

BEFORE THE ENVIRONMENTAL APPEALS BOARD FEB 28 2018

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. ENVIRONMENTAL APPEALS BOARD

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ORAL ARGUMENT

IN THE MATTER OF: :

LOS ALAMOS NATIONAL SECURITY, : NPDES Appeal No.
LLC, AND THE U.S. DEPARTMENT : 17-05
OF ENERGY :

Permit No. NM0028355 :

Thursday,
February 22, 2018

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, NW
Washington, DC

The above-entitled matter came on for hearing, pursuant to notice, at 11:00 a.m.

BEFORE:

THE HONORABLE MARY BETH WARD
Environmental Appeals Judge

THE HONORABLE MARY KAY LYNCH
Environmental Appeals Judge

THE HONORABLE KATHY A. STEIN
Environmental Appeals Judge

APPEARANCES:On Behalf of Concerned Citizens for
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ALSO PRESENT:

Eurika Durr, Clerk of the Board

1 P-R-O-C-E-E-D-I-N-G-S

2 11:00 a.m.

3 MS. DURR: All rise. The Environmental
4 Appeals Board of the United States Environmental
5 Protection Agency is now in session for oral
6 argument in re Los Alamos National Security, LLC
7 and the U.S. Department of Energy, Permit Number
8 NM0028355, NPDES Appeal Number 17-05.

9 The Honorable Judges Kathy Stein, Mary
10 Beth Ward, and Mary Kay Lynch presiding. Please
11 turn off all cell phones and no recording devices
12 allowed. You may be seated.

13 JUDGE WARD: Good morning. Today's
14 argument will proceed as outlined in the Board's
15 January 30 order allocating time for oral
16 argument.

17 Specifically, we will hear first
18 argument from Concerned Citizens for Nuclear
19 Safety. Concerned Citizens will have 20 minutes
20 for argument and may reserve up to five minutes
21 for rebuttal.

22 Next, we will hear from EPA Region 6

1 for 15 minutes. And finally, the Board will hear
2 from the Permittees, Los Alamos National Security
3 and the Department of Energy for five minutes.

4 On behalf of the Board, I want to
5 express our appreciation for the effort that we
6 know the parties put in the briefs that they
7 filed, as well as preparing for argument.

8 You should assume that we have read
9 the pleadings that you filed, but you should not
10 assume that we have reached any decisions
11 regarding the issues raised in this case,
12 although we may ask you some very tough questions
13 on arguments.

14 Oral argument is really an opportunity
15 for us to explore the parties' positions in this
16 case and to give you an opportunity to share with
17 us the specific points you want to raise and the
18 ones that you want to emphasize from the
19 pleadings that you have filed.

20 So, with that, before we begin
21 argument, I'd like all the parties to introduce
22 themselves and who is accompanying them to

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1 argument here today. So, let's start with
2 Concerned Citizens, then EPA Region 6, and
3 finally, the Permittees, Los Alamos National
4 Security and the Department of Energy. So,
5 Concerned Citizens?

6 MR. LOVEJOY: Thank you, your honor.
7 I'm Lindsay Lovejoy, representing Concerned
8 Citizens for Nuclear Safety, accompanied by Ms.
9 Joni Arends, who is a principal of that
10 organization and also an attorney.

11 JUDGE WARD: And did you wish to
12 reserve any time for rebuttal?

13 MR. LOVEJOY: Yes, I'd like to reserve
14 five minutes. Thank you.

15 JUDGE WARD: Okay. EPA?

16 MS. RYLAND: Good morning. My name is
17 Renea Ryland, I'm Assistant Regional Counsel with
18 EPA Region 6, and I'll be presenting the Region's
19 arguments in this matter. And I have with me at
20 counsel table Dawn Messier from the Office of
21 General Counsel.

22 JUDGE WARD: Thank you.

1 MS. McMICHAEL: Your honor, my name is
2 Susan McMichael and I'm here on behalf of Los
3 Alamos National Security, one of the Permittees in
4 this matter.

5 MR. DEROMA: Good morning, your honors.
6 I'm Silas DeRoma. I'm here on behalf of the
7 Department of Energy and I'll be ceding my time
8 today to Ms. McMichael.

9 JUDGE WARD: Thank you. We can
10 proceed.

11 MR. LOVEJOY: Thank you, your honor.
12 This is case is, as the Court, I'm sure, knows,
13 is about Outfall 051 at Los Alamos National
14 Laboratory. It's connected to the radioactive
15 liquid waste treatment facility and it has not
16 discharged any water or pollutants for more than
17 seven years now.

18 And the question is, whether the Lab
19 should keep it's NPDES permit for this outfall?
20 As --

21 JUDGE WARD: If I could just ask you to
22 bring the microphone a little closer to you?

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1 MR. LOVEJOY: Okay.

2 JUDGE WARD: That's helpful, thank you.

3 MR. LOVEJOY: Oh, I can hear, it's
4 connecting now. The declared statutory purpose
5 of the Clean Water Act, of course, is to
6 eliminate discharges of pollutants. And the
7 regulatory system is the National Pollutant
8 Discharge Elimination System.

9 In the location of concern here, there
10 is no discharge, it's been eliminated. When
11 there's no discharge, I submit that the purpose
12 of the Clean Water Act has been achieved and it
13 has no further role to play.

14 At the same time, the RLWTF manages
15 hazardous waste. And under 42 USC 6925 and the
16 state laws, it's required to have a permit,
17 unless there's an exception. And the Lab
18 maintains that the NPDES permit carries a RCRA
19 exemption, the wastewater treatment unit
20 exemption, for the entire RLWTF.

21 And so, they want to keep the NPDES
22 permit. We say that EPA must terminate that

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1 permit, which serves no purpose here, except to
2 provide, one might say, a regulatory fig leaf to
3 prevent the application of RCRA.

4 JUDGE STEIN: Excuse me, let me
5 interrupt for a moment. Am I correct that you're
6 objecting to the permit only with respect to
7 Outfall 051 and not with respect to other
8 outfalls?

9 MR. LOVEJOY: The proceeding now
10 concerns Outfall 051, that was the request to
11 terminate.

12 JUDGE STEIN: There is an NPDES permit
13 that applies to other outfalls.

14 MR. LOVEJOY: Correct, your honor.

15 JUDGE STEIN: So that even if you were
16 to prevail, there would still be an NPDES permit.

17 MR. LOVEJOY: Yes, as to other
18 outfalls, your honor.

19 JUDGE LYNCH: So, are you asking for
20 the permit to be terminated or are you asking for
21 it to be modified?

22 MR. LOVEJOY: I think, technically, it

1 is a termination, it is a partial termination, as
2 to this outfall, because there would be no
3 renewed or continued permit with respect to
4 Outfall 051.

5 JUDGE LYNCH: But isn't that dealt with
6 under another provision in the regulations?

7 MR. LOVEJOY: Well, I must say, the way
8 I read them, this is a termination case.

9 JUDGE LYNCH: So, if we were to grant
10 your request for a termination, what would be the
11 next steps?

12 MR. LOVEJOY: The Panel would remand to
13 the Region, with directions to initiate a
14 termination proceeding in accordance with 40 CFR
15 124.5.

16 JUDGE LYNCH: And --

17 MR. LOVEJOY: Which I think would be a
18 Part 22 proceeding.

19 JUDGE STEIN: As I understand the
20 regulations that you're proceeding under, your
21 allegation is that there has been a change in a
22 condition that requires a temporary or permanent

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1 reduction of the discharge. What is the change
2 in the condition that you are alleging?

3 MR. LOVEJOY: There have been several
4 changes, your honor. The entire RLWTF has been
5 rebuilt. And most --

6 JUDGE STEIN: Could you spell out what
7 that is for those in the audience that --

8 MR. LOVEJOY: Well, the material parts
9 in this proceeding are the addition of
10 evaporation units.

11 JUDGE LYNCH: And when did that happen?

12 MR. LOVEJOY: We don't know, actually.
13 We're dealing with a federal nuclear facility, it
14 is not open to the public. We have information
15 that is filed or is available through FOIA, but
16 we can't go up there and look.

17 JUDGE LYNCH: Well, when I read the
18 record, it indicates to me that the solar panels
19 were constructed prior to 2014.

20 MR. LOVEJOY: It took a long time to
21 build those. They are actually evaporation ponds
22 that are --

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1 JUDGE LYNCH: Correct.

2 MR. LOVEJOY: -- called tanks. And
3 there is, in addition, a mechanical evaporator.
4 These came in over a period of time, they were
5 initially -- the project began in the late 1990s,
6 at a study level.

7 But the matters -- these particular
8 parts were designed and constructed after the
9 2008 site-wide EIS. There were separate records
10 of decision adopting these plans.

11 JUDGE LYNCH: But the record shows that
12 they were constructed before the 2014 permit was
13 issued.

14 MR. LOVEJOY: Actually, as I recall,
15 the application for a renewal stated that the
16 changes will be forthcoming during the term of
17 the --

18 JUDGE LYNCH: Right, but in Los
19 Alamos's comments on the permit, they indicate
20 that the tanks were constructed before the permit
21 was issued.

22 MR. LOVEJOY: As I said, it's a secret

1 facility. I can tell you this --

2 JUDGE LYNCH: Well, that's what I'm
3 reading in the record. But let me ask a
4 different question, then. So, what happened,
5 what is the change that occurred after the permit
6 was issued in 2014?

7 MR. LOVEJOY: Well, reserving the point
8 that it is a secret facility, I can tell the
9 Court that Form 2C stated on the renewal
10 application, the configuration of the RLWTF and
11 Outfall 051 will be changing --

12 JUDGE LYNCH: I'm asking, I've moved
13 on, I'm asking a different question. What is the
14 change in condition that happened after the
15 permit was issued in 2014?

16 MR. LOVEJOY: I'm not contending that
17 it's necessary to prove that, but from this, I
18 gather the change was construction of two new
19 concrete evaporation tanks at TA-52, under the
20 Zero Liquid Discharge Project.

21 JUDGE LYNCH: And are you saying that
22 happened after the permit was issued?

1 MR. LOVEJOY: That's my best
2 information, your honor.

3 JUDGE STEIN: I have a --

4 MR. LOVEJOY: That's what this says.

5 JUDGE STEIN: I don't understand why
6 you're not required to prove a change in any
7 condition. As I understand the regulations, once
8 the permit is issued, the regulations lay out
9 four bases for potential termination.

10 You've alleged one, under, I think,
11 it's (a) (4), under Issue 4, which says, a change
12 in any condition. So, isn't that a condition
13 precedent that you have to show a change in any
14 condition in order to come within the purview of
15 the regulatory provision you're seeking to
16 terminate under?

17 MR. LOVEJOY: There has been a change.
18 I'm not saying --

19 JUDGE LYNCH: And when did it --

20 MR. LOVEJOY: -- that the --

21 JUDGE LYNCH: When did it happen?

22 MR. LOVEJOY: It happened after the

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1 application for renewal was filed, because that's
2 in accordance with the statement contained in
3 that application.

4 JUDGE LYNCH: So, the change you're
5 talking about is the construction of the
6 evaporator tanks?

7 MR. LOVEJOY: Yes, and I would say that
8 it's also the addition of the mechanical
9 evaporator, because I don't agree with the Panel
10 that it's necessary to prove specific timing of
11 this change. That's not in 124.5 --

12 JUDGE WARD: 122 --

13 MR. LOVEJOY: -- and it's not in
14 122.64.

15 JUDGE WARD: Well, 122.64 says, during
16 the term of the permit.

17 MR. LOVEJOY: That's -- it says that
18 the application for termination may be made --
19 yes, the change has to occur any time during the
20 term of the permit.

21 The occasion for termination may be
22 brought to the attention of the Region either

1 during the renewal process or at any later time,
2 there's no time restriction, it's an independent
3 process.

4 JUDGE STEIN: What would be the purpose
5 of going through a full-blown permitting
6 proceeding and issuing a permit and then allowing
7 someone to wait until after the permit was issued
8 to assert grounds that could have been asserted
9 during the permitting proceeding as a basis for
10 terminating that very permit? Why would that
11 kind of a scheme make any degree of sense?

12 MR. LOVEJOY: Because at this point, in
13 this case, the Applicant represented on various
14 grounds that there would be use for this outfall
15 during the permit term. And the interested
16 party, being a member of the public, but not
17 able, as I said, to enter upon and study this
18 secret facility, had to take that at face value.

19 But it was only after seven years went
20 by and there was no use of the outfall at all, so
21 the representations that it was necessary to use
22 the outfall at times of maintenance or breakdown

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1 was disproved. In that situation, it makes a lot
2 of sense, your honor.

3 JUDGE STEIN: But didn't they represent
4 that the only discharge would be intermittent or
5 potentially for maintenance? I mean, as I read
6 the record, I thought that the application
7 materials were fairly clear that once the zero
8 Discharge tanks were operational, in fact, the
9 discharge might be intermittent.

10 So, what I'm, as I think you know,
11 what I'm having difficulty with is understanding
12 where the change is.

13 MR. LOVEJOY: If the question is as to
14 when the change took place, I would say it took
15 place most materially when those tanks were
16 constructed, your honor.

17 JUDGE STEIN: Are the tanks operational
18 today?

19 MR. LOVEJOY: They are functional. The
20 Lab is awaiting the process of permitting under
21 the State Water Quality Act. But I must say,
22 there's a great question whether that act even

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1 applies to this situation, because of the same
2 reason, it requires a discharge and there's no
3 discharge.

4 JUDGE LYNCH: What if there was a
5 discharge tomorrow, would that moot your case?

6 MR. LOVEJOY: Well, I'm sure we would
7 all want to know why there was a discharge.

8 JUDGE LYNCH: That wasn't my question.

9 MR. LOVEJOY: No, it wasn't. But the
10 point is, we don't -- we can't know, because all
11 we would know, I suppose, is that the Los Alamos
12 Labs reported in some public way that there had
13 been a discharge and we'd have to take their word
14 for it.

15 I don't know what would happen, your
16 honor. One would suspect that after seven years,
17 there was some particular legal motive behind
18 that. But as I say, it hasn't happened.

19 JUDGE WARD: If I could switch subjects
20 slightly, if this were a formal appeal under
21 124.19, the Board standard of review, we would be
22 reviewing it for clear error or an abuse of

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1 discretion.

2 In 124.5, in this informal appeal, it
3 doesn't appear, at least on the face of it, to
4 provide for the standard of review. What would
5 you say the standard of review should be here?
6 Should it be the same as 124.19 or should it be
7 perhaps more stringent?

8 MR. LOVEJOY: I'm not sure it would be
9 more stringent, your honor. I think we have
10 basically some legal questions here. So, these
11 are right or wrong legal judgments that the
12 Agency has made. They have made the judgment
13 that one can issue an NPDES permit based on a
14 hypothetical discharge.

15 Now, the Clean Water Act is a pretty
16 concrete statute. As I was reading, for example,
17 in the Gorsuch case, there are several elements
18 that need to be present. There needs to be a
19 pollutant, it needs to be added from a point
20 source into a navigable water.

21 We do not issue, we our government,
22 doesn't issue an NPDES permit on the hypothesis

1 that the water being polluted might be,
2 jurisdictional, or might not.

3 We don't issue Clean Water Act permits
4 where the source could be a point source, by
5 maybe not. They're asking for a permit to be
6 issued and sustained when there might be a
7 discharge or maybe not.

8 JUDGE LYNCH: Well, Counsel --

9 MR. LOVEJOY: And I think --

10 JUDGE LYNCH: -- in your reply brief on
11 Page 8, in Paragraph 19, you list other outfalls
12 at the facility that have the potential, referred
13 to as potential no-flow outfalls. What's the
14 difference between those and Outfall 051?

15 MR. LOVEJOY: I don't know, your honor.
16 Those designations, those descriptions were
17 applied by the Lab on criteria they haven't
18 disclosed.

19 JUDGE LYNCH: But you're not concerned
20 about those?

21 MR. LOVEJOY: I might well be concerned
22 about them, your honor. And, actually, some have

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1 been brought to my attention that maybe should be
2 pursued. But this proceeding is about 051.

3 JUDGE WARD: Could I -- another
4 question on the issue of change in this facility
5 since the issuance of the permit. If there were
6 no change in the facility after issuance of the
7 permit in 2014, would you have a basis for
8 seeking termination now?

9 MR. LOVEJOY: Well, one would then ask,
10 why did the -- I assume from your hypothetical
11 that there was a discontinuance of discharges.
12 And there would have to be some reason for that.
13 These are important, big facilities and they're
14 operated in accordance with certain criteria and
15 management protocols.

16 And if there is a change in the
17 operations, one would want to know why and then,
18 what the basis was. There's got to be a change
19 somewhere if the operations are changing.

20 JUDGE WARD: I think my question was
21 more, if there were no change. If the record
22 failed to show that there had been any change in

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1 the condition of the facility since the permit
2 was issued, would there be any basis for
3 termination here under (a)(4)?

4 MR. LOVEJOY: Well, I hate to simply
5 repeat, but there would have to be some change at
6 some point, maybe going back many years. But
7 sometimes, when a facility is operated under
8 secrecy, the only time you can establish that
9 they actually have discontinued discharges is if
10 you wait several years and you can point to the
11 fact that there's been nothing. That's this
12 case.

13 There's also been changes, I mean,
14 they've been very blatant about how this is a
15 zero liquid discharge facility now. It wasn't
16 before. They've never denied seriously that
17 there's been a change. So, I think there's been
18 an ample change and there have been several major
19 changes since the permit was issued.

20 JUDGE WARD: Well, one of the things
21 you state in your reply, as to going to the
22 change, is to how the facility is operated, but

1 it's simply a statement that -- and this is Page
2 11 and 12 of your reply.

3 You stated that Los Alamos reversed
4 itself and determined that Outfall 051 will not
5 be used. And I took that to mean, after the
6 permit was issued. What's the basis for that
7 statement?

8 MR. LOVEJOY: The evidence that there's
9 been no discharge. In the application, there
10 were references to various needs, including
11 maintenance, that would be the basis for
12 discharging through Outfall 051. None of that
13 has taken place.

14 JUDGE WARD: Well, I think the record
15 before the Agency when the permit was being
16 issued was that there hadn't been a discharge
17 since 2010.

18 MR. LOVEJOY: When the permit was on
19 renewal, that was only about a year before the
20 decision was being made on renewal. Now, it's
21 been seven years. That's certainly a much more
22 convincing case.

1 JUDGE LYNCH: So, is it just the
2 passage of time that proves your case?

3 MR. LOVEJOY: As I think I've said, the
4 addition of several evaporator facilities, the
5 reconstruction of the RLWTF, but most pointedly,
6 the addition of the zero liquid discharge
7 equipment, is the change.

8 JUDGE STEIN: Why is it inappropriate
9 for an entity that's making some kind of
10 alteration in its operations to plan for the
11 possibility of a breakdown or a malfunction and
12 to be prudent and have a discharge permit in the
13 event that there is a discharge?

14 And what I hear or what I see in the
15 papers of the Region and Los Alamos is, or the
16 Department of Energy, is that they are trying to
17 prudently plan for the possibility of a
18 discharge. Why is it that that is inappropriate
19 for them to do?

20 MR. LOVEJOY: It's certainly
21 appropriate for them to plan. And their plans
22 probably ought to include planning to apply for

1 an NPDES permit if they should foresee
2 discharges.

3 But the way Congress drafted the law,
4 there's no permit for a possible discharge. And
5 two courts of appeals, more than two, have said
6 that. So, that's a redline that Congress drew
7 and it faces us all and we have to honor it.

8 JUDGE STEIN: Well, didn't the Pork
9 Producers case that you rely on, the National
10 Pork Producers and Water Keeper Alliance, deal
11 with situations where EPA required people to
12 apply for permits as opposed to the situation
13 that we're dealing with here, where the entity in
14 question has voluntarily requested a permit?
15 Isn't that a distinction that we should take
16 account of?

17 MR. LOVEJOY: It's not in the statute,
18 your honor. Either a permit is required or it's
19 not. And this time, it's really not required,
20 but Los Alamos has requested it, not for any
21 purposes having to do with control of pollution,
22 but simply to get a RCRA exemption.

1 JUDGE STEIN: Can you point me to a
2 case that's been decided that says the EPA lacks
3 discretion to issue a permit in circumstances
4 where the permittee is voluntarily applying for a
5 permit as opposed to being required by the Agency
6 to apply for a permit?

7 MR. LOVEJOY: Well, the Water Keepers
8 case specifically addresses the question of
9 whether EPA has discretion to require permits
10 that are not required by the precise terms of the
11 Clean Water Act.

12 And it rejects that possibility. It
13 says, we believe that the Clean Water Act on its
14 face prevents the EPA from imposing upon CAFOS
15 the obligation to seek an NPDES permit or
16 otherwise demonstrate that they have no potential
17 to discharge, citing Chevron and relying on
18 Chevron One.

19 JUDGE STEIN: But that's talking about
20 imposing the requirement to apply. I'm asking
21 you about whether there's case law in the
22 situation in which we have here, where the

1 company or the entities have applied for a permit
2 and weren't required in the same sense that
3 you're describing, as I understand it, in the
4 other cases.

5 MR. LOVEJOY: Well, I don't know of a
6 case that makes a distinction between someone who
7 applies for a permit, quote, voluntarily, and one
8 who applies for a permit, quote, involuntarily.

9 As far as I know, they're all applied
10 for by people who want the permit and it doesn't
11 really make any difference to the legality of the
12 situation. We're talking about a jurisdictional
13 limit. It's in 33 USC 1342, a permit --

14 JUDGE LYNCH: Why didn't you raise that
15 objection before the permit was issued?

16 MR. LOVEJOY: Well, for the reasons
17 that are set forth in Pages 8 through 11 of our
18 reply brief. That it was being claimed that
19 there were various needs that would lead to
20 discharges during the operation of the facility.
21 And --

22 JUDGE LYNCH: Well, on Page 9 of your

1 termination request, it seems very clear that you
2 were aware that there might not be any
3 discharges.

4 MR. LOVEJOY: We did get the
5 information that the last discharge was in 2010.
6 But it was very clear that this Applicant was
7 fighting to keep the permit and we had no way to
8 get any harder facts than from their own
9 application, which professed various needs to
10 discharge.

11 JUDGE LYNCH: Possible needs.

12 MR. LOVEJOY: Possible needs. But I
13 must say, and I don't -- I'm not saying that it
14 would have been legal, but I think, as happened
15 in fact, it was much more likely for Region 6 to
16 grant a permit on the basis of those claims and
17 it would be a hard case for us to contest. But
18 when you've gone seven years and nothing's
19 happened and there's been no discharge --

20 JUDGE LYNCH: How long has the permit
21 been in effect?

22 MR. LOVEJOY: It's been in effect since

1 late 2014. It's on a five-year basis.

2 JUDGE LYNCH: That's not seven years.

3 MR. LOVEJOY: It's seven years since
4 they stopped discharging. And that's a pretty
5 good record to go to court about, I think. And
6 it's certainly, I would think, a very -- a
7 situation that should give us all pause, when EPA
8 is saying, or the Region is saying, that they
9 should be able to grant a permit to somebody
10 who's not discharging who pretty clearly only
11 seeks it for a RCRA exemption.

12 JUDGE LYNCH: But I don't understand
13 why it didn't give you pause in 2014.

14 MR. LOVEJOY: As I think I've said, it
15 did. But it seems like it would have been a much
16 harder case to pursue and if you can prove that
17 someone has been not discharging for seven years
18 --

19 JUDGE LYNCH: Well, no, but you filed
20 your first request with the Region just a year
21 later --

22 MR. LOVEJOY: The request to --

1 JUDGE LYNCH: -- in 2015.

2 MR. LOVEJOY: It was actually 2016 and

3 --

4 JUDGE LYNCH: Well, your first letter
5 to the Region questioning the authority to issue
6 the permit, you submitted in November 2015. The
7 permit had only been issued August 12, 2014. So,
8 I don't understand what happened between that
9 year.

10 MR. LOVEJOY: Well, I suppose what
11 actually happened is that the evaporation ponds
12 were built. And we got that information and it
13 became --

14 JUDGE WARD: I don't see anything --

15 MR. LOVEJOY: -- clear that the --

16 JUDGE WARD: -- in the record to
17 support your claim that they were built at the
18 particular time you're implying. I see contrary
19 evidence in the record that's available to
20 everyone.

21 And, specifically, I think it's
22 Exhibit OO to your termination request, which are

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1 Los Alamos comments on the permit from 2013, in
2 which they state, additionally, the facility has
3 constructed two zero liquid discharge tanks.

4 So, a year before the permit was
5 issued in 2014, those two tanks had been
6 constructed. At least that's what we're reading
7 in the record before us.

8 MR. LOVEJOY: Well, that's what they
9 said. And then, in their comments, Exhibit W in
10 Form 2C at Page 7, they say, the configuration of
11 RLWTF and Outfall 051 will be changing in the
12 next five years, due to the construction of two
13 new concrete evaporation tanks. This is the
14 information we got.

15 JUDGE WARD: But that was in 2012.
16 You're reading from the application itself in
17 2012 and I was referring to Los Alamos's comments
18 from 2013.

19 MR. LOVEJOY: Okay. Okay, I see your
20 point, yes. I can only say that very often, the
21 Lab announces various ambitious plans and they
22 don't take effect very quickly.

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1 I would think that if we're going to
2 make the availability of termination depend on a
3 change that one can point to which occurred since
4 the most recent permit renewal proceeding, none
5 of which is in the rules, none of which is in the
6 rules, then we're going to be dealing with
7 situations like when an outfall has been dry and
8 dormant for 20 years, that there will be a right
9 to get that re-permitted, and interested parties
10 cannot apply for termination, because it's been
11 so many years since the most recent renewal.
12 None of that's in the rules.

13 JUDGE STEIN: But what is in the rules,
14 in (4), is a parenthetical that gives an example
15 of what is meant by termination, which says,
16 e.g., plant closure or connection of the
17 discharge to the POTW.

18 Why aren't those examples of what was
19 intended by this? Which seems to me to be a
20 fairly limited category for termination. I don't
21 see that precluding, in a new permitting
22 proceeding, from concerned citizen raising, in a

1 new permitting proceeding, something.

2 But I think termination is something
3 that is regarded as more of perhaps an
4 extraordinary remedy or a limited remedy. But
5 you don't issue a permit that takes years to
6 issue and turn around the next year and terminate
7 it for information that was publicly available at
8 the time the permit was issued. That would turn
9 the permitting program on its head.

10 So, I see a difference between a
11 termination request and a new permit proceeding.
12 I do think the parenthetical in the language of
13 the regulation makes it clear that this is a
14 somewhat limited kind of -- that at least (a) (4)
15 is available in limited circumstances.

16 MR. LOVEJOY: The items listed in
17 (a) (4), in the parenthetical, are stated to be
18 examples, not exclusive. And the example of
19 connection to a POTW is actually quite pertinent,
20 because that connection could take place very
21 easily and the outfall, which was previously in
22 use, could remain unused. And that's what's

1 happened here.

2 JUDGE LYNCH: But that language --

3 MR. LOVEJOY: It's just the same.

4 JUDGE LYNCH: -- is specific and the
5 examples are of a particular nature that's
6 different than the language in the conditions for
7 modification to revocation and reissuance.

8 MR. LOVEJOY: Yes. And it's -- the
9 (a)(4) termination language applies here. And
10 the example given is very close to what was done
11 here, because as in the connection to a POTW,
12 alternative disposal, if you will, methods were
13 connected and the previous outfall was left and
14 it's now been dry and dormant for seven years.

15 Just because a discharge is possible
16 doesn't make it mean that it supports a permit.
17 As a matter of fact, the law is to the contrary.
18 I think I've --

19 JUDGE WARD: Okay. Judge Lynch, any
20 further? Okay. Thank you.

21 MR. LOVEJOY: Thank you.

22 JUDGE WARD: And you'll have five

1 minutes for rebuttal. We'll hear from EPA Region
2 6 next.

3 MR. LOVEJOY: May I inquire whether
4 there is any time remaining for --

5 JUDGE WARD: Yes, five minutes.

6 MR. LOVEJOY: Thank you.

7 MS. RYLAND: May it please the Board,
8 this morning, I'd like to make basically four
9 points on the part of the Region. First, the
10 Region's decision making here is fully supported
11 by the text of the regulations.

12 Second, the discharges at issue have
13 not terminated. At least, there is no evidence
14 in the record that the potential for discharges
15 through Outfall 051 have been eliminated.

16 Third, there are no changed conditions
17 that constitute cause to terminate permit
18 coverage under the regulations.

19 And finally, that EPA does have both
20 the authority and the discretion to issue permits
21 upon request to permittees for episodic
22 unpredictable discharges.

1 JUDGE LYNCH: Are there any limits on
2 that discretion?

3 MS. RYLAND: There are no limits set in
4 the regulations. I mean, there's not a, for
5 instance, a time limit on discharges, like there
6 has to have been a discharge in ten years, or
7 whatever. We -- it would depend on the facts of
8 the case, because the EPA does have very broad
9 discretion in issuing permits.

10 JUDGE STEIN: Other than the Region 8
11 example that you cited in one of your briefs, are
12 there other examples of quote/unquote no-
13 discharge permits?

14 MS. RYLAND: Yes, there are. I just
15 put one in the brief sort of as a backup example,
16 but there are lots of examples. And particularly
17 in the Stormwater Program and the CAFO Program,
18 those programs are based on unpredictable
19 discharges in the future that you don't know when
20 are going to happen.

21 And one point I would like to make is,
22 even though I mentioned that we issue no-

1 discharge permits, which we do when a facility is
2 not intending to discharge, or at least is hoping
3 not to discharge, this case is not really a no-
4 discharge permit.

5 In this case, the Permittees sought
6 coverage because they anticipate a discharge.
7 This is not a no-discharge facility.

8 JUDGE WARD: Based on the record before
9 you when the permit was issued, was that a
10 reasonable expectation? I mean, by the time the
11 permit was issued, four years had passed, there
12 had been no discharge, correct?

13 MS. RYLAND: Right.

14 JUDGE WARD: Perhaps there wouldn't
15 have been a malfunction, but I would assume
16 there's some kind of routine maintenance that
17 goes on, but even so, there had been no
18 discharge, is that the case?

19 MS. RYLAND: I think it's still
20 reasonable, yes, and even for a malfunction or a
21 breakdown, in that this facility, it's an old
22 facility. I guess, with each passing year,

1 there's more of a chance that something would go
2 wrong and they would need to discharge.

3 Also, it was not just for malfunction
4 or maintenance that they requested permit
5 coverage, but also in case of an increase of
6 their scope or mission, that if for some reason
7 the facility was required to rev up and put out
8 more treated wastewater, then they would need an
9 additional pathway.

10 And I think the record is clear that
11 they needed this third pathway to dispose of
12 treated wastewater, that it was not intended to
13 be a replacement for -- or that, I guess, the
14 solar evaporation tanks were not intended to be a
15 replacement for this outfall.

16 JUDGE WARD: So, I see those statements
17 in the record --

18 MS. RYLAND: Right.

19 JUDGE WARD: -- is there anything else
20 in the record that supports, say, for example, we
21 have some plans vis a vis this facility that
22 might warrant needing to use the discharge?

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1 MS. RYLAND: I think there is. Well,
2 there is in the record before the Board, I
3 believe, in the affidavit filed by the facility
4 about their groundwater permit and the need to
5 discharge.

6 The groundwater permit itself was not
7 before the Region when we made our decision, but
8 I think the Permittee's counsel will speak to that
9 more, which goes more to possibly an actual
10 discharge.

11 But as far as the Region was
12 concerned, I think we thought the record was
13 strong enough that there was a potential for
14 discharge and that the Permittee was seeking
15 coverage in case of that discharge, and those are
16 the kind of permits that we issue all the time.

17 JUDGE STEIN: Leaving aside the
18 question of the affidavit, which obvious was
19 issued after --

20 MS. RYLAND: Right.

21 JUDGE STEIN: -- the Region made its
22 decision in its case, is there other publicly

1 available information of which the Board could
2 take judicial notice that would show a potential
3 for discharge? Or is everything you're pointing
4 to found in either the permitting record or the
5 affidavit?

6 MS. RYLAND: As far as the potential
7 for discharge for this facility?

8 JUDGE STEIN: Yes. This outfall.

9 MS. RYLAND: Yes. As far as I -- I
10 don't know of anything offhand that would not be
11 either in the record or in the affidavit from
12 them.

13 JUDGE WARD: If the Board were to
14 affirm the Region's decision regarding the
15 termination request here, what is Concerned
16 Citizen's recourse?

17 MS. RYLAND: Well, they could always
18 bring this issue -- the permit will expire, I
19 believe, in September of 2019 and there will be a
20 reapplication permitting process and they could -
21 - they are certainly free to bring this issue up
22 at that time.

1 JUDGE WARD: In comments on any request
2 for renewal?

3 MS. RYLAND: Yes.

4 JUDGE WARD: I asked Concerned Citizens
5 this question, so I'll put it to you as well,
6 what standard of review should the Board use for
7 purposes of this informal appeal?

8 MS. RYLAND: I would think that it
9 should be at least as stringent as a formal
10 appeal, the clear error.

11 And perhaps even more stringent, in
12 that EPA has discretion as to whether -- like I
13 say, the termination of a permit is thought of as
14 a very severe remedy, and even if one of the
15 causes are met, EPA has a great deal of
16 discretion in determining whether to take that
17 severe of a remedy.

18 JUDGE LYNCH: So, what would more
19 stringent be?

20 MS. RYLAND: I don't know, that's
21 difficult to say, in that I guess clear error is
22 pretty stringent. But I'm not sure of what that

1 would be.

2 JUDGE STEIN: I think if the Board were
3 to set a standard for review, it would do that
4 under 124.5 generally, not just the issues in
5 this particular case. Are there -- if you were
6 to have something more stringent, what would it
7 be?

8 MS. RYLAND: That's what I -- I'm not
9 sure that anything comes to mind. And so, maybe
10 just to fall back on the standard for formal
11 appeals under 122.19, which is clear error on the
12 part of the Agency.

13 JUDGE WARD: So, I think in the
14 Concerned Citizens' reply, if they -- I'm reading
15 their reply as seeking to make the point that
16 they didn't have -- they really couldn't have
17 challenged the permit, because they didn't have
18 all the facts before them.

19 So, they now know the facts. Is that
20 a basis for termination here? Is it something
21 the Board could consider at this point in time?

22 MS. RYLAND: I don't think so in that

1 I think that the record was clear at the time
2 that the permit was issued, that there had been
3 no discharges since 2010, and that also the solar
4 evaporation tanks are discussed in the 2012
5 application, which was available to the public.

6 I think it is also stated clearly in
7 the reapplication that the Permittee is seeking
8 permit coverage in case of a future discharge.
9 So, I think all of that taken together is pretty
10 clear that these facts were available at the time
11 the permit was issued and the Appellants could
12 have raised it at that point.

13 JUDGE WARD: But, I guess, if we were
14 to find that they weren't --

15 MS. RYLAND: Okay.

16 JUDGE WARD: -- would that be a basis
17 to direct the Region to begin termination
18 proceedings?

19 MS. RYLAND: Not necessarily, because
20 I think even if we were to say that these
21 conditions were a change, I think they are not --
22 that they still don't meet the second part of

1 122.64(a)(4), which says a change that requires
2 termination of the discharge.

3 And here, again, I think the record
4 shows that the addition of the solar evaporation
5 tanks were not intended as a replacement for
6 Outfall 051. There are numerous points in the
7 record where these solar evaporation tanks are
8 referred to as a third pathway, another
9 alternative for disposal of treated waste.

10 And so, I think it's clear that it's
11 not a change that requires termination of the
12 Outfall. So, I think even if you were --

13 JUDGE LYNCH: Do we have to -- excuse
14 me.

15 MS. RYLAND: Sorry.

16 JUDGE LYNCH: Do we have to reach that
17 particular issue? So, in other words, if the
18 Board were to decide that there was no change
19 after the permit was issued, do we have to reach
20 the question of whether it was required or not?

21 MS. RYLAND: No. I don't believe you
22 do. I think if there was no change, then they do

1 not meet the requirements of 122.64(a)(4).

2 I'm just saying that even if you were,
3 for the sake of argument, to say that there was a
4 change, that that in and of itself is not enough,
5 there's still a second prong that they would need
6 to meet. Which I don't think they've met that
7 prong here either.

8 JUDGE STEIN: When you say they haven't
9 met that prong and you're focusing on the word,
10 requires, are you --

11 MS. RYLAND: Right.

12 JUDGE STEIN: -- suggesting that
13 something that's voluntarily done does not meet
14 the definition of requires? Or could you make
15 your point more clear as to the second part of
16 (a)(4)?

17 MS. RYLAND: Well, I guess, requires,
18 in the sense, if you look at the examples, the
19 parenthetical examples to (a)(4), if they've
20 terminated the discharge by shutting down the
21 plant, but hooking up to a POTW, then you could
22 see where that would require termination of the

1 discharge.

2 Although, even in that case, you would
3 tend to think it would be that the permittees are
4 seeking termination of the discharge. I think
5 that read in combination with (b) seems to
6 indicate that there was some thinking that these
7 would be situations under which the permittee is
8 coming in and seeking to terminate permit
9 coverage, because they no longer need it.

10 JUDGE WARD: I have one additional
11 question. If the Board were to conclude that
12 there was no change in condition, is it necessary
13 for us to reach the scope of the jurisdictional
14 question that Concerned Citizens has raised about
15 the breadth of the Clean Water Act?

16 MS. RYLAND: No, I don't think that it
17 is. I think we've already -- this permit has
18 been issued under the regulations. There are
19 four reasons for which it can be terminated and I
20 think they would have to meet one of those
21 conditions.

22 JUDGE STEIN: One additional question,

1 and forgive me if I've gone over territory --

2 MS. RYLAND: That's okay.

3 JUDGE STEIN: -- somebody else has
4 covered. Is there any publicly available
5 information regarding the status of the zero
6 liquid discharge tanks? I've heard they've been
7 constructed, I've heard they haven't been
8 permitted --

9 MS. RYLAND: Right.

10 JUDGE STEIN: -- but is there any
11 publicly available information to which you could
12 point us as to their status? I'm assuming if
13 they haven't been permitted --

14 MS. RYLAND: They haven't --

15 JUDGE STEIN: -- they can't be used.

16 MS. RYLAND: Right, they are not
17 operational yet, because they haven't been --
18 LANL was seeking a groundwater permit from the
19 State that also is needed for that facility. And
20 so, the SETs are not operational.

21 Which is another point to the change
22 in condition. If the solar evaporation tanks are

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1 seen as a change in condition, that change hasn't
2 happened yet, in that those tanks are not being
3 used at LANL.

4 JUDGE STEIN: Where in the record could
5 you point us, either the record of this
6 proceeding or publicly available information or
7 something publicly available from the State
8 proceeding, could you point us to? And if you
9 don't have it immediately available and it exists
10 --

11 MS. RYLAND: Okay.

12 JUDGE STEIN: -- I would appreciate
13 receiving that information.

14 MS. RYLAND: I know there are notices
15 of planned changes to Outfall 051 that are in the
16 record, in which the facility talks about the
17 fact that these tanks will be coming online. I'm
18 not sure that I can think of anything in
19 particular in the record that says, they are not
20 operational at this point.

21 JUDGE STEIN: Well, we'll ask your
22 colleagues --

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1 MS. RYLAND: Okay, yes.

2 JUDGE STEIN: -- from the Department of
3 Energy --

4 MS. RYLAND: Yes.

5 JUDGE STEIN: -- that question --

6 MS. RYLAND: They might, yes --

7 JUDGE STEIN: -- when they come up.

8 MS. RYLAND: -- might have a better
9 answer to that.

10 JUDGE WARD: If those tanks, assuming
11 we can get verification --

12 MS. RYLAND: Right.

13 JUDGE WARD: -- they haven't yet been
14 permitted, we're assuming they haven't yet been
15 permitted, if they were permitted, would that be
16 a change within the meaning of (a) (4)?

17 MS. RYLAND: No, I don't believe it
18 would, because these tanks, the fact that they
19 were going to be permitted is clear in the
20 record. It was discussed in the 2012
21 application. As I said, there were several
22 notices of change to Outfall 051 that were

1 provided to EPA.

2 So, EPA was well aware and it was in
3 the record at the time of the permit issuance in
4 2012 that these SETs were going to be coming
5 online eventually. And so, I think that was
6 taken into consideration in writing the permit.

7 JUDGE WARD: So, if, just another
8 scenario, so if a facility had applied for a
9 permit and during the permit application process
10 stated, we anticipate the possibility that within
11 the next five years, we'll be hooking up to a
12 POTW --

13 MS. RYLAND: Right.

14 JUDGE WARD: -- then, that occurs
15 during the permit term, would there be a basis
16 for termination under (a)(4) in that scenario?

17 MS. RYLAND: I don't think so. There,
18 again, just in that termination of a permit is
19 such a severe -- it's described in the preamble
20 to the Regs as basically an enforcement action.
21 And the other three items are -- the other three
22 causes for termination are based on wrongdoing by

1 the permittee or harm to health of the
2 environment.

3 So, I think we would probably -- I
4 think that even if the Agency said, okay, this
5 was -- even if they considered it a change, in
6 that they had actually hooked up to the POTW, I
7 can't see that we would view that as something
8 that required such a severe measure. I would
9 think that we would address that in the next
10 permit reissuance.

11 JUDGE LYNCH: Would you consider a
12 request for modification?

13 MS. RYLAND: Yes, I think we probably
14 would consider a request for modification. And
15 in fact, under the regulations, under the
16 regulations for minor mods to permits, the fact
17 that the outfall has been totally eliminated,
18 such as by hooking up to a POTW, is cause for a
19 minor modification.

20 But that is, of course, assuming that
21 the permittee is requesting to eliminate that
22 discharge from the permit.

1 JUDGE WARD: Any further questions?
2 No? Okay, thank you very much.

3 MS. RYLAND: Thank you very much.

4 JUDGE WARD: We'll hear next from
5 counsel for the Permittees.

6 MS. McMICHAEL: Thank you. May it
7 please the Board, we appreciate the opportunity
8 to provide these comments today and to assist
9 you. A couple of major points here. Outfall 051
10 is an integral part of the RLWTF facility.

11 There has been no evidence of any
12 intent to terminate, it's a critical part of the
13 facility, as specified in the 2012 application
14 very clearly, that it exists not only for the
15 prudent and conservative measures in the event a
16 malfunction occurs with, currently, the
17 mechanical evaporator is our only option, but
18 also the SETs, which I will try to answer
19 questions in just a moment on the solar
20 evaporation tanks.

21 But also, importantly, there's a third
22 reason. It is specified in the application that

1 -- it's also described in the permit application
2 section 3.1, that is to support increases in
3 treatment capacity caused by changed to LANL's
4 mission.

5 So, in other words, we may need both,
6 not only the outfall, but also the evaporator, to
7 treat our liquid radioactive waste. It's not a
8 question of a replacement and there is no intent
9 whatsoever to terminate Outfall 051.

10 Which gets me to your question about
11 the SET and the Outfall. So, the SET, solar
12 evaporation tanks, were constructed in 2012.
13 Most importantly, they are expressly in the
14 application for the NPDES permit.

15 The work on that was done prior to
16 that. They are permitted under the NPDES permit.
17 There has been no change, no change because, no,
18 they cannot operate.

19 They are also regulated under the
20 State's groundwater permit. And in the affidavit
21 of Michael Saladen, he describes the State
22 groundwater permit and attaches the proposed

1 permit, which I believe you can take judicial
2 notice, it was public noticed, the permit
3 attachment includes the public notice of this.
4 This is judicially noticeable.

5 This permit, the solar evaporation
6 tanks cannot operate under that permit is issued.
7 That permit is expected to be issued this year.
8 The application was submitted, as well, in 2012.

9 And each year that the evaporator,
10 mechanical evaporator is not used increases the
11 potential to need to discharge from Outfall 051,
12 obviously, because it is aging. It's not -- we
13 don't have the solar evaporator as an option now
14 until the final permit is issued.

15 Secondly, the groundwater permit has
16 specific conditions to Outfall 051 and you can
17 take judicial notice of them under Paragraphs 8,
18 Page 15 -- I'm sorry, Condition 8 of the permit,
19 which is on Page 15, and Condition 21 of that
20 permit, which is on Page 27 of the permit,
21 requires use of the Outfall.

22 Requires within, after the permit

1 issued, within 180 days, we are to perform
2 testing, water tightness testing, quantifiable
3 tests and documents that will need to be
4 submitted to the State of New Mexico to
5 demonstrate compliance with this permit.

6 So, there is no question we will be
7 using and need to use that outfall after the
8 groundwater permit is issued in order to comply
9 with the State groundwater permit.

10 JUDGE WARD: If I could just, I think
11 --

12 MS. McMICHAEL: Certainly.

13 JUDGE WARD: -- I would like to confirm
14 what I think I just heard --

15 MS. McMICHAEL: Yes.

16 JUDGE WARD: -- which is that once the
17 zero liquid discharge tanks -- when the zero
18 liquid discharge tanks are permitted, you have
19 180 days to test -- you'll have to have to have
20 some discharge for purposes of testing and
21 reporting to the State?

22 MS. McMICHAEL: Correct. As well as,

1 Outfall 051. So, I mean, there's no question,
2 Outfall 051 is integral to this facility and
3 always consistently has been.

4 So, when that discharge permit is
5 issued, we will need to comply with it and some
6 of the compliance conditions, they do require use
7 of our discharge points to confirm testing, water
8 tightness testing, flow meters, other sorts of
9 technical issues associated and required as part
10 of that permit.

11 We are not going to discharge or would
12 not want to or be prudent to discharge out of
13 Outfall 051 today, because we have a final permit
14 that should be issued by the end of this year.
15 We will wait for the final terms and conditions
16 of that permit, and then, to comply with that
17 permit, we'll be required to test the Outfall.

18 JUDGE LYNCH: You're talking about the
19 State permit?

20 MS. McMICHAEL: I am. I'm talking
21 about the State permit, your honor. And it's
22 very integral to the facility. I just can't

1 emphasize enough how there is no evidence of any
2 intent to terminate. Los Alamos did not reverse
3 itself. Outfall 051 has consistently been part
4 of this facility.

5 JUDGE LYNCH: So, what's different in
6 nature about Outfall 051 from the other, at least
7 ten, outfalls that you eliminated and that you
8 discussed in your 2012 permit application.

9 MS. McMICHAEL: Sure. So, the other
10 outfalls that are in the permit application are
11 not associated with the RLWTF facility. So, it's
12 an umbrella NPDES permit, it has many outfalls.
13 We have many outfalls at Los Alamos.

14 The only outfall at RLWTF is Outfall
15 051, just for a point of clarification. The --
16 again, the purpose of that Outfall is to -- the
17 RLWTF facility treats -- is a mission-critical
18 facility, because it is the only facility to
19 treat radioactive liquid wastes that we receive
20 from our scientific and technical experiments
21 throughout the labs go to this facility for
22 treatment.

1 It is a -- in that sense, it is not an
2 option for Los Alamos to stop our work and not
3 discharge or have a point to discharge, because
4 we don't have a permitted outfall, for example.
5 It is not an option for Los Alamos to discharge
6 in violation of the Clean Water Act at Outfall
7 051, if necessary.

8 If we need -- we have very
9 specifically in the application is there for an
10 increase in treatment capacity by a change to our
11 Lab mission and scope. Things change, things
12 break, right?

13 I mean, this is a conservative, it's
14 a very conservative measure to permit for the
15 inevitable of malfunction or anything that can
16 happen in terms of maintenance and repair with
17 the SET, once its operational, and of course
18 right now, the mechanical evaporator.

19 JUDGE LYNCH: So, in terms of the
20 construction of the zero liquid discharge tanks,
21 in the permit application, which was in January
22 2012 --

1 MS. McMICHAEL: Yes.

2 JUDGE LYNCH: -- you talk about, these
3 aren't too be constructed, the plans are changed.
4 But then, when you file your response to comments
5 in 2013, you state in there that they have been
6 constructed.

7 So, did the construction happen
8 between those two points and is there anything
9 else in the record or publicly available that you
10 can point to in terms of the construction?

11 MS. McMICHAEL: The SETs were
12 constructed in 2012 and the -- the actual
13 construction was in 2012. I'm trying to think,
14 in the comments, there are the comments referring
15 they have been built.

16 We can certainly provide the actual
17 date of final construction or anything, if that
18 is important and relevant to this issue, which it
19 obviously is.

20 I would only say further that
21 critically, the actual SET itself was included,
22 all of the information necessary for permitting

1 included in the permit application in the renewal
2 application of 2012.

3 So, that -- since that point in time,
4 really there has been no change, as Mr. Saladen
5 said in his affidavit. We have been waiting for
6 the permitting of that through the State
7 Environmental Department, groundwater permit.

8 JUDGE WARD: So, if I could ask you to
9 address the question I asked --

10 MS. McMICHAEL: Sure.

11 JUDGE WARD: -- the other counsel, the
12 standard of review, what standard of review
13 should we apply in this informal appeal?

14 MS. McMICHAEL: Well, I think the
15 Agency's decision should be provided the
16 discretion as an Agency final decision of the
17 review of it for unreasonable necessary,
18 arbitrary use of discretion.

19 I think they do have discretion as an
20 Agency and should be afforded that standard of
21 review that you would afford any final Agency
22 decision.

1 JUDGE WARD: So, clear error or abuse
2 of discretion, much like we would for a formal
3 appeal?

4 MS. McMICHAEL: Correct.

5 JUDGE WARD: Nothing more stringent or
6 less stringent?

7 MS. McMICHAEL: That is my opinion,
8 yes.

9 JUDGE WARD: All right. Thank you very
10 much.

11 MS. McMICHAEL: You're welcome.

12 JUDGE WARD: And we'll hear now from
13 counsel for Concerned Citizens. Five minutes is
14 on the clock for your rebuttal.

15 MR. LOVEJOY: Thank you, your honor.
16 Just to respond to a few points. I wish to
17 emphasize that 122.64 specifies causes for
18 termination expressly for terminating a permit
19 during its term or for denying a permit renewal
20 application.

21 There is no constraint in the
22 regulations. As a matter of fact, the

1 regulations refuse any such constraint requiring
2 a termination issue to be raised during a renewal
3 proceeding.

4 Second, on the standard of review,
5 there is an ancillary requirement that I think
6 applies to all judicial review, and I think
7 that's what is happening here, of Agency action.

8 It's the SEC v. Chenery doctrine,
9 which I'm sure the Court has heard of, which says
10 expressly that an Agency action may be sustained
11 on the grounds that the Agency cited in its
12 decision, but not on new grounds.

13 The idea that the change we're dealing
14 with here, which is adoption of the zero liquid
15 discharge system, does not "require" termination
16 of discharges, but only makes them -- leaves them
17 in a potential state.

18 That was not used by Region 6, the
19 Agency, in its decision, and I submit that that
20 cannot be used by this Panel in affirming that
21 decision.

22 JUDGE WARD: You mean the decision

1 denying your request to terminate?

2 MR. LOVEJOY: Yes, at the Agency level,
3 yes. Counsel for the Region and also counsel for
4 the Lab have recited up, down, and sideways how
5 there is a potential for discharge here, and
6 that's very important to them. And, yet, nothing
7 has happened over seven years.

8 And the cases like Water Keepers and
9 the like, the National Pork Producers, and there
10 are certainly others, say flatly that EPA cannot
11 issue a permit for a potential.

12 JUDGE WARD: If I could go back to the
13 point I think you were making about the SEC
14 versus Chenery --

15 MR. LOVEJOY: Yes, your honor.

16 JUDGE WARD: -- and the Region's letter
17 of August 2017 denying your request for
18 termination, what point do you think was not made
19 in that letter?

20 MR. LOVEJOY: The idea that a change in
21 condition doesn't require that discharges end.
22 There has been a change, certainly the zero

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1 liquid discharge facility has been a major change
2 at this facility, and counsel for the Lab and
3 counsel for the Region are making much of the
4 fact that even after all of those changes, it's
5 still possible to discharge through the Outfall.
6 And I submit that that is not what the Region
7 relied on.

8 JUDGE WARD: Well, I'm looking at the
9 letter, the Region's letter, on Page 2, and the
10 third paragraph that begins, finally, which
11 states: finally, EPA is not aware of a change in
12 any condition that would warrant termination.

13 And then, it goes to describe what the
14 Permittee had requested in their application,
15 describing the no-discharge nature of Outfall
16 051, but specifically seeking permit coverage to
17 protect against liability in case of a future
18 discharge, and talking about the circumstances
19 under which a discharge could occur. So, what do
20 you think is missing in that paragraph?

21 MR. LOVEJOY: What's missing is a
22 reliance on the regulation, the terms of the

1 regulation, to refuse a termination. They're
2 saying, I certainly see that, that a discharge
3 could occur. And this seems to be the trigger
4 for their own exercise of discretion.

5 Or perhaps it's their acceptance of
6 the Permittee's exercise of its discretion,
7 because later on in the letter, the statement is
8 made that EPA often defers to the request of a
9 permittee for a permit on the grounds that they
10 might need it because of a potential discharge.

11 That, I grant, is in the letter.
12 They're simply not relying, they're not citing
13 the regulation as the basis for their decision.

14 JUDGE WARD: Well, I think the citation
15 in the paragraph refers to Section 122.64(a)(4).
16 That's the --

17 MR. LOVEJOY: They cite to it.

18 JUDGE WARD: They cite to the
19 regulation --

20 MR. LOVEJOY: Of course.

21 JUDGE WARD: -- which refers -- and the
22 sentence states, they're not aware of any change

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1 in any condition, within the meaning of that
2 regulation.

3 MR. LOVEJOY: They seem to be relying
4 on the change in condition issue, to me.

5 JUDGE WARD: As opposed to?

6 MR. LOVEJOY: Whether the change in
7 condition requires that discharge be terminated.

8 JUDGE WARD: Well, the regulation,
9 under 124.5, doesn't -- it simply requires -- let
10 me take a moment to turn to that. It requires,
11 under 124.5(b), that the Director provide simply
12 a brief written response.

13 MR. LOVEJOY: Yes.

14 JUDGE WARD: So, I guess, arguably, it
15 doesn't have to provide every single point they
16 might make, so long as they make a sufficient
17 enough -- they state the basis, which is there
18 hasn't been a change of condition within the
19 meaning of this regulation.

20 MR. LOVEJOY: If that were the
21 situation, this Panel would be permitted under
22 Chenery to agree with that position, but not to

1 go find other rationales for denying the
2 application for termination.

3 I submit that there is, in addition,
4 a substantial legal question raised by the whole
5 concept of denying a termination because there
6 had been a change, but it didn't require the end
7 of discharges, because that means that the
8 outfall could still be permitted if it was
9 possible.

10 Well, really, anything is possible.
11 And the possibility of a discharge does not
12 support a permit. The Clean Water Act doesn't
13 act on hypotheticals, it acts on concrete
14 situations. And we have no discharge here and we
15 haven't seen one for seven years and that's
16 grounds for termination.

17 JUDGE WARD: So, thank you very much.
18 I think what we'd like to ask all the parties,
19 and perhaps the Permittees could provide this to
20 the Board in writing, which is anything that is
21 publicly available of which we could take
22 official notice regarding the status of the

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1 permitting of the zero liquid discharge tanks.
2 If that could be provided, perhaps, by next
3 Tuesday, February 27, is that doable? All right.

4 MR. LOVEJOY: Is the Court referring to
5 the permitting under State law? I can tell the
6 Court that that permit is out, published in
7 draft. I believe it's attached to Mr. Saladen's
8 affidavit.

9 There is a hearing scheduled in April
10 and there is a substantial question whether that
11 permit can go forward, because I think I said
12 before, there's no discharge and the groundwater
13 discharge permits are only available to
14 discharges to groundwater.

15 And in addition, the Water Quality
16 Act, which is the authority for that permit, does
17 not apply where a facility is regulated under the
18 Hazardous Waste Act, which we hope will happen
19 very soon.

20 JUDGE WARD: Okay. Thank you.

21 MR. LOVEJOY: Thank you.

22 JUDGE WARD: We'll have the Permittee

1 provide that in writing by February 27. Thank
2 you. Okay. Thank you very much, counsel. We
3 appreciate again the time and effort you've spent
4 coming here today, preparing for argument, it was
5 very helpful.

6 MS. DURR: All rise. This session of
7 the Environmental Appeals Board now stands
8 adjourned.

9 (Whereupon, the above-entitled matter
10 went off the record at 12:09 p.m.)

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This is to certify that the foregoing transcript

In the matter of: Los Alamos National Security, LLC
(NPDES Appeal No. 17-05)

Before: US EPA Environmental Appeals Board

Date: 02-22-18

Place: Washington, DC

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