



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
1445 ROSS AVENUE  
DALLAS, TEXAS 75202-2733



Mr. Lindsay A. Lovejoy, Jr.  
Attorney-at-law  
3600 Cerrillos Road, Unit 1001A  
Santa Fe, NM 87507

DEC 18 2015

Re: Outfall 051, NPDES Permit NM0028355, Radioactive Liquid Waste Treatment Facility, Los Alamos, NM

Dear Mr. Lovejoy,

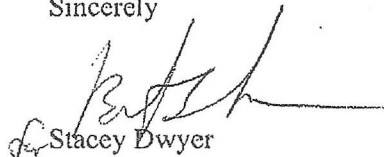
This letter is in response to your letter of November 13, 2015, to Mr. Ron Curry, Regional Administrator for the Environmental Protection Agency Region 6 (EPA), requesting that EPA terminate National Pollutant Discharge Elimination System (NPDES) permit coverage for the above-referenced outfall. As noted in your letter, NPDES permit No. NM0028355, issued by EPA to Los Alamos National Laboratory (LANL), includes coverage for discharges from LANL's Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. There has been no discharge from Outfall 051 since 2010 and the RLWTF has been recently redesigned to eliminate all discharges. As a result, you argue that Outfall 051 does not require NPDES permit coverage, and that such coverage is improper because it would make RSWTF eligible for a Waste Water Treatment Unit (WWTU) regulatory exemption under the Resource Conservation and Recovery Act (RCRA). In addition, you argue that pursuant to federal court rulings in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5<sup>th</sup> Cir. 2011) ("*National Pork Producers*") and *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) ("*Waterkeeper*"), EPA has no jurisdiction to issue an NPDES permit to a facility that has no discharge. Consequently, you request that EPA terminate LANL's permit coverage for Outfall 051.

In response to your letter, we have re-examined our files regarding NPDES Permit No. NM0028355, including LANL's application for permit coverage. LANL specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. In its application, LANL indicated that under certain circumstances, e.g. maintenance, malfunction, and/or capacity shortage, a discharge could occur and permit authorization would be needed. Because a discharge from Outfall 051 not covered by an NPDES permit would subject LANL to liability for discharge without a permit under Section 301(a) of the Clean Water Act (CWA), EPA does not believe it is appropriate to terminate the facility's permit coverage for this Outfall without the permittee's consent. EPA generally defers to a permit requester'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. 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.

Further, we do not read *National Pork Producers Council* or *Waterkeeper* to prohibit EPA from issuing NPDES permit coverage to a facility seeking coverage to protect against liability in the event of a discharge. Each of those cases dealt with EPA's authority to **require** operators of Concentrated Animal Feeding Operations (CAFOs) to obtain NPDES permit coverage where there had not yet been a discharge – not EPA's authority to issue a permit to a facility **requesting** coverage for a possible future discharge.

For the above reasons, EPA declines to propose termination of LANL's NPDES permit coverage for Outfall 051 under NPDES Permit No. NM0028355. Should you have any question regarding this matter, please contact Mr. Brent Larsen, Chief of Permitting Section, at 214-665-7523.

Sincerely



Stacey Dwyer

Associate Director

NPDES Permits & TMDL Branch

cc: Shelly Lemon, New Mexico Environment Department