

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGION SIX REGIONAL ADMINISTRATOR**

In the matter of:

CONCERNED CITIZENS FOR
NUCLEAR SAFETY,
HONOR OUR PUEBLO EXISTENCE, and
VETERANS FOR PEACE Chapter 63
COMMENTS ON PROPOSED
RENEWAL OF NPDES PERMIT
NM 0028355 FOR LOS ALAMOS
NATIONAL LABORATORY,
RADIOACTIVE LIQUID WASTE
TREATMENT FACILITY

**CONCERNED CITIZENS FOR NUCLEAR SAFETY
HONOR OUR PUEBLO EXISTENCE AND
VETERANS FOR PEACE Chapter 63
COMMENTS ON PROPOSED RENEWAL
OF NPDES PERMIT # NM0028355**

These supplemental comments on the proposed renewal of National Pollutant Discharge Elimination System (“NPDES”) Permit No. NM0028355 are filed on behalf of Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace Chapter 63 (collectively, “Citizens”) pursuant to the remand by the Environmental Protection Agency (“EPA”) Environmental Appeal Board (“EAB”), on December 28, 2022:

1. The EAB has remanded this matter to Region 6 with instructions:
 - a. To invite the public to comment on Outfall 051 discharge data for 2021,
 - b. To consider comments received, and

c. To revise the Response to Comments and take further action as appropriate in issuing the permit decision.

EAB Order, December 28, 2022.

2. Briefly, in 2021 Applicants Department of Energy National Nuclear Security Administration (“DOE/NNSA”) and Triad National Security LLP (“Triad”) (collectively, “Applicants”) stated that discharges from the Radioactive Liquid Waste Treatment Facility (“RLWTF”) would be made via Outfall 051 when evaporation equipment is unavailable or when treatment demands exceed normal levels. See Applicants’ Supp. Comments at 3, 8, 13 (Feb. 25, 2021).
3. The time for public comments on the proposed NPDES permit, with extensions, ended on March 29, 2021. Frequent discharges of waste water from the RLWTF began in April, 2021, *i.e.*, immediately *after* the end of the public comment period. The data from 2021 were not available for comment during the original public comment period.
4. The present question is how such 2021 discharge data should be interpreted by Region 6, which is responsible for the initial permit decision.
5. As background, in 1998 the heads of the Environmental Safety and Health (“ESH”) and the Environmental Management (“EM”) Divisions at LANL jointly adopted the goal of zero liquid discharge from the RLWTF:

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

AR 01239, July 10, 1998.

6. The zero-liquid-discharge program went forward, and by 2010, with the installation of a Mechanical Evaporation System (“MES”), Los Alamos National Laboratory (“LANL” or the “Lab”) achieved the goal of ending liquid discharges from the RLWTF. The RLWTF did not discharge liquid for about ten years. Discharges were made in 2019 and 2020, principally when evaporation equipment was unavailable due to maintenance. (Region 6 Response brief at 4 note 5 (July 7, 2022)). These discharges have been termed “backup” use of the Outfall 051 and did not represent normal operation.
7. From approximately 2010, when the MES was installed, whether to use Outfall 051 or the MES to dispose of waste water at the RLWTF has been essentially a matter of Applicants’ choice. Clearly, the facility could operate on a zero-liquid-discharge basis for an indefinite period. Given the choice, presumably based upon economic, safety, and legal considerations, Applicants operated the RLWTF normally on a zero-liquid-discharge basis.
8. From 2012 onward, Applicants stated that they would rely on Outfall 051 to dispose of waste water in event of unavailability of evaporation equipment

due to maintenance or malfunction or, possibly, increased treatment capacity needs. In their renewal application in 2012, Applicants requested a Clean Water Act, 33 U.S.C. § 1342(a) (“CWA”), permit for Outfall 051 for the stated purpose of maintaining the capability to discharge in case the evaporators became unavailable due to maintenance or malfunction or in case of an increase in treatment capacity. (AR 000033, at 5 of 9). This is the “backup” function. The 2014 CWA permit was issued based on this backup role.

9. Applicants are now motivated to obtain a renewal CWA permit; they claim that such a permit might support a Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (“RCRA”), exemption for the RL WTF under the Waste Water Treatment Unit, 40 C.F.R. § 264.1(g)(6) (“WWTU”) provision.
10. It is the job of Region 6 to determine whether a new CWA permit should be issued, and to explain its decision with reasonable clarity based on the administrative record.
11. Under 40 C.F.R. § 122.21, a person who “discharges or proposes to discharge” CWA pollutants may and must apply for a CWA permit.
12. In 2019 Applicants applied to renew the CWA permit. Applicants’ February 25, 2021 Supplemental Comments envision changes in discharge operations.

Applicants stated that Outfall 051 would be “an integral component of its operations, rather than solely as a backup.” (Supp. Comments, Att. 1).

However, the new operating protocols did not contain a statement that

Applicants plan or propose to discharge any particular quantity in the future.

13. There were no discharges from Outfall 051 in 2012-19. After the public comment period ended in March of 2021, Applicants began making significant discharges from Outfall 051 for the remainder of 2021. (See Region 6 Response to Order for Clarification, DMR Summary, March 8, 2022, at 45 of 114).

14. On this Record, the Region issued a permit, explaining in its Response to Comments (March 24, 2022) at 10 that it was authorized to issue a permit for a possible or “potential” discharge.

15. The appeal now stands in an awkward posture. Region 6’s appellate brief acknowledges the series of 2021 discharges and some in 2022 (Region 6 Response brief at 4 note 5) (July 7, 2022), but it insistently argues that EPA may issue a permit for a “potential” or “possible” discharge. (*Id.* 12-21).

Applicants, on the other hand, argue that EPA need not rely upon a “possible” discharge, because Outfall 051 now discharges regularly. (Applicants’ Response brief at 10-14).

16. The “possible” discharge theory is disputed, to say the least. *National Pork Producers Council v. U.S. Environmental Protection Agency*, 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005). A reviewing Board or court could hardly hold that a permit issued for a “possible discharge” reflects “considered judgment,” *In re General Electric Co.*, 18 E.A.D. 575, 608 (EPA E.A.B. 2022), and, at the same time, reason “post hoc” that Region 6’s permit may rest, not upon a “possible discharge,” but on actual discharges, past or proposed. (Applicants’ Response brief at 14).

17. The EAB has remanded for public comment on the 2021 discharges (an opportunity not previously available), also inviting the Region to explain in revisions to its Response to Comments what significance it attributes to the 2021 discharges. (EAB Order, Dec. 28, 2022).

18. In the EAB, Region 6 stated that it viewed discharges in 2021 as “confirmatory” evidence. (Region 6 Response brief at 4 note 5 (July 7, 2022) (See also Region 6 Clarification Response, at 7, Sept. 1, 2022)). One may ask: what was confirmed? It was known that Outfall 051 is capable of discharging. It had also been established that the RLWTF could operate indefinitely without discharging. The idea that Outfall 051 would be an

“integral component” of Applicants’ operations is so vague that it is not clear how it could be confirmed or, if so, how that would be significant.

19. But it was clear that the use of Outfall 051 to discharge waste water, given the installation of evaporation equipment, was, and is, largely a matter of the Lab’s choice. And for ten years the Applicants chose to evaporate waste water. It is reasonable to infer that in normal operation, Applicants would choose to use the evaporation equipment to dispose of waste water, in preference to a discharge.

20. Thus, until April 2021, Applicants had operated Outfall 051 on the basis that (a) evaporation would be used regularly, except when discharge was needed because of the unavailability of the MES and SET evaporation systems and any increases in treatment capacity demands, and, most recently, (b) Outfall 051 would be “an integral component of its operations, rather than solely as a backup.” The latter plan still “does not represent a quantity that DOE plans or proposes to discharge in the future,” nor “amount to a plan or proposal actually to discharge via the outfall in the future.” (Petitioners’ Supplemental comments at 3) (March 29, 2021).

21. The data also show that, from April 2021, Applicants departed sharply from the previous operating protocol. After the public comment period ended, the

practice became one of frequent discharges. Notably, Applicants have offered no explanation for their change to frequent use of Outfall 051.

22. Applicants have not asserted any set of circumstances, other than unavailability of evaporation equipment or a change in treatment demands, that might require a discharge through Outfall 051 for disposal, in lieu of the MES. The output of the RLWTF could be evaporated, not discharged. It is a matter of choice by the Applicants.

23. Moreover, Applicants enthusiastically urge the post-March 2021 discharges as key evidence supporting issuance of a CWA permit: “Region 6 knew full well that the Laboratory has in fact utilized the outfall and had made clear its intention to continue to utilize the outfall into the future.” (Applicants’ Response brief, July 1, 2022, at 14). Applicants offer these discharges as support, in a “forward-looking” inquiry (Applicants’ Supp. Comments, Feb. 25, 2021, at 3), for a finding that Applicants propose to discharge waste water regularly from Outfall 051.

24. Given the suddenness of the post-comment period change in operation, its fundamental nature, its occurrence immediately after public comment ended, its continuation since that change, and the argument by Applicants that the discharges support the issuance of a permit, Region 6 should conclude that

Applicants have discharged from the outfall in an effort to influence the outcome of this proceeding.

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

26. Applicants filed comments in the original comment period (as extended) on February 25, 2021. Notably, these comments contained *no reference* to a forthcoming major change in discharge practices. Applicants then told EPA:

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

Supplemental Comments, Feb. 25, 2021, at 13. Applicants suggested that some changes in this protocol were "envisioned," but they were still based on operational efficiency, *i.e.*, waste water volume:

Whereas the outfall will remain as a back-up alternative when evaporation equipment is unavailable, as before, the outfall will henceforth be utilized even when evaporation equipment is on line but influent volume is of a magnitude that operational efficiency makes it

advisable to rely on both the evaporation equipment and Outfall 051 simultaneously for short or longer-term periods of time.

Id. 13-14.

27. A month later Applicants started their new program of discharges. They have offered no explanation, and certainly no innocent explanation, for the sudden increase in discharges.¹

28. In 1998 the staffs of the EM and ESH divisions in the Applicants' management wholeheartedly supported the policy of zero-liquid-discharge, and for nearly ten years the facility operated successfully under that regime. Costly facility modifications were carried out to enable zero-liquid-discharge operations. In 2010 Permittees equipped the RLWTF with the MES. In 2012 the Permittees constructed the Solar Evaporation Tanks ("SET") to evaporate waste water with solar power. The zero-liquid-

¹ Concerning the Outfall 051 discharge data for 2021-2022, shown in the DMR Summary, 3/3/23 10:27 AM, p. 4 of 12 and p. 10 of 12, one cannot tell whether the flow is to Outfall 051, to the MES, or potentially to the SET. For transparency, EPA should require the Permittees to report the discharge volumes to the Outfall, the MES, and the SET on the DMRs separately.

Concerning Outfalls 13SA, 05A055, 03A160, 03A027 and 03A113 in 2021-2022, shown in the DMR Summary, 3/3/23 10:27 AM, please note that there are no reported discharges from Outfalls 13SA, 05A055, 03A027 and 03A160. For some sites, there have been no discharges for years. For example, 05A055 (High Explosives Waste Treatment Facility), has never reported a discharge. EPA should delete these outfalls from the permit.

discharge program has never been stopped or abandoned. One may infer from this history that in the future, litigation issues aside, zero-liquid-discharge would be the practice.

29. In this situation, the Region cannot know what the discharge plan or proposal actually is for the future. As a result, if Region 6 should decide, nevertheless, to issue a permit that includes Outfall 051, the Region would not be able to explain its action based on any legitimate justification.

30. In *DOC v. New York*, 139 S.Ct. 2551 (2019), the Supreme Court held that the proffered explanation for including a citizenship question in the decennial census could not be accepted in light of contrary evidence suggesting that the stated explanation was pretextual.

31. Here there is not just an inadequate explanation; there is none at all. If Region 6 were to accept Applicants' present practice of discharging as establishing (as Applicants claim) that Outfall 051 will discharge regularly, the Region would be relying on evidence that is, in light of history, essentially performative, *i.e.*, created to establish a litigation point. When Applicants' actions are not satisfactorily explained, Region 6 may not accept them as support for the agency's decision.

32. As in *DOC*, "the evidence tells a story that does not match the explanation the [Region is asked to give] for its decision." 139 S.Ct. at 2575. Rather, the

proffered rationale “seems to have been contrived.” (*Id.*). “We are presented, in other words, with a [proposed] explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process.” (*Id.*). Against the history of zero-liquid-discharge, the Region must bear in mind that

The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

DOC v. New York, 139 S. Ct. 2551, 2575-76 (2019). Consequently,

Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.

(at 2576).

33. In *Transportation Division of the International Association of Sheet Metal,*

Air, Rail, and Transportation Workers v. FRA, 988 F.3d 1170 (9th Cir.

2021), the Ninth Circuit noted the reasoning of the Supreme Court in *DOC*

v. New York:

In *New York*, the Court set forth four steps for reviewing whether an agency's stated reasons for taking action are pretextual. "First, in order to permit meaningful judicial review, an agency must disclose the basis of its action." 139 S. Ct. at 2573. . . . "Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's

contemporaneous explanation in light of the existing administrative record." *Id.* "Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Id.* Fourth, the Court "recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers'" where there is "a strong showing of bad faith or improper behavior." *Id.* at 2573-74.

Transp. Div., 988 F.3d 1178-79.

34. Should the Region determine to renew the NPDES permit, it would need to

state the role of the 2021 discharges in its reasoning. "Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action." *Transp. Div.*, 988 F.3d at 1179.

35. Yet before this renewal proceeding, Applicants chose to evaporate waste

water and had scarcely discharged any such water since 2010. No credible explanation is offered for the sudden change to regular discharges. And, since the change occurred exactly when it might have forestalled any comment on the new practice, and cannot be explained by any of the factors previously said to determine whether waste water would be discharged (such as the unavailability of evaporation equipment or an abnormal treatment demand), the recent discharges must be viewed as calculated to influence the Region's decision, and Applicants' explanation, projecting future discharges, must be considered pretextual.

36. It is understood that an agency's ruling may not be set aside when the agency entertained legitimate reasons, but also unstated reasons, for its action. The presence of legitimate reasons must be doubted here, where the Region's previous rationale was to license a "potential" discharge, in disregard of the CWA requirement of a "discharge."

37. The Region's duty to consider whether Applicants seek here to obtain a permit, against all available facts, is supported by the circumstance that the Applicants are driven to obtain a RCRA exemption (See Applicants' Supp. Comments, February 25, 2021, at 14) and that the change in discharge protocols was a surprise occurrence, timed immediately after the comment period closed.

38. The Region must bear in mind the standards of judicial review of its actions:

In reviewing petitioners' claim that the FRA failed to comply with the APA, we look to "whether the [FRA] examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made." *New York*, 139 S. Ct. at 2569.

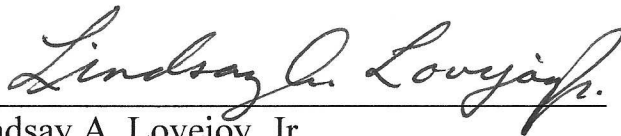
Transp. Div., 988 F. 3d at 1182. The record here directs the Region to the conclusion that there is no factfinding on the current Record which could support renewal. The history of discharges is contrived. No other facts support a NPDES permit.

39. The original plan—to discharge when evaporation is unavailable or treatment capacity requires it—has been abandoned. The more recent plan—to integrate the outfall with the facility—is next to meaningless. To the extent Applicants articulate a plan to discharge, it has no credibility. There is no possible interpretation that supports renewal of the permit. And if no permit is required, none may be issued.

Conclusion

Region 6 should deny the requested renewal of the discharge permit for Outfall 051.

Respectfully submitted,



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