

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)	
In re:)	
Los Alamos National Security, LLC and the)	
Department of Energy)	NPDES Appeal No. 17-05
Permit No. NM0028355)	
_____)	

**EPA RESPONSE TO CONCERNED CITIZENS FOR NUCLEAR SAFETY'S
INFORMAL APPEAL OF EPA'S DENIAL OF REQUEST TO TERMINATE
PERMIT AUTHORIZATION**

Respectfully Submitted,



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I. Introduction

On September 14, 2017, Concerned Citizens for Nuclear Safety (CCNS) filed with the Environmental Appeals Board (“the Board”) an informal appeal titled *Concerned Citizens for Nuclear Safety Submission pursuant to 40 C.F.R. §§ 124.2 and 124.5(b)* (“CCNS Submission”), asking the Board to review the Environmental Protection Agency (EPA) Region 6’s denial of CCNS’s *Request to Terminate NPDES Permit No. NM0028355 as to Outfall 051 for Radioactive Liquid Waste Treatment Facility* (“Request for Permit Termination”). CCNS filed the Request for Permit Termination with EPA Region 6 on March 9, 2017, asking the Region to terminate permit authorization for Outfall 051 under NPDES Permit #NM0028355, which the Region issued in 2014 to Los Alamos National Security, LLC (LANS) and the Department of Energy (DOE) as co-permittees for the Los Alamos National Laboratory (LANL) facility located at Los Alamos, NM (“the Permit”). The Permit authorizes LANL to discharge from eleven sanitary and/or industrial outfalls, including a discharge of treated radioactive liquid waste from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051 into Mortandad Canyon. Region 6 denied CCNS’s Request for Permit Termination by letter dated August 16, 2017. CCNS files this informal appeal from Region 6’s August 16, 2017 denial of CCNS’s Request for Permit Termination.

II. Issue Presented for Review

The issue before the Board is whether Region 6 erred in denying CCNS’s March 9, 2017 Request for Permit Termination, i.e. whether CCNS’s Request for Permit Termination demonstrated cause for permit termination under 40 C.F.R. § 122.64, as required by 40 C.F.R. § 124.5.

III. Factual Background

1. On August 12, 2014, EPA Region 6 issued NPDES Permit No. NM0028355 for the LANL facility located at Los Alamos, New Mexico to LANS and DOE as co-permittees under Section 402 of the Clean Water Act (CWA or “the Act), 33 U.S.C. § 1251. A.R. II. The Permit authorizes the permittees to discharge from eleven sanitary and/or industrial outfalls, including a discharge of treated radioactive liquid waste from the RLWTF through Outfall 051 into Mortandad Canyon. *Id.* EPA Region 6 modified the Permit on March 27, 2015 to remove monitoring and sampling requirements for selenium at permitted Outfall 03A048 in settlement of a Petition for Review filed by the permittees.
2. In their 2012 re-application for permit authorization, LANS and DOE described the sources of discharge to Outfall 051 and stated that the RLWTF has not discharged to Outfall 051 since 2010. *See* A.R. I.A. LANS and DOE specifically sought permit authorization for Outfall 051 to provide NPDES authorization in case of a future discharge. The permittees explicitly stated that they sought to “re-permit the outfall so that the RLWTF can maintain the capability to discharge should the Mechanical Evaporator and/or Zero Liquid Discharge (ZLD) Solar Evaporation Tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in LANL scope/mission.” *Id.* at 5.
3. On March 9, 2017, CCNS filed with the Acting Regional Administrator of EPA Region 6 a Request to Terminate permit authorization for Outfall 051 under NPDES Permit

#NM0028355 (“Request for Permit Termination”). A.R. IV. CCNS’s Request for Permit Termination stated that it was filed pursuant to 40 C.F.R. § 124.5.

4. Region 6 denied CCN’s Request for Permit Termination by letter dated August 16, 2017.

A.R. V.

5. On October 16, 2017, LANS and DOE filed in this proceeding a letter that reaffirms its need for NPDES authorization for Outfall 051, including the need “to maintain the capability to discharge should the Mechanical Evaporator and/or Zero Liquid Discharge (ZLD) Solar Evaporation Tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in LANL scope/mission.” Affidavit of Michael Thomas Saladen, at 6, attached to Letter from LANS and DOE to the Board dated October 12, 2017 (quoting language from A.R. I.A pp. 1-5).

IV. Legal Background

1. CWA Section 301 prohibits the discharge of any pollutant by any person unless in compliance with specified sections of the Act, including CWA Section 402. CWA Section 402(a) establishes the NPDES permitting program, under which the EPA Administrator “may issue” an NPDES permit for the discharge of any pollutant or combination of pollutants upon condition that such discharge will meet the applicable requirements of the Act. 33 U.S.C. § 1311, 33 U.S.C. §§ 1342, 1342(a).
2. Under Section 501(a) of the Act, the Administrator may prescribe such regulations as are necessary to carry out his duties under the Act. 33 U.S.C. § 1361(a).
3. 40 CFR § 124.5(a) provides that permits may be terminated either at the request of any interested person (including the permittee) or upon the Director’s initiative. 40 CFR

§124.5(a) further provides that all requests must be in writing and contain facts or reasons supporting the request.

4. 40 C.F.R. § 124.5(a) provides that NPDES permits may only be terminated for the reasons specified in 40 C.F.R. § 122.64.
5. 40 C.F.R. § 122.64(a) sets out four causes for terminating a permit during its term:
 - (1) Noncompliance by the permittee with any condition of the permit;
 - (2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;
 - (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or
 - (4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW). 40 C.F.R. § 122.64(a)(1) - (4).
6. Under 40 C.F.R. §124.5 (b), if the Director decides a request to terminate NPDES permit authorization filed by an interested party is not justified, the Director must send the requester "a brief written response giving a reason for the decision."
7. The regulations at 40 C.F.R. § 124.2(a) further provide that when there is no approved state NPDES program, and there is an EPA administered program, "Director" means the Regional Administrator.
8. Because the State of New Mexico does not have an approved state NPDES program under Section 402(b) of the CWA, EPA is the NPDES permitting authority within the State.
9. Pursuant to 40 C.F.R. § 124.5(b), denials of requests for termination are not subject to public notice, comment, or hearings.

V. Argument

CCNS's informal appeal of Region 6's denial of its Request for Permit Termination should be denied because CCNS has not demonstrated error on the part of Region 6 in denying the Request for Permit Termination.

A. Region 6 properly denied the Request for Permit Termination because CCNS did not demonstrate cause for termination under 40 C.F.R. § 122.64, as required by 40 C.F.R. § Section 124.5.

Region 6 properly denied CCNS's Request for Permit Termination because CCNS did not demonstrate cause to terminate permit authorization as required by federal regulations implementing the CWA. Termination of NPDES permits during their terms is governed by 40 C.F.R. §§ 124.5 and 122.64. The regulation at 40 C.F.R. § 124.5(a) explains that NPDES permits may *only* be terminated for the reasons specified in 40 C.F.R. § 122.64. 40 C.F.R. § 122.64(a) provides four specific causes for terminating a permit during its term:

- (1) Noncompliance by the permittee with any condition of the permit;
- (2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;
- (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or
- (4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW). 40 C.F.R. § 122.64(a)(1) – (4).

CCNS does not allege that cause for termination of LANL's authorization to discharge from Outfall 051 exists under subsections (1) – (3) of 40 C.F.R. § 122.64(a). CCNS does not allege that LANL is in violation of its permit conditions with regard to Outfall 051 or that the permittees failed to disclose, or misrepresented, any relevant facts, and there is nothing in the record to support such an allegation. In addition, there is no information to support a

determination that any discharge through the permitted outfall would endanger human health or the environment, much less that the activity could only be regulated through termination of the Permit.

CCNS seems to suggest that the current lack of discharge from Outfall 051 constitutes cause for permit termination under subsection (4) of 40 C.F.R. § 122.64(a), which provides for termination of a permit when there is “[a] change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit.” 40 C.F.R. § 122.64(a)(4). *See* A.R. IV at II.42, p. 16; CCNS Submission, V.8 at p. 3. However, there is nothing in CCNS’s Request for Termination before Region 6 or in its argument before the Board explaining how the lack of recent or current discharge from Outfall 051 fits within the limited confines of subsection (4) of 40 C.F.R. § 122.64(a). CCNS does not, and cannot, point to any “change in any condition that requires either a temporary or permanent reduction or elimination of any discharge” under of 40 C.F.R. § 122.64(a)(4). There is no change in any condition that *requires* reducing or eliminating the permitted discharge. There is no shutdown of the facility or the RLWTF, elimination of the outfall, or other permanent change that ends the possibility of discharge. The record shows that LANL requested re-authorization for a possible discharge through Outfall 051 should one or both evaporative systems be unavailable. A.R. I.A., p. 5. While the possible discharge may be only infrequent, irregular or rare, it is nonetheless a possible discharge. And, as explained in detail under paragraph V.B. below, termination of an NPDES permit during its term under 40 C.F.R. § 122.64 is intended to be used only in very limited circumstances.

The parenthetical examples included in the language of subsection (a)(4), i.e., plant closure or termination of discharge by connection to a POTW,” *Id.* describe situations in which

there is no possibility of a discharge, and thus no potential liability to the discharger for discharging without NPDES permit authorization. These types of situations are very different from the situation at hand. LANL has not closed the RLWTF or permanently eliminated the possibility of a discharge through Outfall 051. Instead, the permittees have concluded that a future discharge through Outfall 051 is possible under certain circumstances, and have requested permit authorization for that potential discharge. *See* A.R. I.A., pp. 1-5. There has been no change in any permit condition requiring permit termination, such as closure or termination of the discharge by connection to a POTW, such as to meet the requirements for cause under 40 C.F.R. § 122.64(a)(4). The record here points to the possibility of an infrequent, irregular or rare discharge from Outfall 051. CCNS has not presented any contrary engineering projections.

Because CCNS has not demonstrated cause for permit termination under 40 C.F.R. § 122.64, as required by 124.5, the Board should deny CCNS's informal appeal and uphold Region 6's denial of its Request for Permit Termination.

B. The legislative history of the CWA and 40 C.F.R. § 122.64 confirms that termination of an NPDES permit is limited to the specific causes set forth under 40 C.F.R. § 122.64(a).

1. Legislative history of NPDES permit termination under the CWA.

Congress included provisions for termination or modification of an NPDES permit during its term when it first enacted the CWA in 1972. Under CWA section 402(b)(1)(C), concerning authorization of state NPDES programs, Congress provided that any state desiring to administer its own permit program must have the ability to, among other things, issue permits which:

(C) can be terminated or modified for cause, including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; 33 U.S.C.A 1342(b)(1)(C).

This statutory language has remained unchanged since 1972 and there is nothing in the legislative history that further illuminates Congress' intent as to what constitutes "cause" for modification or termination of NPDES permits.

2. Legislative history of NPDES permit termination under the federal regulations.

There is a long history in the development of the NPDES regulations regarding termination of NPDES permits during their term. When EPA first promulgated regulations establishing guidelines for state NPDES programs in 1972, it included the requirement that states have the ability to modify or terminate permits for cause. *See* 37 Fed. Reg. 28390 (December 22, 1972). 40 C.F.R. § 124.45 as adopted in 1972 closely tracked the statutory language in providing that the procedures of any state seeking NPDES authorization must provide for and insure:

(b) That the permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

(1) Violation of any terms or conditions of the permit;

(2) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; and

(3) A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

40 C.F.R. 124.45 (b)(1-3) (1972); 37 Fed. Reg. 28390 at 28397.

There is no discussion in the preamble or response to comments regarding this specific provision.

Although EPA's prior regulations at 40 C.F.R. § 124.45, as well as CWA section 402(b)(1)(C), concerned requirements for state NPDES programs, EPA included similar language when it promulgated regulations for the federal program¹ in 1973. 38 Fed. Reg. 13528 (May 22, 1973). The regulations for EPA-issued NPDES permits at 40 C.F.R. 125.22 added a requirement for notice and opportunity for public hearing before a permit could be "modified, suspended, or revoked in whole or in part during its term for cause," but otherwise included language identical to § 124.45. *See* 40 C.F.R. § 125.22 (1973), 38 Fed. Reg. 13528 at 13533. Again, there is no discussion in the preamble or response to comments regarding this particular provision.

EPA extensively revised the regulations governing the NPDES program in 1979. 44 Fed. Reg. 32854 (June 7, 1979). In the preamble to the final regulations, EPA discussed comments received on "*Modification, revocation and reissuance, and termination*" of NPDES permits, then at 40 C.F.R. §122.31. EPA noted that a large number of commenters "suggested that causes for revocation and causes for modification should be listed separately since absolute revocation is a more 'severe' measure. EPA agrees with these commenters and has separated and reduced the causes for absolute revocation." 44 Fed. Reg. 32854 at 32868. EPA went on to explain that the revised regulations used three terms to distinguish between methods for changing or terminating a permit during its term under Section 122.3: "modification," "revocation and reissuance," and "termination." *Id.* "Modification" referred to situations in which the permit conditions were changed, but the expiration date remained the same. *Id.* "Revocation and reissuance" was used to describe situations in which the existing permit was revoked and a new permit was issued,

¹ CWA section 402(a)(3) specifies that the NPDES program administered by EPA and permits issued under it are subject to the same terms, conditions, and requirements that apply to state programs. 33 U.S.C. § 1342(a)(3).

providing the permittee the protection of a new five-year permit. *Id.* “Finally, ‘termination’ means the revocation of an existing permit, where a new permit is not issued.” *Id.*

In the 1979 revisions, EPA explained its decision to revise the regulations to allow termination of permits “only in certain limited circumstances,” and removed the qualifying language “but not limited to” from the list of causes for modification, revocation and reissuance, or termination. 44 Fed. Reg. 32854 at 32868 and 32912, respectively. The Agency also added two additional “causes” to the reasons for modifying, revoking and reissuing, or terminating a permit during its term.” 44 Fed. Reg. 32854 at 32912. Finally, EPA added parenthetical examples to the “cause” for modification, revocation and reissuance, or termination of a permit for a “change in any condition that requires either a temporary or permanent reduction or elimination” of the permitted discharge, but did not include discussion of these examples in the preamble. The revised regulation read in pertinent part as follows:

§ 122.31 *Modification, revocation and reissuance, and termination*

- (a) An issued permit may be modified in whole or in part, revoked and reissued, or terminated during its term for cause as specified in this section. ...
- (d) Causes for modification, revocation and reissuance, or termination, include the following:
 - (1) Violation of any term or condition of the permit;
 - (2) Failure of the permittee to disclose all relevant facts or misrepresentation of any relevant facts by the permittee in the application or during the permit issuance process;
 - (3) A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (e.g., plant closure, termination of a discharge by connection to a POTW, the promulgation of any applicable effluent standard or prohibition under section 307 of the Act, any change in State law that requires the reduction or elimination of the discharge, etc.);
 - (4) Information indicating that the permitted discharge poses a threat to human health or welfare; or
 - (5) A change in ownership or control of a source which has a permit, where required by the Director in accordance with § 122.12(d).

40 C.F.R. § 122.31 (1979); 44 Fed. Reg. 32854 at 32912.

EPA revised the regulations again in 1980 to consolidate requirements governing permit programs under several statutes, including the CWA NPDES program. 45 Fed. Reg. 33290 (May 19, 1980). Under the consolidated regulations, modification or revocation and reissuance of permits were addressed in 40 C.F.R. § 122.15, and termination of permits was moved to a separate section, 40 C.F.R. § 122.16. In proposing the consolidated regulations, EPA explained that the section on termination of permits “specifies conditions under which permits will be terminated for cause by the permitting authority. While revocation and reissuance is a mechanism for changing permit terms and conditions in light of changed conditions, termination is essentially an enforcement mechanism.” 44 Fed. Reg. 34244 at 34249 (June 14, 1979).

When the consolidated regulations were finalized, EPA again stated that “[a]s noted in the preamble to the proposal, ‘termination is essentially an enforcement mechanism.’” 45 Fed. Reg. 33290 at 33316. In response to concerns from commenters that the causes for termination were worded too broadly, EPA stated that the need to carefully allocate scarce enforcement resources should prevent the Director of a permit program from reading the termination causes too broadly. “It should also be clear that in most cases less drastic actions, such as permit modifications, are available.” *Id.* The consolidated regulations, which included changes to reflect the separation of causes for termination from causes for modification, or revocation and reissuance, now provided:

§ 122.16 *Termination of Permits*

- (a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:
- (1) Noncompliance by the permittee with any condition of the permit;
 - (2) The permittee’s failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee’s misrepresentation of any relevant facts at any time; or

- (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination.
 - (4) For NPDES and 404 only, permits may be modified or terminate when there is a change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW.)
- (b) The Director shall follow the applicable procedures in Part 124 or State procedures in terminating any RCRA, UIC, NPDES, or 404 permit under this section.

40 C.F.R. § 122.16 (1980); 45 Fed. Reg. 33290 at 33429-33430.

Although EPA had included “other good cause” as a grounds for permit termination in the proposal of § 122.16, the Agency chose to remove it from the final rule, stating that it was too open-ended and could be used to circumvent the limitations that the changes from the proposed rule were intended to provide. 45 Fed. Reg. 33290 at 33317.

EPA deconsolidated the Consolidated Permit Regulations in 1983, and § 122.16 as it pertained to termination of NPDES permits became § 122.64. 48 Fed. Reg. 14146 at 14175 (April 1, 1983). However, there were no substantive changes to the rule, other than the removal of the phrase “For NPDES and 404 only, permits may be modified or terminated when there is...” from the beginning of subsection (a)(4) and the removal of language in subsection (b) pertaining to procedures to be used for programs other than the NPDES program. *Id.* Section 122.64 was amended in 1989 to add “or sludge use or disposal practice” to § 122.64 (a)(4) in response to the agency’s promulgation of regulations governing sludge management programs [54 Fed. Reg. 18716 at 18784 (May 2, 1989)], and again in 2000 to add the current language regarding procedures for terminating permits under § 122.64 (b). 65 Fed. Reg. 30886 at 30909 (May 15, 2000). There have been no regulatory changes to 40 C.F.R. § 122.64 since 2000.

The statutory and regulatory history of 40 C.F.R. § 122.64 demonstrate that termination of an NPDES permit during its term under that section is intended essentially as an enforcement

mechanism to be used only in very limited circumstances. EPA intentionally separated the causes for termination of permits from the causes for “less drastic” actions such as modification or revocation and reissuance, and narrowed the causes for termination to four specific causes. Three of the four causes for termination concern noncompliance or dishonesty by the permittee, or a finding by the agency of endangerment to human health or the environment. Although there is little discussion in the statutory and regulatory history specific to subsection 122.64(a)(4), EPA did add parenthetical language to the statutory language setting out examples of cause under that subsection.

As discussed above, the cited examples for termination of NPDES permits under 40 C.F.R. § 122.64(a)(4) are “plant closure or termination of discharge by connection to a POTW” *Id.*, both of which are situations in which there is no possibility of a discharge, and thus no potential liability to the discharger for discharging without NPDES permit authorization. These examples are in keeping with Region 6’s position that permit termination is not appropriate in the current instance, where LANS and DOE specifically requested permit authorization for a possible future discharge from Outfall 051.

C. The proper forum for CCNS’s claim is the permit issuance process, and CCNS failed to raise this claim during the most recent renewal of the Permit during 2013 – 2014.

As discussed above, CCNS’s claim in its Request for Permit Termination filed with Region 6 in March of 2017, and in its current informal appeal of the Region’s denial of that

request, may not be properly considered in a proceeding to terminate NPDES permit authorization under 40 C.F.R. § 122.64. Instead, the permit re-issuance process is the proper forum for CCNS to raise its claim that NPDES permit authorization should not be provided for discharges from the RLWTF through Outfall 051. CCNS did not raise this claim during the most recent permit renewal process, which was in the time period spanning 2013-2014. On June 29, 2013, Region 6 issued public notice of Draft NPDES Permit No. NM0028355, proposing to reissue permit authorization for a potential discharge from Outfall 051. *See* EX. A. The Region provided a 45-day comment period and held a Public Meeting regarding reissuance of the Permit in Los Alamos, NM on July 30, 2013. *Id.* A representative of CCNS attended the Public Meeting [*See* EX. B.], and CCNS was a signatory to comments filed by Communities for Clean Water (CCW) on the New Mexico Environment Department, Surface Water Quality Bureau's 401 certification of the draft permit. *See* EX. C. CCW's comment letter on New Mexico's 401 certification were re-submitted to EPA as comments on the draft permit and responded to by Region 6 in its Response to Comments document. A.R. III, pp. 9-13. However, CCNS did not raise the claim that NPDES permit authorization should not be provided for discharges from the RLWTF through Outfall 051 in comments on the draft permit. *See* A.R. III. The claim raised by CCNS in this proceeding was ascertainable during the permit re-issuance process and could have been raised at that time. The regulation at 40 C.F.R. § 124.19 provides that any person who filed comments on the draft permit or participated in the public hearing may petition the Board to review the permit decision within 30 days of notice of permit issuance. CCNS did not file a petition for review of NPDES Permit No. NM0028355 with the Board.

CCNS did not raise its current claim during the 2013-2014 permit re-issuance process and CCNS cannot now circumvent the timeframe for petitioning the EAB for review of the 2014

permit decision by raising this claim in the context of a request to terminate permit authorization. CCNS has the option to raise this claim during the next permit re-issuance process should LANS and DOE seek re-authorization to discharge through Outfall 051.²

D. EPA has authority to issue NPDES permit authorization at the request of an applicant for a potential future discharge.

As discussed above, CCNS's claim is essentially a challenge to the Region's issuance of a permit for Outfall 051, and it is the Region's position that CCNS should have presented its claim in accordance with the requirements for challenging recently issued permits, not much later under the guise of a challenge to the Region's denial of a request to terminate the permit under 40 C.F.R. § 124.64.

However, even if CCNS's claim may be heard at this time, EPA has authority under the CWA and federal regulations to *issue* an NPDES permit to the operator of a facility that seeks NPDES authorization because of a potential future discharge, even if the possible future discharge would only be infrequent, irregular or rare. Section 402 of the CWA created the NPDES program, under which the Administrator of EPA may, after opportunity for public hearing, issue permits for the discharge of pollutants upon condition that such discharge meets all applicable requirements of the Act. 33 U.S.C. § 1342(a). Pursuant to CWA section 301(a), any discharge from a point sources into waters of the U.S. is unlawful unless the discharger possesses a valid permit or is excluded from coverage by law or regulation. 33 U.S.C. § 1311(a). Under the requirements of sections 301 and 402(a) of the CWA, NPDES permit authorization must be obtained prior to discharge. Once a discharge has occurred, the discharger is liable for

²NPDES Permit No. NM0028355 expires September 30, 2019. See A.R. II., p. 1.

enforcement under section 309 of the Act if the necessary permits are not in place and effective. See 33 U.S.C. § 1319.

CCNS's assertion that the "CWA *only* allows the EPA to issue a permit when there is an actual 'discharge' of a pollutant" [CCNS Submission at 21., p. 5] is illogical and inconsistent with the operational structure of the NPDES program. If EPA had "no authority to issue NPDES permits for a 'possible' or 'potential' discharge" [CCNS Submission at 21., p. 5] that would be infrequent, irregular or rare, then it would be impossible for such facilities to obtain a permit in advance so as to avoid enforcement liability. Prior to the actual discharge, facilities would be unable to obtain NPDES permit authorization, yet if they discharged and then sought permit authorization, the facilities would be in violation of the CWA. It is an established rule of statutory interpretation that Congress is presumed not have intended illogical or absurd results. See *Hughey v. JMS Development*, 78 F.3d 1523, 1528 (11th Cir. 1996) ("Interpreting the liability provisions of the CWA we realize that Congress is presumed not to have intended absurd (impossible) results."); *Towers v. United States (In re Pacific-Atlantic Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir. 1995) ("We will not presume Congress intended an absurd result."); *Bechtel Constr., Inc. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1225 (9th Cir. 1987) ("Legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious.")

The regulation at 40 C.F.R. § 122.21 places the burden on the owner and/or operator of a facility to obtain NPDES permit authorization prior to discharge. If the owner and/or operator does not seek authorization and a discharge occurs, the owner and/or operator is strictly liable under the CWA and subject to possibly severe civil and/or criminal penalties. 33 U.S.C. § 1319. It is not unusual for facilities that do not routinely discharge to nevertheless seek and maintain

permit authorization to protect against liability in the event of an unanticipated discharge,³ even if the discharge would be infrequent, irregular or rare.

1. EPA's authority to issue NPDES permit authorization at the request of an applicant for a potential future discharge is not precluded under federal court holdings in *Waterkeeper* or *National Pork Producers*.

CCNS misreads the holdings in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (“*National Pork Producers*”) and *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (“*Waterkeeper*”). CCNS cites the federal rulings in these cases in support of its argument that EPA has “no authority to issue NPDES permits for a ‘possible’ or ‘potential’ discharge.” See CCNS Submission at 21.-24., pp. 5-6. However, in each of these cases, the reviewing court examined EPA’s authority to *require* operators of Concentrated Animal Feeding Operations (CAFOs) to apply for NPDES permit authorization when there had been no evidence of an actual discharge nor a request for authorization by the would-be permittee. In *Waterkeeper*, the Second Circuit found that EPA had exceeded its statutory authority by requiring all CAFOs to apply for an NPDES permit whether or not they actually discharged.⁴ The *Waterkeeper* court found that the CWA, “on its face, prevents the EPA from imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge.” *Waterkeeper* at 486. Likewise, in *National Pork Producers*, the Fifth Circuit found that EPA could not mandate permit applications in cases where there was no actual

³ EPA has a long-standing practice of issuing “no discharge” permits. See e.g. EX. D, a recent “no discharge” permit issued by EPA Region 8.

⁴ The 2003 CAFO rule required all CAFOs to apply for a permit unless they had received a determination by the permitting agency that the facility had “no potential to discharge.” This “duty to apply” provision was based on the presumption that every CAFO has a potential to discharge and therefore must seek coverage under an NPDES permit. 68 FR 7176 at 7202 (February 12, 2003).

discharge. The agency could require discharging CAFOs to obtain NPDES permits. *National Pork Producers* at 755-756.

Both *National Pork Producers* and *Waterkeeper* place the burden on the CAFO owner and/or operator to determine whether to seek permit authorization or to risk liability in case of a discharge. Neither case addresses EPA's authority to issue a permit to a facility operator voluntarily *requesting* authorization for a recognized possible or potential discharge. If a facility voluntarily seeks permit authorization for a possible or potential discharge of pollutants, CWA section 402(a) provides authority for EPA to issue a permit authorizing that possible or potential future discharge.

In this instance, LANS and DOE, co-permittees under Permit No. NM0028355, specifically sought permit authorization for discharges that may occur, albeit infrequently or irregularly, from Outfall 051. *See* A.R. I and I.A. In their application for NPDES permit authorization, LANS and DOE noted that while there had been no discharge from the RLWTF through Outfall 051 since 2010, under certain circumstances, for example "should the Mechanical Evaporator and/or Zero Liquid Discharge (ZLD) Solar Evaporation Tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in LANL scope/mission," a discharge could occur and advance permit authorization would be necessary. A.R. I.A., p. 5. LANL reiterated its desire for NPDES authorization to discharge through Outfall 051 in a letter to the Board dated October 12, 2017. *See* Letter from LANS and DOE to the Board dated October 12, 2017, attaching the Affidavit of Michael Thomas Saladen.

2. EPA's authority to issue NPDES permit authorization at the request of an applicant for a potential future discharge is not precluded under other previous federal court rulings or an opinion by the Board cited by CCNS.

None of the additional opinions cited by CCNS is applicable to the facts at hand. CCNS cites two federal appeals courts decisions, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), as well as a prior opinion by the Board as supporting its assertion that EPA has no authority to provide NPDES permit authorization for any future discharge through Outfall 051. CCNS Submission at 26., p. 7. In *National Wildlife Federation v. Gorsuch*, the issue before the court was whether EPA had a nondiscretionary duty to regulate dam-caused pollution under the NPDES program. EPA argued that water quality changes caused by dams did not meet the definition of "addition of pollutant" under the CWA, and therefore EPA had no mandatory duty to regulate dams. *National Wildlife Federation v. Gorsuch* at 165. The D.C. Circuit upheld EPA's interpretations of the terms as reasonable and entitled to deference. *Id.* at 183. In *National Wildlife Federation v. Consumers Power Co.*, EPA argued that defendant's movement of pollutants already in the water was not an "addition" of pollutants to navigable waters such as to require the facility to obtain NPDES permit coverage. *National Wildlife Federation v. Consumers Power Co.* at 583. Again, the federal court deferred to and upheld EPA's interpretation of the Act. *Id.* at 590. Finally, the Board's opinion in *In re Lowell Vos*, 2009 EPA ALJ LEXIS 8 (EPA, June 8, 2009) dealt with whether EPA had established facts sufficient to demonstrate an illegal discharge in an enforcement action. As noted by CCNS [CCNS Submission at 26., p. 7], EPA acknowledged the *Waterkeeper* decision and agreed "that it cannot require one to obtain an NPDES permit on the basis of a mere potential to discharge." *In re Lowell Vos* at *63 (emphasis added). None of these cases dealt with EPA's authority to issue

permit authorization in response to an application for NPDES authorization in case of a future potential discharge.

3. EPA has not conceded any lack of authority to issue NPDES permit authorization at the request of an applicant for a potential future discharge

CCNS misconstrues EPA's actions subsequent to the Fifth Circuit's decision in *National Pork Producers*. See CCNS Submission at 25. and 26., pp. 6 and 7. EPA did amend its CAFO regulations in 2012 to comply with the Court's vacatur of provisions in that rule that required CAFOs to apply for NPDES permits, or otherwise demonstrate that they had no potential to discharge. 77 Fed. Reg. 44494 (Monday, July 30, 2012). In the preamble to its 2012 regulatory revisions, EPA characterized the vacated portion of the 2008 CAFO rule as the "propose to discharge" requirement. 77 Fed. Reg. 44494 at 44495. However, as explained by the *National Pork Producers* court, EPA's regulation of CAFOs that "propose to discharge" was not the same as regulating CAFOs that *want* to discharge.

Instead, the EPA's definition of a CAFO that "proposes" to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to this definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging. *National Pork Producers* at 749.

Thus, when EPA explained that it had accepted "the decision of the Court that vacated the requirement that CAFOs that propose to discharge apply for NPDES permits and the EPA lacks the discretion to reach a different conclusion" [77 Fed. Reg. 44494 at 44496], the Agency was speaking only of its acceptance of the *National Pork Producers* court's decision that EPA lacked authority to impose a mandatory duty to apply for an NPDES permit on facilities that "proposed to discharge" within the meaning described above. EPA in no way conceded that it lacks authority to issue permits to facilities requesting authorization because of the potential for future discharges.

E. CCNS's objection to LANL's eligibility for a WWTU exemption under RCRA regulations is not a cause for termination of NPDES permit authorization under 40 C.F.R. § 122.64.

CCNS argues that Region 6 should have terminated NPDES permit authorization for Outfall 051 because authorization of LANL's RSWTF under NPDES Permit #NM0028355 makes LANL's RSWTF eligible for the WWTU exemption under RCRA regulations. CCNS Submission at 13., p. 4 and 38., p.9. However, even assuming for the sake of argument that CCNS's assertion that NPDES permit authorization allows LANL to retain eligibility for the RCRA WWTU exemption for the RSWTF is true,⁵ this circumstance is not relevant to whether to terminate an NPDES permit authorization. As discussed above, § 122.64(a) sets out specific and exclusive circumstances, or "causes" for which a permit may be terminated during its term. A facility's eligibility for the WWTU exemption under RCRA regulations is not included as a cause for permit termination under 40 C.F.R. § 122.64(a).

VI. Questions posed by the Board

In its September 21, 2017 ORDER FOR ADDITIONAL BRIEFING, the Board requested that the parties include in their briefs responses on the following five topics:

- (1) the applicability of 40 C.F.R. § 122.64(a)(4) to this situation, prior determinations by EPA on the applicability of this provision, and any regulatory history or EPA guidance on the scope or meaning of this provision;

EPA Response: The applicability of 40 C.F.R. § 122.64(a)(4) to the current case, as well as the legislative and regulatory history behind this section, is discussed above in paragraph V.B. of EPA's

⁵ Whether NPDES coverage for Outfall 051 makes LANL's RSWTF eligible for the RCRA WWTU regulatory exemption is outside the scope of this proceeding.

argument. Region 6 has coordinated with the HQ Office of Water and Office of General Counsel and has not located any further EPA guidance specific to the scope or meaning of this provision.

- (2) the information in the administrative record relating to the nature and extent of any discharges from Outfall 051 when EPA publicly noticed the draft NPDES Permit No. 0028355 in June 2013, and when EPA issued a final permit decision in August 2014; and how that information compares to what is known now about the nature and extent of any discharges from Outfall 051;

EPA Response: LANS/DOE addressed the nature and extent of the discharges from Outfall 051 in their application for renewal of Permit No. NM0028355. *See* A.R. at I. An *Outfall Fact Sheet* was provided by the permittees as supporting documentation for each of the 11 outfalls authorized under the Permit, including Outfall 051. The *Outfall Fact Sheet* for Outfall 051 included information regarding the location of the Outfall, the water treatment process for the RLWTF (the source for discharge to the Outfall), analytical data for potential contaminants in any effluent discharge, and attached Discharge Monitoring Reports (DMRs) from August 2007-December 2011. *See* A.R. at II. LANS/DOE stated in the *Outfall Fact Sheet* that:

The RLWTF has not discharged to Outfall 051 since November 2010. LANL requests to re-permit the outfall so that the RLWTF can maintain the capability to discharge to the outfall should the Mechanical Evaporator and/or Zero Liquid Discharge (ZLD) Solar Evaporation Tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in LANL scope/mission. A.R. at II, p. 5.

LANS/DOE further stated that “[a] grab sample for the Form 2C Constituents” would “be collected for Outfall 051 when/if the RLWTF discharges effluent through the outfall.” *Id.*

This information was the most current information available to Region 6 when it issued a final permit decision in August 2014. Regarding the Board’s question as it pertains to the current nature and extent of any discharges from Outfall 051 (which post-dates both permit issuance and the Region’s consideration of CCNS’s Request for Permit Termination), the Region

refers the Board to LANL's October 12, 2017, letter to the Board. *See* Letter from LANS and DOE to the Board dated October 12, 2017, attaching the Affidavit of Michael Thomas Saladen.

- (3) Whether the permittee has constructed and made operational the two new Concrete Evaporation Tanks" referenced at page 7 of the 2012 NPDES Permit Re-Application Outfall Fact Sheet (Attachment No. 051 to the February 2012 NPDES Permit Re-Application);

EPA Response: Information addressing this question, which post-dates the Region's consideration of CCNS's Request for Permit Termination, may be found in LANL's October 12, 2017, letter to the Board. *See* Letter from LANS and DOE to the Board dated October 12, 2017, attaching the Affidavit of Michael Thomas Saladen.

- (4) Whether these "Concrete Evaporation Tanks" are the same as the "Solar Evaporation Tanks" referenced at page 5 of the 2012 NPDES Permit Re- Application Outfall Fact Sheet (Attachment No. 051 to the February 2012 NPDES Permit Re-Application);

EPA Response: Information addressing this question post-dates, which post-dates the Region's consideration of CCNS's Request for Permit Termination, may be found in LANL's October 12, 2017, letter to the Board. *See* Letter from LANS and DOE to the Board dated October 12, 2017, attaching the Affidavit of Michael Thomas Saladen.

- (5) Whether anyone commented on the draft NPDES Permit No. 0028355 publicly noticed in June 2013 about inclusion of Outfall 051 (if so, the parties should include copies of those comments and any EPA response to those comments as exhibits to their briefs).

EPA Response: As discussed above in paragraph V.C. of EPA's argument, CCNS did not raise the claim that NPDES permit authorization should not be provided for discharges from the RLWTF through Outfall 051 in comments on the draft permit. *See* A.R. III. In addition, none of the individuals or organizations who filed comments on the draft permit raised the issue of the inclusion of Outfall 051. *See* A.R. at III.

VII. Conclusion

In conclusion, Region 6 properly denied CCNS's Request for Permit Termination. 40 C.F.R. § 124.5(a) states that NPDES permits may only be terminated for the reasons specified in 40 C.F.R. § 122.64, and 40 C.F.R. § 122.64(a) sets out four specific causes for which a permit may be terminated during its term. CCNS's request to terminate permit authorization for Outfall 051 did not demonstrate that any of the causes specified in § 122.64(a) exists. The proper forum for CCNS's claim is the permit re-issuance process. Because CCNS has not demonstrated error on the part of Region 6 in denying its Request for Permit Termination, Region 6 respectfully asks the Board to deny CCNS's informal appeal and uphold Region's 6 decision.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *EPA Response to Concerned Citizens for Nuclear Safety's Informal Appeal of EPA's Denial of Request to Terminate Permit Authorization* in the matter of Los Alamos National Security LLC. and the Department of Energy, NPDES Appeal No. 17-05 were sent to the following persons in the manner indicated:

By First Class Mail (with courtesy copy by email):

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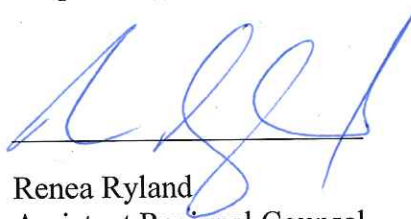
Dated: October 18, 2017

CERTIFICATION OF IDENTICAL PAPER FILING

I certify that the enclosed *EPA Response to Concerned Citizens for Nuclear Safety's Informal Appeal of EPA's Denial of Request to Terminate Permit Authorization* in the matter of Los Alamos National Security LLC. and the Department of Energy, NPDES Appeal No. 17-05, and exhibits thereto are identical copies of those filed electronically in this matter by EPA Region 6 with the Environmental Appeals Board on October 18, 2017.

Dated: October 18, 2017

Respectfully Submitted,



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EPA REGION 6 RESPONSE TO CCNS SUBMISSION

EXHIBIT LIST

Exhibits attached to EPA's Response to Concerned Citizens for Nuclear Safety's Informal Appeal of EPA's Denial of Request to Terminate Permit Authorization:

- A. U.S. Environmental Protection Agency (EPA) Public Notice of Draft NPDES Permit and Public Meeting, dated June 29, 2013
- B. Sign-In Sheet for Public Meeting, NM0028355, July 30, 2013
- C. Comment Letter from Communities for Clean Water (CCW) to Bruce Yurdin, Surface Water Quality Bureau, New Mexico Environment Department, dated August 13, 2013.
- D. Example "no discharge" NPDES Permit No. WY-0000221 issued by EPA Region 8 to the Wind River Indian Reservation, Wesco Operation, Inc. Oil and Gas Operations, Dated October 10, 2017

**EPA REGION 6 RESPONSE TO CCNS SUBMISSION
REFERENCE COPY OF**

INDEX TO EPA REGION 6 ADMINISTRATIVE RECORD (A.R.)

**Los Alamos National Security LLC. and the Department of Energy, NPDES
Appeal No. 17-05**

- I. LANL NPDES Permit Re-Application NM0028355, February 2012
 - I.A. Outfall 051 *Outfall Fact Sheet*, as attached to LANL NPDES Permit Re-Application NM0028355, February 2012
- II. Final NPDES Permit #NM0028355, issued August 12, 2014
- III. EPA Region 6 *Response to Comments*, NPDES Permit #NM0028355
- IV. CCNS's *Request to Terminate NPDES Permit #NM0028355 as to Outfall 051 for Radioactive Liquid Waste Treatment Facility*, dated March 9, 2017
- V. Region 6 Response to CCNS's *Request to Terminate NPDES Permit #NM0028355 as to Outfall 051 for Radioactive Liquid Waste Treatment Facility*, dated August 16, 2017