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

REPLY BRIEF FOR PETITIONER

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Petitioner Concerned Citizens for Nuclear Safety (CCNS) respectfully submits this Reply Brief addressed to new points made in the Brief in Opposition filed by Respondent Triad National Security, LLC (Triad).

STATEMENT

While the Tenth Circuit erroneously dismissed this case on grounds of standing, Respondent Triad seeks to portray this case as riddled with complexities and deficiencies that render it inappropriate for review. But the only issue for review is standing, and that issue is entirely straightforward, contrary to Respondent's claims.

Based upon the Petition and the Brief in Opposition by Triad (R.Br.), several matters are undisputed: The Environmental Protection Agency (EPA), responding to a request from a fellow agency, Los Alamos National Laboratory (LANL), issued a Clean Water Act, 33 U.S.C. 1251 *et seq.* (CWA), permit for the outfall connected to LANL's Radioactive Liquid Waste Treatment Facility (RLWTF), which outfall has no plan to discharge contaminants, and which CWA permit confers immunity upon the RLWTF from hazardous waste regulation under the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq*. (RCRA), and state law by virtue of the Wastewater Treatment Unit (WWTU) exemption. 42 U.S.C. 6903(27); 40 C.F.R. § 260.10 (*Tank system, Wastewater treatment unit*); 40 C.F.R. § 264.1(g)(6). As a result, there is no effective

regulation of the RLWTF under either the CWA or RCRA.[1]

To enable RCRA regulation to proceed, Petitioner requested EPA to terminate the CWA permit for the reason that discharges had ended. 33 U.S.C. 1342(b)(1)(C)(iii). EPA rejected the request, explicitly giving no weight to the impact of that CWA permit upon regulation of hazardous waste under RCRA. (Pet. App. 46). The Tenth Circuit dismissed Petitioner's review proceeding for asserted lack of standing.

A. The impact of the Tenth Circuit's erroneous ruling is undisputed.

The Petition pointed out the numerous federal facilities, and the several private facilities, in New Mexico alone that are regulated under RCRA and whose regulation would be immediately affected by the decision below. Pet. 23-25. Cases under other federal laws, such as the CWA and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq*., would also be affected by that decision. Pet. 23. Indeed, standing is part of every case. The Brief in Opposition does not dispute that the decision below affects numerous facilities, federal and private, and litigation throughout the Tenth Circuit and may well be cited to courts outside the circuit. The broad impact is not contested by the Respondent.

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[1] Notably, the current CWA permit and the proposed renewal CWA permit contain no provisions regulating the mechanical and solar evaporation units that constitute the principal disposal method for treated liquid radioactive and hazardous waste at the RLWTF.

The RCRA citizen suit provision, 42 U.S.C. 6972, creates liability in a citizen suit

> against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act [42 USCS §§ 6901 et seq.].

A citizen suit is a hollow right if a plaintiff must show, in addition to the normal standing elements outlined in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 183 (2000), the further facts that a facility has allowed hazardous wastes to escape and the hazardous wastes have appeared and can be identified in some public location. Article III imposes no such additional requirement, but the decision below required such a showing.

B. Contentions relevant to standing

The individual CCNS members here own and use property downgradient from the RLWTF, which manages waste classed as hazardous under RCRA but has no RCRA permit. They attested to their concern about escape of contamination from the RLWTF, and their use and enjoyment of those lands have been reduced. As a result, they have Article III standing to contest the regulatory tangle that imposes such hardship upon them. Under *Laidlaw*,

> 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. *Sierra Club v. Morton*, 405 U.S. 727, 735, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). See also *Defenders of Wildlife*, 504 U.S. at 562-563.

528 U.S. at 183. Respondent insists otherwise (R.Br. 11), but numerous conflicting court of appeals decisions, collected in the Petition at 13-15 note 8, clearly hold that such concrete and individualized injuries establish Article III standing. The Tenth Circuit, in finding no standing, jumped the rails of established standing analysis.

Triad says that the Tenth Circuit ruled only on causation and redressability and did not find that Petitioners failed to show injury in fact. (R. Br. 9-11). To be sure, the decision below invokes causation and redressability, but all standing analysis necessarily includes injury-in-fact. The Tenth Circuit stated:

> We do, however, describe the injury alleged by Concerned Citizens because doing so is necessary to our discussion of causation and redressability.

(Pet. App. 7). Doing so, the Tenth Circuit expressly articulated an erroneous understanding *as to injury-in-fact*. The court asserted that Petitioner claimed that the RCRA exemptions "enable the Lab to discharge waste into the Rio Grande River" (Pet. App. 8); therefore, it demanded an "example of a Lab activity

that has contributed to increased contamination * * * and would be prohibited under the RCRA or the HWA" (*id.*), and objected that Petitioner "presents no evidence that any Lab activity would be prohibited under either RCRA or the HWA." (Pet. App. 9). The court's statement that standing requires a showing that hazardous waste had escaped the RLWTF and made its way into the Rio Grande is a critical error. It enlarges the requirements of Article III standing beyond this Court's precedents and the rule in the other circuits without offering any logic or rationale supporting such action. It led the court to violate the fundamental rules that, (1) to show standing, a plaintiff need not establish liability on the merits. *Laidlaw,* 528 U.S. at 181. Likewise, (2) a party asserting procedural standing need not demonstrate the outcome that the omitted procedures would have produced, here the content of the RCRA permit that would have been issued. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7 (1992).

The Petition lists numerous decisions supporting procedural standing here. Petition at 19-22 note 10. Triad seeks to distinguish the conflicting precedents, claiming that the spurious CWA permit here was not issued through any erroneous procedure. (R. Br. 14). To the contrary, the 2014 issuance of the CWA permit and EPA's refusal to terminate that permit in 2018 were based on EPA's erroneous determinations that a CWA permit may be issued for a non-discharging facility, and that, in considering a CWA permit application, EPA may "pick and choose" among the federal laws that shall govern the RLWTF. Moreover, EPA's Environmental Appeals Board (EAB) erroneously read 40 C.F.R. § 122.64(a)(4) to impose

unsupported procedural requirements on a citizen seeking termination: For example, the idea that, to seek termination, a citizen must guess when, exactly, in the course of a twenty-year project for "zero-liquid-discharge," EPA will choose to conclude that a Section 1342(b)(1)(C)(iii) "change in . . . condition" occurred turns the administrative process into a shell game run by the agency. Petitioner asserted these and other defects in EPA procedure at length. (Brief in Chief for the Petitioner, No. 18-9542, at 14-47 (10th Cir. Jan. 19, 2019); Reply Brief, No. 18-9542, at 10-34 (10th Cir. Jan. 25, 2019); CCNS Petition to EAB (Sept. 14, 2017), CCNS Reply Submission to EAB, Nov. 7, 2017; CCNS Post-Argument Submission to EAB, Feb. 27, 2018). The assertion that "Petitioner raised no objections to any aspect of the procedure employed by EPA to reach its decision to refuse termination of the 2014 permit" (R. Br. 14) simply ignores the extensive arguments advanced by Petitioner to the EPA, EAB and the Tenth Circuit.

C. Contentions relevant to the underlying merits of the case

In addressing standing, a court assumes that the complainant's allegations as to liability are true and have legal merit. *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Estate of Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 947 (2020). However, Triad improperly asks the Court to delve into the merits of the claims—an inquiry not pertinent to the standing determination in issue. The Tenth Circuit did not base its decision on mootness or the other merits-based issues Triad raises. If the lower court's

dismissal on standing grounds is reversed, that court is better placed to address those issues on remand. There is no reason for this Court to do so in the first instance.

Triad's contentions are erroneous in any event: Triad argues that the case is moot, because the CWA permit has expired. (R. Br. 8-9). In fact, the permit remains in effect, because Respondent operators filed a permit renewal application, which extends the permit's term pending its resolution. NPDES Permit Re-Application (LA-UR-19-22215, March 2019); 40 C.F.R. § 122.6. Triad tells the Court that issuance of the renewal permit is "imminent" (R. Br. 2, 8) in a matter of "weeks" (R. Br. 6). Triad fails to mention that Triad itself asked EPA to extend the comment period, and that on January 30, 2021 EPA agreed to do so, extending the time for submissions and decisionmaking for several more weeks. EPA, Reopening of Public Comment Period, Authorization to Discharge to Waters of the United States, NPDES Permit No. NM0028355 (Jan. 30, 2021). Nothing is "imminent."

More importantly, the renewal application incorporates by reference the terms of the previous 2012 application, which describes Outfall 051 as a fallback outlet, for use only when the evaporation equipment is unavailable. NPDES Permit Re-Application at 6 through 14 of 14 (Jan. 27, 2012); NPDES Permit Re-Application, Introduction, at 1 of 13 (LA-UR-19-22215, March 2019). The issue is plainly a recurring one. Expiration of the original permit is not relevant where there is a "'highly reasonable

expectation that petitioners will be subjected to the same action again.'" *Trustees for Alaska v. EPA*, 749 F.2d 549, 556 (9th Cir. 1984), *quoting from Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 581 (D.C. Cir. 1980). Moreover, review is time-consuming. This case began with CCNS's filing of a Request for Termination in mid-2016. Now, in 2021, Respondent claims the permit has expired and the case is moot. It is not moot. But the permit will expire someday and be renewed, and since a CWA permit has a five-year term, the validity of the renewal permit is not likely to come before this Court before it, too, expires. The mootness defense is without merit.

Triad also claims that this case is "moot" because LANL discharged contaminants through the RLWTF outfall in mid-2019 and has therefore "resumed" discharging. (R. Br. 6, 9). The alleged occurrence took place after the EPA decision in issue here and while the case was pending in the Tenth Circuit. The Government improperly sought to introduce evidence of the event at the appellate level, in violation of Fed. R. App. P. 28(j), and the court of appeals correctly rebuffed the offer as irrelevant to standing and "not properly part of the record on appeal." Pet. App. 3 n. 4. Such a discharge, when the RLWTF's mechanical evaporator was fully operable, would conflict with the Respondent operators' representations in seeking the permit, *viz:* that discharges would be made only when evaporation equipment was unavailable. (NPDES Permit Re-Application at 6 through 14 of 14 (Jan. 27, 2012).

As for mootness,

> "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. *Concentrated Phosphate Export Assn.*, 393 U.S. at 203."

Laidlaw, 528 U.S. at 190. No such showing has been made or even attempted.[2]

The further claim (R.Br. 15) that EPA may issue a CWA permit for a non-discharging facility if the facility operator *requests* the permit is supported neither by precedent, *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), nor by the CWA, which authorizes only a "permit for the discharge of any pollutant." 33 U.S.C. 1342(a). The idea that Congress authorized EPA to hand out RCRA exemptions to any facility that requests one is repugnant to any valid concept of environmental regulation. Whether a given facility "voluntarily sought" (R.Br. 15) a CWA permit is no proper criterion; all permit applications are voluntary, in a sense, and mandatory, in a sense, and a criterion of supposed voluntariness is meaningless.

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[2] The dual use of RLWTF facilities for waste water treatment followed by disposal via Outfall 051, alternating with use of RLWTF facilities to dispose of waste water by evaporation units, would disqualify the RLWTF for the WWTU exemption from RCRA. *See, e.g.*, EPA letter, Cosworth to Pendleton, 1998 (RO 14262).

Further, Triad asserts (R.Br. 16-17) that the RLWTF is entitled to a RCRA exemption based upon an EPA opinion letter referring to facilities that are "subject to" 33 U.S.C. 1342(a). Nothing in that letter states that Section 1342, or the WWTU exemption, applies to facilities that have undergone changes, such as the installation of evaporation equipment at the RLWTF, so that the CWA no longer applies. Under Section 1342, a permit

> can be terminated or modified for cause including, but not limited to, the following:
>
> * * *
>
> (iii) 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). EPA has no power to confer a perpetual RCRA exemption upon a facility that last discharged half a generation ago, nor to repeal the statutory conditions for termination in an agency letter.

CONCLUSION

The Court should grant the writ of certiorari and reverse the judgment below.

Respectfully submitted,

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