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. 23-04
	)	
Permit No. NM0028355	)	
_____	)	

Reply Brief for Petitioners

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800

Attorney for Petitioners
Concerned Citizens for Nuclear Safety
Honor Our Pueblo Existence
Veterans for Peace, Chapter 63

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This document complies with the word limitation of 40 C.F.R. §124.19(d)(3), because, excluding the parts of the document exempted by 40 C.F.R. § 124.19(d)(e), this document contains fewer than 7,000 words.

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REQUEST FOR ORAL ARGUMENT

Petitioners, Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence and Veterans for Peace Chapter 63, hereby request that the Environmental Appeals Board (EAB) hear oral argument in the above-captioned matter. Oral argument would assist the Board in its deliberations on the issues presented by the case for the following reasons: This case presents issues important to the administration of Clean Water Act permitting requirements and the relationship between that act and the Resource Conservation and Recovery Act. This matter is complex and calls for close analysis.

Introduction

This memorandum is submitted on behalf of Petitioners Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace, Chapter 63 in reply to contentions contained in responding briefs filed by respondents U.S. Environmental Protection Agency ("EPA"), Region 6 ("Region 6"), U.S. Department of Energy ("DOE"), and Triad National Security, LLC ("Triad").

1. The Environmental Appeals Board ("EAB") on December 28, 2022 remanded this case to Region 6 for further proceedings concerning the posture of the Radioactive Liquid Waste Treatment Facility ("RLWTF") under the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 through 74-4-14 ("HWA"). Region 6 issued its Response to Comments on September 27, 2023. Petitioners filed a Petition for Review with the EAB (October 30, 2023) concerning several matters requiring resolution. Response briefs were filed on December 13, 2023.
2. This case asks whether a regulated entity, here the Permittees DOE and Triad, can manipulate the regulatory requirements of the Clean Water Act (42 U.S.C. § 1342) ("CWA") so that the CWA is turned to the purpose of defeating regulation under the Resource Conservation and Recovery Act,

42 U.S.C. §§ 6921 through 6939e ("RCRA"), and the HWA at a federal facility that manages radioactive liquid waste.

3. The RLWTF manages waste that is hazardous under the HWA, which enforces RCRA in New Mexico. Management of hazardous waste normally requires a Hazardous Waste permit. NMSA 1978, § 74-4-4.2, § 20.4.1.900 NMAC.

4. Permittees DOE and Triad are committed to avoiding RCRA regulation of the RLWTF. Thus, Permittees are motivated to obtain a CWA permit for the RLWTF, based on which, Permittees contend, they can employ the "Wastewater Treatment Unit" (40 C.F.R. § 264.1(g)(6)) ("WWTU") exemption under RCRA and the HWA to avoid regulation of the RLWTF. See Permit Applicants' Response to Petition for Review, No. 22-01, at 28-31 (July 1, 2022).

5. The agency action here on review is the issuance on March 24, 2022 by EPA Region 6 to DOE and Triad of a renewal CWA permit for discharge of contaminated water through Outfall 051 into Effluent Canyon at Los Alamos National Laboratory ("LANL").

6. After briefing in No. 22-01, the EAB issued the Remand Order, dated December 28, 2022, remanding the CWA permit proceeding to Region 6 and directing publication of 2021 discharge data, further public comment,

revision of the Response to Comments, and such further action as appropriate in reissuing a permit decision.[1] (AR I.1 at 22). The Board stated further that any person dissatisfied with the Region's decision on remand must file a petition seeking Board review to exhaust administrative remedies. (*Id.* 22 n. 10).

a. Factual background.

7. The case involves examination of the recent history of the RLWTF. This period falls into two segments: (a) the period 2010 through March 2021, during which essentially no discharge from the RLWTF was made, and contaminated water was evaporated, and (b) the period in the remainder of 2021, during which discharges of contaminated water to Effluent Canyon were made in each month from April 2021 onwards.

8. These time spans show different activities by the Permittees. Since Permittees support a CWA permit for Outfall 051 based upon activities in both time spans, Petitioners address the facts in both such time spans.

9. From late 2010 until mid-2021, under a regime of "zero-liquid-discharge," treated wastewater was evaporated in an on-site gas-powered mechanical evaporation system ("MES"). Outfall 051 of the RLWTF

[1] The Remand Order (AR I.1 at note 1) makes clear that this remand proceeding concerns only the discharges from Outfall 051.

[2] **Section 4.** Intermittent Flows Item 4.1. Answer "Yes" or "No" to indicate whether any of the discharges you described in Sections 1 and

served as standby and backup in this time period; approximately three discharges occurred by reason of unavailability of evaporation equipment.

10. From April 2021 through the end of 2021 Permittees discharged contaminated water through Outfall 051 nearly every month.

11. Permittees seek a CWA permit for the RLWTF, and, based on the CWA permit, intend to obtain a WWTU exemption for the RLWTF. They have several theories: (a) They say that the CWA enables EPA to authorize a permit for a facility which has a "potential" to discharge contaminated water. They do not say how such a "potential" is defined. (b) They state that, under the CWA, a facility must have a permit at the time it makes a discharge; thus, it may obtain a permit before its discharge. (c) They argue that an application for a CWA permit constitutes a 40 C.F.R. § 122.21(a) "proposal" to discharge, in response to which EPA may authorize a CWA permit. (d) Permittees claim that a party may "voluntarily" request a CWA permit, and the issuing agency (EPA) may respond by issuing a CWA permit. Petitioners discuss each of these theories.

b. EPA has no authority to issue a permit for a potential discharge.

12. Permittees request a CWA permit for a "potential" discharge. However, the CWA language requiring a "discharge" of a pollutant to support a CWA permit (33 U.S.C. § 1342) is *Chevron I*-clear and cannot be ignored. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). The requirement of a discharge is not met by anything less. Thus, *Waterkeeper Alliance, Inc. v. U.S. EPA,* 399 F.3d 486, 504-05 (2d Cir. 2005), states unambiguously that the CWA requires a discharge to support an NPDES permit:

> Congress left little room for doubt about the meaning of the term "discharge of any pollutant." The Act expressly defines the term to mean "(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

Waterkeeper Alliance, 399 F.3d at 504-05. The Second Circuit emphasized that its decision was based on *Chevron 1* analysis:

> For all these reasons, we believe that the Clean Water Act, on its face, prevents the EPA from imposing, upon CAFOs [concentrated animal feeding operations], the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (where Congress has

> "directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Id. 506 (*footnote omitted*).

13. Permittees argue that the key Court of Appeals decisions—*Waterkeeper Alliance* and *National Pork Producers Council v. U.S. Environmental Protection Agency,* 635 F.3d 738 (5th Cir. 2011)—rest on EPA's want of power to call in an application, not its want of power to regulate a facility. (Pttees' Br. 16; Region 6 Br. 18-20). But EPA itself has stated that, in issuing CAFO regulations, it assumed that any large CAFO has the potential to discharge, and must obtain a CWA permit, even though it does not discharge: "The duty to apply provision is based on the presumption that every CAFO has a potential to discharge and therefore must seek coverage under a NPDES permit." See NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7202 (Feb. 12, 2003). Thus, EPA intended its permitting rules to address whether CAFO facilities are subject to substantive CWA regulation.

14. Region 6 contends that, in authorizing regulation of a "discharge," the CWA "draws no distinction between actual and potential

discharges." (Region 6 Br. 3). Such assertion ignores the difference between an action—"discharge"—and its negation. It is not sensible to argue that Congress has legislated to regulate a hypothetical (and counterfactual) activity, nor to state that it has done so without including a definition of such hypothetical activity.

15. The CWA, 33 U.S.C. § 1342, in authorizing EPA to license a "discharge," uses the term in its conventional sense and is subject to application using the *Chevron I* meaning. Its meaning may not be enlarged in the guise of interpretation or in reliance on supposed agency expertise. In the absence of a discharge there can be no CWA permit.

c. The claimed need to have a permit before discharge does not support issuance of a permit to a facility that does not plan to discharge.

16. Permittees and Region 6 insist that Region 6 may properly issue a CWA permit to the RLWTF, even though it may not be discharging, because a facility must have a permit in place *before* it discharges. Thus, the permit would rest upon a "potential" or "possible" discharge. (Pttees' Br. 14; Region 6 Br. 3-4, 15-18). However, a so-called "potential discharge" is clearly *not* a discharge, and a discharge is the only thing

that can be permitted under the CWA; thus, Region 6 has no authority to issue a permit for a potential discharge.

17.The problem that Permittees hypothesize does not exist. The CWA authorizes permitting of future discharges, but not imaginary discharges. 40 C.F.R. § 122.21(a)(1), (c)(1) (permit may issue for a discharge occurring in the future). One may obtain a permit in advance of a discharge if one "proposes" to discharge, *i.e.*, states that in the future a discharge will occur. 40 C.F.R. § 122.21.

d. An application is not a supposed "proposal" to discharge.

17. Permittees argue that the CWA authorizes permitting a future discharge on the theory that a CWA application constitutes a "proposal" to discharge. (Pttees' Br. 15). However, this is true only if the application actually contains such a proposal. The application in this case does not contain such a "proposal."

18.A "proposed discharge" that may be the basis for an application is not the same as a "possible" or "potential" discharge. It has a date. It is a discharge on a future date or time frame, not an imaginary or hypothetical discharge. 40 C.F.R. § 122.21. Permittees' application here does not have a date or time frame for a future discharge.

19. Language in the 2019 application, stating the volume of discharges from Outfall 051, does not constitute a proposal to make such discharges in the future. To the contrary, such data reflects historical discharges. EPA's instructions for the preparation of Form 2C, an essential part of a CWA application for a discharge permit, so state.[2] Permittees' theory that the act of submitting a permit application constitutes a "proposal to discharge," cannot be correct, since Permittees' discharge calculations in such application are based *only on historical data.* The claim that the

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[2] **Section 4.** Intermittent Flows Item 4.1. Answer "Yes" or "No" to indicate whether any of the discharges you described in Sections 1 and 3 of Form 2C are intermittent or seasonal, except for stormwater runoff, spillage, or leaks. An intermittent discharge is one that is not continuous.

* * *

Item 4.2. By relevant outfall number, identify each operation that has intermittent or seasonal discharges. Indicate the average frequency (days per week and months per year), the long-term average and maximum daily flow rates in mgd, and the duration of the intermittent or seasonal discharges. *Base your answers on actual data if available*. Otherwise, provide your best estimate

* * *.

Item 5.4. Indicate the operations, products, or materials produced at the facility for each outfall. For each operation, product, or material produced, denote the quantity produced per day using the measurement units specified in the applicable ELG. The NPDES permitting authority will use the production information to apply ELGs to your facility. * * * *The production figures provided must be based on a reasonable measure of actual daily production, not on design capacity or on predictions of future operations. (emphasis supplied).*

Permittees have made "unequivocal statements" that they "plan to use Outfall 051 regularly" is made without citation to anything and misstates the record. (Pttees' Br.16).

e. A voluntary request does not support a CWA permit.

20. Permittees also argue that Region 6 can issue a permit in response to a "voluntary" request (Pttees' Br. 16)—a proposition unsupported by anything in the CWA. It should be obvious that the idea that a person may "voluntarily" submit a permit application and thereby avoid all the conditions and requirements of the CWA is wholesale nonsense. (Pttees' Br. 16). Nothing in the CWA supports this theory.

f. Region 6 fails to state the actual determinations made in agency proceedings.

21. Region 6 recites numerous legal theories that might support the issuance of a permit, despite the lack of discharge. See, for example, the concepts listed in the Region's brief at 3, 16-24. Petitioners disagree as to the merits of the Region's theories. In addition, Region 6 has not selected the one (or more) theories that it claims apply to the facts in this case, *i.e.*, that it relies upon in authorizing a discharge permit. The theories require factfindings. They cannot all represent the Region's actual findings and reasoning, and it does not serve the purpose of the regulator to avoid determining the legal basis for issuing the permit.

g. No explanation for change in discharge protocol.

22. Discharge records show that, starting in April 2021, Permittees began discharges to Effluent Canyon from Outfall 051 each month. Permittees and Region 6 contend that it is now clear that Outfall 051 is not a 'non-discharging outfall" and, as a continuing discharge, is entitled to a CWA permit.

23. Public comment on the proposed renewal CWA permit ended on March 29, 2021. (AR I.3). Immediately thereafter, Permittees terminated the period of "zero-liquid-discharge" and commenced regular discharges from Outfall 051, breaking abruptly from the practice which had been in effect since November 2010. Discharges occurred in each of the following months in 2021.

24. Permittees were then fully capable of disposing of contaminated water from the RLWTF using the mechanical evaporation system, which served that purpose for nearly ten years.

25. However, Permittees have offered no credible explanation for their sudden change in discharge protocol in April 2021, such that most if not all of the RLWTF's throughput of contaminated water would be discharged via Outfall 051, rather than evaporated. The change from

evaporation to discharges was not an accident, nor an act of nature. It was made for a reason.

26. Permittees state that the reason for the change from evaporation to discharge was "operational" (Pttees' Br. 18-20), but they give no further explanation. They now contend that Region 6 is required to issue a CWA permit for Outfall 051, supported by the "continuing" discharges occasioned by "operational" issues.

27. Permittees' argument resembles that of the Department of Commerce ("DOC") in *DOC v. New York*, 139 S.Ct. 2551 (2019), where the Supreme Court vacated an agency decision that, DOC asserted, was motivated by a legitimate governmental purpose—but which in fact was motivated by a different, and unacknowledged, purpose.

28. The agency action in *DOC* was incorporation of a citizenship question in the decennial census. The DOC created a paper record, indicating that the purpose involved enforcement of the Voting Rights Act, 52 U.S.C. § 10301. Opponents urged that the true purpose was a covert intention to affect the population of minorities reported in the census.

29. In *DOC*, the Chief Justice, writing for the Court, stated that DOC's actions in amending census documents conformed with the applicable

regulations. Based on the regulations, the Court could identify no illegality. *DOC v. New York*, 139 S. Ct. at 2573.

30. But that did not end the matter: In *DOC*, facts brought out the speciousness of the claimed purpose:

> Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

DOC v. New York, 139 S. Ct. at 2575.

31. The Court held that, where the agency asserted a contrived purpose, instead of owning up to its genuine motivation, judicial review is defeated, and the decision must be vacated.

> We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. 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. at 2575-76.

32. This case likewise presents a mismatch between the nature of agency action and the supposed purpose. Permittees claim that they responded to "operational" needs in commencing regular discharges. (Pttees' Br. 3, 5, 6, 11, 18, 19, 20). They do not further describe any actual need to discharge. Previously, Permittees declared that they would discharge from Outfall 051 if there was a failure of evaporation equipment or a surge in needed capacity. (AR I.6 at ¶ 8). No such circumstances are claimed now. Indeed, there is no identification of any "operational" need supporting a discharge, much less continuous discharges for many months. In fact, although the change in the RLWTF's discharge practices is wholesale and continuing, and Permittees submitted 234 pages of data to Region 6 in commenting on the 2021 discharges,[3] none of it constitutes documentation of the Permittees' supposed "operational" need to reverse the longstanding "zero liquid discharge" protocol.

[3] Permittees' comments are available at (AR I.5).

33. The failure to identify a specific need served by the policy reversal of April 2021 leaves a gap in the agency's reasoning: Permittees admit that for agency review—

> The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion. . . . As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record."

(Pttees' Br. 10).

34. In this case, Petitioners have maintained that the 2021 discharges were a plain effort to influence this proceeding. (Petitioners' Comments on Proposed Renewal, April 7, 2023, at 22-27, AR I.6 at 24-26.). The Board, in remanding, observed that

> there are different ways of characterizing the nature and significance of the 2021 Outfall 051 discharge data and the debate as to that characterization and significance should not occur before the Board in the first instance.

(AR I.1 at 21 note 9).

35. Permittees have conceded that the timing of the termination of "zero-liquid-discharge"—immediately after the public comment period ended—creates an inference that Permittees sought to influence the outcome in this proceeding. (Pttees' Br. 18-19).

36. Moreover, Region 6 *did not respond* to Petitioners' assertion that the claim concerning an "operational" need was a contrived basis for the Region's decision. Region 6 said only that Petitioners' "comment does not directly respond to the 2021 data that is the subject of this opportunity for comment"—which is no response at all. (AR J.3 at #29, at 94).

37. Region 6 also said, "[t]he comment also does not cite any requirement of the applicable statute or regulations that EPA or the permittee fail to meet." (Id. at #29). Permittees and Region 6 demand that Petitioners identify a regulation that was allegedly violated. (Pttees' Br. 8, 9, 11, 25; Region 6 Br. 2, 24, 30, 33, 34, 35, 38). Permittees and Region 6 make no answer in arguing that Petitioners do not cite a regulation that was violated. The violation was a breach of the basic process of administrative review, which requires that parties speak truthfully to the tribunal. *DOC v. New York*, 139 S.Ct. at 2575-76.

38. Permittees assert that the record contains "ample demonstration of the Laboratory's continuing operational need to discharge from Outfall 051." (Pttees' Br. 19). To the contrary, the record shows that the RLWTF ran for nearly ten years without any discharge, while evaporating nearly all

its output. And a "contrived" motivation can play no role in agency review. *DOC v. New York*, 139 S. Ct. at 2575.

39. When Petitioners asserted that the Permittees sought to influence this proceeding by manipulating discharges, Permittees and Region 6 failed to address this argument. Thus, it falls to the Board to call out the Permittees' and the Region's failure to disclose the actual motivation for the Region's issuance of a permit.

40. An agency, when it acts, must explain the basis for its action: the legislative mandate and the facts that impel action. Normally, in administrative review, an agency provides a rationale and a court reviews it:

> 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.

DOC v. New York, 139 S. Ct. at 2575–76.

41. Permittees insist that, to the contrary, the motivation for discharges may not be examined here. (Pttees' Br. 18): "Permittees demonstrated an intent to discharge, and Permittees did discharge. That is sufficient to justify issuance of the 2023 Permit." (Pttees' Br. 18).

42. The claim that there is no evidence of any motive *other than* a claimed "operational need" (Pttees' Br. 18) gives no weight to the natural

inference that arises when, after the comment period ended, Permittees ceased "zero-liquid-discharge" and began discharging, and only spotlights the secrecy that masks operations at the RLWTF. Permittees and the Region have abandoned this issue. When one party to an appeal offers an argument, and its opponent fails to address it in its response, the opponent is deemed to have abandoned the point. Here, Petitioners squarely asserted that the only possible inference is that Permittees stopped "zero-liquid-discharge" to influence the outcome of this proceeding. (Petition at 15-24; Pttees' Br. 18-19).

43. Neither Region 6 nor Permittees offers any factual dispute or legal contention; in fact, no comment of any substance.

> [A]n appellant's abandonment of an issue on appeal to this Court, including implicit abandonment via "failure to assert any challenge and argument regarding the Court's decision on an issue," results in relinquishment of the right to judicial review of the Board's decision on the abandoned issue.

Harris v. Wilkie, 2018 U.S. App. Vet. Claims LEXIS 1719, *8.

44. Permittees complain that they discharged from Outfall 051 for "operational reasons," noting discharges in 2019. (Pttees' Br. 3-4). The Board, however, inquired as to 2021 discharges, for which no explanation is offered. The Board noted that post-2021 discharges are outside the scope of the remand. (AR I.1 at 14).

45. Permittees might have responded to Petitioners' allegation—that 2021 discharges were intended to influence the outcome of this case—by pointing to a legitimate reason for the discharges. But Permittees did not do so.

46. Permittees' reluctance to address this issue is striking in light of their readiness, otherwise, to offer unsworn, anonymous generalizations to establish points that, they claim, counter the known facts. See Pttees' Br. at 2-4, citing Responses to Comments (subjects include supposedly discharging for "operational" reasons; supposed intention to discharge in the future; reference to supposed "changes in the Laboratory's operations and evolving mission needs." (at 4). They claim, without citation, "[f]our years of documented actual discharges from Outfall 051 during the prior permit term," when discharges resumed in April 2021, which is less than three years ago. They assert that the Laboratory made "clear statements included in the administrative record explaining the Laboratory's expected need to discharge into the future"—but they cite no record reference saying so. (Pttees' Br. 4).

47. Permittees argue that they have no obligation "to justify their operational changes to the Region, and baseless allegations about a permittee's reasons for discharging should have no bearing on the Region's

permitting decisions." (at 11-12). They argue that "there is no evidence that Permittees have discharged for anything other than operational need." (at 18). Permittees urge that the reasons for discharging "are not within the purview of this Board's review: it is enough that a discharge occurs or is planned to occur." (at 17). Thus: "Other than the items specified in EPA's permit application forms, no law or regulation requires permit applicants to provide information about operations, and nothing compels applicants to explain the reasons for any changes from prior operating procedures." (at 18).

48. There is a duty, however, to explain agency action, and there is a duty to respond to argument before the Board.

49. Region 6 likewise states that, where the occurrence of a discharge is clear, there is no occasion to examine the motivation:

> To be clear, CCNS's public comments, which acknowledge discharges from Outfall 051 (see, e.g., ". . . Applicants have discharged from the outfall in an effort to influence the outcome of this proceeding." RtC at 94), "did not contend that discharges from Outfall 051 fail to meet the definition of 'discharge' at CWA § 502 or 40 C.F.R. § 122.2. This being the case, there was no significant comment for EPA to address in the Response to Comments."

(Region 6 Br. 31). Thus, "[p]etitioners have identified no lack of clarity regarding the facts relevant to Outfall 051 as presented in the Response to Comments or in the permit." (at 32). Region 6 asserts that "[t]he Board

did not make a 'firm request for an explanation of the change in discharge practices" as Petitioners state." (at 33). Region 6 argues at length that there is no obligation to explain an agency decision. (at 33-34). There obviously is a requirement to explain agency action.

50. To suggest that the volume of waste treated at the RLWTF will *increase*, when the volume has recently trended *downwards,* is to mislead the Board and induce it to err in Permittees' favor. In 1999-2005 RLWTF discharge volume steadily decreased.[4] In 2020 the Permittees projected reduction in liquid waste output from the RLWTF:[5]

> The 2008 LANL SWEIS projected total of 5.3 million gallons per year of liquid radioactive waste would be treated at the Radioactive Liquid Waste Treatment Facility (RLWTF) (DOE 2008a, ch.5, p. 136, Table 5-37). Based on the projected liquid waste that would be treated under [plutonium] pit [triggers for nuclear weapons] production (1.7 million gallons per year) and the current annual treatment of liquid waste (one million gallons), it is expected that the proposed action would not exceed the 2008 LANL SWEIS analyzed projections (LANL 2019b).

51. Given the suddenness of the post-comment-period change in operations, its fundamental nature, its occurrence immediately after the public comment ended, its continuation since that change, and the argument by

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[4] Ex. JJ, SWEIS Table 4-13, at 4-46 (p. 13 of pdf); 4-48 (AR C.2.JJ).

[5] *Final Supplemental Analysis of the 2008 Site-Wide Environmental Impact Statement (SWEIS)* (August 2020, DOE/EIS-0380-SA-06) https://www.energy.gov/nepa/articles/doeeis-0380-sa-06-final-supplement-analysis (p. 69 of pdf).

Permittees that the discharges support the issuance of a CWA permit, and Permittees' refusal to clarify what actual purpose is masked by the opaque description, "operational," Region 6 should conclude that Permittees have resumed discharges from the outfall in an effort to influence the outcome of this proceeding.

52. Permittees filed comments in the original comment period on February 25, 2021. These comments contained no reference to a forthcoming major change in discharge operations. A month later Permittees started their new program of discharges. They offer no explanation, certainly no innocent explanation, for the sudden increase in discharges.

53. The burden of explanation of an agency's action correctly falls principally on the agency itself. Region 6 is well aware of the Board's insistence upon a considered judgment by the Region so that the Board may properly perform an appellate function. In re *GE*, 17 E.A.D. 434, 560-61 (E.P.A. Jan. 26, 2018); In re *GE*, 18 E.A.D. 575, 608 (E.P.A. Feb. 8, 2022). The requirement was presented at length in the Petition (at 19, 20, 21, 24, 25). Region 6 has not complied with or even spoken to the requirement. This amounts to an abandonment of the point.

54. Since Region 6 and the Permittees have refused to disclose the actual reason for commencing discharges in 2021, the process of administrative

review is frustrated. As in *DOC v. New York*, the agency action should be vacated.

h. Importance of the question of regulation of hazardous waste.

55. Permittees contend that no question of public importance is presented here. (at 22-23). It is said that RCRA would not apply to the RLWTF, because "Permittees do not concede that the treatment facility 'manages' hazardous waste." (Pttees' Br. 21-22). What the State of New Mexico does concede is that the RLWTF manages waste that is hazardous under the HWA, which enforces RCRA, and requires a HWA permit. Specifically, 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[.]" (AR C.2.VV, p. 4 of pdf).

56. Permittees also assert that Congress enacted a rule of deference by RCRA to CWA requirements. The provision reads as follows:

> Application of 42 USCS §§ 6901 et seq. Nothing in this Act [42 USCS §§ 6901 et seq.] shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act (33 U.S.C. 1151 and following), the Safe Drinking Water Act (42 U.S.C. 300f and following), the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 and following), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 and following) except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

42 U.S.C. § 6905.

57. Permittees quote subsection 6905(a)—but *leave out the part* where Congress said, "except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts." (at 22). Based on the entire enactment, it allows full scope for operation of RCRA, so long as there is no statutory conflict.

58. To eliminate conflicts, EPA, with the consent of Congress, issued the WWTU exemption. (See 53 Fed. Reg. at 34079-34087 (Sept. 2, 1988)). As construed *by EPA*, the WWTU exemption applies only so long as the RLWTF disposes of *all* treated waste water through a CWA outfall.

59. Since the RLWTF has two units dedicated to evaporation of treated water, the MES and the Solar Evaporative Tank System ("SET"), one may question whether the RLWTF may benefit from the WWTU exemption. The RLWTF is ineligible for the WWTU exemption because it is a "dual-use" facility. The WWTU exemption does not apply to a facility that, in addition to treating wastewater for discharge through a CWA outfall, also manages wastewater that is disposed of by other means. EPA has explained:

> EPA intends that this exemption apply to any tank system that manages hazardous wastewater and is dedicated for use with an on-site wastewater treatment facility. However, if a tank system, in addition to being used in conjunction with an on-site wastewater

> treatment facility, is used on a routine or occasional basis to store or treat a hazardous wastewater prior to shipment off-site for treatment, storage, or disposal, it is not covered by this exemption.

(*Id.* ¶2*)*.

60. EPA has ruled, specifically, that a tank system does not qualify when the facility at *some times* releases hazardous waste water through a CWA outfall and, at *other times* disposes of hazardous waste water by means not regulated by the CWA:

> That is, in order to satisfy the WWTU exemption, a tank must be dedicated solely for on-site wastewater treatment at all times and for no other purpose. EPA believes that the preamble language is clear on this point. *EPA did not intend the WWTU exemption to apply in situations involving "dual use" of a tank (when a tank is concurrently used for wastewater treatment and for another purpose). Nor did EPA intend for the exemption to apply in situations, such as the one your letter describes, involving "alternating use" of a tank.*

Letter, E.A. Cotsworth, Acting Director, Office of Solid Waste, to Pendleton, RO 14262, April 1998. (*Emphasis supplied.*)[6]

61. The RLWTF diverts wastewater for disposal in the MES and the SET, and these systems are not regulated by the CWA or even mentioned in the current CWA permit. Operation of the RLWTF, insofar as it involves the

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[6] Here, the construction and operation of the MES and solar evaporative tanks ("SET") evaporation equipment are not regulated by EPA under the CWA. The operations of the RLWTF clearly result in much hazardous waste water being diverted to the unregulated evaporation units. Therefore, the WWTU exemption has no application to the RLWTF.

MES and the SET, is not regulated at all. Thus, the RLWTF is a dual-use facility and cannot be covered by the WWTU exemption. Further, EPA has ruled, specifically, that a tank system does not qualify when the facility at *some times* releases hazardous waste water through a CWA outfall and, at *other times* disposes of hazardous waste water by means not regulated by the CWA:

> That is, in order to satisfy the WWTU exemption, a tank must be dedicated solely for on-site wastewater treatment at all times and for no other purpose. EPA believes that the preamble language is clear on this point. *EPA did not intend the WWTU exemption to apply in situations involving "dual use" of a tank (when a tank is concurrently used for wastewater treatment and for another purpose). Nor did EPA intend for the exemption to apply in situations, such as the one your letter describes, involving "alternating use" of a tank.*

Letter, E.A. Cotsworth, Acting Director, Office of Solid Waste, to Pendleton, RO 14262, April 1998. (*Emphasis supplied.*).

62. Accordingly, the current HWA permit for LANL contains an explicit proviso, denying any exemption unless the entire throughput of treated waste water is disposed of through Outfall 051:

> **4.6 TA-50 RADIOACTIVE LIQUID WASTE TREATMENT FACILITY**
> The Permittees shall discharge all treated wastewater from the TA-50 Radioactive Liquid Waste Treatment Facility (RLWTF) through the outfall permitted under Section 402 of the federal Clean Water Act, or as otherwise authorized by the terms of an applicable Clean Water Act permit that regulates the treatment and use of wastewater. If the Permittees intentionally discharge through a location other than the permitted outfall or as otherwise authorized, they will fail to comply

with this requirement, and as a consequence the wastewater treatment unit exemption under 40 CFR § 264.1(g)(6) will no longer apply to the RLWTF.[7]

i. The Board has jurisdiction of this appeal.

63. Permittees assert, finally, that Petitioners did not properly appeal the permit version issued on September 28, 2023. The Petition (dated October 30, 2023) makes reference to the date of the original permit, in March 2022.

64. Petitioners apologize for the confusion. Petitioners had assumed that a reference to the original draft permit (dated March 2022) would include successive drafts in that series, including the draft issued in September 2023. Both bore the number NM0028355. It was therefore assumed that the Petition might use the original date to refer to documents in this series. Instead, it now appears that successive drafts keep the same permit number and are dated with their date of issuance.

65. It is quite clear that no one was put off track by the confusion about identification of successive versions. Petitioners' 2023 Petition raises questions about the latest final permit; Permittees and the Region respond to those questions, and Petitioners' reply is herein.

[7] https://www.env.nm.gov/hazardous-waste/wp-content/uploads/sites/10/2023/11/Permit_Parts_1-11_November_2023.pdf (p. 88 of pdf).

Conclusion

For the reasons set forth herein and in the Record of this case, the Board should reverse the issuance of Permit No. NM0028355 as to any discharges or so-called potential or possible discharges via Outfall 051 from the LANL RLWTF, and any consequences thereof, but should otherwise allow the Permit to remain in effect.

Respectfully submitted,

/s/Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800

Attorney for Petitioners
Concerned Citizens for Nuclear Safety
Honor Our Pueblo Existence
Veterans for Peace, Chapter #63

CERTIFICATE OF SERVICE

I, Joni Arends, hereby certify that on this day I electronically filed the *Reply Brief for Petitioners* 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 *Reply Brief for Petitioners* to the following:

Emilio Cortes
Clerk of the Board
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460-0001
Tel: 202 233-0122
Clerk_EAB@epa.gov

James Banks
Misty Howell
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Tel: 202-637-5802
james.banks@hoganlovells.com
misty.howell@hoganlovells.com
Tel. (202) 637-5802

Jay Przyborski
Assistant Regional Counsel
U.S. EPA, Region 6
1445 Ross Ave., Suite 1200
Dallas, TX 75202-2733
Tel: 214 665-6605
przyborski.jay@epa.gov

Renea Ryland
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733
Tel: (214) 665-2130
Ryland.renea@epa.gov

Attorneys for EPA Region 6

Maureen C. Dolan
Maxine M. McReynolds
Office of General Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, NM 87545-0001
Tel: (505) 667-3766
dolan@lanl.gov
mcreynolds@lanl.gov

Silas Deroma
Stephen Jochem
U.S. Department of Energy
National Nuclear Security Adm.
3747 W. Jemez Road
Los Alamos, NM 87544
silas.deroma@nnsa.doe.gov
stephen.jochem@nnsa.doe.gov

Attorneys for Triad National Security, LLC

Attorneys for U.S. Department of Energy, National Nuclear Security Administration (DOE/NNSA)

Dated: January 11, 2024.

/s/Joni Arends_____
Joni Arends