

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
ENVIRONMENTAL APPEALS BOARD**

In the matter of

**CONCERNED CITIZENS FOR NUCLEAR SAFETY
REQUEST TO TERMINATE PERMIT NM0028355
FOR LOS ALAMOS NATIONAL LABORATORY
RADIOACTIVE LIQUID WASTE TREATMENT
FACILITY DUE TO LACK OF DISCHARGES**

Docket No. _____

**CONCERNED CITIZENS FOR NUCLEAR SAFETY
SUBMISSION PURSUANT TO 40 C.F.R. §§ 124.2 AND 124.5(b)**

I. INTRODUCTION

1. Pursuant to 40 C.F.R. § 124.5(b), Appellant, Concerned Citizens for Nuclear Safety (“CCNS”), seeks Environmental Appeals Board (“EAB” or the “Board”) review of the United States Environmental Protection Agency (“EPA”) Region 6 Administrator’s ruling, denying CCNS’s Request to Terminate National Pollutant Discharge Elimination System (“NPDES”) Permit NM 0028355 (“Permit”) as to Outfall 051 (the “Request”), which has not had any discharge since 2010. A copy of the Request and its referenced exhibits has been sent in hard copy and digitally to the Board and is, by reference, hereby incorporated into the record of this appeal.¹

¹ Copies of the Request and exhibits, as well as subsequent filings with Region 6, were provided to persons on the service list at the time they were filed with the Region. A hard copy and a digital copy of the Request have been sent to the Board along with a hard copy and a digital copy of this petition, which attaches items in the Region 6 record subsequent to the filing of the Request and an exhibit list that encompasses the entire record. The parties on the service list were sent a copy of this petition with its attached exhibits and exhibit list. Because they were already served with hard copies of the Request and all subsequent documents during the proceedings in Region 6, CCNS has not sent another copy of that record but has offered to

II. JURISDICTION.

2. The EAB has jurisdiction of this appeal under 40 C.F.R. §§ 124.2 and 124.5(b).

III. STANDING.

3. CCNS has the mission of addressing issues of public health and safety arising from the nuclear weapons operations and legacy waste clean-up at Los Alamos National Laboratory (“LANL”). *See* Request ¶¶ 1-4. Members of CCNS are at risk from the release or mismanagement of radioactive and hazardous wastes at LANL. Releases of such waste would create a direct and immediate risk to members of CCNS. *Id.* at ¶¶ 3, 4. CCNS presented the Request to the Administrator of Region 6 and obtained a ruling, denying the Request. *See generally*, Letter from William Honker, Director, Water Division, by delegation of the Administrator of Region 6, to Counsel for CCNS, denying Request (dated August 16, 2017, postmarked August 21, 2017, received August 24, 2017). Ex. 10 (the “Honker Letter” or “Response”).²

IV. THE IMPORTANCE OF RESOLVING THE ISSUES PRESENTED.

4. Appellant CCNS submits that the Board should take jurisdiction and resolve this important legal issue: Region 6 defends the issuance of an NPDES permit for Outfall 051 at LANL by asserting that, unless EPA can issue an NPDES permit to a facility whose owner claims that it may experience a “possible discharge” at some future time, but which is not currently discharging anything and has no plan to do so, “the

provide any party with an additional copy of the Request, its exhibits, or other items filed in Region 6.

² The *Honker letter* is unnumbered; it is referenced herein as if numbered.

CWA's requirement that facilities obtain NPDES permit coverage prior to discharge would be impossible for the agency to implement." *Id.* at 3. CCNS contends that Region 6's position is in error and is directly at odds with two decisions of the United States Courts of Appeals, positions EPA has taken elsewhere, and this Board's decisions. See *infra* at ¶¶ 22-26.

V. BACKGROUND FACTS

5. CCNS submitted the Request pursuant to 40 C.F.R. § 124.5(a) to the Regional Administrator of EPA Region 6 (dated June 17, 2016).

6. The Response (from Mr. Honker) to the Request, made pursuant to 40 C.F.R. § 124.5(b), was received on August 24, 2017. Honker Letter, Ex. 10.

7. The Response denied the Request. *Id.*

8. Pursuant to 40 C.F.R. § 124.5(d), CCNS's Request seeks commencement of an agency proceeding under 40 C.F.R. Part 22 to determine whether the Permit should be terminated as to Outfall 051 at LANL for reasons expressly set forth in 40 C.F.R. § 122.64(a) and 33 U.S.C. § 1342(b)(1), *viz.*, "elimination of any discharge . . . controlled by the permit." *Id.*

9. Under 40 C.F.R. § 124.5(a), an NPDES permit may be terminated "for the reasons specified in § 122.62 or § 122.64."

10. Specifically, CCNS alleges that no discharges of water or pollutants are planned or expected for Outfall 051, and no such discharges have occurred since November 2010.

11. CCNS asserts, consequently, that there is no legal basis under 33 U.S.C. § 1342 for application of the Clean Water Act, 33 U.S.C. § 1311 *et seq.* (“CWA”), to this Outfall.

12. If regulation of Outfall 051 is outside the jurisdiction of the CWA, as CCNS contends, inclusion of Outfall 051 in the Permit is unlawful and must be terminated.

13. It should be noted that, once the NPDES Permit for Outfall 051 is terminated, the entire RLWTF will lose its exemption from hazardous waste regulation under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*, and the New Mexico Hazardous Waste Act, § 74-4-1 *et seq.* NMSA 1978 (which enforces RCRA).

VI. ARGUMENT FOR TERMINATING THE NPDES PERMIT AT ISSUE.

14. CCNS’s Request shows in thorough and uncontroverted detail as follows:

15. Since the 1990s, LANL has planned to reconstruct the Radioactive Liquid Waste Treatment Facility (“RLWTF”). *See generally*, Request Ex. A.

16. The RLWTF connects to Outfall 051. Request Ex. AA at 4, 8, 11, 18.

17. LANL has publicly stated that its “ultimate goal” was to terminate any discharges through Outfall 051. Request, Ex. B; *see also* Request Ex. C, D, and E.

18. LANL proceeded with the planned reconstruction and completed the “new” RLWTF as a “zero-liquid-discharge” facility. Request Ex. LL and MM.

19. As recently reconstructed, the RLWTF is now a “zero-liquid-discharge” facility, *i.e.*, liquid waste is either dewatered and drummed, or placed in holding tanks,

then processed through evaporation, and, ultimately, reduced to a sludge that is removed for land disposal. *See generally*, Request Ex. W at 1, 5, 7 of 9; *see also* Ex. OO, encl. 1 at 3.

20. LANL ended discharges from Outfall 051 in November 2010. The RLWTF has made no discharges since then, and LANL does not plan or expect to make any discharges from the RLWTF. *See generally*, Request Ex. W at 5 of 9, *see also* Request Ex. OO, PP, QQ and RR.

21. The CWA is limited in regulatory scope. It authorizes the EPA Administrator to “issue a permit for the discharge of any pollutant” on stated conditions. 33 U.S.C. § 1342(a). The CWA *only* allows the EPA to issue a permit when there is an actual “discharge” of a pollutant. There is no authority to issue NPDES permits for a “possible” or “potential” discharge.

22. Recent United States Court of Appeals decisions confirm that, absent an actual or intended discharge, EPA has no authority to issue a permit under the NPDES. In *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005), the Second Circuit held that “in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.” *Waterkeeper*, 399 F.3d at 505. Thus, “the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual*

discharges—not potential discharges, and certainly not point sources themselves.” *Id.* (emphasis in original).

23. The court in *Waterkeeper* also stated that EPA has *no discretion* to regulate potential discharges: “Congress has ‘directly spoken to the precise question at issue’ and ‘the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *Id.* at 506.

24. After *Waterkeeper*, EPA again sought to regulate facilities that were not discharging—but supposedly had a potential to discharge. The Fifth Circuit held that such regulation was unlawful: “This definition thus requires CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of *Waterkeeper*, as well as Supreme Court and other well-established precedent.” *National Pork Producers Council v. U.S. Environmental Protection Agency*, 635 F.3d 738, 750 (5th Cir. 2011).

25. EPA did not seek certiorari in *Waterkeeper*, nor in *National Pork Producers*. After the Fifth Circuit decision, EPA withdrew regulations requiring NPDES permits for facilities that supposedly “propose” to discharge.³ EPA expressly conceded that it has no authority to issue NPDES permits for such facilities: “The EPA accepts the decision of the Court that vacated the requirement that CAFOs that propose to discharge

³ National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44494 (July 30, 2012).

apply for NPDES permits and the EPA lacks the discretion to reach a different conclusion.”⁴ Clearly, EPA has acquiesced in the decisions.

26. Other decisions also support this conclusion: *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988). This Board has also previously adjudicated issues based upon the effect of the *Waterkeeper* decision. See, e.g., *In re Lowell Vos*, 2009 EPA ALJ LEXIS 8 at *63-*64 (based upon the *Waterkeeper* decision, EPA concedes that it cannot require a discharge permit based solely upon the potential to discharge).

27. Despite these authoritative decisions, and EPA’s acquiescence in them, Region 6 refused even to allow a hearing on CCNS’s allegations. Region 6 acknowledged that EPA’s authority to issue an NPDES permit is limited to actual “discharges” and that 40 C.F.R. § 122.64 authorizes termination of a permit in event of “elimination of any discharge.” Compare Honker Letter, Ex. 10 at 2 with 33 U.S.C. § 1342(b)(1).

28. Nevertheless, Region 6 decided that there is no basis to consider termination of the Permit for Outfall 051, even though Outfall 051 no longer discharges anything, has not done so for more than six years, and LANL has no plans to discharge anything from the RLWTF, which is a “zero-liquid-discharge” facility.

29. The Region 6 Response justifies its position based upon the Region’s stated desire to issue an NPDES permit where the owner or operator of a facility requests one

⁴ *Id.* 44496.

on the assertion that a discharge “could occur”: “Consequently, EPA generally defers to an owner/operator’s determination that a discharge could occur and that permit coverage is needed.” Honker letter, Ex. 10 at. 2.

30. The Clean Water Act does not establish the regulatory system that Region 6 would prefer. Region 6’s Response disregards the plain language of the CWA, the decisions of two Courts of Appeals, and this Board, all of which prohibit a permit for a discharge that supposedly “could occur.”

31. Region 6 states in its Response that the statutory limitations in the CWA are irrelevant, because LANL *requested* the unlawful permit—as if EPA can ignore legal prohibitions when a regulated party requests it to do so. (Moreover, Region 6’s statement ignores the fact that *all* permits are “requested” by an applicant.)

32. Region 6’s assertion, Honker letter, Ex. 10, at 2-3, that “EPA has authority under CWA § 402(a) to issue a permit authorizing the discharge of pollutants should one occur” flatly contradicts the CWA and the authorities cited above.

33. The Region 6 Response also argues that, unless EPA can issue an NPDES permit to regulate a possible future discharge, the CWA requirement to have a permit at the time of a discharge would be “impossible” to implement. Honker letter, Ex. 10, at 3.

34. This statement is simply wrong. There is no risk of a sudden and unanticipated discharge, because the RLWTF has redundant evaporation capabilities and ample storage capacity for waste water.⁵

⁵ The designed capacity of the zero-liquid-discharge tanks is 754,036 gallons. Ex. VV attached hereto, Letter from Davis to Grieggs (Nov. 18, 2011) at 1. In 2009 the RLWTF had a

35. LANL, furthermore, has never claimed it is at all likely that an unanticipated discharge from the RLWTF will occur.

36. LANL never claimed that it needs a permit to cover an unanticipated discharge from Outfall 051.

37. Indeed, Region 6, in justifying the lack of a compliance schedule for Outfall 051, argued that there is *no need to prepare for an emergency discharge*, because “[n]o discharge has occurred since 2010.” Ex. TT. Region 6, plainly, took the position that there was no need for concern about emergency discharges and would be ample time for LANL to begin “evaluating the treatment technology and operation practices prior to the next discharge.” *Id.* Region 6 cannot claim now that LANL needs an NPDES permit for “emergency” discharges from the RLWTF.

38. Region 6 also asserts that it is “irrelevant” that LANL uses the Wastewater Treatment Unit⁶ exemption based on the NPDES permit to escape any RCRA regulation of the RLWTF. But the availability of that exemption from the Hazardous Waste Act, § 74-4-1 *et seq.* NMSA 1978 (which enforces the RCRA, 42 U.S.C. § 6901 *et seq.*, in New Mexico), is not irrelevant: For LANL, the primary function of the unlawful NPDES permit for the “zero-liquid-discharge” Outfall 051 is to insulate the RLWTF from RCRA.

discharge of 4,401,900 liters or 1,162,859 gallons. Ex. WW, RLWTF Annual Report (2009) at 10. Thus, the evaporation tanks can hold more than a seven months’ supply of the 2009 discharge.

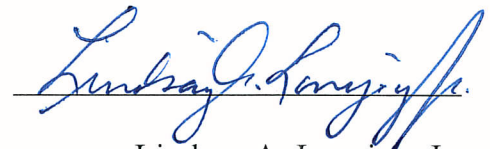
⁶ See generally 42 U.S.C. § 6903(27); 40 C.F.R. § 260.10 (*Tank system; Wastewater treatment unit*), and § 264.1(g)(6).

VII. CONCLUSION AND REQUESTED RELIEF.

WHEREFORE, Appellant CCNS requests that the EAB take up this matter, reverse the Region 6 decision denying CCNS's Request, and direct Region 6 to initiate a proceeding to terminate NPDES Permit NM 0028355 with respect to Outfall 051 at LANL.

DATED at Santa Fe, New Mexico, this 14th day of September, 2017.

Respectfully submitted:



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CERTIFICATE OF SERVICE

On this 14th day of September, 2017, the undersigned caused the foregoing submission to be sent by electronic means and via the United States Post Office, Priority Mail pre-paid to the Board and the below listed persons.



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