steel well screen or well screen of an alternate appropriate material that has been approved for use by NMED shall be installed across the water table. Screens created by cutting slots into solid casing with saws or other tools shall not be used. The screen material selected for use shall be compatible with the anticipated chemistry of the ground water and appropriate for the contaminants of interest at the facility. Screen sections shall be joined using welded, threaded, or mechanically locking joints; the method selected shall provide sufficient joint strength for the specific well installation and shall not introduce constituents that may reasonably be considered contaminants of interest at the facility. A cap shall be attached to the bottom of the well screen; sumps (i.e., casing attached to the bottom of a well screen) shall not be installed. The bottom of the screen shall be installed no more than 15 feet below the water table; the top of the well screen shall be positioned not

- less than 5 feet above the water table. The well screen slots shall be appropriately sized for the formation materials and shall be selected to retain 90 percent of the filter pack.
7. Casing and well screen shall be centered in the borehole by placing centralizers near the top and bottom of the well screen.
 8. A filter pack shall be installed around the screen by filling the annular space from the bottom of the screen to 2 feet above the top of the screen with clean silica sand. The filter pack shall be properly sized to prevent fine particles in the formation from entering the well. For wells deeper than 30 feet, the sand shall be emplaced by a tremmie pipe. The well shall be surged or bailed to settle the filter pack and additional sand added, if necessary, before the bentonite seal is emplaced.
 9. A bentonite seal shall be constructed immediately above the filter pack by emplacing bentonite chips or pellets (3/8-inch in size or smaller) in a manner that prevents bridging of the chips/pellets in the annular space. The bentonite seal shall be 3 feet in thickness and hydrated with clean water. Adequate time shall be allowed for expansion of the bentonite seal before installation of the annular space seal.
 10. The annular space above the bentonite seal shall be sealed with cement grout or a bentonite-based sealing material acceptable to the State Engineer pursuant to 19.27.4 NMAC. A tremmie pipe shall be used when placing sealing materials at depths greater than 20 feet below the ground surface. Annular space seals shall extend from the top of the bentonite seal to the ground surface (for wells completed above grade) or to a level 3 to 6 inches below the top of casing (for wells completed below grade).
 11. A concrete pad (2-foot minimum radius, 4-inch minimum thickness) shall be poured around the shroud or well vault and wellhead. The concrete and surrounding soil shall be sloped to direct rainfall and runoff away from the wellhead.

Abandonment:

12. Approval for abandonment of monitoring wells used for ground water monitoring in accordance with Discharge Permit requirements shall be obtained from NMED prior to abandonment.
13. Well abandonment shall be accomplished by removing the well casing and placing neat cement grout, bentonite-based plugging material, or other sealing material approved by the State Engineer for wells that encounter water pursuant to 19.27.4 NMAC from the bottom of the borehole to the ground surface using a tremmie pipe. If the casing cannot be removed, neat cement grout, bentonite-based plugging material, or other sealing material approved by the State Engineer shall be placed in the well using a tremmie pipe from the bottom of the well to the ground surface.
14. After abandonment, written notification describing the well abandonment shall be submitted to the NMED. Written notification of well abandonment shall consist of a copy of the well plugging record submitted to the State Engineer in accordance with 19.27.4 NMAC, or alternate documentation containing the information to be provided in a well plugging record required by the State Engineer as specified in 19.27.4 NMAC.

Deviation from Monitoring Well Construction and Abandonment Requirements: Requests to construct water table monitoring wells or other types of monitoring wells for ground water monitoring under ground water Discharge Permits in a manner that deviates from these requirements shall be submitted in writing to the GWQB. Each request shall state the rationale for the proposed deviation from these requirements and provide detailed evidence supporting the request. The GWQB will approve or deny requests to deviate from these requirements in writing.

MONITORING WELL SCHEMATIC

(Not to Scale)

