BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:)
)
U.S. Department of Energy and)
Triad National Security, LLC) NPDES Appeal No.
)
Permit No. NM0028355)
)

Petition for Review under 40 C.F.R. §124.19

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October 30, 2023

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REQUEST FOR ORAL ARGUMENT

Petitioners Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace (collectively, "Petitioners") respectfully request that the Environmental Appeals Board hear oral argument in the review proceeding initiated today by Petitioners. Petitioners suggest that this proceeding involves important issues of compliance with the Clean Water Act, 33 U.S.C. § 1342, and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 through 6939e, by a major operating facility at Los Alamos National Laboratory.

STATEMENT OF COMPLIANCE WITH WORD LIMIT

This document complies with the word limitation of 40 C.F.R. § 124.19(d)(3), because, excluding the parts of the document excepted by 40 C.F.R. § 124.19(d)(3), this document contains fewer than 14,000 words. The body of this Petition contains 5487 words, calculated by Microsoft Word.

PETITION FOR REVIEW UNDER 40 C.F.R. § 124.19

a. Introduction

1. Petitioners Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace (collectively, "Petitioners") respectfully request that the Environmental Appeals Board (the "Board") of the Environmental Protection Agency ("EPA") undertake review pursuant to 40 C.F.R. § 124.19 of the issuance by EPA Region 6 of a Clean Water Act, 33 U.S.C. § 1342 ("CWA"), permit, No. NM0028355 (the "Permit"), to U.S. Department of Energy and Triad National Security, LLC ("Permittees") on March 24, 2022.
2. This Petition is the second installment of the Board's review of issuance of a CWA Permit to Permittees for facilities at Los Alamos National Laboratory (the "Lab") that regulates, among other point sources, Outfall 051 at the Lab's Radioactive Liquid Waste Treatment Facility ("RLWTF"). The first installment is No. 22-01.

b. Background

3. Much of the following history is already reflected in the Board's Remand Order in No. 22-01 (Dec. 28, 2022).
4. On March 24, 2022 EPA Region 6 issued a renewal CWA permit (No. NM 0028355) for the Lab that includes Outfall 051, which has in the past

discharged from the RLWTF into Effluent Canyon, a tributary to Mortandad Canyon. This appeal concerns that Permit.

5. In the 1990's, the Lab studied the question of ceasing discharges from Outfall 051, summarizing its analysis in the Moss, et al. report (AR C.2.A[1]) With its eyes open to the impacts of cessation of discharges, the Lab chose, with the backing of two Lab divisions, to proceed towards zero-liquid-discharge. (AR C.2.XX).
6. Thus, in 1998 the heads of the Environmental Safety and Health and the Environmental Management Divisions at the Lab jointly adopted the goal of zero liquid discharge from the RLWTF:

> We agree that the Laboratory should set a goal of zero discharge of radioactive liquid effluent to the environment. To reach this ambitious goal, ESH and EM Divisions will jointly initiate the Radioactive Liquid Waste Zero Discharge Project.

(AR C.2.XX) (AR 01239) (July 10, 1998).

7. By 2010 the Lab had made changes in the RLWTF and installed a gas-powered mechanical evaporation system ("MES") that would evaporate the

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1. Record references are to the record in No. 22-01.

processed waste water. From 2010, when the MES was installed, the decision whether to discharge waste water through Outfall 051 or evaporate it in the MES has been a matter of Permittees' choice. The RLWTF could operate on a zero-liquid-discharge basis indefinitely.

8. Permittees stopped discharging from Outfall 051 in November 2010. Permittees then operated the RLWTF normally on a zero-liquid-discharge basis, presumably reasoning from economic, safety, and legal considerations. Permittees made the reservation that Outfall 051 would remain in place as a backup facility. Permittees told Region 6 that discharges via Outfall 051 would be made when evaporation equipment is unavailable or when treatment demands exceed normal levels. (See Permittees' Supp. Comments at 3, 8, 13 (Feb. 25, 2021)).
9. The RLWTF manages waste that is hazardous under the Hazardous Waste Act, §§ 74-4-1 through 74-4-14 NMSA 1978 ("HWA"), which enforces the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 through 6939e ("RCRA"), and requires a HWA permit. Permittees concede that the RLWTF will "receive and treat or store an influent wastewater which is hazardous waste as defined in 40 C.F.R. § 261.3[.]" (Lab Comments to New Mexico Environment Department concerning groundwater discharge permit DP-1132, Dec. 12, 2013, Encl. 3 at 1).

10. Permittees have claimed that issuance of the CWA Permit would enable them to argue that the "Wastewater Treatment Unit" RCRA exemption (40 C.F.R. § 264.1(g)(6)) applies, allowing the RLWTF to avoid regulation under RCRA. (Permittees' Response brief at 28-31, July 1, 2022).
11. In approximately 2010 through 2020 almost the entire output of the RLWTF was evaporated in the MES, and there were no discharges from Outfall 051, except for occasional discharges in 2019 and 2020 because of unavailability of evaporation equipment or to verify operability. These have been termed "backup" discharges from Outfall 051 and were not its regular practice. (*See* Remand Order, No. 22-01, Dec. 28, 2023, at 20) ("Remand Order").
12. In 2012 the Lab built the Solar Evaporation Tanks ("SET"), evaporation ponds that could evaporate waste water from the RLWTF passively without using gas. The SET system is now permitted but undergoing maintenance and has not been used to date.
13. From 2012 onward, Permittees stated that they would rely on Outfall 051 to dispose of waste water in event of unavailability of evaporation equipment due to maintenance or malfunction or, possibly, increased treatment capacity needs. In 2012, Permittees requested a CWA Permit for Outfall 051 expressly to maintain the capability to discharge in the stated circumstances.

(AR 000033, at 5 of 9). The 2014 CWA Permit was issued based on this backup role.

14. Permittees applied to renew the Permit for Outfall 051 in 2019. Permittees' Supplemental Comments (Feb. 25, 2021) stated that Outfall 051 would henceforth operate as "an integral component of its operations, rather than solely as a backup." (*Id*. Att. I) The new operating protocols did not state that Permittees would discharge any particular quantity or at any particular time. The time for public comments on the present CWA Permit, with extensions, ended on March 29, 2021.

15. Permittees plainly sought to exempt the RLWTF from HWA regulation, and that purpose motivated their efforts to obtain a CWA Permit for Outfall 051. With such motivation, and the question of CWA permitting squarely presented, Permittees made a blatant demonstration of their capability and intention to discharge the RLWTF's waste water:

16. In April 2021, *i.e.*, immediately *after* the end of the public comment period, Permittees began making frequent discharges of waste water via Outfall 051. Instead of operating as a zero-liquid-discharge facility, Permittees began operating the RLWTF as a 100%-liquid-discharge facility. They reverted to pre-2010 practice and undertook to discharge most and possibly all of the

waste water output of the RLWTF through Outfall 051. (Remand Order at 20).

17. This 180-degree turnabout was not discussed in any Lab documents before April 2021. Permittees' February 2021 Supplemental Comments did not mention the change or any prospect of such a change. Notably, the Lab, which had repeatedly generated scientific analyses of different operating protocols, such as the Moss et al. report, offered no comparison of options and no explanation of the reversion to the regimen of 2010 and before.

18. *No explanation* for this radical change in discharge practice has ever been offered. Permittees' Supplemental Comments, filed on April 5, 2023,[2] report the quantity and the composition of recent discharges—but make no explanation of why, after years of zero-liquid-discharge operation, there was any discharge at all.

19. Region 6 issued the current Permit on March 24, 2022. In its accompanying 2022 Response to Comments, Region 6 identified legal theories that might support a Permit. Thus, it claimed the authority to issue a Permit to regulate a "potential discharge," asserting that "[t]he CWA draws no distinction between actual and potential discharges and does not limit EPA's authority

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[2] Permittees' April 5, 2023 Supplemental Comments are available at: https://www.epa.gov/system/files/documents/2023-04/EPC-DO-23-121%20Permittees%27%20Comments%20and%20Data%20in%20Support%20of%20Reissuance%20of%20NPDES%20Permit%20NM0028355.pdf (as of Oct. 28, 2023).

on that basis." (2022 Response to Comments at 10). It also noted that the CWA requires that a permit be in place before a discharge occurs. (*Id.*). It stated that the stiff penalties for discharging without a permit encouraged facilities to obtain a permit, even if the likelihood of a discharge is "remote." (*Id.*) It also stated that issuance of a permit would serve the clean-water goals of the CWA (*Id.* 11). Region 6 also noted that new operating procedures made Outfall 051 an "integral component of [RLWTF] operations, rather than solely as a backup." (*Id*. 11). Region 6 also stated: "If a facility voluntarily seeks permit authorization for a possible or potential future discharge of pollutants, CWA section 402(a) provides authority for EPA to issue a permit authorizing that possible or potential future discharge." 2022 Response at 74. These statements are repeated in the 2022 Response at 31, 32, 33, 34, 36, 38, 55, 56, 58, 60, and 72-73.

20. Region 6 did not make factfindings supporting the application of the various legal theories that it referred to, nor did it state which theories it relied upon in issuing the Permit.

21. The RLWTF admittedly manages hazardous wastes, and there is a question whether it is exempted from RCRA and HWA under the Wastewater Treatment Unit exemption (See 40 C.F.R. § 264.1(g)(6)) based on having a

CWA permit. Region 6 stated that whether the RLWTF is in compliance with RCRA and HWA is not its concern. (2022 Response at 74).

c. Environmental Appeals Board Review

22. Petitioners petitioned for review by the Board on May 9, 2022. (Case No. 22-01). Petitioners asserted in No. 22-01 that Outfall 051, which had not discharged in regular use since 2010 and (to Petitioners' knowledge) was not currently used to discharge anything, did not qualify for a permit. Petitioners argued that there is no authority to issue a permit for a possible or potential discharge. (Petition at 38-41). *See*: *National Pork Producers Council v. U.S. Environmental Protection Agency,* 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency,* 399 F.3d 486 (2d Cir. 2005).

21. Region 6's Response Brief (July 7, 2022) referred to various legal theories that might support Outfall 051 meeting the statutory requirement of a "discharge of any pollutant." (33 U.S.C. § 1342(a)(1)). Region 6 mentioned the concepts of a "potential" discharge (at 12-15) and the "voluntary request" for a permit (at 15-16, 18-19)). Region 6's brief listed recent 2021-22 discharges (at 4-5) but asserted that Region 6 might lawfully issue a permit for a "potential" or "possible" future discharge. (at 12-15). Region 6 did not identify the facts that supported the use of such theories to

issue a permit here. Thus, it failed to explain which, if any, of such theories supported Region 6's issuance of the Permit.

22. Permittees' Response Brief argued that the permit might be issued on the basis that Outfall 051 discharges regularly, as shown by the 2021-22 discharges reported in public data. (Permittees' Response Brief at 10-14) (July 1, 2022). Permittees also contended that a permit may regulate "possible" future discharges or may be issued in response to a "voluntary" request. (at 14-17, 19-22).

23. Petitioners' briefs (Petition, May 9, 2022; Reply, July 25, 2022) argued that there is no authority to issue a CWA permit for a supposed "possible" or "potential" discharge. Petitioners showed that the various theories advanced by Respondents were vague and indefinite and could not lawfully be used to grant a permit.

24. On reply, Petitioners specifically argued that Region 6 had not identified the test it had used in issuing the Permit, *i.e.,* what facts satisfied the statutory requirement of a "discharge of any pollutant" or, indeed, a "potential discharge" under the Region's legal test. Petitioners stated that Region 6 failed to identify the "crucial facts it relied upon when reaching its conclusion." (In re *GE*, 18 E.A.D. 575, 607 (2022) (Reply at 11). (See also 13, 14) (July 25, 2022).

25. To avoid repetition, Petitioners respectfully refer the Board to Petitioners' arguments in briefs filed in No. 22-01 (Petition, May 9, 2022; Reply brief, July 25, 2022), of which the Board may take official notice:

a. Region 6 may not issue a CWA permit for a "potential" or "possible" discharge: Petition at 35-51, 57-58; Reply brief at 5-13.

b. Region 6 may not issue a CWA permit for a supposed remote chance of a discharge. Petition at 53-54; Reply brief at 13-14.

c. Region 6 may not issue a CWA permit based upon its understanding that a permit will best serve the goals of the CWA. Reply brief at 15-16.

d. Region 6 may not issue a CWA permit to a person who voluntarily requests it. Petition at 52-53, 59; Reply brief at 16-17.

e. Region 6 is required to consider the effect of its actions on RCRA enforcement. Petition at 54-57, 59; Reply brief at 17-18, 19-22.

d. The Remand Order

26. After briefing, the Board entered a Remand Order. (Dec. 28, 2022). Therein, the Board specifically asked Region 6 to explain the significance Region 6 attributed to the 2021 discharges, which had not been part of the administrative record when briefs were submitted:

> The nature and significance of the 2021 Outfall 051 discharge data, including whether it is "confirmatory," are substantive issues that should have first been addressed and debated through the public comment process and for the permitting authority to address in its Response to Comments document, not for the first time in briefing before the Board.

(Remand Order, Dec. 28, 2022, No. 22-01 at 20-21). The public was also invited to comment. (*Id.*).

27. Responding to the Remand Order, Region 6 issued the 2023 Response to Comments. (Sept. 27, 2023). Therein, Region 6 states that, in issuing the permit, it regarded the 2021 discharges as "actual discharges from an Outfall that Petitioners argued EPA has no authority to permit because the Outfall does not discharge." (2023 Response at 91-92, ¶ 23). Region 6 states that the recent discharges are "directly responsive to public comments made during the 2020 comment periods, which included inaccurate assertions that Outfall 051 was non-discharging and so should be denied permit authorization." (2023 Response, at 92 ¶ 23).

28. But to state that the 2021 discharges made a debating point does not specify their role, if any, in supporting issuance of a permit. Region 6 did not explain why the 2021 discharges were made, reversing years of consistently evaporating waste water. And Region 6's 2023 Response still does not disclose the test that the Region used to identify a "discharge of any pollutant," as it must do to issue a permit. 33 U.S.C. § 1342(a)(1).

29. Region 6 again refers to various theories that arise in CWA permitting. In citing such theories, Region 6 failed to present a complete picture of its reasoning in issuing this Permit. Thus, Region 6 said that "actual discharges are not necessary for permit authorization." (2023 Response at 86-103, ¶ 23). This statement does not identify the facts that *are* necessary to be established. Moreover, the *National Pork* and *Waterkeeper Alliance* cases hold that a permit must regulate an actual discharge.

30. Region 6 said that Outfall 051 constitutes a "potential discharge." (2023 Response at 86-103, ¶¶ 19, 20, 26, 41). However, a "potential discharge" is an undefined, unexplained term. Region 6 did not say what facts demonstrate a "potential discharge." It is definitely *not* a "discharge." Moreover, the concept appears to contradict the statutory requirement of a "discharge," as was noted in *National Pork,* 635 F.3d at 750, and *Waterkeeper Alliance,* 399 F.3d at 504-05 .

31. As for a "discharge," "[t]he triggering statutory term here [is] not the word "discharge" alone, but "discharge of a pollutant," a phrase made narrower by its specific definition requiring an "addition" of a pollutant to the water. §1362(12)." *S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380-381 (2006). Region 6 did not state which components of a statutorily-

defined "discharge" are included in Region 6's definition of "potential discharge," nor how they might have been established in this case.

32. Likewise, the suggestion that one may obtain a CWA permit simply by requesting it "voluntarily" (2023 Response at 68-69, ¶¶ 18-20, 72-74) contains other undefined terms. What is a "voluntary" request, given Region 6's view that a person who "discharges" or has a "potential discharge" needs a CWA permit, and that need is *not* voluntary? Most basically, where is the statutory authority to issue unnecessary permits in response to "voluntary" requests?

33. Region 6 observed that 40 C.F.R. § 122.21(a) requires that "[a]ny person who discharges or proposes to discharge pollutants must apply for a permit." Region 6 also states: "By submitting a complete application, permittees propose to discharge." (Response at 86-103, ¶ 23). But 40 C.F.R. § 122.21, in referring to one who "proposes to discharge," refers to a person with a plan actually to discharge, and indeed a schedule: "Any person proposing a new discharge, shall submit an application at least 180 days before the date on which the discharge is to commence . . ." 40 C.F.R. § 122.21(c)(1). Clearly, one cannot assume that all applications constitute a "proposal" to discharge; it depends on what the application says.

34. Region 6 continues: "The permit application materials and the permit applicant's comments submitted during the public comment period in 2020 constitute a request for authorization from Outfall 051, and the other outfalls, which are indeed capable of discharging." (2023 Response at 86-103, ¶ 23). Is Region 6 stating that a "request" alone suffices for permitting?

35. Region 6 concludes: "Actual discharges in 2021 and 2022 are not necessary to support EPA's decision to grant permit authorization, however, the [2021-22] discharges *confirm* the possibility of discharge and that there was no lack of a plan or proposal to discharge." (2023 Response at 86-103, ¶¶ 23, 39). Thus, Region 6 repeats the undefined element, a "possibility" of a discharge, and the "plan or proposal," which is likewise undefined.

36. What plan? The "plan" for Outfall 051 is an imponderable, since Permittees can choose at the drop of a hat either to discharge or to evaporate waste water, and they have historically done one or the other for several years at a stretch. What "plan" does Region 6 see? How a few months of discharge in 2021 give Region 6 assurance for the future is not explained.

37. Region 6's statement implies that an applicant must show that a discharge is "possible" and that a plan or proposal exists. This asks again: What is a "possible discharge" and how was it established here? What is a "plan" or "proposal"? Region 6 does not say.

38. Region 6 states that a facility must have a permit when it discharges, so the Region must issue a permit *before* a discharge occurs. (2023 Response ¶ 26). Clearly so, but the regulation specifies a person who intends actually to discharge 180 days or more ahead. 40 C.F.R. § 122.21(c)(1). Region 6 suggests that an application is sufficient to show a "proposal to discharge," but that must depend on what the application says. (2023 Response at 92, ¶ 23, 93, ¶ 26, 100, ¶ 39).

39. Region 6 also argues: "The CWA draws no distinction between actual and potential discharges and does not limit EPA's authority on that basis." (2023 Response ¶ 26). A "potential discharge" is not a discharge in reality. Moreover, EPA's statutory duty to regulate is commensurate with its authority. *See, e.g.*, *Nat'l Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009). If a permit is *allowed* for a "potential discharge," a permit must be *required* for a "potential discharge." It is difficult to see the practical limits of such a permitting program. (See also 2023 Response at 10, 31-39, 54-76, 78-81)

e. Significance of 2021 discharges

40. Petitioners commented that in April 2021 Permittees undertook regular discharges from Outfall 051 for the purpose of influencing the outcome of this proceeding. (Petitioners' Reply Brief at 27) (2023 Comments ¶¶ 28-30).

Petitioners assert that Permittees have no innocent explanation for the sudden change in discharge protocol, that the Board should infer that the change was made to influence this litigation, and that the Board should give no weight to the 2021 discharges.

41. Responding, Region 6 now states only that "The comment does not directly respond to the 2021-2022 data that is the subject of this opportunity for comment" (2023 Response ¶ 29) and "The comment does not cite any requirement of the applicable statute or regulations that EPA or the permittees fail to meet." (2023 Response ¶ 30). Region 6 adds: "The rules do not set standards or restrictions on the rationales for discharge." (2023 Response ¶ 31).

42. Petitioners' comment clearly does address the 2021 discharges. Region 6 avoids the issue that the Board asked about, namely: the significance of the 2021 discharges. Region 6 does not assert that Permittees, in abruptly changing their operating protocols, had any purpose *other than* to influence the outcome of this proceeding. It must be taken as admitted that the 2021 discharges were motivated to influence the outcome of this litigation.

43. The Board requires a "considered judgment" by Region 6 in issuing the permit. In re *GE*, 17 E.A.D. 434, 560-61 (EPA 2018). Critically, despite this Board's firm request for an explanation of the change in discharge

practices, Region 6 did not in 2022 and does not in 2023 set forth its understanding. Its narrative reviews hypothetical situations at level of abstraction but lacks a straightforward statement of the facts and the reasoning that Region 6 actually followed in issuing this Permit.

44. For instance, Region 6 states in the 2023 Response:

> EPA has authority under the CWA and federal regulations to issue an NPDES permit to the operator of a facility that seeks NPDES authorization to cover a possible future discharge, even if the possible future discharge would only be intermittent, infrequent, irregular, rare, or even uncertain or unlikely.

(2023 Response ¶ 32). This statement mentions issues that might apply here, namely: a permit for a "possible" or "potential" discharge; a permit application as a 40 C.F.R. § 122.21(a) "proposal" to discharge; issuance of a permit to one who "voluntarily requests" one; the significance of the "rationale" for discharges. But it fails to explain the application of such issues to this case.

45. The legal theories that Region 6 presents are incomplete, dubious, and sometimes contradictory. One theory postulates a "potential" discharge, and another assumes a "future" discharge. But Region 6 does not say which theories might apply here. Its Responses read more like a treatise about CWA permits than a reasoned decision of this specific case.

46. But to review Region 6's decision the Board needs to know "the grounds that the agency invoked when it took the action." *DHS v. Regents of the University of California*, 140 S.Ct. 1891, 1907 (2020). Thus, questions remain. Did Region 6 issue this permit to regulate a "potential" discharge? (2023 Response ¶¶ 23, 26, 39). Or was it because Region 6 considered Permittees' application to be a "proposal" to discharge? (2023 Response ¶¶ 23, 39). Or was the Permit issued because the Permittees made a "voluntary request" for a permit? (2023 Response ¶ 23). Or was it because the Permittees proposed a future discharge? (2023 Response ¶¶ 26, 32). Or did Region 6 issue the permit so that the Permittees could obtain an exemption from RCRA? Region 6 refuses to say. (2023 Response ¶ 14). Did Permittees make discharges in 2021 to influence the outcome of this proceeding? Region 6 refuses to say. (2023 Response ¶¶ 29, 30, 36, 37, 38, 40, 42). Perhaps it was based on a combination of rationales. It is just not clear.
47. Review of agency action requires examination of the agency's reasoning: "'It is a foundational principle of administrative law' that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *DHS v. Regents of the University of California*, 140 S.Ct. 1891, 1907 (2020). Thus, "Reasoned decisionmaking under the Administrative

Procedure Act calls for an explanation of agency action." *DOC v. New York,* 139 S. Ct. 2551, 2576 (2019). But here no such explanation is offered.

48. Region 6's statement that "EPA's bases for decisionmaking are found throughout this Response to Comments" (2023 Response ¶¶ 39, 41, 43, 44) suggests that the Board should hunt through Region 6's 2023 Response and select ideas that might support a permit. However, such is not the correct process of administrative review. Factual determinations and development of reasoning are the task of Region 6: "The Board's role is not to make initial scientific findings but to review the Region's decisions to determine if the Region has based its conclusions on clearly erroneous conclusions of fact or law." *See also* In re *GE.*, 18 E.A.D. at 618 ("The Board's role is not to evaluate scientific arguments in the first instance. Instead, the Board's role is to review whether the Region's permitting decision is based on clearly erroneous conclusions of fact or law.").

49. The Board's standard requires "considered judgment" by the agency. This standard requires a clear explanation of the Region's action by the Region itself:

> The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. *See, e.g., In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). In addition, the decisionmaker must "duly consider[] the issues raised in the comments" as well as other relevant information in

> the record, *In re Pio Pico Energy Center*, 16 E.A.D. 56, 131-34 (EAB 2013), *review voluntarily dismissed sub nom. Helping Hand Tools v. EPA*, No. 14-71267 (9th Cir. June 17, 2014), and its considered judgment must be "documented in the record." *In re Russell Energy Ctr., LLC*, 15 E.A.D. 1, 44 (EAB 2010). Finally, as a whole, the record must demonstrate that the permit issuer ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

In re *GE,* 17 E.A.D. 434, 560-61 (E.P.A. Jan. 26, 2018). *See also:* In re *GE*, 18 E.A.D. 575, 608 (E.P.A. February 8, 2022).

50. Decision of this case involves "substantive issues that should have first been addressed and debated through the public comment process and for the permitting authority to address in its Response to Comments document . . . " (Remand Order at 20-21.). Region 6 appears to have left that job for the Board. Such a position misunderstands the Region's role and that of this Board.

51. Further, Region 6's inability to articulate its explanation indicates a failure to apply "considered judgment":

> That is, despite the fact that the 2021 discharge data existed when the Region prepared its 2022 Response to Comments document, the Region did not mention it and instead references three discharges over the past decade and simply reiterated the permittees' representation that things would change *in the future.* E.g., Resp. to Cmts. at 11. Yet, in its submissions

> before the Board, the Region's rationale appears to shift to a focus on a rationale that the facility "actively discharge[s]," Region Resp. Br. at 4, and that the 2021 data is merely "confirmatory." Clarification Resp. at 7.

(Remand Order at 16).

52. But the "response to comments document plays an integral role in the public's ability to participate in and effectively challenge permitting decisions." (Remand Order at 15). Here, the 2022 Response to Comments does not contain the "Agency's final rationale for its decision." (*Id*. 16). The Board noticed a "lack of clarity" (*Id.* 16) on the part of Region 6 about the significance and purposes of discharges from Outfall 051, particularly in 2021:

> As in *Pio Pico* [16 E.A.D. 56, 132 (E.A.B. 2013] the Region's post-hoc reliance on the 2021 discharge data in its Response Brief reflects a lack of considered judgment by the Region in making its permitting decision. 16 E.A.D. at 132-34.

(Remand Order at 16).

53. The Region's treatment of the 2021 discharge data fails to reflect "considered judgment":

> The Region's presentation of new data in its Response Brief here and shifting articulation of the rationale for the permitting decision with respect to Outfall 051 from the [2022] Response to Comments to its briefs before the Board indicates a lack of considered judgment in the Region's permitting decision. As discussed above, the Region's rationale for its permitting decision is unclear, and remand is warranted if we "can not [*sic*]

> determine with sufficient certainty the basis for the Region's determination." . . .

(Remand Order at 17).

54. There is a clear need for explanation of the abrupt and total interruption of the zero-liquid-discharge regimen and the switch to discharges after a hiatus of more than 10 years, foregoing the MES and the SET evaporation systems that had been built at significant expense to the Lab. Remanding, the Board asked for one. Permittees' supplemental comments (April 7, 2023) supplied only the specifications of the discharges. As for the reason for them, Permittees were no help. There is no indication that anyone at Region 6 asked Permittees for an explanation.

55. Permittees had openly claimed that a CWA permit would give them a RCRA exemption (Permittees' Responding Brief at 14), casting a spotlight on the Permittees' eligibility for a CWA permit, which depends upon a "discharge of pollutants." 33 U.S.C. § 1342(a)(1). The sudden stream of discharges where none were made a month before, and for which no need had even been suggested, begs for explanation.

56. Petitioners suggested that Permittees had managed the RLWTF to make discharges, to support the sought-after CWA permit. The Board looked to Region 6 for its answer. Region 6 said this:

29. Given the suddenness of the post-comment period change in operation, its fundamental nature, its occurrence immediately after public comment ended, its continuation since that change, and the argument by Applicants that the discharges support the issuance of a permit, Region 6 should conclude that Applicants have discharged from the outfall in an effort to influence the outcome of his proceeding.

EPA RESPONSE TO COMMENT #29:This comment characterizes statements made by Permittees and offers conclusions and theories regarding the Permittees' operations and motivation for discharges. The comment does not directly respond to the 2021-2022 data that is the subject of this opportunity for comment.

The comment also does not cite any requirement of the applicable statute or regulation that EPA or the permittee fail to meet.

30. Where previously the Applicants had stated that they would discharge when evaporation equipment was unavailable or treatment demands exceeded normal levels, they have now broken with that pattern without any explanation in terms of equipment availability or treatment capacity or any other factor rooted in technical or practical needs. There can be no conclusion but that Applicants have changed their operating protocol in an effort to influence the Region's permit decision.

EPA'S RESPONSE TO COMMENT 30:The comment summarizes and characterizes permittees' statements and operations and offers conclusions as to permittees' motivations for discharge. The comment does [*sic*] cite any requirement of the applicable statute or regulations that EPA or the permittee fail to meet.

EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite any requirement of 40 CFR 122.21 or any other applicable regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their requests for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. . . .

57. The Supreme Court has described the function of an administrative agency in judicial review—and the outcome when the agency becomes diverted from its proper course:

> Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." *United States* v. *Stanchich*, 550 F. 2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

DOC v. New York, 139 S. Ct. 2551, 2575-2576 (2019).

58. This Board has its own expression for the agency's role: "The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion." In re *GE,* 17 E.A.D. 434, 560 (2018) (See Remand Order at 3-4). The Board's standard calls for a clear statement of the facts and the principles leading Region 6 to issue the permit. Instead of that, Region 6 has offered generalities and evasions. The role of the "considered judgment" (Remand Order at 3) is critical. It is a legal requirement, and it has not been satisfied. The permit should be vacated.

f. Conclusion

The Region having failed to demonstrate its considered judgment in deciding to issue the Permit, the Region's decision should be vacated and the case remanded to Region 6.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joni Arends, hereby certify that on this day I electronically filed the Appellants' *Petition for Review under 40 C.F.R. § 124.19* using the Environmental Appeals Board (EAB) electronic filing system at https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf/main_menu?OpenForm

Under the EAB 's Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals, dated September 21, 2020, I emailed the *Petition for Review under 40 C.F.R. § 124.19* to the following:

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