

**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. _____

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]eceive[s] 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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