No. 20-717

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

BRIEF IN OPPOSITION

SUSAN L. MCMICHAEL
OFFICE OF LABORATORY COUNSEL
LOS ALAMOS NATIONAL LABORATORY
P.O. Box 1662 (MS 187)
Los Alamos, NM 87545-0001
smcmichael@lanl.gov

JAMES T. BANKS
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5802
james.banks@hoganlovells.com

Counsel for Respondent Triad National Security, LLC

QUESTION PRESENTED

Whether the Court should grant certiorari to review the Tenth Circuit's application of established principles in concluding that petitioner lacked standing because it failed to offer a single example of conduct by the U.S. Environmental Protection Agency that could cause it concrete injury, failed to present any evidence showing that the relief it seeks would redress such conduct, and failed to demonstrate procedural harm caused by a faulty agency decision-making process.

RULE 29.6 DISCLOSURE STATEMENT

Triad National Security, LLC is a nonprofit, public service-focused organization incorporated under the laws of the State of Delaware. Triad is comprised of three member organizations: Battelle Memorial Institute, The Texas A&M University System, and The Regents of the University of California. Triad does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 20-717

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

BRIEF IN OPPOSITION

INTRODUCTION

This case concerns a Clean Water Act discharge permit issued in 2014 by the U.S. Environmental Protection Agency ("EPA") authorizing the Los Alamos National Laboratory ("LANL," or the "Laboratory") to discharge effluent from its treatment facility. That permit has expired and will be replaced in the coming weeks by a new permit.

Because the petitioner, Concerned Citizens for Nuclear Safety ("Concerned Citizens"), had failed to challenge EPA's issuance of the 2014 permit, it was left with only a long-shot strategy of requesting that EPA

terminate the 2014 permit. The allowable grounds for permit termination are precise and narrow. Concerned Citizens argued that permit termination was required under one of the regulatory criteria governing that process—that there had been a change in any condition requiring the elimination of effluent discharges—relying on a previous equipment change that had been fully accounted for in the 2014 permit issuance process. Concerned Citizens also attempted to raise issues in its termination petition that could only have been asserted in a challenge to permit issuance. Both EPA and its Environmental Appeals Board rejected these hail-Mary arguments, and Concerned Citizens sought review in the Tenth Circuit.

The court of appeals dismissed the petition for review, applying the principles this Court established in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) to find that Concerned Citizens lacked standing. There was nothing remarkable about that decision; it merely applied *Lujan* to the facts in the record and reached a conclusion entirely consistent with the uniform approach followed by every court of appeals.

Moreover, with EPA's imminent issuance of the replacement permit, the court of appeals will be unable to order the sole element of injunctive relief sought by Concerned Citizens—EPA's termination of the 2014 permit. EPA will have effectively terminated that permit by issuing the replacement permit. And there are no issues in the case that might be capable of repetition yet evading review. The only issue *properly* before the court of appeals was whether EPA erred in applying the criteria in its permit-termination regulation, and a decision on that issue would change nothing since the 2014 permit that Concerned Citizens sought to terminate will no longer be extant.

The petition is a poor candidate for certiorari for three reasons. *First*, this Court's review could not result in any meaningful relief for Concerned Citizens on the merits of its efforts to terminate the 2014 permit because in short order that permit will no longer exist. *Second*, the first issue raised in the petition—whether the court of appeals incorrectly found that Concerned Citizens had not suffered injury in fact—was not addressed below. *Third*, the Tenth Circuit undertook a case-specific application of this Court's Article III precedents in a manner consistent with all other circuits, and this case therefore is not the type of case warranting review. *See* Sup. Ct. R. 10(a).

The petition should be denied.

STATEMENT

A. The Clean Water Act Pollutant Discharge Permit.

Congress provided in the Clean Water Act ("CWA") that EPA "may * * * issue a permit for the discharge of any pollutant * * * upon condition that such discharge will meet" various statutory and regulatory limitations. 33 U.S.C. § 1342(a). EPA is authorized to issue permits to those who apply for permission to discharge, but it may not require the submission of a permit application in the absence of an actual discharge. *Waterkeeper All., Inc.* v. *U.S. Env't Prot. Agency*, 399 F.3d 486, 495 (2d Cir. 2005); *Nat'l Pork Producers Council* v. *U.S. Env't Prot. Agency*, 635 F.3d 738, 744 (5th Cir. 2011).

CWA permits are issued for a term of five years, and thereafter must be renewed for an additional five-year term. 33 U.S.C. § 1342(b)(1)(B). An expired permit will continue in effect until EPA issues a new permit if the permittee has submitted a re-permitting

application at least 180 days prior to expiration. 40 C.F.R. §§ 122.21(d)(2); 122.6(a)(1).

The focal point of this case is a permit for the discharge of water pollutants issued in 2014 pursuant to the CWA by the Region 6 office of EPA. EPA issued the permit jointly to the U.S. Department of Energy ("DOE"), which owns the permitted facility, and Los Alamos National Security, LLC, which operated the facility pursuant to a contract with DOE. Triad National Security, LLC became the contract operator and co-permittee on November 1, 2018.

The facility—the Radioactive Liquid Waste Treatment Facility ("RLWTF")—is a vital component of the Laboratory, located in New Mexico. It treats hazardous and radioactive wastewater generated by multiple sources throughout LANL and is permitted to discharge treated effluent via Outfall 051, a structure that conveys the wastewater to Mortandad Canyon.

Treated effluent may be either discharged pursuant to the CWA permit through Outfall 051 or routed to evaporation equipment that will eliminate most of the liquid, leaving only a smaller quantity of sludge to be disposed of. After 2010 and until recently, LANL relied on the evaporation equipment rather than Outfall 051, retaining permission under the permit to utilize the outfall in the event the evaporation equipment was unavailable or a change in the Laboratory's mission required the handling of a greater volume of effluent than the evaporation equipment could reasonably process.

EPA's Region 6 issued the permit at issue in this case, after notice and public comment, on August 12, 2014 (Permit No. NM0028355). No one objected to the permit's authorization of discharges via Outfall 051,

nor did anyone appeal the Region 6 decision to issue it. Pet. App. 4-5. The permit expired in September 2019. *Id.* at 2 n.1.

B. Administrative Proceedings.

In March 2017, over two and one-half years following EPA's issuance of the 2014 permit, Concerned Citizens demanded that EPA terminate the permit's authorization to discharge via Outfall 051. EPA rejected Concerned Citizens' demand, and Concerned Citizens appealed to the EPA Environmental Appeals Board, which agreed with EPA's denial.

The Board's decision was based upon Concerned Citizens' failure to satisfy a narrow regulatory criterion for permit termination. As required by the CWA, 33 U.S.C. § 1342(b)(1)(C), EPA regulations, 40 C.F.R. § 124.5(a), provide that CWA permits may be terminated only for one of four reasons specified in 40 C.F.R. § 122.64. *See* Pet. App. 44. Concerned Citizens based its demand on one of those four reasons—a "change in any condition that requires either a temporary or permanent reduction or elimination of any discharge." *Id.* § 122.64(a)(4). But Concerned Citizens failed to satisfy this criterion.

Concerned Citizens contended that treatment technology changes at the RLWTF—i.e., utilization of the evaporation equipment—had eliminated the use of Outfall 051 as Triad had not used it since 2010, and that it was merely maintaining permit coverage to enable the outfall's use as a backup or to handle any increases in the amount of treated effluent produced by the RLWTF. The Board rejected Concerned Citizens' argument, concluding that the "change in any condition" required by 40 C.F.R. § 122.64(a)(4) plainly referred only to changes occurring after the permit was

issued, which excluded the pre-permit installation of the evaporation equipment upon which Concerned Citizens had relied. Pet. App. 14. The Board noted that, in any event, "Concerned Citizens may raise the issues it raises here, or any other issue it chooses, in any future permit renewal process * * * when the 2014 Permit expires in September 2019." *Id*. at 38.

Concerned Citizens also asserted that EPA lacked statutory authority to issue a permit where the discharger has no definite plan to use its outfall in the near future. The Board held that this was an attempt to challenge the permit's *issuance* and therefore time barred. *Id*. at 37-38.

Concerned Citizens appealed the Board's decision to the U.S. Court of Appeals for the Tenth Circuit. Meanwhile, as the Board had earlier noted, the 2014 permit expired on September 30, 2019; it continued in force pursuant to 40 C.F.R. §§ 122.21(d)(2) and 122.6(a)(1), DOE and Triad having timely applied for a replacement permit. EPA Region 6 is in the final phase of issuing the replacement permit, which is expected within a few weeks. As Concerned Citizens acknowledges, the replacement permit will continue to authorize effluent discharges via Outfall 051. Pet. 16 n.9. Concerned Citizens has fully participated in the replacement permitting process.

C. Court of Appeals Proceedings.

The court of appeals noted that the basis for Concerned Citizens' request that EPA terminate the 2014 permit—disuse of Outfall 051 since 2010—no longer held, as LANL had resumed use of the outfall in June 2019. Pet. App. 3 & n.4. The court set that fact aside, however, because it had no bearing on the principal

issue that would decide the appeal—Concerned Citizens' lack of Article III standing. *Id.*

The court of appeals applied the familiar three-pronged test for Article III standing set down by this Court. *See Lujan*, 504 U.S. at 560. Declining to decide whether Concerned Citizens had established injury in fact, the court rested its decision on the second and third prongs—lack of causation and redressability. Pet. App. 8-9.

Concerned Citizens advanced two independent arguments in support of standing. Concerned Citizens first alleged that its members suffered concrete harm due to EPA's refusal to terminate the 2014 permit's coverage of Outfall 051 because the continuing application of that permit to Outfall 051 exempted the RLWTF from requirements that might otherwise apply pursuant to the federal hazardous waste law, the Resource Conservation and Recovery Act ("RCRA"), and New Mexico's analogous hazardous waste control statute, the Hazardous Waste Act ("HWA"). *Id.* at 3. Concerned Citizens asserted, without any legal support, that requirements under RCRA and HWA would alleviate the harm it suffered due to pollution downstream of the RLWTF, and that termination of the 2014 permit's applicability to Outfall 051 would cause those requirements to apply. The court of appeals found that Concerned Citizens had failed to demonstrate that any harmful pollution actually would be prohibited under RCRA or HWA, and that Concerned Citizens had failed to demonstrate redressability because it presented "no evidence that any Lab activity would be prohibited under either the RCRA or the HWA." *Id.* at 8-9.

Second, Concerned Citizens contended that it had suffered injury in fact resulting from a procedural violation. The gist of its argument seemed to be that, by refusing to terminate the 2014 permit's coverage of Outfall 051, EPA had wrongfully denied Citizens the opportunity to participate in different permit proceedings under RCRA and HWA that would have ensued upon elimination of the exemption. The court of appeals disagreed. It held that a procedural violation can occur where "the injury results not from the agency's decision, but from the agency's uninformed decisionmaking." *Id.* at 9 (quoting *WildEarth Guardians* v. *U.S. Env't Prot. Agency*, 759 F.3d 1196, 1205 (10th Cir. 2014)). Because the court decided that Concerned Citizens' alleged injury "resulted from the EPA's decision, not from deficiencies in the EPA's decision-making process," it held that Concerned Citizens had not alleged a procedural injury sufficient to support standing. *Id.* at 10.

The court denied Concerned Citizens' petition for rehearing en banc, *id.* at 48-49, and Concerned Citizens' petition for certiorari followed.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS WILL BE UNABLE TO GRANT ANY EFFECTUAL RELIEF, AND THE CASE IS DESTINED TO BECOME MOOT.

EPA's imminent decision to issue the 2021 replacement permit will eliminate any need for permit termination, as requested by Concerned Citizens. Because issuance of the replacement permit will effectively terminate the 2014 permit, the court of appeals will no longer be able to grant the relief requested by Concerned Citizens.

In a footnote, Concerned Citizens argues that, despite EPA's issuance of the replacement permit, a live controversy will remain because the replacement permit will also authorize discharges from Outfall 051. Pet. 16 n.9. But the only controversy in the court of appeals was whether EPA and the Board erred in concluding that the criterion for permit termination—changed conditions—was limited to changes occurring after permit issuance; Concerned Citizens' argument that EPA lacked authority to permit Outfall 051 was time barred. And the only relief sought by Concerned Citizens was vacatur of the Board's decision and the commencement of termination proceedings. No actual claim for relief by Concerned Citizens can be granted in the court of appeals now that the 2014 permit has been effectively terminated by EPA.

Indeed, no "effectual relief whatever" can be granted now that Triad has resumed utilizing the outfall—eliminating the sole basis for Concerned Citizens' challenge to EPA's permitting authority—and the case is destined to become moot. *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S.Ct. 1652, 1660 (2019) (quoting *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013)).

II. PETITIONER SEEKS REVIEW OF A QUESTION NOT DECIDED BELOW.

Petitioner asks this Court to consider whether the court of appeals, in assessing the injury-in-fact component of standing, impermissibly raised the bar by demanding evidence that actual pollution from the RLWTF was contaminating the aquatic environment rather than recognizing that injury to the petitioner occurs when they are subjected to the mere risk of environmental contamination in an area they use and

enjoy. Pet. 11-12. But the court did not decide whether petitioner had demonstrated injury-in-fact. Instead, it said: "[w]e conclude that Concerned Citizens has failed to establish causation and redressability. Consequently, we need not decide whether Concerned Citizens has satisfied the injury-in-fact requirement." Pet. App. 6. As a result of its inaccurate characterization of the court's decision, Concerned Citizens not only asks this Court to venture beyond its role as a court of appellate review by addressing an issue set aside by the court below, but it conjures an illusory circuit split on the very issue the Tenth Circuit declined to address.

In addressing causation, the circuit court stressed that Concerned Citizens had failed to provide any examples of Laboratory activity that, due to EPA's refusal to terminate the 2014 permit, could have caused downgradient contamination "and would be prohibited under the RCRA or the HWA." *Id.* at 8. In other words, if EPA's refusal to terminate the 2014 permit had allowed Laboratory activities to adversely impact petitioner and that impact would have been prevented by the application of RCRA or HWA, Concerned Citizens had utterly failed to explain what those activities were.

Similarly, in addressing redressability, the court applied the requirement of *Lujan* that the petitioner must demonstrate that a favorable court action would likely redress the injury. *Id.* at 9. Even assuming that a favorable court action would have given rise to jurisdiction under RCRA and HWA, as Concerned Citizens asserted, the court found that Concerned Citizens had presented no evidence that RCRA or HWA would redress that situation by prohibiting any activity at the

Laboratory that was allegedly causing harm or a risk of harm.

In its petition to this Court, Concerned Citizens recites the three-pronged standard from *Lujan*, but it then critiques the Tenth Circuit's decision exclusively within the framework for assessing injury in fact. Pet. 10-16. By conflating the Tenth Circuit's surgical analysis of the three separate requirements for Article III standing, Concerned Citizens has misdirected the Court's attention to a non-existent circuit split premised solely on the first factor—injury in fact—which the court of appeals declined to address.

To support its assertion that the decision below conflicts with decisions from every other circuit (as well as a prior decision from the Tenth Circuit), Concerned Citizens provides quotations from sixteen cases. *Id.* at 13-15 n.8. Without exception, the selected quotations demonstrate that those circuit courts were addressing the proper analysis of allegations of injury in fact. Those cases cannot possibly conflict with the decision below, which addressed only causation and redressability

III. THE COURT OF APPEALS' DECISION IS CORRECT AND CONSISTENT WITH THIS COURT'S DECISIONS.

The court of appeals' decision as to causation and redressability is fully consistent with this Court's cases. Petitioner's alleged injury must be "fairly traceable to the [agency's] challenged behavior; and likely to be redressed by a favorable ruling." *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2565 (2019) (quoting *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 733 (2008)). The court of appeals applied precisely that standard, as articulated in *Lujan*, 504 U.S. at 560. Pet. App. 6.

In this case, the challenged behavior was EPA's denial of Concerned Citizens' request to terminate the 2014 permit. EPA's denial was based on Concerned Citizens' failure to show that the regulatory criteria for permit termination were satisfied. *Id.* at 5. Therefore, Concerned Citizens' burden to demonstrate causation and redressability in the court of appeals was to show: (1) that EPA's denial caused its alleged injury by blocking the application of requirements under RCRA and HWA, which would curtail contamination from the RLWTF; and (2) that a decision by the court overturning EPA's denial would result in the imposition of those RCRA and HWA requirements, to Concerned Citizens' benefit. The court of appeals correctly decided that Concerned Citizens had made neither of the required showings.

a. To demonstrate standing based upon physical injury, Concerned Citizens submitted affidavits of two members in support of its assertion that the Laboratory had released "hazardous chemicals" or "contamination" to the Rio Grande River. Pet. 7. One member asserted that these releases were "public knowledge," but offered nothing to back that up. *Id.* They then stated that "one cannot be certain that the LANL RLWTF is currently releasing contamination that goes to the river." *Id.* These unsupported allegations were the basis for Concerned Citizens' assertions that its members had been harmed by diminished use and enjoyment of the River. But neither of the members even attempted to explain how such contamination allegedly is being released from the RLWTF or how the application of RCRA or HWA requirements would curtail such releases. Instead, they provided generalized summaries of the types of requirements that could apply, such as "regulations that cover the operation of

tanks, tank systems, pipes and pipe connections; monitoring and inspections; and characterization of hazardous wastes." *Id.* at 8.

The court of appeals was unwilling to simply assume, as Concerned Citizens had, that the RLWTF was polluting the River, *and* that such pollution was being released via improper operation of tanks and pipes, inadequate inspections and monitoring, or faulty waste characterization, *and* that RCRA and HWA restrictions would correct these problems sufficiently to curtail the releases. For the alleged injury to be "fairly traceable" to the challenged behavior, the court expected Concerned Citizens to at least offer an "example of a Lab activity that has contributed to increased contamination * * * and would be prohibited under the RCRA or the HWA." Pet. App. 8. Finding that Concerned Citizens had failed to clear even this low bar, the court correctly held that the element of causation had not been demonstrated. *Id.*

Essentially the same analysis underpinned the court of appeals' conclusion that Concerned Citizens had not demonstrated that the challenged behavior was likely to be redressed by a favorable ruling. *Id.* at 9. Because Concerned Citizens was unable to provide examples of Laboratory activities that were contributing to river pollution and would be stopped by the application of RCRA or HWA, the court declined to hold that EPA's refusal to terminate the CWA permit, if reversed, would redress the petitioner's alleged injury by the application of effective requirements under RCRA or HWA. *Id.*

In its redressability analysis, the court of appeals gave petitioner a significant advantage by taking at face value Concerned Citizens' assertion that

termination of the CWA permit would erase the RCRA exemption, thereby causing RCRA and HWA requirements to apply to the RLWTF. That assertion is wrong as a matter of law.

b. Concerned Citizens argues that the court of appeals' treatment of procedural injury is "flatly inconsistent with" this Court's articulation as to how a procedural error can supply the injury-in-fact component of the standing analysis. Pet. 17. The petition relies on an example, provided in *Lujan*, of a decision to license the construction of a dam without first completing the procedural step of issuing an environmental impact statement. *Id.* (quoting *Lujan*, 504 U.S. at 572 n.7). The procedural error in the *Lujan* example occurred in the course of the decision-making process leading to the licensing decision. It was *that* error, not the licensing decision itself, that constituted procedural injury.

The court of appeals' treatment of procedural injury in this case is entirely consistent with *Lujan*. The court correctly held that "the injury alleged by Concerned Citizens resulted from the EPA's decision, not from deficiencies in the EPA's decision-making process." Pet. App. 10. Petitioner raised no objections to any aspect of the procedure employed by EPA to reach its decision to refuse termination of the 2014 permit.

Likewise, the court's analysis is consistent with the way in which other courts of appeals have addressed procedural injury. In each of the cases cited by petitioner, procedural injury was caused by defective decision-making processes, not by unfavorable decisions. Pet. 19-22 n.10. There is no split among the circuits in considering claims of procedural injury.

Finally, Concerned Citizens argues that it *did* raise defects in EPA's decision-making sufficient to support procedural standing under the rule laid down in *Lujan*: "But CCNS asserted numerous violations underlying EPA's issuance of a CWA permit * * * ." Pet. 17. These assertions of "numerous" violations were two: (1) that EPA lacks statutory authority to permit non-discharging facilities; and (2) that EPA should have considered the impact on RCRA applicability of issuing the CWA permit. *Id.* at 18. These assertions have nothing to do with procedural deficiencies, and the problems with them are manifold.

First, as Concerned Citizens acknowledges, these issues might be germane to "EPA's issuance of a CWA permit," *id.* at 17, but Concerned Citizens waived its opportunity to challenge permit issuance by sleeping on its rights for over two years.

Second, the RLWTF is not a "non-discharging facility," as Concerned Citizens asserts. As the court of appeals recognized, Pet. App. 3 n.4, and as petitioner acknowledges, Pet. 4 n.4, LANL utilized the permitted Outfall 051 in 2019 to evaluate its readiness for use in making the inevitable future discharges needed to meet the Laboratory's needs.

Third, Concerned Citizens' assertion that EPA lacks authority to permit facilities that discharge infrequently lacks any support in the law. Concerned Citizens relies upon Second Circuit and Fifth Circuit decisions that say no such thing. *See* Pet. 4. Those cases hold that EPA may not *force* a facility to acquire a permit unless and until there is a discharge, but they do not hold that EPA lacks authority to issue permits that are *voluntarily sought* in anticipation of future discharges.

Fourth, Concerned Citizens is mistaken in asserting that termination of the 2014 permit would give rise to participation opportunities for its members in permitting procedures for the RLWTF under RCRA and HWA. For that reason, EPA's refusal to terminate the 2014 permit did not deprive Concerned Citizens of any procedural right.

The exemption from RCRA applicability for facilities subject to the CWA, commonly referred to as the wastewater treatment unit ("WWTU") exemption, is set forth in two provisions of EPA's regulations governing RCRA implementation. The first provision exempts tanks and associated ancillary equipment from the applicability of substantive RCRA standards. 40 C.F.R. § 264.1(g)(6). The second provision exempts facilities subject to CWA jurisdiction from RCRA permitting requirements. *Id.* § 270.1(c)(2)(v). Together, these two provisions comprise the WWTU exemption.

In specifying which facilities are covered by the WWTU exemption, both provisions point to the definition of "wastewater treatment unit" in 40 C.F.R. § 260.10. The key element of that definition is that such a unit must be "subject to regulation under either section 402 or 307(b)" of the CWA. *Id.* Section 402 contains EPA's authority to issue discharge permits under the CWA. 33 U.S.C. § 1342.

EPA has consistently interpreted this definition for nearly 30 years. In 1992, EPA's Office of Solid Waste and Emergency Response ("OSWER") issued an official directive addressing the issue. OSWER Directive from Sylvia K. Lowrance, Director, Off. of Solid Waste, to Thomas W. Cervino, Colonial Pipeline Co., OSWER 9522.1992(01), 1992 WL 754630 (Jan. 16, 1992). OSWER emphasized that:

> It is important to note that it is not necessary that the Clean Water Act permits actually be issued for the units to be eligible for the RCRA exemption; it is sufficient that the facility be subject to the requirements of the Clean Water Act.

Id. at *1. Explaining further, OSWER made clear that "subject to regulation under * * * Section 402" of the CWA covers facilities "which are currently permitted, were ever permitted, or should have been permitted under [Section 402]." *Id.*

The OSWER directive leaves no doubt that the RLWTF is exempt from RCRA permitting under 40 C.F.R. §§ 260.10 and 264.1. Because LANL has held a CWA discharge permit for Outfall 051 at the RLWTF authorizing discharges in the past, and clearly was required to do so, the directive concludes that the exemption applies. Accordingly, even if EPA were to terminate the 2014 permit as requested by Concerned Citizens, the WWTU exemption would foreclose any RCRA and HWA permit proceedings sought by the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SUSAN L. MCMICHAEL
OFFICE OF LABORATORY COUNSEL
LOS ALAMOS NATIONAL LABORATORY
P.O. Box 1662 (MS 187)
Los Alamos, NM 87545-0001
smcmichael@lanl.gov

JAMES T. BANKS
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5802
james.banks@hoganlovells.com

Counsel for Respondent Triad National Security, LLC

JANUARY 2021