No. _____

In the
Supreme Court of the United States

CONCERNED CITIZENS FOR NUCLEAR SAFETY, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES DEPARTMENT OF ENERGY; TRIAD NATIONAL SECURITY, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD H. DOLAN
Of Counsel
SCHLAM STONE & DOLAN LLP
26 Broadway
New York, NY 10004
(212) 344-5400

LINDSAY A. LOVEJOY, JR.
Counsel of Record
LAW OFFICE OF
LINDSAY A. LOVEJOY, JR.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87505
(505) 983-1800
lindsay@lindsaylovejoy.com

Counsel for Petitioner

November 19, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Members of petitioner, Concerned Citizens for Nuclear Safety (CCNS), live in and have visited the Rio Grande and its riparian areas near, and downgradient from, the Los Alamos National Laboratory (LANL) Radioactive Liquid Waste Treatment Facility (RLWTF). They previously used and enjoyed this area for recreation and farming. The RLWTF is a hazardous waste facility, but it has no Resource Conservation and Recovery Act, 42 U.S.C. 6921 *et seq*. (RCRA), hazardous waste permit. In violation of the Clean Water Act, 33 U.S.C. 1251 *et seq*. (CWA), the Environmental Protection Agency (EPA) issued a CWA permit for the RLWTF, and that permit confers exemption from RCRA regulation. The CCNS members are now deterred from visiting the area, and their experience is diminished, by the risks presented by the unlicensed RLWTF. CCNS members would participate in RCRA permitting proceedings, were they conducted.

Questions presented are:

1. Does petitioner CCNS have Article III substantive standing to challenge the CWA permit?

2. Does petitioner CCNS have Article III procedural standing to challenge the CWA permit, where EPA's action violated CWA and blocked the entire RCRA permitting process?

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Counsel for CCNS, petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is an unreported order. The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. 48) is unreported. The decision of the EPA Environmental Appeals Board (EAB) is reported at 17 E.A.D. 586 (EAB 2018), Pet. App. 12. The decision of EPA Region 6 is unreported and appears at Pet. App. 42.

JURISDICTION

The court of appeals had jurisdiction under 33 U.S.C. 1369(b). The judgment of the court of appeals was entered on April 23, 2020. (Pet. App. 1). A timely petition for rehearing was denied on June 23, 2020. (Pet. App. 48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of RCRA and CWA appear in the Appendix to the Petition. (Pet. App. 50-56).

STATEMENT

A. Background.

This case concerns the standing of CCNS[1] to assert that respondent EPA violated the CWA in issuing a CWA permit for the RLWTF to respondents U.S. Department of Energy (DOE) and Triad National Security, LLC (Triad), and that DOE and Triad have violated RCRA in operating the RLWTF. Standing is a threshold jurisdictional requirement under Article III of the Constitution. Under the Tenth Circuit's erroneous decision, persons who live and use lands downgradient from the RLWTF, and whose use and enjoyment of those lands are diminished by the RLWTF's RCRA noncompliance, lack standing to question its unlicensed operation.

CCNS is a nonprofit organization based in Santa Fe, New Mexico. LANL is owned by DOE and operated by DOE and Triad. LANL's functions include design and development of nuclear weapons. That work uses radioactive and hazardous materials, the release of which is dangerous to human health and the environment.

The dispute here involves whether the RLWTF must comply with RCRA. The RLWTF is a hazardous waste management facility, recently reconstructed, which normally would need to have a RCRA permit. 42 U.S.C. 6925. The Court has explained:

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[1] There is no issue concerning CCNS's ability to represent the interests of affected members under *Hunt v. Washington State Apple Ad. Comm'n*, 432 U.S. 333, 343 (1977).

> RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934.

Chicago v. EDF, 511 U.S. 328, 331 (1994). A RCRA permit functions to *prevent accidental* releases of hazardous waste, *e.g.*, by imposing a detailed site-specific permit, developed in a public process. 40 C.F.R. § 270.10(f). RCRA exemptions are read strictly. *See: Chicago*, 511 U.S. at 338-39. Federal facilities are specifically subject to RCRA. 42 U.S.C. 6961. The President may exempt a federal facility if it is determined to be in the "paramount interest" of the United States. 42 U.S.C. 6961(a). No such determination has been made as to the RLWTF.

But the RLWTF has no RCRA permit. LANL has instead obtained from EPA a CWA permit under 33 U.S.C. 1342, authorizing the RLWTF to discharge pollutants via the RLWTF's "Outfall 051," and asserts that, by statute and regulation, the CWA permit exempts the RLWTF and its discharge from RCRA as a "waste water treatment unit" and a CWA discharge.[2] A CWA permit regulates the *intentional* discharge of pollutants from an outfall, but it does not regulate the construction or operation of the RLWTF, as RCRA would, to prevent accidental leaks. The protections and

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[2] See 42 U.S.C. 6903(27); 40 C.F.R. § 260.10 (*Tank system, Wastewater treatment unit*), and § 264.1(g)(6).

safety standards imposed by a RCRA permit are not available under a CWA permit.[3]

Moreover, under its "zero-liquid-discharge" program, LANL installed evaporation equipment, and the RLWTF's discharges ended in November 2010. For many years, there has been no discharge from the RLWTF,[4] and LANL has stated no present intention to discharge from the RLWTF. A CWA permit cannot lawfully be issued for a non-discharging facility. *National Pork Producers Council v. U.S. EPA,* 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. U.S. EPA,* 399 F.3d 486 (2d Cir. 2005).

However, LANL told EPA in 2012 that, if its two evaporation systems were somehow both disabled, the RLWTF might discharge pollutants. EPA then reissued the CWA permit, continuing the RCRA exemption. Since there are no planned discharges, the CWA permit functions only to exempt the RLWTF from RCRA.

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[3] Under RCRA regulation, the RLWTF would be subject, *inter alia*, to detailed protective requirements, calling for, *e.g.*, a public permitting process for any new construction (40 C.F.R. § 270.10(f)), examination of the site's compliance with seismic risk standards (40 C.F.R. §§ 264.18, 270.14(b)(11)), assurances of the integrity of tank systems, of which there are many at the RLWTF (40 C.F.R. §§ 264.190-.199), and completeness of closure planning (40 C.F.R. §§ 264.110-.120). Seismic compliance in particular has presented problems for nearby LANL facilities, such as the Chemistry and Metallurgy Research Replacement Building.

[4] After the Record closed, LANL made one discharge, purportedly to establish operational readiness.

As a result, CCNS members must live in the shadow of the RLWTF, a hazardous waste facility that has not been required to meet the environmental and safety conditions that RCRA permitting would impose. The unlicensed RLWTF presents risks to downgradient residents and visitors. CCNS members' use and enjoyment of the downgradient land is diminished by the risks of the RLWTF's unlicensed operation. Further, the CCNS members wish to participate in RCRA permitting procedures, but the unlawful CWA permit blocks all RCRA proceedings.

B. Proceedings Below.

CCNS asked EPA to terminate the CWA permit for the RLWTF on the basis of a "change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge" (33 U.S.C. 1342(b)(1)(C)(iii)) to allow RCRA to apply. Request to Terminate at 16, June 17, 2016.[5] EPA Region 6 denied the Request to Terminate. Pet. App. 42, AR0000178-180. EPA stated that "EPA generally defers to an owner/operator's determination that a discharge could occur and that permit coverage is needed." Pet. App. 45. EPA emphasized that

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[5] Under 40 C.F.R. § 124.5(a), a NPDES permit may be terminated "for the reasons specified in § 122.62 or § 122.64." Pursuant to 40 C.F.R. § 124.5(d), CCNS's Request sought an agency proceeding to determine whether the Permit should be terminated as to Outfall 051 for reasons set forth in 40 C.F.R. § 122.64(a) and 33 U.S.C. 1342(b)(1)(C)(iii), *viz.*, "A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge . . ." *Id.* A list of attachments to the Request, Exhibits A through UU, is at AR0000257-259. The Exhibits are at AR0000260-1089.

consideration of the RCRA exemption that results from a CWA permit was

> *outside the scope of our decision*

and

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

Pet. App. 46, AR0000180 (*emphasis supplied*). CCNS appealed to the EPA EAB. AR0001664-1665. The EAB denied relief, deeming CCNS's Request untimely.[6]

CCNS appealed to the Tenth Circuit under 33 U.S.C. 1369(b). At that point, the Government raised an issue about standing, and CCNS presented

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[6] In reviewing the Tenth Circuit's ruling on standing, there is no occasion for the Court to consider the EAB's decision, which the court of appeals did not address. In any case, the EAB read 40 C.F.R. § 122.64(a)(4) to require that a "cause" for termination must have occurred, and the request for termination must be submitted, during the current permit term (which began in 2014). AR0001665. These conditions are not contained in the rule or the statute. The EAB's construction of 40 C.F.R. § 122.64(a)(4) could not be sustained, because the rule restates language from 33 U.S.C. 1342(b)(1)(C)(iii), which contains none of the conditions imposed by the EAB. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 n. 5 (2019) (no deference where agency interprets rule that parrots the statutory text.). The EAB stated that it did not deem CCNS's request untimely; rather, it held that CCNS did not prove a "change in condition." AR0001667 n.15. But it is undisputed that evaporators were installed, and discharges stopped. The EAB held that CCNS did not present the issue at the right time—*i.e.*, that the Request was untimely.

affidavits of two members, Joni Arends and J. Gilbert Sanchez, answering it. (CCNS Reply Brief, Jan. 25, 2019, Attachments). They stated, first, that pollution from various LANL facilities has degraded the Rio Grande and its shores, diminishing their experience of the area:

> 8. . . . Since it has become public knowledge that LANL has released hazardous chemicals to the Rio Grande and to the ground water flowing towards the Rio Grande, my appreciation for the river and its shores, and my use of that land and water have sharply declined. I no longer regard the Rio Grande and its riparian area as a desirable location for recreation and enjoyment. This is difficult for me, because I grew up on the shores of this river and regard it as my home.
>
> 9. Riverside property such as mine is now considered undesirable on account of its proximity to the Rio Grande, which is generally known to be contaminated by releases from LANL and considered unsuitable for swimming, drinking, fishing, and recreation.

Sanchez Aff. ¶¶ 8, 9.

Next, Mr. Sanchez described specifically his concerns about the RLWTF:

> 15. While one cannot be certain that the LANL RLWTF is currently releasing contamination that goes to the river, it is known that that RLWTF manages waste that is hazardous under the New Mexico Hazardous Waste Act ("HWA") and that the RLWTF is not operated in

> accordance with regulations under the HWA, which are intended to effectuate the Resource Conservation and Recovery Act ("RCRA") in New Mexico and to protect human health and the environment. In this situation, I am concerned and fearful that the management of LANL will allow the release of hazardous constituents from the RLWTF, as they have allowed the release of contaminants in the past, to the detriment of nearby residents and users of the Rio Grande such as me.
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> * * *
>
> 17. If a public permitting process under the HWA were conducted for the RLWTF, it would result in the application of the HWA safety regulations to all of the operations of the RLWTF, including regulations that cover the operation of tanks, tank systems, pipes and pipe connections; monitoring and inspections; and characterization of hazardous wastes. If a HWA permit were adopted for the RLWTF, and were administered by the New Mexico Environment Department, conditions on San Ildefonso Pueblo near the RLWTF and along the Rio Grande down-gradient from LANL would improve, and I would be more willing to use the riparian areas as I have used them in the past.

Ms. Arends made similar statements. Arends Aff. ¶¶ 16, 17, attached to CCNS Reply Brief, Jan. 25, 2019. Both witnesses stated that they would participate in

RCRA permitting proceedings[7] and would consider returning to the area if the RLWTF had a RCRA permit. Sanchez Aff. ¶ 18; Arends Aff. ¶ 17.

The Tenth Circuit dismissed the case based on an asserted lack of standing. The court's unreported Order (April 23, 2020, Pet. App. 1, *rehearing denied*, June 23, 2020, Pet. App. 48) quoted language from *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (*quoting from Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)), that states:

> Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.' *Benham v. Ozark Materials River Rock, LLC,* 885 F.3d 1267, 1273 (10th Cir. 2018).

Order at 5, Pet. App. 5. The court acknowledged that the CCNS members claimed injury in their "diminished use and enjoyment of the Rio Grande River." (Pet. App. 6).

But, critically, the court then misstated the injury, asserting incorrectly that CCNS contended that the RCRA exemption "*enable[d] the Lab to discharge waste* into the Rio Grande River" (Pet. App. 8) (*emphasis supplied*). The court continued, stating that CCNS

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[7] RCRA is applied in New Mexico by the state Environment Department under the New Mexico Hazardous Waste Act, § 74-4-1 *et seq*. NMSA 1978.

"has not offered a single example of a Lab activity that *has contributed to increased contamination*" of the river and would be prohibited under RCRA (Pet. App. 8) (*emphasis supplied*). The court stated that CCNS "presents no evidence that any Lab activity *would be prohibited* under either RCRA or the HWA." (Pet. App. 9) (*emphasis supplied*). Such statements misstated CCNS's claims about the injury sustained by its members and misconceived CCNS's burden where there is a failure to apply RCRA.

CCNS also asserted that it had procedural standing (CCNS Reply Brief at 6-9, Jan. 25, 2019), since EPA's unlawful issuance of the CWA permit blocked the entire RCRA permitting process. The Tenth Circuit disagreed, stating that CCNS's "injury flows directly from the EPA's decision to issue the NPDES permit; it does not result from any failure by the EPA to follow the proper decision-making procedure in issuing this permit" (Pet. App. 10)—even though CCNS had contended that a CWA permit may not issue for a non-discharging facility, EPA had ignored the impact of a CWA permit on RCRA enforcement, and the CWA permit plainly blocked the RCRA process.

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit Wrongfully Rejected Petitioner's Standing.

Standing is an "irreducible minimum" requirement for access to a federal court. *Valley Forge Christian Academy v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Standing is "perhaps the most important" condition of justiciability,

Allen v. Wright, 468 U.S. 737, 750 (1984). A showing of standing "is an essential and unchanging" predicate to Article III jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The three elements of standing are injury-in-fact, traceability, and redressability. *Lujan*, 504 U.S. at 560; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976). *Laidlaw* explains the injury requirement in an environmental case:

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.

528 U.S. at 181. Under *Laidlaw*, injury is established where the plaintiff is deterred from use of a certain area, or his or her enjoyment of such area is diminished, by concern about unlawful contamination:

> Focusing properly on injury to the plaintiff, the District Court found that FOE had demonstrated sufficient injury to establish standing. . . . For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he

> was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges.

Id. 181-82. The Court required no more to uphold standing. 528 U.S. at 183. Here, the CCNS members similarly state that their concerns about the operation of the unlicensed RLWTF—violative of numerous RCRA requirements—diminished their use and enjoyment of the Rio Grande and its riparian areas.

Standing is established when a plaintiff is subjected to the *risks* of an environmental violation: *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 n.3 (2010), finds injury-in-fact when deregulation "pose[d] a *significant risk* of contamination to respondents' crops" (*emphasis supplied*). *Duke Power Co. v. Carolina Envtl. Study Grp.,* 438 U.S. 59, 73-74 (1978), bases standing upon the risks of radiation from nuclear facilities. A resident near a proposed waste disposal site has standing to challenge its regulation based on the risk:

> Although radionuclides escaping from the Yucca repository may not reach Goedhart's community for thousands of years, his injury is "actual or imminent," for he lives adjacent to the land where the Government plans to bury 70,000 metric tons of radioactive waste—a sufficient harm in and of itself. *See La. Envtl. Action Network v. United States EPA*, 335 U.S. App. D.C. 247, 172 F.3d 65, 67-68 (D.C. Cir. 1999) (holding that an environmental group established constitutional standing where its members lived near a landfill into which an EPA

> regulation allegedly would permit certain hazardous wastes to be deposited).

Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1266 (D.C. Cir. 2004). The Tenth Circuit's erroneous position on standing conflicts with holdings in other circuits.[8]

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[8] *First Circuit: Animal Welfare Institute v. Martin*, 623 F.3d 19, 25-26 (1st Cir. 2010) (Plaintiffs' interest in observing Canada lynx in the wild supports suit to compel application for incidental take permit under Endangered Species Act); *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 285 (1st Cir. 2006) ("Mallinckrodt has created a substantial probability of increased harm to the environment. That increased risk, in turn, rendered reasonable the actions of the plaintiffs' members in abstaining from their desired enjoyment of the Penobscot.").

Second Circuit: New York Public Interest Research Group v. Whitman, 321 F.3d 316, 325-26 (2d Cir. 2003) (PIRG members' "allegations about the health effects of air pollution and of uncertainty as to whether the EPA's [permitting] actions expose them to excess air pollution are sufficient to establish injury-in-fact, given that each lives near a facility subject to Title V permitting requirements.").

Third Circuit: Interfaith Community Organization v. Honeywell Int'l, Inc., 399 F.3d 248, 257 (3d Cir. 2005) ("The individual Plaintiffs, in establishing injury-in-fact, have shown sufficiently direct and present concerns, neither general nor unreasonable, that constitute a legally cognizable injury . . .").

Fourth Circuit: Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387, 395 (4th Cir. 2011) ("[T]he plaintiffs were not required to present evidence of actual harm to the environment so long as a direct nexus existed between the plaintiffs and the 'area of environmental impairment.'").

Fifth Circuit: *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996) ("All of the affiants

expressed fear that the discharge of produced water will impair their enjoyment of these activities because these activities are dependent upon good water quality.").

Sixth Circuit: Sierra Club v. U.S. EPA, 793 F.3d 656, 663-65 (6th Cir. 2015) (EPA's erroneous designation of Clean Air Act attainment area creates risk constituting injury); *American Canoe Association v. City of Louisa Water & Sewer Commission,* 389 F.3d 536, 541 (6th Cir. 2004) ("Kash's averments are virtually indistinguishable from those that the Court found sufficient to establish an injury in fact in *Laidlaw*.").

Seventh Circuit: Sierra Club v. U.S. EPA, 774 F.3d 383, 392 (7th Cir. 2014) ("[T]he increased probability of injury to Sierra Club members creates standing here . . ."); *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 658 (7th Cir. 2011) ("even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability."); *Sierra Club v. Franklin County Power, LLC,* 546 F.3d 918, 925 (7th Cir. 2008) ("This 'likely exposure' to pollutants is 'certainly something more than an "identifiable trifle" even if the ambient level of air quality does not exceed [certain national limits].'").

Eighth Circuit: Kuehl v. Sellner, 887 F.3d 845, 850-51 (8th Cir. 2018) (Plaintiffs have standing where injured by mistreatment of endangered species in captivity).

Ninth Circuit: NRDC v. Southwest Marine, Inc., 236 F.3d 985, 994 (9th Cir. 2000) ("Here, members of the plaintiff organizations, and individual plaintiff Kenneth Moser, testified that they have derived recreational and aesthetic benefit from their use of the Bay (including areas of the Bay next to Defendant's shipyard), but that their use has been curtailed because of their concerns about pollution, contaminated fish, and the like.").

Tenth Circuit in 2018: Benham v. Ozark Materials River Rock, LLC, 885 F.3d 1267, 1273 (10th Cir. 2018) ("Here, Mr. Benham has shown injury in fact by maintaining that he regularly swims and fishes in Saline Creek and that his ability to do so has been

The Tenth Circuit ignored the holdings of this Court and other circuits, demanding proof that the Rio Grande had been polluted by unlawful discharges from the RLWTF. (Pet. App. 8, 9). That ruling erroneously shifts the focus away from injury to the CCNS members and onto environmental damage, and it "raise[s] the standing hurdle higher than the necessary showing for success on the merits," contrary to *Laidlaw's* holding that standing does not require proof of ultimate liability. *Laidlaw,* 528 U.S. at 181. The court below invoked the traceability requirement (Pet. App. 8), but

> the 'fairly traceable' requirement 'does not mean that plaintiffs must show to a scientific certainty that defendant's [actions], and defendant's [actions] alone, caused the precise harm suffered by plaintiffs . . . . The fairly traceable requirement . . . is not equivalent to a requirement of tort causation.' [*Pub. Interest*

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diminished by Ozark's discharge of material into the creek and its surrounding wetlands.").

Eleventh Circuit: Sierra Club v. Johnson, 436 F.3d 1269, 1279 (11th Cir. 2006) ("Judge Doremus' affidavit brings him within that [*Laidlaw*] description, assuming that reduced aesthetic and recreational values stemming from concern about pollution qualifies. It does.").

D.C. Circuit: La. Envtl. Action Network v. EPA, 955 F.3d 1088, 1095 (D.C. Cir. 2020) (Standing found where "All of the members allege that they experience various symptoms that they attribute to emissions from neighboring pulp mills, and each alleges having curtailed favored activities accordingly.").

> *Research Grp. v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990)].

Interfaith Community Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 257 (3d Cir. 2005).

Again:

> Thus, plaintiffs in this case . . . need not show violation of the Clean Water Act permitting requirements, nor actual damage to the Farmington River from lead pollution, to establish standing.

Simsbury-Avon Pres. Soc'y v. Metacon Gun Club, Inc., 2006 U.S. Dist. LEXIS 60376, at *9 (D. Conn. Aug. 23, 2006).

The Tenth Circuit ignored these established rules. The decision below would require plaintiffs to establish that a facility, *operating illegally without any permit*, and *causing risks* to its neighbors, has, in addition, *actually leaked* contaminants, and those contaminants have *reached public land or water—just to establish standing*. No justification was offered for this expansive enlargement of standing requirements.[9]

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[9] This case is not moot. The Tenth Circuit stated that this case is moot because the CWA permit has expired. Pet. App. 2 n. 1. The permit has not expired. DOE and Triad have filed a renewal application, extending the permit until the end of the renewal process. 40 C.F.R. § 122.6. Moreover, the proposed renewal permit also authorizes discharges through Outfall 051, thus presenting the same legal issue as the present permit. The issue is capable of repetition yet evading review—an established

B. Procedural Standing.

The Tenth Circuit also misstated, and wrongfully rejected, procedural standing. It is established that

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan, 504 U.S. at 572 n. 7. The Tenth Circuit's ruling rejecting procedural standing is flatly inconsistent with *Lujan*. The court below stated that CCNS's

> injury flows directly from the EPA's decision to issue the NPDES permit; it does not result from any failure by the EPA to follow the proper decision-making procedure in issuing the permit.

(Pet. App. 10). But CCNS asserted numerous violations underlying EPA's issuance of a CWA permit, and, as in *Lujan*, CCNS was not required to "establish

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exception to mootness. *Trustees for Alaska v. EPA,* 749 F.2d 549, 555-56 (9th Cir. 1984); *Montgomery Environmental Coalition v. Costle,* 646 F.2d 568, 578-79 (D.C. Cir. 1980).

with any certainty that . . . the license [will] be withheld or altered . . .".

Thus, CCNS alleged that EPA erroneously issued a CWA permit for a non-discharging facility. The remote possibility of a discharge in the unlikely event that both evaporation systems fail is plainly not the statutorily required "discharge of [a] pollutant." 33 U.S.C. 1342(a). EPA disregarded decisions holding that a CWA permit may not issue for a non-discharging facility. *National Pork Producers Council v. U.S. EPA,* 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. U.S. EPA,* 399 F.3d 486 (2d Cir. 2005).

And EPA, despite being charged with application of both CWA and RCRA (33 U.S.C. 1251(d); 42 U.S.C. 6921), explicitly refused to consider the impact of a CWA permit on RCRA enforcement, forgetting that it has no authority to "pick and choose" the federal law that it will apply and, instead, must give effect to both. *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1624 (2018); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Under EPA's decision, neither statute is effective: The CWA permit regulates nothing, because there is no discharge. But it blocks the RCRA process, thwarting RCRA's preventive purposes—a direct and "connected" result of the CWA permit. *Center for Biological Diversity v. EPA*, 861 F.3d 174, 184 (D.C. Cir. 2017); *see also National Parks Conservation Association v. Manson,* 414 F.3d 1, 4 (D.C. Cir. 2005). EPA, by issuing the unlawful CWA permit, denied CCNS members the "procedural right to protect [their] concrete interests," *Lujan*, 504 U.S. at 572 n. 7—the

definition of procedural standing. *See Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007).

The Tenth Circuit objected that CCNS had not shown what contamination a RCRA permit would have prohibited (Pet. App. 8, 9). But it is not CCNS's burden to establish what a RCRA permit would prohibit, if one were issued. *NRDC v. U.S. EPA,* 542 F.3d 1235, 1245-46 (9th Cir. 2008). All that is required is "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA,* 549 U.S. at 518. Thus:

> A plaintiff who alleges a deprivation of a procedural protection to which he was entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.

Sugar Cane Growers Cooperative v. Veneman, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

The court below departed from the many decisions holding that procedural omissions confer standing on persons exposed to consequent environmental risks.[10]

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[10] Examples are as follows:

First Circuit: *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 29 (1st Cir. 2007) (Plaintiffs "clearly established a demonstrable risk to their interests in Split Rock as a result of BIA's alleged failure to adequately assess the dangers associated with the lease as required by federal law.").

Second Circuit: N.Y. Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 326 (2d Cir. 2003) (Members of environmental organization establish standing based on uncertainty as to whether they are exposed to harmful pollutants under Clean Air Act permits allegedly arising from "administrative failure.").

Third Circuit (district court): Robert Wood Johnson Univ. Hosp., Inc. v. Thompson, 2004 U.S. Dist. LEXIS 8498 (D.N.J. 2004) (Plaintiff hospital corporation has standing to challenge HHS approval of demonstration project without consideration of statutory prohibitions.).

Fourth Circuit (district court): Murray Energy Corp. v. McCarthy, 2016 U.S. Dist. LEXIS 143404 (N.D.W.Va. 2016), *rev'd on other grounds*, 861 F.3d 529 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018) (Energy companies asserted EPA's failure to perform its duties under 42 U.S.C.S. § 7621, which required EPA to evaluate potential loss or shifts of employment from the administration or enforcement of the Clean Air Act).

Fifth Circuit: Texas v. United States, 809 F.3d 134, 150-51 (5th Cir. 2015), *aff'd*, 136 S.Ct. 2271 (2016). ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

Sixth Circuit: Wright v. O'Day, 706 F.3d 769, 773 (6th Cir. 2013) (Plaintiff has procedural standing where he seeks "to enforce a procedural requirement that if disregarded would impair his concrete interests.").

Seventh Circuit: Heartwood, Inc. v. United States Forest Serv., 230 F.3d 947, 952 (7th Cir. 2000) ("[W]here the Service fails 'to permit [plaintiffs] to participate in the public review of the decision' to establish a categorical exclusion and forego performance of an EA, and this decision affects plaintiffs' ability to use and enjoy Service land, this is enough to show Article III standing.").

Eighth Circuit: Sierra Club v. U.S. Army Corps of Engineers, 645 F.3d 978, 987 (8th Cir. 2011) *("*The Hunting Club, whose property lies adjacent to the plant site and some of whose members reside on it, challenged among other things the Corps' failure to prepare an EIS. See Hunting Club Complaint at ¶¶ 200-01. The Hunting Club alleged an adequate injury in fact under the Lujan standard.").

Ninth Circuit: Friends of the Santa Clara River v. United States Army Corps of Eng'rs, 887 F.3d 906, 918 (9th Cir. 2018) ("In order to establish an injury in fact in the context of a claimed procedural error in an agency's decisionmaking process, a plaintiff must show that "(1) the [agency] violated certain procedural rules; (2) these rules protect [a plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." *Haugrud, 848 F.3d at 1232 (alterations in original) (quoting Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n, 457 F.3d 941, 949 (9th Cir. 2006)).").*

Tenth Circuit in 2017: Wildearth Guardians v. U.S. BLM, 870 F.3d 1222, 1231 (10th Cir. 2017) ("Here, the Plaintiffs pointed out that the increased risk of environmental harm is directly tied to BLM's inadequate alternatives comparison. '[T]he normal standards for redressability are [also] relaxed' in the NEPA context. *Id*. at 452 (quoting Defenders of Wildlife, 504 U.S. at 572 n.7). "[A] plaintiff need not establish that the ultimate agency decision would change upon [NEPA] compliance" but "rather . . . that its injury would be redressed by . . . requiring the [agency] to comply with [NEPA]'s procedures." *Id*.).

Eleventh Circuit: Riverkeeper v. U.S. EPA, 938 F.3d 1157, 1163 (11th Cir. 2019) ("Those statements are enough to establish injury in fact. . . . [S]ee also *Sierra Club v. Johnson (Johnson I*), 436 F.3d 1269, 1279 (11th Cir. 2006) (concluding that the plaintiff's "injury in fact exists as a result of concerns about pollution, concerns that arise because the failure to use one of the mandated public participation procedures leaves him uncertain about whether pollution is being emitted in illegal quantities.").

A failure to regulate (as, here, EPA has blocked RCRA) is a procedural violation, properly asserted by a person injured by that failure. *NRDC v. U.S. EPA,* 542 F.3d at 1245 (Standing exists to challenge EPA's failure to regulate stormwater discharges under CWA; "[T]he members' statements that their use of specific waterways has been diminished due to their concerns about discharge from a particular source (here, the construction sites) are sufficient to establish injury in fact."). Again:

> Even though the NRDC members cannot establish the immediacy of an injury from construction activities operating under the General Permit, the NRDC nonetheless has standing to challenge the EPA's failure to mandate public availability of the NOI and the SWPPP, and its failure to provide the opportunity for a public hearing related to the NOI and the SWPPP.

Texas Independent Producers & Royalty Owners Association v. EPA, 410 F.3d 964, 977 (7th Cir. 2005). Yet again:

> The declarations are also adequate to show that the EPA's decision not to commence withdrawal

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D.C. Circuit: American Rivers & Alabama Rivers Alliance v. FERC, 895 F.3d 32, 42 (D.C. Cir. 2018) ("Requiring the Commission to prepare an Environmental Impact Statement might cause the Commission to gather more information that could improve the conditions in the license and the conditions of the Coosa River. Under these circumstances, the Conservation Groups have established standing to challenge the Coosa River Project license.").

> proceedings is a cause of the alleged injuries. "The proper focus on causation is not harm to the environment, but harm to the plaintiffs." Jacobs, 463 F.3d at 1172.

Riverkeeper v. United States EPA, 938 F.3d 1157, 1163 (11th Cir. 2019).

C. This Case Merits the Court's Review.

The ruling below limits standing in environmental cases by imposing, without explanation, conditions that this Court has rejected. Unless it is reversed, it will inevitably cause dismissal of challenges to environmental violations at DOE facilities within the Tenth Circuit and beyond. The ruling would apply to RCRA violations at New Mexico DOE facilities, *e.g.,* Sandia National Laboratories, the Waste Isolation Pilot Plant, and LANL—all major federal facilities that present numerous environmental challenges. Eight additional federal facilities hold RCRA permits in New Mexico.[11] The Tenth Circuit's new tests for standing will also apply to disputes under other environmental statutes, such as the CWA and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq*. Moreover, the decision would bear upon standing in litigation against private entities; New Mexico has 12 outstanding permits for private RCRA facilities.[12] The decision would be

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[11] New Mexico Environment Department web site, Oct. 13, 2020, https://www.env.nm.gov/hazardous-waste/permitted-facilities.

[12] New Mexico Environment Department web site, Oct. 13, 2020, https://www.env.nm.gov/hazardous-waste/permitted-facilities.

immediately applicable to cases in other states in the Tenth Circuit and will certainly be argued in states outside the circuit.

If the decision below remains uncorrected, remediation of environmental violations would be artificially restricted to cases distinguished only by the appearance of visible contaminants, despite the occurrence of injury-in-fact to plaintiffs. The Tenth Circuit offers no justification for the major changes it makes in the law of standing. The Court should grant the writ so that its changes in standing law can be examined and rejected.

The questions raised by this petition were timely presented below and have been preserved for this Court's review. The issue of petitioner's standing was considered and decided by the Tenth Circuit's ruling. There is no procedural or other bar to this Court's consideration and disposition on the merits of the questions presented in this petition.

CONCLUSION

The CCNS members here demonstrated diminished use and enjoyment of the Rio Grande and its riparian areas, caused by their concerns over the undisputed operation of the RLWTF in violation of RCRA—satisfying this Court's precedents on environmental standing. The Tenth Circuit's additional demands depart utterly from the holdings of this Court and the courts of appeals. The decision below, shaded from public view in an unpublished order, negates the pronouncements of Congress. It defies the principles set forth in *Laidlaw, Lujan,* and

legions of appellate decisions. Its demands exceed constitutional requirements and prevent the enforcement of federal rights. The decision is not amenable to legislative remedy. To restore the consistency of the constitutional law of standing, this Court should grant certiorari to review and reverse the decision below.

Respectfully submitted,

LINDSAY A. LOVEJOY, JR.
Counsel of Record
LAW OFFICE OF LINDSAY A. LOVEJOY, JR.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87505
(505) 983-1800
lindsay@lindsaylovejoy.com

RICHARD H. DOLAN
Of Counsel
SCHLAM STONE & DOLAN LLP
26 Broadway
New York, NY 10004
(212) 344-5400

Counsel for Petitioner