UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the matter of

CONCERNED CITIZENS FOR NUCLEAR SAFETY
REQUEST TO TERMINATE NPDES PERMIT
NM 0028355 FOR LOS ALAMOS NATIONAL
LABORATORY RADIOACTIVE LIQUIS WASTE
TREATMENT FACILITY DUE TO LACK OF
DISCHARGES

RESPONSE TO REQUEST TO TERMINATE NPDES PERMIT #NM0028355 AS TO OUTFALL 051 FOR THE RADIOACTIVE LIQUID WASTE TREATMENT FACILITY AND MOTION TO DISMISS

STATEMENT OF FACTS

1. On August 12, 2014, EPA Region 6 issued National Pollutant Discharge Elimination System (NPDES) Permit No. NM0028355 (the "Permit") for the Los Alamos National Laboratory (LANL) facility located at Los Alamos, New Mexico to Los Alamos National Security, LLC (LANS) and the Department of Energy (DOE) as co-permittees under the Section 402 of the Clean Water Act. The Permit authorizes the Permittees to discharge from eleven sanitary and/or industrial outfalls located at Los Alamos National Laboratory, including a discharge of treated radioactive liquid waste from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051 into Mortandad Canyon. EPA Region 6 modified the Permit on March 27, 2015 to remove monitoring and sampling requirements for selenium at permitted Outfall 03A048 in settlement of a Petition for Review filed by the Permittees.

2. Because the state of New Mexico does not have an approved state NPDES program under Section 402(b) of the Clean Water Act (CWA or "the Act"), EPA is the NPDES permitting authority within the state.

3. By letter dated November 13, 2015 to Ron Curry, Regional Administrator for EPA Region 6, attorneys representing Communities for Clean Water and Concerned Citizens for Nuclear Safety (CCNS) requested that EPA Region 6 review Permit No. NM0028355

and state a justification, if any, for issuance of the Permit for Outfall 051. The letter stated there has been no discharge from Outfall 051 since 2010 and the RLWTF has been recently redesigned to eliminate all wastewater discharges. The attorneys asserted that, as a result, NPDES coverage for Outfall 051 is unnecessary, and improper in that it provides the RLWTF with a Waste Water Treatment Unit (WWTU) regulatory exemption under the Resource Conservation and Recovery Act (RCRA).

4. After re-examining its files for Permit #NM 0028355, the Region responded by letter dated December 18, 2015. In that letter, the Region declined to propose termination of NPDES permit coverage for Outfall 051 and explained the rationale for its decision, including the fact that it is not uncommon for facilities that do not routinely discharge to seek and retain permit coverage to protect against liability in the event of an unanticipated discharge. The Region also noted that whether or not issuance of NPDES permit coverage might trigger the RCRA WWTU exemption has no bearing on EPA's permitting decisions, which must be based on the requirements of the CWA.

5. On June 17, 2016, CCNS filed with the Regional Hearing Clerk for EPA Region 6 this Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility ("Request for Termination").

6. Although CCNS filed the Request for Termination with the Region 6 Regional Hearing Clerk, the Request does not claim jurisdiction under 40 CFR Part 22 – Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination of Permits. Instead, the Request cites language at 40 CFR Part 124.5(b) that allows application for termination of an NPDES permit to be made by "any interested person" to which the Director may respond. See Paragraph 43 of the Request for Termination.

DISCUSSION OF THE LAW

7. CWA §301 prohibits the discharge of any pollutant by any person unless in compliance with specified sections of the Act, including CWA §402. CWA §402(a) establishes the NPDES permitting program, under which EPA may issue permits for the discharge of any pollutant or combination of pollutants upon condition that such discharge will meet the applicable requirements of the Act.

8. Under Section 501(a) of the Act, the Administrator may prescribe such regulations as are necessary to carry out his duties under the Act.

9. EPA procedures for issuing, modifying, revoking and reissuing, or terminating NPDES permits are set out in 40 CFR Part 124.

10. 40 CFR Part 124 contains specific provisions concerning the termination of NPDES permits. 40 CFR §124.5(a) provides that permits may be terminated either at the request of any interested person (including the permittee) or upon the Permitting Authority's initiative. 40 CFR §124.5(a) further provides that all requests must be in writing and contain facts or reasons supporting the request.

11. 40 CFR §124.5 (b) states that "[I]f the Director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision." 124.2(a) defines "Director" to mean "the Regional Administrator, the State director or the Tribal director as the context requires, or an authorized representative. When there is no approved State or Tribal program, and there is an EPA administered program, Director means the Regional Administrator."

12. Under 40 CFR § 124.5(b):

    Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the Regional Administrator may be informally appealed to the Environmental Appeals Board by a letter briefing setting forth the relevant facts. The Environmental Appeals Board may direct the Regional Administrator to begin modification, revocation and reissuance, or termination proceedings under paragraph (c) of this section. The appeal shall be considered denied if the Environmental Appeals Board takes no action on the letter within 60 days of receiving it. This informal appeal is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of EPA action in denying a request for modification, revocation and reissuance, or termination.

13. Pursuant to 40 CFR §124.5(d)(2), should the Regional Administrator or his authorized representative determine the request is justified and tentatively decide to terminate the permit under 40 CFR § 122.64(a), "he or she shall prepare a complaint under 40 CFR 22.13 and 22.44 of this chapter. Such termination of NPDES ... permits shall be subject to the procedures of part 22 of this chapter."

CONCLUSION AND REQUESTED RELIEF

40 CFR §124.5 mandates a specific process for the filing by any interested person of a request for termination of NPDES permit coverage. For EPA issued permits, that process includes the filing of a written request with the Regional Administrator (or his authorized representative), to which the Regional Administrator must provide a written response. Under 40 CFR §124.5(b), an appeal of a denial by the Regional Administrator of a request to terminate permit coverage must be filed with the Environmental Appeals Board. Only if the Regional Administrator determines that the request should be granted and tentatively decides to terminate the permit is a complaint filed under 40 CFR §§ 22.13 and 22.44, after which the procedures of 40 CFR Part 22 apply.

Because the Regional Administrator has not made a tentative decision to terminate permit coverage and has not filed a complaint under 40 CFR §§ 22.13 and 22.44, the Regional Judicial Officer lacks jurisdiction to proceed with this matter under 40 CFR Part 22.

WHEREFORE, EPA Region 6 respectfully requests that this Request for Termination be dismissed for lack of jurisdiction.

Respectfully submitted,

E. Renea Ryland
Assistant Regional Counsel
U.S. EPA, Region 6
1445 Ross Ave., Suite 1200
Dallas, TX 75202
(214) 665-2130

Counsel for EPA, Region 6

DATED: September 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2016, I mailed, U.S. Postal Service First Class postage pre-paid, copies of the foregoing Response to Request to Terminate NPDES Permit #NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility and Motion to Dismiss to the following:

Lindsay A. Lovejoy, Jr.
Attorney at Law
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
Co-Counsel for Concerned Citizens for Nuclear Safety

Jonathan Block, Eric D. Jantz
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87506
Co-Counsel for Concerned Citizens for Nuclear Safety

Charles F. McMillan, Director
Los Alamos National Laboratory
P.O. Box 1663 (MS K499)
Los Alamos, New Mexico 87545

Kimberly D. Lebak, Manager
Los Alamos Field Office, U.S. DOE
3747 West Jemez Road (MS A316)
Los Alamos, New Mexico 87544

E. Renea Ryland
Assistant Regional Counsel
U.S. EPA, Region 6
1445 Ross Ave., Suite 1200
Dallas, TX 75202
(214) 665-2130
Counsel for EPA, Region 6