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. 22-01
	)	
Permit No. NM0028355	)	
	)	

Reply Brief on Petition for Review under 40 C.F.R. §124.19

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Veterans for Peace, Chapter #63

July 25, 2022

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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)(3), this document contains fewer than 7000 words.

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WASHINGTON, D.C.

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REQUEST FOR ORAL ARGUMENT

Appellants, 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. The matter is complex and calls for close analysis.

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This memorandum is submitted on behalf of Concerned Citizens for Nuclear Safety ("CCNS"), Honor Our Pueblo Existence ("HOPE"), and Veterans for Peace Chapter 63 ("VFP") (collectively, "Petitioners") in response to briefs filed by Appellees Triad National Security, LLC ("Triad") and U.S. Department of Energy (collectively, "LANL") and Environmental Protection Agency ("EPA") Region 6 ("Region 6") and pursuant to the Order dated May 23, 2022.

A. Background.

1. The Clean Water Act authorizes EPA to issue a National Pollutant Discharge Elimination System ("NPDES") permit for a point source "discharge of any pollutant or combination of pollutants." 33 U.S.C. § 1342(a). In this case, LANL adopted a "zero-liquid-discharge" program for the Radioactive

Liquid Waste Treatment Facility ("RLTWF") in 1998.[1] By the mid-2000's total waste water throughput at the RLWTF was declining. By 2010 LANL had installed evaporation equipment, and discharges from the RLWTF's Outfall 051 ceased. For nearly ten years there were no discharges. LANL advised Region 6 that it intended to discharge if treatment volume increased or evaporation equipment were unavailable. Witnesses for LANL and for the New Mexico Environment Department ("NMED") testified in late 2019 that, on that basis, a discharge was "highly unlikely."

2. LANL stated recently that it had "integrated" Outfall 051 into the operation of waste water disposal from the RLWTF, and discharges were expected to be more routine and frequent. However, there was no statement that LANL planned actually to discharge on any stated schedule or for any stated purpose.

3. On this record, Region 6 issued a NPDES discharge permit to LANL for Outfall 051, reasoning that (1) the Clean Water Act in 33 U.S.C. § 1342(a) does not distinguish between actual discharges and potential discharges, (2) facilities must have a permit before they discharge, (3) to issue a permit for a potential discharge serves the goal of the Clean Water Act to protect the

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[1] LANL tells the Board that the zero-liquid-discharge program has been "long-abandoned." (LANL Br. 11). There is no support for this statement.

nation's waters, even though "the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular," and (4) EPA may issue a permit to one who requests it voluntarily. (Response to Comments at 10-11, 74) (AR H.5).

4. Region 6 did not explain what facts established "a potential for discharge." It did not explain by what logic it reasoned from those facts to the conclusion of "a potential for discharge." Neither did it state the facts and reasoning that establish that a permit is requested "voluntarily."

5. Appellate review follows this standard: "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." *In re General Electric Co.*, 18 E.A.D. 575, 607 (2022). Here, the issuance of a permit by Region 6 must meet this standard. LANL agrees that this is the question before the Board. (LANL Br. 9-10).

6. The Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), includes the NPDES provision, which authorizes EPA to issue "a permit for the discharge of any pollutant." (33 U.S.C. § 1342(a)(1)). LANL agrees that 33 U.S.C. § 1342(a) imposes a "forward-looking" test; that is, the "discharge" must be found in the applicant's plans and commitments, not based on the applicant's past performance. (LANL Br. 17).

B. LANL's plan for the RLWTF contains no decision to discharge pollutants.

7. LANL committed more than 20 years ago to a "zero-liquid-discharge" operating principle at the RLWTF. (Ex. A, Ex. XX) (AR C.2.A, C.2.XX). It took years to achieve its goal. In 2010 the mechanical evaporation system ("MES") was introduced, and from November 2010 there began nearly ten years with no discharges. (Ex. W (AR C.2.W); Petition at 24-28). Clearly, the RLWTF can operate without a liquid discharge.

8. The waste water throughput at the RLWTF has steadily declined. Flow volumes in millions of gallons per year are shown in LANL's 2008 Site-Wide Environmental Impact Statement ("SWEIS"):

Facility	1999	2000	2001	2002	2003	2004	2005
RLWTF	5.3	4.9	3.6	2.92	2.97	2.14	1.89

Thus, "the volume of treated effluent discharged from the TA-50 [RLWTF] has steadily decreased from the 1999 SWEIS. In 2005, the [RLWTF] discharged 1.83 million gallons (6.9 million liters) compared to the 5.3 million gallons (20 million liters) discharged in 1999." (Ex. JJ at 4-44, 4-48) (AR C.2.JJ).

9. LANL is motivated to cease discharges, which mobilize contaminants below the outfall. Therefore, LANL committed to stop discharges and to dispose of waste water by evaporation:

> An auxiliary action . . . is to construct evaporation tanks and eliminate discharges into Mortandad Canyon. If the facility thus becomes a zero discharge facility, surface water quality would be positively affected.

Ex. JJ at 5-38 (AR C.2.JJ).

10. In 2009 LANL expressly committed in a Record of Decision to reconstruction of the RLWTF as a zero-liquid-discharge facility:

> Construct and operate a new [RLWTF] at TA-50 together with the operation of a zero liquid discharge facility at TA-52 as an auxiliary action:

Ex. MM at 7 of 9 (AR C.2.MM).

11. Thus, in the 2014 NPDES permit renewal proceedings, LANL stated that discharges from Outfall 051 would occur only if evaporation equipment were unavailable or waste water volume increased:

> The operating principle had been that, if the evaporation equipment operated reliably and continuously, and if the wastewater volume did not change due to a change in the Laboratory's mission, then Outfall 051 should not be needed.

LANL Br. 25. In November 2019 witnesses for LANL and for NMED testified that, under such principle, a discharge from Outfall 051 was "highly unlikely." (Transcript, Nov. 14, 2019, In re *Proposed Discharge Permit DP-1132 for the [RLWTF]*, at 90 (Beers, witness for LANL); at 212 (Pullen, witness for NMED) (Ex. AAA) (AR C.2.AAA).

12. In this case, LANL has taken the position that

> Outfall 051 is not used only as a back-up, but also has been and will be used routinely in conjunction with the MES to support the Laboratory's operational priorities, such as when influent to the RLWTF makes such use advisable.

(McKernan aff., LANL Br. 13).

13. Counsel for LANL argue that LANL has "changed its operational plan to make regular use of Outfall 051." (LANL Br. 25). However, the "operating principle" had been that unavailability of evaporation equipment and changes in treatment volume might cause the use of the outfall, and the supposed "changed . . . operational plan" is no different in that respect. The current language remains only a bureaucratic forecast that a discharge may occur if and when, if ever, circumstances make it appropriate, in LANL's judgment at the time, but makes no commitment.

14. The statement that the RLWTF is a facility that "must discharge in unusual or rare circumstances" (LANL Br. 18) misses the point: There is no plan or proposal to discharge from the RLWTF at any time.

15. Region 6 correctly judged the occurrence of discharges supporting a permit on a "forward-looking" basis (LANL Br. 17). But the Region justified the NPDES permit on the express basis that EPA is authorized to permit a "potential discharge":

> The CWA draws no distinction between actual and potential discharges and does not limit EPA's authority on that basis. Further, EPA's authority to issue permits for potential or future discharges is

> evident in the structure of the CWA's NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA's ability under the CWA to issue permits to cover potential discharges serves the Act's goal of protecting the Nation's waters. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated." United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979).

(Response to Comments at 10-11) (The same language appears at pages 31, 33, 34, 36, 38, 55, 56, 58, 60, and 72) (AR H.5).

16. Thus, Region 6 reasoned that the CWA authorizes EPA to issue a permit for a "potential discharge," that a facility must have a permit before it discharges, and that permitting a "potential discharge" serves the purpose of the Clean Water Act.

17. But Region 6 must make such judgments within the overriding legal constraint in 33 U.S.C. § 1342(a). Congress authorized EPA to issue a permit only for a "discharge of pollutants." "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *National Federation of Independent Businesses v. Department of Labor*, 142 S.Ct. 661, 665 (2022).

C. Appellees fail to distinguish *Waterkeepers Alliance* and *National Pork.*

18. Appellees, LANL and Region 6, struggle, and fail, to avoid the teachings of two recent United States Court of Appeals decisions, *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency,* 399 F.3d 486 (2d Cir. 2005), and *National Pork Producers Council v. U.S. Environmental Protection Agency,* 635 F.3d 738 (5th Cir. 2011), which reject outright the idea of a CWA permit for a "potential discharge." (LANL Br. 20-21, Region 6 Br. 15-16). The permit here is expressly based upon this illusory concept.

19. *Waterkeeper Alliance* addressed EPA's regulations for animal feeding operations, stating emphatically:

> [I]n 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 505. Therefore,

> the Clean Water Act gives the EPA *jurisdiction to regulate and control only actual discharges—not potential discharges,* and certainly not point sources themselves."

Id. (*emphasis supplied*).

20. The Fifth Circuit later spoke to EPA's revised regulations for animal feeding operations:

> [T]he 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. . . . This definition thus requires CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of *Waterkeeper*, as well as Supreme Court and other well-established precedent.

National Pork, 635 F.3d at 750.

21. Region 6 in this case expressly based permit issuance on the concept of a "potential discharge," which is not contained in the CWA. Region 6's supporting explanation is simply a word game:

> The CWA draws no distinction between actual and potential discharges and does not limit EPA's authority on that basis.

(Response to Comments at 10-11) (AR H.5).

22. But the statutory requirement of a "discharge" can only mean just that—a discharge occurring in the real world. To say that Congress, in delimiting the authority of an administrative agency, meant no distinction between an actual discharge and a discharge that is only an idea, and which has no physical existence, argues that Congress drew lines of authority around imaginary concepts. It did not, and it is absurd to claim that it did.

23. Region 6's interpretation contradicts the definition contained in the CWA:

> (12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source . . .

33 U.S.C. § 1362. EPA adopted a similar definition in its regulations. "Discharge" means:

> [a]ny addition of a 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source.'

40 C.F.R. § 122.2. Such language clearly does not include a "potential" action that exists only in one's imagination. Notably, EPA issued no definition of a "potential discharge," since the CWA confers no jurisdiction over such a concept.

24. Region 6 failed to specify the facts that it deems constitute a "potential discharge." These *might* include facts concerning the nature of the potential source of water with contaminants, the potential contaminants, the potential point source, and how a potential discharge might become an actual discharge, its likelihood and magnitude. But Region 6 failed to disclose the elements of its conception of a "potential discharge" and so failed to identify "the crucial facts it relied upon when reaching its conclusion." *In re General Electric Co.*, 18 E.A.D. 575, 607 (2022).

25. The Region's concept is daunting. If Congress had delegated to EPA the authority to permit and regulate a "potential discharge," then EPA would be charged with a massive duty to define, locate, and regulate an infinity of situations constituting potential—but not actual—discharges. EPA would have no choice, because EPA may not disclaim CWA regulatory authority.

National Cotton Council v. U.S. EPA, 553 F.3d 927 (6th Cir. 2009); *Northern Plains Research Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2001); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). Other operators would be left uncertain whether they require a permit, based upon whatever unstated factors EPA might deem a "potential discharge." With no statutory limits to its jurisdiction, EPA would have nowhere to stop in its pursuit of the undefined, imagined goal of a "potential discharge."

26. The argument that EPA has been authorized to regulate a "potential discharge" violates the rule that Congress may not delegate governmental power without stated limitations:

> On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no "specific restrictions" that "meaningfully constrai[n]" the agency. *Touby* v. *United States*, 500 U. S. 160, 166-167, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991).

See: Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 669 (2022) (*concurring opinion*).

27. Appellees argue that *Waterkeeper Alliance* and *National Pork* hold only that EPA may not require a permit *application* for a "potential discharge" but do

not limit EPA's power to issue a *permit* for a "potential discharge." (LANL Br. 20; Region 6 Br. 17). But EPA has stated that the application requirement derived from the power to issue a permit, which EPA said included a permit for a "potential to 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 an NPDES permit.

(EPA Release, 68 Fed. Reg. 7176, 7202 (Feb. 12, 2003)).

28. Thus, *Waterkeeper Alliance* and *National Pork*, in holding that EPA has no power to require a permit application, did so because EPA has no power to issue a permit to an entity that has a supposed "potential to discharge."

D. There is no authority to issue a permit where there is a remote chance of discharge.

29. Region 6 also stated that

> EPA's authority to issue permits for potential or future discharges is evident in the structure of the CWA's NPDES permitting program. . . To comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. The . . . stiff penalties for discharging without a permit . . . encourage[] facilities to obtain permits even if there is only a remote chance of discharge.

(Response to Comments at 10, 31, 33, 34, 36, 38, 55, 56, 58, 60, and 72) (AR H.5). Again, Region 6 did not explain what it meant by "a remote chance of discharge," what facts establish this "chance," and what facts show that a "chance" is not too "remote."

30. Here, the idea that the RLWTF could have an unexpected need to discharge is unfounded. When the RLWTF was reconstructed for zero-liquid-discharge, indoor storage tanks sufficient to hold 300,000 gallons of effluent were installed. (See Citizens' Supplemental Comments, March 29, 2021, at 16 ¶ 21 (AR F.4); RLWTF Closure Plan, DP-1132 (July 2016) at 15 (AR0001597) and Appendix A, Table 7 at 50 (AR0001632)). Even if *both* evaporation systems—mechanical and solar—were somehow inoperative, the solar evaporation tanks alone can hold more than seven months of output. (Petition to EAB, Ex. 1 (AR0000198) (solar evaporation tank capacity is 754,036 gallons); *see also* Petition to EAB, Ex. 2 (AR0000204) (in 2009 RLWTF discharged 4,401,900 liters or 1,162,859 gallons)).

31. The situation where a facility must obtain a permit before it discharges is met by regulations requiring a permit for one who *proposes* to discharge. 40 C.F.R. § 122.21(a)(1). These regulations contemplate an actual discharge. 40 C.F.R. § 122.21(c)(1) (A person proposing a new discharge must submit an application at least 180 days before the discharge is to commence.). LANL has not submitted a permit application in which it *proposes* to discharge. In contrast, there is no statute or regulation defining "a remote chance of discharge" or authorizing EPA to regulate it.

E. The Region is not empowered to regulate based on its own conception of the goals of the Clean Water Act.

32. Region 6 stated that a permit for a "potential discharge" serves the CWA's goal of protecting the Nation's waters. (Response to Comments at 11, 31, 33, 34, 36, 38, 55, 56, 58, 60, and 72) (AR H.5). Therefore, Region 6 stated:

> LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA's issuance of permit coverage for these facilities is in accordance with EPA's statutory authority and the CWA's stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

(*Id.*)

33. The Supreme Court has cautioned against "simplistically . . . assuming that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States,* 480 U.S. 522, 526 (1987) (*per curiam*). Instead, the purpose of a statute is found in its language:

> The purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. See *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.

W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 98 (1991). *See also Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982); *United States* v. *American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940); *Caminetti* v. *United States*, 242 U.S. 470, 490 (1917).

34. EPA in *Waterkeeper Alliance* wanted to regulate non-discharging animal feeding operations because a potential discharge, if it occurred, might reach jurisdictional waters. The Second Circuit refused, relying upon the language of the statute:

> While we appreciate the policy considerations underlying the EPA's approach in the CAFO Rule, however, we are without authority to permit it because it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges - not potential discharges, and certainly not point sources themselves.

Waterkeeper Alliance, 399 F.3d at 505. Here, Region 6 had no lawful authority to reach out and issue a permit for a "potential discharge" for the sake of the CWA's supposed "goal," where the statute expressly authorizes only a permit for a "discharge of pollutants."

F. The idea of a "voluntary" permit application is illusory and ill-conceived.

35. Appellees contend that the statutory limitations on EPA's authority do not apply when someone "voluntarily" seeks a NPDES permit. (LANL Br. 20-22; Region 6 Br. 16-17). Thus, under Appellees' theory, one may obtain a NPDES permit without demonstrating that one is discharging or proposes to discharge any pollutants.

36. But, as stated, EPA's jurisdiction under 33 U.S.C. § 1342 is mandatory within its scope. Thus, "Congress expressed "a plain . . . intent to require

permits in any situation of pollution from point sources."" *Nw Envtl Advocates v. EPA*, 537 F.3d 1006, 1022 (9th Cir. 2008). There is no additional subject-matter jurisdiction, under which EPA might issue permits on request to non-discharging parties. EPA cannot select the facilities to be regulated under the NPDES on any basis other than the discharge of pollutants.

37. The idea of a "voluntary" application for a permit is simply another illusory concept. All permit applications are "voluntary" in the sense that they are submitted willingly by a person based on his or her needs and the law's requirements. But if one can apply "voluntarily" and obtain a valuable NPDES permit, even though the law does not call for one, a structure for misuse will be created. Ways will emerge to feign "voluntariness." But EPA has no authority from Congress to issue permits outside the requirements of 33 U.S.C. § 1342.

G. The Region has not considered the impact of its ruling on RCRA compliance.

38. Region 6 noted, but dismissed without considering, that the requested NPDES permit might prevent the operation of RCRA at the RLWTF:

> The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL's compliance with RCRA is outside the scope of this NPDES permitting action.

(Response to Comments at 74) (AR H.5). Petitioners have shown that EPA must consider the effect of its decisionmaking on the application of other statutes. (Petition at 54-57). The Region expressly declined to do so, and instead it reached out to expand the scope of NPDES permitting beyond statutory limits to manufacture a conflict with RCRA. The responding briefs do not contest this point, which alone should suffice to vacate the permit.

H. The existence of programs regulating discharges of precipitation does not support the permit.

39. Appellees argue that other CWA programs justify the issuance of a permit for a "possible discharge." Thus, the regulation of stormwater discharges is said to support a permit for a non-discharging source. (LANL Br. 22-25; Region 6 Br. 19-21). Certainly, the time of a discharge of stormwater is uncertain. But it will rain someday, and the rainwater will flow to a point source someday. It is a far cry, legally, from regulating the RLWTF, an enclosed treatment facility that is designed for zero-liquid-discharge.

40. Similarly, the effluent limitations guidelines are said to support a permit for a potential discharge. (LANL Br. 26, Region 6 Br. 19). But the example offered again rests on the uncertainty of precipitation, which is a situation distinct from a controlled environment, such as the RLWTF.

41. Again, the alleged use of the CWA in other locations to permit unpredictable flows (LANL Br. 27-28) cannot control this case, since there is no indication that such permits address facilities that have no plan or proposal to discharge or that such other permits have ever survived legal review.

I. The waste water treatment unit exemption from RCRA would not apply to the RLWTF.

42. LANL argues that the wastewater treatment unit ("WWTU") exemption from RCRA (See 42 U.S.C. § 6903(27), 40 C.F.R. § 260.10 (Tank system, Wastewater treatment unit), § 264.1(g)(6)), and §270.1(c)(2)(v) (See Petition at 36-37), which is the likely purpose of the permit in issue, would apply to the RLWTF. (LANL Br. 28-31) (See also Region 6 Br. 22 n.8). This issue is not before the Board; indeed, it is a question that the Region refused to consider. (Ex. YY at 3) (AR C.2.YY). But LANL clearly plans to invoke the exemption and asks the Board for support.

43. LANL asserts that a facility need not have a NPDES permit to enjoy the WWTU exemption, pointing out that the exemption is available to a facility "subject to" NPDES permitting (40 C.F.R. § 260.10). LANL cites a 1992 EPA opinion letter, which asserts that the WWTU exemption applies to "facilities which are permitted, were ever permitted, or should have been permitted under NPDES," asserting that such words include the RLWTF, because it was permitted—*i.e.*, "ever." (LANL Br. at 29 - 31). But in 1998

LANL adopted the "zero-liquid-discharge" program, and in the 2000's the RLWTF was reconstructed; evaporation equipment was installed, and discharges stopped. The fact that the RLWTF was once NPDES-permitted *but was then changed* to eliminate discharges, and so is not the same facility, and is not "subject to" NPDES permitting, does not support the WWTU exemption, or a new NPDES permit.

44. In any case, 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 waste water for discharge through a CWA outfall, also manages waste water that is disposed of by other means. EPA explains:

> 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.

EPA Release, 53 Fed. Reg. at 34079 ¶ 2 (Sept. 2, 1988).

45. 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. Cosworth, Acting Director, Office of Solid Waste, to S. Pendleton, RO 14262, April 1998. (*Emphasis supplied.*)[2]

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[2] This opinion letter has been cited in recent EPA briefing and must be considered authoritative. *See, e.g.*, Complainants' Reply Brief on a Motion for Partial Accelerated Decision, citing *In re Chemsolv, Inc.*, 2011 EPA Admin. Enforce. LEXIS 33581 at 5 (Dec. 22, 2011). Numerous EPA releases state that the WWTU exemption does not apply where wastewaters are shipped "off-site." S.K. Lowrance to T.A. Hopkins (Aug. 15, 1990) (RO 11551); D. Bussard to J.C. Mulligan (June 1, 1990); RCRA/Super-fund Hotline Monthly Summary (Oct. 1988) (RO 13226); RCRA/Superfund Hotline Monthly Summary (July 1988) (RO 13203); Hazardous Waste Tank System Standards to Ancillary Equipment and Exempted Elementary (Jan. 27, 1988) (RO 13126); Wastewater Treatment and Elementary Neutralization Units Exemption (Dec. 21, 1987) (RO 13112). EPA has explained that a reference to shipment "off-site" means shipment of wastewater out of a system that is permitted by EPA under the CWA to another, non-EPA-regulated, system:

> EPA's position revolves around whether or not a facility is subject to sections 307(b) or 402 of the CWA. The underlying assumption used in justifying the wastewater treatment unit exemption was that tanks used to handle hazardous wastewater at these facilities would be provided with EPA oversight under the Clean Water Act, thereby ensuring no significant decrease in environmental control afforded at these facilities. We understand that using the terms "on-site" and "off-site" may have represented a confusing way to explain this concept, and wish to further clarify our long-standing intent regarding the scope of the exemption. . .
>
> The concern that lead [*sic*] to the "on-site", "off-site" distinction in the September 2, 1988 notice was that many wastewater treatment facilities are not actually being subjected to NPDES regulatory

46. 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.[3] Thus, the RLWTF is a dual-use facility and cannot be covered by the WWTU exemption.

47. Region 6 argues that Citizens may not contest a regulation in this proceeding, pointing to the WWTU regulations. (Region 6 Br. 21-25). Citizens are not challenging the WWTU regulations and stand firmly for enforcement of the terms and limits of those regulations.

J. Asserted discharges in 2021-22 are entitled to no consideration.

48. LANL and Region 6 argue that discharges from Outfall 051in late 2021 and early 2022 support issuance of a permit for Outfall 051. (LANL Br. 16; Region 6 Br. 4-5). But the test for permitting a "discharge" is forward-looking (LANL Br. 17). LANL has not stated that it will discharge from

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requirements. If they are unregulated by the NPDES program, it would be inappropriate to exempt them from RCRA regulation.

Letter, D. Bussard, Acting Director, WMD, to J.C. Mulligan (June 1, 1990) (FaxBack# 11519). Here, the construction and operation of the MES and solar evaporation tanks ("SET") evaporation equipment are not regulated by EPA under the CWA. The operations of the RLWTF clearly result in most hazardous wastewater being diverted to the unregulated evaporation units. Therefore, the WWTU exemption has no application to the RLWTF.

[3] The statement in the McKernan affidavit that the RLWTF is authorized through the NPDES permit to discharge to the MES and the SET is untrue. (LANL Ex. F, Att. 1). These evaporation units are not addressed by the NPDES permit at all.

Outfall 051; rather, Region 6 issued the permit on the theory that there is a "potential to discharge" which satisfied 33 U.S.C. § 1342(a).

49. LANL points specifically to the Discharge Monitoring Report ("DMR") summary filed by Region 6, showing discharges from Outfall 051 in April, May, June, July, August, September, and November of 2021, claiming that these recent discharges support the Region's decision. (LANL Br. 12) (LANL Ex. K).

50. LANL also states that Region 6 included in the administrative record a summary of Discharge Monitoring Reports ("DMRs") for the five years preceding permit issuance. (LANL Br. 12, LANL Exhibit J). However, the data in LANL Exhibits J and K (and Region 6 Att. B) postdate the comment period. They are not properly in the Administrative Record, since they were added long after the end of the comment period, which ended on March 29, 2021. (AR E.1, E.2, E.3, F.1, F.4, F.5). The referenced summary (Exhibit J to LANL brief and Att. B to Region 6 Brief) is dated July 5, 2022 at 2:20 p.m. (*after* LANL's brief on appeal was filed) and includes events dated as late as December 2021 (Ex. J at 33, 34, 37, 39, 40, 41, 43, 44, 45; Ex. K at 1). They have not been "available to the public for some time." (LANL Br. 12).

51. This Board, as a rule, declines to consider materials that were not before the decisionmaker. These materials should be excluded on that ground:

> These documents were not submitted to the Region during the comment period or otherwise included in the administrative record and were not considered or relied upon by the Region in its final permit decision, nor do they otherwise qualify for an exception to the general rule that our review should be based on the certified administrative record made before the permit issuer.

In re General Electric Co., 18 E.A.D. 575, 608 (2022).

52. LANL requests that its records of these asserted discharges should be subject to official notice. (LANL Br. 13 n. 38). However, the official notice concept does not include all governmental records, and it certainly should not include asserted summaries prepared by a party or by counsel demonstrating the actions of the regulated party (*e.g.*, LANL Exhibit K):

> We have never taken such a sweeping approach to the range of documents that may qualify under the official notice doctrine . . .

In re General Electric Co., 18 E.A.D. 575, 616 (2022) (referring to a company report obtained from government files through public access procedures).

53. Moreover, LANL's argument based on the recent discharges asks the Board to adopt a justification for Region 6's decision that departs from what the record reveals about the Region's decisionmaking process. Region 6 explicitly based its decision on the theory that it may issue a permit for a

"potential discharge." LANL now argues that the Region's decision should not be regarded as based on a "potential" discharge at all, since it was "lawfully issued for an actual discharge." (LANL Br. 14). Region 6 likewise points to a record of flow at Outfall 051 (Region 6 Att. B at 46), and its counsel asserts that the Region relied upon such post-comment-period activity, including discharges in 2021 and 2022, but "inadvertently omitted" any reference to it in its decision. (Region 6 Br. 4 note 5). Presumably, Region 6 now asks the Board to rule that the Region's decision relied upon the omitted data. To do so would be to construct a fiction.

54. It is Region 6's decision that is in issue here, and these claimed recent discharges are not relied upon or even mentioned in the Region's Responses to Comments. Region 6 squarely placed its decision on the existence of a "potential to discharge." (Responses to Comments at 10-11, 31, 33, 34, 36, 38, 55, 56, 58, 60, and 72) (AR H.5). This appellate tribunal may not add facts and theories to an agency's decision; an agency's action is reviewed on the basis of "the grounds that the agency invoked when it took the action." *Michigan v. EPA,* 576 U.S. 743, 758 (2015), quoted in *Department of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891, 1907 (2020). Agency action cannot be "upheld on the basis of

impermissible 'post hoc rationalization.' [*Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971)]." *DHS v. Regents*, 140 S.Ct. at 1908.

55. In *DHS* the Supreme Court rejected an agency's attempted latter-day expansion of the basis of its earlier decision, stating that "[w]hen an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." *DHS v. Regents,* 140 S.Ct. at 1908. Any reliance on recent discharges in 2021 and 2022 that had not even occurred when the record closed violates the rule that an agency's action is judged on the basis of the reasons it actually relied upon.

56. In addition, there are specific concerns about evidence of post-comment-period discharges. Triad, an Appellee, operates the RLWTF and, as such, determines the occurrence of discharges, including the recent 2021-22 discharges which are the basis for Appellees' argument. Public comments were received through March 29, 2021. (AR F.4, F.5). Thereafter, starting in April 2021, 17 discharges from Outfall 051 were reportedly carried out by Appellee Triad. (LANL Br. 12) (LANL Ex. J, K). They were not made public on the record until LANL filed its brief on July 1, 2022.

57. Importantly, there are many discharges from Outfall 051 in 2021-22 (LANL Ex. K), beginning right after the closure of the Administrative Record.

These discharges, which presumably occurred as reported, reflect a sudden change in use of the outfall, even viewed against LANL's stated decision to "integrate" Outfall 051 into the operations of the RLWTF. Yet LANL has not changed its stated operating principles, which contain no commitment to discharge. Notably, the volume of waste water treated by the RLWTF is steadily declining, indicating the absence of any emergency. LANL offers no explanation for the recent discharges based on increased waste water volume or equipment unavailability.

58. The timing and volume of the new discharges lead to an unavoidable inference that the operation of Outfall 051 has been turned to the needs of this litigation. This Board is "'not required to exhibit a naiveté from which ordinary citizens are free.' *United States* v. *Stanchich*, 550 F. 2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)." *DOC v. New York*, 139 S.Ct. 2551, 2575 (2019). In *DOC v. New York,* the Supreme Court declined to accept a "contrived" explanation for agency action. (*Id.*) Here, the recent unexplained discharges, touted as reflecting the normal operation of the outfall ("for over a year," LANL Br. 12), are plainly the actions of a litigant in aid of its case. Such demonstrations can only distract from the task before the Board, which is to review the decision made by Region 6, and should be disregarded.

Conclusion

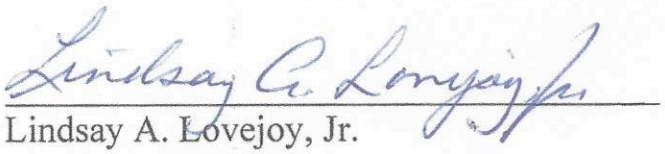
LANL has not told the Region that it plans or proposes to discharge through Outfall 051, and there is no factual basis for the Region to issue a NPDES permit for Outfall 051 or any of the other non-discharging outfalls.

The issue here is the sufficiency of Region 6's reasoning, *i.e.*, whether, on LANL's showing, the Region has explained its issuance of the permit in a rational and lawful manner. Region 6 has explicitly stated that EPA has the authority to permit a "potential discharge," that it is necessary to permit a "potential discharge" so that the permit will be in effect should a discharge occur, that permitting a "potential discharge" serves the purpose of the Clean Water Act, and that LANL may "voluntarily" request and obtain a permit outside the limits of 33 U.S.C. § 1342.

These explanations fail the Board's standard of due consideration of the question presented and of a rational and supportable result. The question concerns the scope of the Region's authority under the NPDES statute, 33 U.S.C. §1342(a). A "potential to discharge" is the *absence* of a discharge and no basis for a NPDES permit. Moreover, a "potential discharge" is an illusory concept, and the Region has not suggested what facts would support this elusive conclusion. The requirement of a discharge applies to any NPDES permit application. If the limits in the NPDES statute somehow vanish upon a "voluntary" application, how is

"voluntariness" established? The Region has ignored the statutory language and its limits. It has not disclosed the facts that are critical to its reasoning, nor explained its reasoning, and its decision should be vacated.

Respectfully submitted,



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July 25, 2022

CERTIFICATE OF SERVICE

I, Joni Arends, hereby certify that on this day I electronically filed the Appellants' *Reply Brief on 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/EABALJ 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 on Petition for Review* under 40 C.F.R. § 124.19 to the following:

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