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**	**NPDES Appeal No. 17-05**

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

Appellant, Concerned Citizens for Nuclear Safety ("CCNS"), hereby submits the within supplemental information in response to the request of the Environmental Appeals Board, stated at oral argument on February 22, 2018:

Submission:

1. The Board, sitting in judicial review[1] of the action of Environmental Protection Agency ("EPA") Region 6 in denying a request for termination, as to Outfall 051, of the National Pollutant Discharge Elimination System ("NPDES") permit held by Los Alamos National Laboratory ("the Lab"), has asked the parties to make a supplemental submission, showing information available to the public, during the 2012-14 permit renewal process and thereafter, concerning the changes planned, underway, or made affecting future discharges from Outfall 051.

2. From the discussion at argument on February 22, 2018, it is evident that the Board is considering whether the Request for Termination made by CCNS should be deemed untimely in

[1] The applicable regulation, 40 C.F.R. § 124.5, describes the Board's review jurisdiction, in the present matter, as that of appellate review.

view of the NPDES permit renewal proceeding that was initiated by application dated January 27, 2012. Request Ex. W.

3. This appeal is taken from the Regional Administrator's decision, contained in the letter by William K. Honker of Region 6, dated August 16, 2017, denying CCNS's request for termination made pursuant to 40 C.F.R. § 124.5. (The "Region 6 Decision"). The Region 6 Decision expressly rests denial upon four grounds:

a. The ground that there was no change in any condition, as specified in 40 C.F.R. § 122.64(a)(4).
b. The ground that, at the facility in question, a discharge "could occur."
c. The ground that "EPA generally defers to an owner/operator's determination that a discharge could occur and that permit coverage is needed."
d. The ground that EPA has authority to issue an NPDES permit to a facility requesting coverage for a possible discharge.

4. The Region 6 Decision does not mention or rely upon the supposed untimeliness of the Request for Termination, either standing alone or in relation to the 2012 permit renewal process.

5. Indeed, the applicable regulation, 40 C.F.R. § 122.64(a)(4), does not restrict the filing of a termination request in relation to a permit renewal. In fact, it does the reverse, stating specifically that termination may be sought either during the term of a permit or in a permit renewal process: "(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application..." *Id.*

6. In this situation, where the Region 6 Decision was not based upon a question of timeliness, the Board, on judicial review, may not introduce concepts of timeliness to affirm the dismissal. The decisions in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), 332 U.S. 194 (1947),

stand for the fundamental principle of judicial review that administrative agency orders, reflecting agency policy and judgment, must stand or fall on the rationale expressed by the agency. Thus, a reviewing court may not introduce a different rationale to affirm the agency's action. In the first *Chenery* decision the Court said:

> If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

318 U.S. At 88. In the second decision the Court repeated the prior holding:

> When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

332 U.S. At 194. The *Chenery* decisions are consistently followed in the federal system:

> But "[i]t is not the role of the courts to speculate on reasons that might have supported an agency's decision." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) ("We may not supply a reasoned basis for the agency's action that the agency itself has not given.'") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)).

Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141, 1150-1151 (10th Cir. 2016).

> We may not consider any of Mr. Salazar's merits arguments regarding asylum because the BIA did not reach the merits of that claim. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) (acknowledging

> fundamental rule of administrative law that a reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency").

Salazar v. Lynch, 614 Fed. Appx. 362, 364 (10th Cir. 2015).

> We agree with the Second Circuit that we "may not 'properly affirm an administrative action on grounds different from those considered by the agency.'" *Forest Watch*, 410 F.3d at 119 (quoting *Melville v. Apfel*, 198 F.3d 45, 52 (2d Cir. 1999); and citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)). "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Chenery*, 332 U.S. at 196.

Ecology Ctr., Inc. v. United States Forest Serv., 451 F.3d 1183, 1195 (10th Cir. 2006).

The *Chenery* doctrine is specifically applicable when the reviewing court is pressed to dispose of a matter on timeliness grounds:

> We are precluded from addressing the timeliness issue because "we will not affirm on grounds raised in the IJ decision unless they are relied upon by the BIA in its affirmance." *Uanreroro*, 443 F.3d at 1204; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) (stating federal courts will not affirm agency decisions based on reasoning not considered by the agency). Because the BIA did not rely on untimeliness to deny Mr. Pacaja's asylum petition, we turn to the merits.

Vicente v. Holder, 451 Fed. Appx. 738, 741 (10th Cir. 2011).

7. Under the *Chenery* decisions, it would be error if the Board were to decide that a termination request must be presented at a particular time, and based on that decision, to affirm the Region 6 Decision, when the Region itself did not use such a rationale. Such a decision by the Board would intrude upon the domain which the law and regulations assign to Region 6, the administrative agency.

8. Further, such a ruling would also be error, because it is unsupported by anything in the applicable regulations, and, indeed, is contradicted by the regulations, which authorize a request for termination of a permit "during its term."

9. In any case, the record shows that CCNS was not made aware of the completion of a significant change in conditions at the Radioactive Liquid Waste treatment Facility ("RLWTF") at a time when the information could have been incorporated in public comments.

10. A member of the public cannot enter upon the grounds of the RLWTF, take note of the operating elements of the facility, examine the equipment or new construction, review the operating procedures, and determine what discharges do occur or are likely to occur. The RLWTF is a part of a federal nuclear weapons laboratory, and such access and information are unavailable to the public.

11. The public has only the information that the Lab chooses to disclose. The record of the 2012 NPDES permit renewal proceeding contains a variety of statements by the Lab, some ambiguous and contradictory, about future discharges from Outfall 051. At certain points, the Lab states that it seeks a NPDES permit for a "possible" or "potential" discharge, which is unlawful under *Waterkeeper* and *National Pork Producers*. At other points the Lab seems to suggest that some discharges are planned or expected, as, for instance, when it says that it will need to discharge when evaporator units are in maintenance—a process that might be expected to occur recurrently.

12. However, during the public comment period on the 2012 renewal, there was no public announcement that the "zero-liquid-discharge" plan had been completed. The Lab had reviewed the alternatives in its 2008 Site-Wide Environmental Impact Statement (Request Ex. JJ), and it had adopted Records of Decision to plan for and execute the zero-liquid-discharge

project (Ex. LL, MM), but such announcements do not mean that the project had been carried out.

13. In the January 2012 Permit Renewal Application, the Lab stated that forthcoming changes would *reduce* the regulated discharge from Outfall 051, but it did not say that discharges would *cease*, nor that the planned changes had been carried out:

> The configuration of the RLWTF and Outfall 051 will be changing in the next 5 years due to the construction of two new Concrete Evaporation Tanks at Technical Area (TA) 52 under the Zero Liquid Discharge (ZLD) Project. These evaporation tanks will receive treated effluent from the RLWTF and will reduce the volume of treated effluent discharged to Outfall 051.

Request Ex. W, January 27, 2012 Fact Sheet, at 7 of 9.

14. The Lab also stated that it sought a permit for Outfall 051 for use in case evaporation units were unavailable due to maintenance, breakdown, or change in mission:

> The RLWTF has not discharged to Outfall 051 since November 2010. LANL requests to re-permit the outfall so that the RLWTF can maintain the capability to discharge to the outfall should the Mechanical Evaporator and/or Zero Liquid Discharge (ZLD) Solar Evaporation Tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in LANL scope/mission.

Request Ex. W, Jan. 27, 2012, Fact sheet, at 5 of 9. *See also* Form 2C at 6 through 14 of 14.

15. Since maintenance of equipment, at least, would appear necessary and predictable, a reader might infer that some discharges would take place. Other passages also suggested that discharges would continue. *See, e.g.*, Ex. W, Form 2C at 1 of 14 (showing Outfall 051 discharge of 19,700 gallons per day); Petition Ex. 14, Feb. 2012, Outfall status summary, at 1 (Outfall 051 not listed as a potential no-flow outfall); Petition Ex. 15, Feb. 2012, schematic (Outfall 051 depicted as a route for effluents); Ex. NN, June 26, 2013, Fact sheet, at 12, 13 (Outfall 051 discharges expected for maintenance), at 18 (describing Outfall 051 as a continuing

discharge point); Petition Ex. 16, June 26, 2013, Draft permit (Intermittent discharges from Outfall 051 authorized).

16. Comments on the draft permit were due by August 13, 2013, and the Lab filed comments on that date. The Lab's comments stated as follows, indicating that the solar evaporating tanks were not yet in operation, suggesting that discharges to Outfall 051 would occur if evaporation were not available, and failing to state that discharges from Outfall 051 had ended:

> The Laboratory's TA-50 Radioactive Waste Treatment Facility (RLWTF) has not discharged since November 2010 as a result of using the mechanical evaporator. Additionally, RLWTF has constructed two Zero Liquid Discharge (ZLD) tanks that can passively evaporate treated effluent. The ZLD tanks are currently being processed for permitting under the [New Mexico Environment Department] NMED's Ground Water Discharge Permit program and are not currently in operation. Based on discharge records prior to November 2010, and with options of using the existing mechanical evaporator or new ZLD evaporation tanks, RLWTF would discharge to Outfall 051 only once or twice per week if evaporation is not an option. (Request Ex. OO Encl. 1 at 3).

17. This statement came on the deadline for public comment and so cannot be the basis for contending that CCNS's comments, also due that very day, should have responded to it and sought termination on the basis of it.

18. Moreover, the statement is explicit that the solar evaporation tanks are not yet in operation, a situation that continues to this date. The statement projects that the RLWTF would discharge "only once or twice per week" if evaporation is unavailable, without describing the likelihood of that situation. *Id*. 3, 7. The Lab also suggested that discharges from Outfall 051 be monitored once per week. *Id*..

19. The information available at the time of re-permitting fails to state, specifically, what discharges are planned or anticipated, and with what probability. Region 6 did nothing to

resolve the ambiguities about future discharges, since it took the position that a permit may issue if "a discharge could occur," and that it would grant a NPDES permit at the request of the owner. (Honker letter, Petition Ex. 12, at 2). If CCNS had sought termination based only upon the ambiguous information contained in the Lab's August 13, 2013 comments, in all probability it would have generated only argument and, ultimately, inaction by the agency.

20. This is not to say that a § 122.64(a)(4) "change in any condition" which led to an "elimination of any discharge" had not occurred by the time CCNS filed the Request for Termination in mid-2016. The series of exhibits contained in the Request for Termination shows that the "zero-liquid-discharge" project was initiated in the 1990's (Request Ex. A) and carried out through a series of facility modifications, including the installation of a mechanical evaporator, and the construction of solar evaporation tanks, which project gave rise to the cessation of discharges from Outfall 051.

21. A mid-2014 LANL report, after the comment period, states: "Discharges from Outfall 051 decreased significantly after the mid-1980s and effectively ended in late 2010." Request Ex. PP at 4 of 31. In late 2014 NMED reported to EPA Region 6 that Outfall 051 had not discharged since November 2010. Request Ex. QQ. A LANL web site, NPDES Industrial Outfall Locations, states that "a mechanical evaporator was installed so no water has been discharged at Outfall 051 since November 2010." Request Ex. RR at 3 of 9.

22. Since clear information about planned or actual discharges at Outfall 051 has been difficult to obtain, CCNS has relied primarily upon the history, now seven years old, of non-discharges at that outfall.

23. CCNS submits that, in situations like this one, the best evidence that a change has resulted in elimination of discharges is, ultimately, the cessation of discharges, continuing over a

period of months or years. CCNS also submits that a rule requiring assertion of a request for termination within a specified time period after the supposed occurrence of a "change" could render this evidence unavailable, by requiring premature assertion of termination claims, before the best evidence of cessation of discharge can be presented. Therefore, and because there is no regulatory support for such a rule, and because Region 6 did not rely upon such a rule, CCNS opposes the introduction of such a rule by the Board.

Conclusion

WHEREFORE, Concerned Citizens for Nuclear Safety respectfully requests that the Environmental Appeals Board 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.

DATED at Santa Fe, New Mexico, this 27th day of February 2018.

Respectfully submitted:

CONCERNED CITIZENS FOR NUCLEAR SAFETY

BY: _____

Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
lindsay@lindsaylovejoy.com

BY: _____

Jonathan Block, Eric D. Jantz
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87506
(505) 989-9022
jblock@nmelc.org

: *Co-Counsel for Concerned Citizens for Nuclear Safety*

CERTIFICATE OF SERVICE

On this 27th day of February 2018, the undersigned caused the *Concerned Citizens for Nuclear Safety Post-argument Submission* to be filed with the Environmental Appeals Board using its electronic filing system and sending email to the below listed persons.

Jonathan M. Block

Renea Ryland, Asst. Regional Counsel
U.S. EPA Region 6
ryland.renea@epa.gov

Jim Payne
Office of Regional Counsel
U.S. EPA, Region 6
payne.james@epa.gov

Stacey Dwyer, Associate Director
Water Quality Protection Division, 6WQ
U.S. EPA, Region 6
dwyer.stacey@epa.gov

Los Alamos National Security, LLC
Los Alamos National Laboratory
smcmichael@lanl.gov

Mr. Charles F. McMillan, Director
Los Alamos National Laboratory
Mcmillan1@lanl.gov

Ms. Kimberly D. Lebak, Manager
U.S. DOE Los Alamos Field Office,
kimdavis.lebak@nnsa.doe.gov

Mr. Butch Tongate, Secretary
New Mexico Environment Department
butch.tongate@state.nm.us