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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**No. 18-9542
(EPA No. 17-05)**

[Filed: April 23, 2020]

CONCERNED CITIZENS FOR)
NUCLEAR SAFETY, INC.,)
)
Petitioner,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY; UNITED)
STATES DEPARTMENT OF ENERGY;)
TRIAD NATIONAL SECURITY, LLC,)
)
Respondents.)
)

**ORDER DISMISSING FOR LACK OF
JURISDICTION***

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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Before **MATHESON, MURPHY, and EID**, Circuit Judges.

In 2016, Concerned Citizens for Nuclear Safety, Inc. (“Concerned Citizens”) filed a petition with the Environmental Protection Agency (“EPA”) to terminate an effluent discharge permit held by the Radioactive Liquid Waste Treatment Facility at Los Alamos National Laboratory (the “Lab”). Concerned Citizens asserted that the Lab had experienced a “change in condition” such that the permit was no longer lawful. The EPA twice denied Concerned Citizens’ request. Concerned Citizens appealed to the Environmental Appeals Board (“EAB”) but was unsuccessful there as well. Concerned Citizens then filed this appeal, asking us to reverse the EAB. On appeal, the EPA has challenged Concerned Citizens’ standing to bring this lawsuit. We agree with the EPA that Concerned Citizens lacks standing and dismiss the appeal.¹

I.

In 2016, when Concerned Citizens filed its petition with the EPA, the Lab held a National Pollutant Discharge Elimination System (“NPDES”) permit to discharge treated radioactive effluent from Outfall

¹ In addition to standing, mootness appears to be another jurisdictional barrier to Concerned Citizens’ appeal. Concerned Citizens challenges NPDES Permit No. NM0028355 as to Outfall 051, but that permit expired on September 30, 2019. A.R. at 53. Because a federal court may “choose among threshold grounds for denying audience to a case on the merits,” we dismiss this appeal for lack of standing. *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999).

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051.² *In Re Los Alamos National Security, LLC and The U.S. Department of Energy*, 2018 WL 3629715, at *1 (EAB 2018). This NPDES permit exempted the Lab from regulation under both the Resource Conservation and Recovery Act (“RCRA”) and the New Mexico Hazardous Waste Act (“HWA”).³

The EPA issued the challenged NPDES permit in 2014 pursuant to the Lab’s 2012 request to renew its 2007 NPDES permit. *Id.* at *3. Prior to November 2010, the Lab regularly discharged effluent from Outfall 051. *Id.* But since November 2010, the Lab has not discharged effluent from that outfall.⁴ *Id.* The Lab now uses a mechanical evaporator to dispose of

² The Lab is currently owned by the Department of Energy and operated by Triad National Security, LLC (“Triad”). Triad assumed management responsibility on November 1, 2018. When this appeal was initially filed, the Lab was operated by Los Alamos National Security, LLC.

³ The RCRA grants the EPA with authority to regulate the generation, management, and disposal of various hazardous and non-hazardous waste. *See* 42 U.S.C. § 6901 et seq. The HWA is New Mexico’s state program for enforcing the RCRA.

⁴ In the EPA’s 28(j) notice of additional developments, it informed the court that, in June 2019, the Lab began discharging wastewater through Outfall 051 because its solar evaporators were unavailable. We may not consider this information in our standing analysis because “[s]tanding is determined as of the time the action is brought.” *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). Additionally, Concerned Citizens urges us not to consider this information because it is new evidence that is “not properly part of the record on appeal.” *See* Pet. 28(j) Letter (quoting *Utah v. United States DOI*, 535 F.3d 1184, 1195 n.7 (10th Cir. 2008)).

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effluent. *Id.* The Lab has also constructed solar evaporation tanks that it anticipates will eventually assist in treating effluent. *Id.*

The Lab disclosed the “no discharge” nature of Outfall 051 in its 2012 permit renewal application. *See id.* at *3–4. The application stated that the facility “ha[d] not discharged to Outfall 051 since November 2010.” *Id.* at *3 (quotations omitted) (alteration in original). Despite the “no discharge” nature of the outfall, the Lab requested to renew the permit “so that the [the Lab] can maintain the capability to discharge *should* the Mechanical evaporator and/or Zero Liquid Discharge tanks become unavailable due to maintenance, malfunction, and/or . . . an increase in treatment capacity.” *Id.* at *3 (quotations omitted). In other words, Outfall 051 was the Lab’s contingency plan. *See id.*

In June 2013, EPA Region 6 issued “a public notice of the draft permit seeking public comment.” *Id.* at *4. The fact sheet accompanying the notice stated, “[t]he effluent is evaporated through a mechanical evaporator and has no[t] discharge[d] since November 2010. [The Lab] includes the outfall in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage.” *Id.* (quotations omitted).

No commenter objected to “the . . . continued authorization of discharges through Outfall 051 during the comment period.” *Id.* On August 12, 2014, Region 6 issued its decision approving the renewed permit. *Id.* at *5. Concerned Citizens did not file a petition for

review objecting to the “inclusion of Outfall 051 in the 2014 Permit.” *Id.*

In June 2016, Concerned Citizens filed a request with the EPA Region 6 Judicial Officer to terminate the Lab’s discharge permit for Outfall 051. *Id.* at *6. Concerned Citizens believed that the permit was unlawful because the Lab had experienced a “change in condition.” *Id.* (quoting 40 C.F.R. § 122.64(a)). According to Concerned Citizens, the change in condition was the presence of the mechanical evaporators, which allowed the Lab to avoid discharging effluent from Outfall 051. *See id.* The Judicial Officer denied Concerned Citizens’ request but noted “that Concerned Citizens could proceed with the matter before the Regional Administrator.” *Id.* at *7. Concerned Citizens did so but was unsuccessful. A.R. at 178–80. Concerned Citizens then appealed to the EAB but lost there as well. *In Re Los Alamos*, 2018 WL 3629715, at *7. The EAB held that for a change in condition to qualify as grounds for terminating a permit, the change must have occurred after the permit had been issued. *Id.* at *8–11. After losing before the EAB, Concerned Citizens filed this appeal.

II.

To establish standing under Article III, a party must show three things: (1) injury in fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury in fact, is “an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). “Environmental plaintiffs

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adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1273 (10th Cir. 2018) (brackets and quotations omitted). Causation exists where the alleged injury is “fairly . . . trace[able] to the challenged action of the defendant.” *Lujan*, 504 U.S. at 560 (alterations in original). And the redressability requirement is met where it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* (quotations omitted). When the injury alleged is a procedural violation, “the requirements for Article III standing are somewhat relaxed, or at least conceptually expanded.” *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1205 (10th Cir. 2014).

An organization has standing to sue on behalf of its members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) [the lawsuit does not require] the participation of individual members.” *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

III.

The EPA contends that Concerned Citizens has failed to satisfy any of the three requirements for standing. We conclude that Concerned Citizens has failed to establish causation and redressability. Consequently, we need not decide whether Concerned Citizens has satisfied the injury-in-fact requirement.

See Lujan, 504 U.S. at 560 (indicating all three are necessary to establish standing). We do, however, describe the injury alleged by Concerned Citizens because doing so is necessary to our discussion of causation and redressability.

The injury alleged by Concerned Citizens was its members' diminished use and enjoyment of the Rio Grande River. To prove this injury, Concerned Citizens submitted declarations from two of its members. The first is from Gilbert Sanchez, a member of Concerned Citizens whose home is "only a few yards from the shore of the Rio Grande." G. Sanchez Decl. at 1. Sanchez "operate[s] a farm and ranch, where sheep, cattle, and other animals and poultry have been raised for generations." *Id.* He declared that "[s]ince it has become public knowledge that [the Lab] . . . has released hazardous chemicals to the Rio Grande and to the ground water flowing towards the Rio Grande, [his] appreciation for the river and its shores, and [his] use of that land and water have sharply declined." *Id.* at 2–3. He also stated that "[r]iverside property such as [his] . . . is now considered undesirable on account of its proximity to the Rio Grande." *Id.* at 3.

The second declaration is from Joni Arends. *See* J. Arends Decl. at 1. Arends is a New Mexico attorney and the executive director of Concerned Citizens. *See id.* She declared that she previously used the river recreationally and professionally (she went on research-sampling trips on behalf of Concerned Citizens). *See id.* at 2–4. But she has not done so since September 2007 because she is "concerned about the contamination" from the Lab. *See id.*

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To establish causation, Concerned Citizens must show that its members' diminished use and enjoyment of the Rio Grande River is fairly traceable to the Lab's NPDES permit to discharge from Outfall 051. According to Concerned Citizens, the permit exempts the Lab from compliance with the RCRA and the HWA, and these permit-based exemptions enable the Lab to discharge waste into the Rio Grande River. *See* Reply Br. at 1–9. As a result, Concerned Citizens argues that its members' diminished use and enjoyment is fairly traceable to the Lab's NPDES permit. We disagree.

Concerned Citizens has not offered a single example of a Lab activity that has contributed to increased contamination of the Rio Grande River and would be prohibited under the RCRA or the HWA. In their declarations, Arends and Sanchez opine that contamination levels would improve if the Lab was regulated under the RCRA and the HWA. They also state that they would feel better about using the river if they knew the Lab was regulated by the RCRA and the HWA. *See, e.g.,* J. Arends Decl. at 4. (“I am confident that it would be much wiser and safer to require the [Lab] . . . to be regulated by a HWA permit.”). But Arends and Sanchez offer no examples of Lab activities contributing to contamination that would be prohibited under either the RCRA or the HWA. *See id.* at 1–5; G. Sanchez Decl. at 1–5. Arends and Sanchez's speculative statements that it would be “wiser and safer” to regulate the Lab under the RCRA and the HWA are insufficient to make the alleged contamination of the Rio Grande River fairly traceable to the NPDES permit.

Redressability fails for similar reasons. To satisfy this requirement, the petitioner must show that favorable court action would likely redress the injury. *Lujan*, 504 U.S. at 560. Here, Concerned Citizens claims that the redressability requirement is met because the court may hold the Lab's NPDES permit invalid, which would require the Lab to comply with the RCRA and the HWA. However, Concerned Citizens presents no evidence that any Lab activity would be prohibited under either the RCRA or the HWA. Accordingly, Concerned Citizens has failed to show that it is "likely, as opposed to merely speculative," that its members' diminished use and enjoyment of the Rio Grande River would "be redressed by a favorable decision." *See id.*

Concerned Citizens contends that it should be held to lower standing requirements because its alleged injury was the violation of a procedural right. We disagree. As mentioned above, we apply "somewhat relaxed, or at least conceptually expanded" standing requirements, *WildEarth Guardians*, 759 F.3d at 1205, when the petitioner challenges a procedural right that has been afforded to "protect [the petitioner's] concrete interests," *Lujan*, 504 U.S. at 572 n.7. Here, however, the injury alleged by Concerned Citizens is not a violation of a procedural right.

An injury in fact can be classified as a procedural violation where "the injury results not from the agency's decision, but from the agency's uninformed decisionmaking." *WildEarth Guardians*, 759 F.3d at 1205. For example, in *WildEarth Guardians*, the plaintiff's injury was classified as "one of process, not

result” where the EPA failed to consult with the Fish and Wildlife Service before promulgating its final Federal Implementation Plan. *Id.* The injury was procedural because the violation did not directly harm the plaintiff. Instead, the violation impaired the agency’s decision-making process in a manner that could have harmed the plaintiff’s concrete interests. *Id.*; see also *Lujan*, 504 U.S. at 573 n.7 (classifying an injury as procedural in a hypothetical scenario where the agency issued a license without first “prepar[ing] an environmental impact statement, even though [the petitioner could not] establish with any certainty that the statement [would] cause the license to be withheld or altered . . .”).

Unlike the procedural injuries described in *WildEarth* and *Lujan*, the injury alleged by Concerned Citizens resulted from the EPA’s decision, not from deficiencies in the EPA’s decision-making process. Concerned Citizens alleges that its members’ diminished use and enjoyment of the Rio Grande River resulted from the EPA’s issuance of an NPDES permit to the Lab. According to Concerned Citizens, the issuance of this permit has allowed the Lab to contaminate the Rio Grande by exempting the Lab from regulation under the RCRA and the HWA. Thus, Concerned Citizens’ injury flows directly from the EPA’s decision to issue the NPDES permit; it does not result from any failure by the EPA to follow the proper decision-making procedure in issuing this permit. Because Concerned Citizens does not allege a procedural injury, it is not subject to relaxed standing requirements.

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IV.

Concerned Citizens has failed to show that it has Article III standing. We therefore DISMISS the appeal.

Entered for the Court

Allison H. Eid
Circuit Judge

APPENDIX B

NPDES Appeal No. 17-05

[Filed: March 14, 2018]

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, within sixty (60) days of the issuance of this opinion, of any typographical or other formal errors, in order that corrections may be made before publication.

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

In re:)

Los Alamos National Security,)
LLC and the U.S. Department of)
Energy)

Permit No. NM0028355)

FINAL DECISION

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Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

**IN RE LOS ALAMOS NATIONAL SECURITY,
LLC AND THE
U.S. DEPARTMENT OF ENERGY**

NPDES Appeal No. 17-05

FINAL DECISION

Decided March 14, 2018

Syllabus

Concerned Citizens for Nuclear Safety (“Concerned Citizens”) filed an Informal Appeal with the Environmental Appeals Board (“Board”) under 40 C.F.R. § 124.5(b) seeking review of the U.S. Environmental Protection Agency Region 6’s (“Region”) denial of Concerned Citizens’ request to terminate as to one outfall – referred to as Outfall 051 – a National Pollutant Discharge Elimination System (“NPDES”) permit issued for operations at the Los Alamos National Laboratory in New Mexico (“Los Alamos Laboratory”).

The Region issued the permit in 2014 (“2014 Permit”) authorizing Los Alamos National Security, LLC and the U.S. Department of Energy to continue discharges from eleven sanitary and/or industrial outfalls at the Los Alamos Laboratory, including the discharge of treated wastewater from the Radioactive Liquid Waste Treatment Facility through Outfall 051. In its Informal Appeal, Concerned Citizens alleges that

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the Region erred in denying its subsequent request to terminate the 2014 Permit as to Outfall 051 because the Los Alamos Laboratory has not discharged liquid waste from that Outfall since 2010. Concerned Citizens asserts that permit termination is appropriate under 40 C.F.R. § 122.64(a)(4), which provides that after an NPDES permit is issued, “[a] change in any condition” requiring a reduction or elimination of any discharge is cause for permit termination. In response, the Region argues that Concerned Citizens failed to establish a change in any condition justifying permit termination.

Held: The Region did not clearly err or abuse its discretion in denying Concerned Citizens’ request to terminate the 2014 Permit as to Outfall 051. When the Region issued the 2014 Permit, discharges from Outfall 051 had not occurred since 2010 and would only be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage. Under these circumstances, the record supports the Region’s determination that Concerned Citizens failed to establish a change in any condition after the Region issued the 2014 Permit justifying permit termination pursuant to 40 C.F.R. § 122.64(a)(4). The Board therefore denies the Informal Appeal.

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Ward:

I. STATEMENT OF THE CASE

Concerned Citizens for Nuclear Safety (“Concerned Citizens”) filed this Informal Appeal under 40 C.F.R. § 124.5(b) seeking review of the denial of its request to terminate as to one outfall – Outfall 051 – a National Pollutant Discharge Elimination System (“NPDES”) permit issued for operations at the Los Alamos National Laboratory (“Los Alamos Laboratory”). *See* Concerned Citizens for Nuclear Safety Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) (“Informal Appeal”) (Sept. 14, 2017); Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. NM0028355 (Aug. 12, 2014) (“2014 Permit”) (Administrative Record (“A.R.”) II).¹ The U.S. Environmental Protection Agency

¹ In responding to the Informal Appeal, the Region attached an index to the administrative record. *See* “Index to EPA Region 6 Administrative Record (A.R.)” (Oct. 18, 2017). The Region’s Index lists five documents, each identified with a Roman numeral (I-V). This decision will cite these documents using the Roman numeral assigned by the Region along with the title of the document. In addition, one of the documents in the administrative record provided by the Region, A.R. IV, is Concerned Citizens’ request to terminate with respect to Outfall 051 filed with the Regional Judicial Officer in June 2016 and then resubmitted to the Region 6 Acting Regional Administrator in March 2017 (discussed in section III.C. of this decision). *See* Letter from Lindsay A. Lovejoy, Jr., Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, Counsel for Concerned Citizens, to Samuel Coleman, P.E., Acting Administrator, U.S. EPA Region 6 (Mar. 9, 2017)

Region 6 (“Region”) issued the permit in 2014 authorizing Los Alamos National Security, LLC and the U.S. Department of Energy (“Permittees”) to continue discharges from eleven sanitary and/or industrial outfalls at the Los Alamos Laboratory, including discharges of treated wastewater from the Radioactive Liquid Waste Treatment Facility (“Treatment Facility”) through Outfall 051. *See* 2014 Permit Pt. I at 6. Concerned Citizens participated in the permitting process leading up to the issuance of the 2014 Permit.

In the current appeal, Concerned Citizens alleges that the Region erred in denying its subsequent request to terminate the 2014 Permit as to Outfall 051 because the Los Alamos Laboratory has not discharged liquid waste from that outfall since 2010. *See* Informal Appeal at 1. Concerned Citizens asserts that permit termination is appropriate under 40 C.F.R. § 122.64(a)(4), which provides that after a permit is issued, “[a] change in any condition” requiring a reduction or elimination of any discharge is cause for permit termination. *See id.* at 3-11. In response, the Region argues that Concerned Citizens failed to establish a change in any condition justifying permit termination. *See* EPA Response to Concerned Citizens for Nuclear Safety’s Informal Appeal of EPA’s Denial of

(enclosing Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility) (June 17, 2016) (“Termination Request”). The Termination Request attaches multiple exhibits. This decision cites to these exhibits as “Ex. __ to Termination Request.”

Request to Terminate Permit Authorization (Oct. 18, 2017) (“Region’s Response”).

We conclude that the Region did not clearly err or abuse its discretion. The record supports the Region’s determination that Concerned Citizens failed to establish a change in a condition justifying permit termination after the Region issued the 2014 Permit. The Informal Appeal is therefore denied.

II. *REGULATORY HISTORY*

EPA’s consolidated permitting regulations provide detailed procedures for EPA’s issuance or renewal of permits under NPDES and other permit programs. Those regulations require EPA to issue a draft permit, seek public comment, hold a public hearing where there is significant public interest in the draft permit, and respond to significant comments received when a final permit decision is issued. *See* 40 C.F.R. §§ 124.6-.12, .17. The regulations specify the procedures and grounds for an appeal of a permit decision at 40 C.F.R. § 124.19. After EPA issues an NPDES permit, however, 40 C.F.R. § 124.5 allows “any interested person” to request termination under that regulation only for the reasons listed in 40 C.F.R. § 122.64. In particular, section 124.5 states, in part:

(a) Permits * * * may be modified, revoked and reissued, or terminated, either at the request of any interested person * * * or upon the [Region’s²] initiative. However, permits may

² The regulations use the term “Director” to describe the permitting authority. 40 C.F.R. § 124.2 (defining “Director”). The

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only be * * * terminated for the reasons specified in * * * [40 C.F.R.] § 122.64 * * *.

40 C.F.R. § 124.5 (emphasis added). And 40 C.F.R. § 122.64 in turn identifies four bases 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).

permitting authority here is EPA’s Regional Administrator for Region 6. The Board will therefore refer to the Region in places where the regulations use the term “Director.” *See id.* (“When there is no approved State * * * program, and there is an EPA administered program, ‘Director’ means the Regional Administrator.”).

Concerned Citizens' Informal Appeal relies on the fourth basis for termination at 40 C.F.R. § 122.64(a)(4) – where there has been “[a] change in any condition” since permit issuance.

III. *FACTUAL HISTORY*

To best understand the issue raised by Concerned Citizens – that there has been “[a] change in any condition” after the Region issued the 2014 Permit – we describe in detail below the Treatment Facility, the process leading to issuance of the 2014 Permit, and Concerned Citizens' subsequent termination request.

A. *The Los Alamos Laboratory*

The Los Alamos Laboratory is located on forty square miles in Los Alamos County in north-central New Mexico, approximately sixty miles north-northeast of Albuquerque. *See* Los Alamos National Laboratory NPDES Permit Re-Application, Permit No. NM0028355 at ¶ 3.0 (Feb. 2012) (“2012 Permit Re-Application”) (A.R. I) and attached 2012 NPDES Re-Application Outfall Fact Sheet for Outfall 051 (“2012 Re-Application Fact Sheet – Outfall 051”) (A.R.I.A.). The Los Alamos Laboratory provides for “stockpile stewardship” and engages in “extensive basic research in physics, chemistry, metallurgy, mathematics, computers, earth sciences, and electronics.” 2012 Permit Re-Application at ¶ 3.1.

B. *The 2012 Permit Re-Application and the 2014 Permit*

In February 2012, the Los Alamos National Security, LLC and the U.S. Department of Energy

submitted an application for renewal of the Los Alamos Laboratory's then-existing NPDES permit, issued in August 2007, to authorize continued discharges from eleven outfalls, including discharges from the Treatment Facility to the Facility's one Outfall, Outfall 051. *See* 2012 Permit Re-Application at ¶ 4.0 & Table 4.1. The Treatment Facility treats low-level and transuranic radioactive liquid waste from various locations at the Laboratory. 2012 Re-Application Fact Sheet – Outfall 051 at 1.

Prior to 2010, treated wastewater from the Treatment Facility was regularly discharged to Outfall 051. *See* 2012 Permit Re-Application at ¶ 2.0; 2012 Re-Application Fact Sheet – Outfall 051 at 1, 5. As the Permittees stated in their 2012 Re-Application, however, the Treatment Facility “ha[d] not discharged to Outfall 051 since November 2010” due to changes in facility operations prior to re-application, including the use of a mechanical evaporator. *See* 2012 Re-Application Fact Sheet – Outfall 051 at 5. The Permittees also identified the anticipated construction of two new solar evaporation tanks – referred to as “Zero Liquid Discharge” tanks – that would serve the same function as the mechanical evaporator of receiving treated effluent from the Treatment Facility. *See id.* at 5, 7. Permittees nevertheless requested re-permitting of Outfall 051, “so that the [Treatment Facility] can maintain the capability to discharge to the outfall *should* the Mechanical Evaporator and/or Zero Liquid Discharge * * * tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory's] scope/mission.” *Id.* at 5 (emphasis added).

Permittees further noted that “[a] grab sample [of the effluent] will be collected from Outfall 051 *when/if* the [Treatment Facility] discharges effluent through the [O]utfall.” *Id.* (emphasis added). *See also* Form 2C to the 2012 Permit Re-Application at 6-14 (same).

In June 2013, the Region issued a public notice of the draft permit seeking public comment. *See* NPDES Permit No. NM0028355 Response to Comments at 2 (Aug. 4, 2014) (“Response to Comments”) (A.R. III). The Region’s Fact Sheet accompanying the 2013 draft permit stated: “The effluent is evaporated through a mechanical evaporator and has no discharge since November 2010. [Los Alamos Laboratory] includes the outfall in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage.” NPDES Permit No. NM0028355, Fact Sheet for the Draft [NPDES] Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN to Termination Request) (emphasis added).

In their August 2013 comments on the draft permit, the Permittees reiterated that “the * * * [Treatment Facility has] not discharged [to Outfall 051] since November 2010 as a result of using the mechanical evaporator” and that it sought to re-permit the Outfall in the event that the mechanical evaporator or now constructed evaporation tanks (once permitted and in use) were not functioning: “Based on discharge records prior to November 2010, and with options of using the existing mechanical evaporator or new [Zero Liquid Discharge] evaporation tanks, [the Treatment Facility] would discharge to Outfall 051 only once or twice per

week *if* evaporation is not an option.” Letter from Alison M. Dorries, Division Leader, Environmental Protection Division, Los Alamos National Security, LLC, and Gene E. Turner, Environmental Permitting Manager, Los Alamos Field Office, Department of Energy, to Diane Smith, U.S. EPA Region 6 Permit Processing Team, Enclosure 1 at 3 (Aug. 13, 2013) (emphasis added) (“Los Alamos Laboratory Comments on 2013 Draft Permit”) (Ex. OO to Termination Request).

Further, because Los Alamos Laboratory anticipated that future discharges to Outfall 051 – if they were to resume – were likely to be intermittent, its August 2013 comments requested modification of a provision in the draft permit’s continuous flow monitoring requirements for Outfall 051: “[The Treatment Facility] has not discharged since November 2010. *If* discharges to the Outfall 051 resume, it is estimated that [Treatment Facility] would only discharge intermittently * * *.” *Id.* at 7 (emphasis added).

Although Concerned Citizens apparently filed comments on other parts of the draft permit, no commenter objected to the 2014 Permit’s continued authorization of discharges through Outfall 051 during the comment period on the draft permit.³ *See generally*

³ In its response to Concerned Citizens’ Informal Appeal, the Region represents that Concerned Citizens joined another organization, Communities for Clean Water, in submitting comments on the 2013 draft permit and that the Region responded

Response to Comments.

The Region issued its 2014 permit determination on August 12, 2014. In the Region's August 2014 Response to Comments on the draft permit, the Region agreed that continuous monitoring was not necessary because the Treatment Facility had not discharged to Outfall 051 since November 2010 and would only discharge intermittently even "if discharges resume." Response to Comments at 17. Consequently, although the 2014 Permit includes discharge parameters for Outfall 051, the Permit requires only that a one-time grab sample be taken "if a discharge occurs at Outfall 051." 2014 Pt. I.E. at 26 (emphasis added).

The deadline for filing a petition for review of the Region's 2014 Permit renewal decision with the Board was in September 2014. 40 C.F.R. § 124.19(a).⁴ Neither Concerned Citizens nor any other party filed a petition for review with the Board under 40 C.F.R. § 124.19

to those comments. *See* Region's Response at 14 (citing Response to Comments at 9-13). The Region states that these comments did not raise the issue of whether the permit should authorize discharges from Outfall 051. *Id.* In its Reply to the Region's Response, Concerned Citizens indicates that the Region correctly characterized Concerned Citizens' participation during the public comment period. *See* Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) at 16 (Nov. 3, 2017).

⁴ Under 40 C.F.R. § 124.19(a), any person filing comments on the draft permit or participating in a public hearing on the draft permit may file a petition for review with the Board within thirty days after the Region serves notice of issuance of a permit. 40 C.F.R. § 124.19(a)(2)-(3).

objecting to the inclusion of Outfall 051 in the 2014 Permit. However, Permittees filed a petition for review with the Board challenging the 2014 Permit's imposition of monitoring and sampling requirements for selenium at a different outfall (Outfall 03A048). At the request of the parties, the Board dismissed the petition after the Region removed the disputed permit provision. *See In re Los Alamos Nat'l Lab.*, NPDES Appeal No. 14-02 (EAB Apr. 27, 2015) (Order Dismissing Petition for Review).

C. *Concerned Citizens' 2015 Letter Challenging Issuance of 2014 Permit and 2016 Termination Request*

A little over a year later, in November 2015, new attorneys representing Concerned Citizens sent a letter to the Region questioning the need for the 2014 Permit. *See* Letter from Stacey Dwyer, Associate Director, U.S. EPA Region 6, NPDES Permits and TMDL Branch, to Lindsay A. Lovejoy, Jr., Attorney at Law, 3600 Cerrillos Rd., Santa Fe, NM (Dec. 18, 2015) ("Region's 2015 Response Letter") (Ex. UU to Termination Request) (referencing Concerned Citizens' Nov. 2015 letter). Concerned Citizens did not request termination of the 2014 Permit and instead asked for the Region's justification for issuance of the Permit in the first instance. In particular, the letter stated that because the Treatment Facility has been designed to eliminate all discharges and there have been no discharges since 2010, there was no need for the Permit, and, pursuant to federal case law, the Region lacked jurisdiction under the Clean Water Act to have issued the 2014 Permit for Outfall 051. *Id.* at 1-2; *see also* Ex. 7 to

Informal Appeal (attaching Concerned Citizens' Nov. 2015 letter).

In response, the Region stated that it had re-examined its permit file and determined that it would not alter its permit determination. Region's 2015 Response Letter. Although no discharges had occurred since 2010, the Region stated, in part, that: "[Los Alamos Laboratory] specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. In its application, [Los Alamos Laboratory] indicated that under certain circumstances, e.g. [,] maintenance, malfunction, and/or capacity shortage, a discharge could occur and permit authorization would be needed." *Id.* at 1. The Region also disagreed that it lacked jurisdiction to issue a permit for potential discharges where, as here, the permittee requested coverage "for a possible future discharge." *Id.* at 2.

In June 2016, Concerned Citizens filed with the Regional Judicial Officer a request to terminate the 2014 Permit with respect to Outfall 051 pursuant to 40 C.F.R. §§ 124.5 and 122.64(a)(4).⁵ *See* Termination Request (June 17, 2016) (A.R. IV). As noted above, section 124.5 allows any person to request termination of an NPDES permit during its term based on: "(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

⁵ Concerned Citizens did not allege that 40 C.F.R. § 122.64(a)(1)-(3) served as a basis for termination.

termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a). In particular, Concerned Citizens stated that, since at least 1998, Los Alamos Laboratory had engaged in an effort to eliminate liquid discharges from the Treatment Facility to Outfall 051. *See* Termination Request at 3-11 (citing *Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility*, David Moss, et. al., Los Alamos National Laboratory, at vi (June 1998) (Ex. A to Termination Request) (recommending a “phased transition toward zero liquid discharge” through Outfall 051). Concerned Citizens further noted that as a result of these efforts, the Treatment Facility had not discharged any wastes through Outfall 051 since November 2010. *Id.* at 10-11.

Concerned Citizens also acknowledged that in the 2012 Permit Re-Application, Permittees had “expressly requested a permit [for Outfall 051] only for a possible discharge” and as a “fallback” for “use in possible contingencies.” *See Id.* at 9; *see also id.* at 10 (stating that 2012 Permit Re-Application sought leave to provide effluent characteristics for Outfall 051 only “*if discharges * * * are initiated* during the life of the new permit”), 11 (stating that the final permit refers to regulation of discharges from Outfall 051 “*if discharges resume*”) (emphasis in original). Nevertheless, because no discharges had occurred since 2010, Concerned Citizens asserted that Los Alamos Laboratory had no need for or intention of discharging through Outfall 051. *Id.* at 11. Given the continued lack of any discharges from Outfall 051, Concerned Citizens asserted that termination was justified under 40 C.F.R.

§ 122.64(a)(4). *See id.* at 17 (asserting that the permit must be terminated “due to lack of discharge”).

Concerned Citizens further argued that EPA lacked the authority under the Clean Water Act (“CWA”) to issue a permit for potential discharges that could occur sometime in the future. *Id.* at 12-15. Finally, Concerned Citizens suggested that Los Alamos Laboratory sought to maintain Outfall 051 as a permitted discharge for the Treatment Facility because coverage under the 2014 Permit allows Los Alamos Laboratory to obtain a Waste Water Treatment Unit exemption under another federal law, the Resource Conservation and Recovery Act (“RCRA”), and loss of the exemption would require Los Alamos Laboratory to meet additional RCRA requirements. *Id.* at 3-6 (citing RCRA § 1004(27), 42 U.S.C. § 6903(27); 40 C.F.R. §§ 260.10, 264.1(g)(6)).

On March 2, 2017, the Regional Judicial Officer dismissed Concerned Citizens’ termination request for lack of jurisdiction under 40 C.F.R. § 124.5, but stated that Concerned Citizens could proceed with the matter before the Regional Administrator. *See In re Concerned Citizens for Nuclear Safety (CCNS) Request to Terminate NPDES Permit #NM0028355 (Permit) for Los Alamos Nat’l Lab. Radioactive Liquid Waste Treatment Facility*, (RJO, Mar. 2, 2017) (referencing June 2016 Termination Request).⁶ Thereafter, on

⁶ Although the Regional Judicial Officer’s Order is not part of the administrative record identified by the Region, the Board takes official notice of it as a public document. *See, e.g., In re Donald Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004) (explaining that information in the public domain is subject to official notice by the

March 9, 2017, Concerned Citizens resubmitted its termination request to the Regional Administrator. *See* Letter from Lindsay A. Lovejoy, Jr., Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, Counsel for Concerned Citizens, to Samuel Coleman, P.E., Acting Administrator, U.S. EPA Region 6 (Mar. 9, 2017) (A.R. IV) (enclosing Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility (June 17, 2016)).

D. *Region 6's Denial of Concerned Citizens' Termination Request*

In August 2017, the Region denied Concerned Citizens' request pursuant to 40 C.F.R. § 124.5(b).⁷ The Region determined that Concerned Citizens' request to terminate the 2014 Permit as to Outfall 051 was not justified because Concerned Citizens failed to demonstrate that there had been “[a] change in any condition” after the 2014 Permit was issued justifying termination under 40 C.F.R. § 122.64(a)(4). *See* Letter from William K. Honker, Director, Water Division, U.S. EPA Region 6, to Lindsay A. Lovejoy, Jr., Attorney at Law, and Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, New Mexico

Board); *In re City of Denison*, 4 E.A.D. 414, 419 n.8 (EAB 1992) (taking official notice of administrative order not part of proceeding before Board).

⁷ 40 C.F.R. § 124.5(b) states, in pertinent part, that “[i]f the [Region] decides that the [termination] request is not justified, he or she shall send the requester a brief written response giving a reason for the decision.”

Environmental Law Center, Counsel for Concerned Citizens (Aug. 16, 2017) (“Region 6 Letter”) (A.R. V). The Region also rejected Concerned Citizens’ assertion that EPA lacked the authority under the CWA to issue the NPDES permit for potential discharges. *Id.* at 2. Finally, the Region concluded that “[w]hether or not issuance of NPDES permit coverage might trigger the RCRA [Waste Water Treatment Unit] regulatory exemption has no bearing on EPA’s NPDES permitting decisions, which must be based on the requirements of the CWA and implementing regulations.” *Id.* at 3.

E. *Informal Appeal to the Board*

On September 14, 2017, Concerned Citizens timely filed an Informal Appeal with the Board under 40 C.F.R. § 124.5(b) seeking review of the Region’s denial of Concerned Citizens’ termination request.⁸ On September 21, 2017, the Board issued an Order for Additional Briefing requiring that the Region file a response to the Informal Appeal and requesting that the parties address certain issues in their replies. Thereafter, on September 25, 2017, the Board issued an order granting the parties’ request to extend deadlines for the Region’s and the Permittees’ responses as well as Concerned Citizens’ reply. The Permittees and the Region filed responses on October 16 and 18, 2017, respectively.⁹ Concerned Citizens filed

⁸ Under 40 C.F.R. § 124.5(b), denials of requests for termination “may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts.”

⁹ *See* Letter from Susan L. McMichael, Attorney, Office of Laboratory Counsel, Los Alamos National Laboratory, and Silas R.

a reply on November 3, 2017, and requested oral argument.¹⁰ On February 22, 2018, the Board heard oral argument in this case.¹¹ For the reasons stated below, the Board denies Concerned Citizens' Informal Appeal.¹²

III. *STANDARD OF REVIEW*

Unlike the procedures governing Board review of permit determinations under 40 C.F.R. § 124.19, the regulations governing informal appeals from the denial of a request to terminate a permit under 40 C.F.R.

DeRoma, Field Office Counsel, U.S. Department of Energy, to Clerk of the Board, U.S. EPA Environmental Appeals Board, and enclosed Aff. of Michael Thomas Saladen, Environmental Manager at LANL (Oct. 12, 2017); EPA Response to Concerned Citizens for Nuclear Safety's Informal Appeal of EPA's Denial of Request to Terminate Permit Authorization (Oct. 18, 2017) ("Region's Response").

¹⁰ Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b).

¹¹ Concerned Citizens, the Region, and Permittees (Los Alamos National Security, LLC and the U.S. Department of Energy) all participated in oral argument. *See* EAB Hearing Transcript ("Tr.") (Feb. 22, 2018).

¹² Under 40 C.F.R. § 124.5(b), the "appeal shall be considered denied if the Environmental Appeals Board takes no action on the letter within 60 days after receiving it." The Board's September 21 and 25 orders constituted sufficient "action" necessary to keep this matter alive beyond the sixtieth day, allowing the Board to now address this Informal Appeal on the merits. *See In re Waste Techs. Indus.*, 5 E.A.D. 646, 655 n.13 (EAB 1995) (order for supplemental briefing is sufficient action for purposes of the sixty-day period specified in 40 C.F.R. § 124.5(b)).

§ 124.5 do not specify the Board's standard of review. Upon consideration, the Board will adopt for informal appeals the same standard used for appeals of permit determinations under 40 C.F.R. § 124.19. Specifically, a party seeking review under 40 C.F.R. § 124.5 must demonstrate that the Region's determination was based on either a finding of fact or conclusion of law that was clearly erroneous or was an abuse of discretion. *See* 40 C.F.R. § 124.19(a)(4)(i)(A)-(B).¹³ The issues that may arise in a proceeding under 40 C.F.R. § 124.5 are not necessarily different or less significant than the issues that arise in a proceeding under 40 C.F.R. § 124.19. Where, as here, the Board has decided to consider an informal appeal under 40 C.F.R. § 124.5, *see supra* note 12, the issues presented warrant Board consideration under the same standard of review as issues arising in proceedings under 40 C.F.R. § 124.19. Moreover, adopting this standard will serve administrative efficiency and will provide for consistency in addressing future appeals to the Board whether formal or informal. *Cf.* 40 C.F.R. § 124.19(n) (stating that the Board "may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal").

¹³ This standard is in keeping with the Board's other review on the merits of an informal appeal under 40 C.F.R. § 124.5. *See, e.g., In re Waste Tech. Inds.*, 5 E.A.D. 646 (EAB 1995). Although the Board in *Waste Technologies* did not explicitly address the standard of review for informal appeals, the Board found that the permit issuer "committed no error" in its permit determination and adequately justified that determination. *Id.* at 662-63.

IV. ANALYSIS

A. *The Region Did Not Clearly Err or Abuse its Discretion in Denying the Termination Request*

In this Informal Appeal, Concerned Citizens asserts that permit termination proceedings are appropriate for the reason specified in 40 C.F.R. § 122.64(a)(4) because “no discharges of water or pollutants are planned or expected for Outfall 051, and no such discharges have occurred since November 2010.” Informal Appeal at 3.

Under 40 C.F.R. § 122.64(a)(4), a cause for “terminating [an NPDES] permit during its term” includes: “[a] change in any condition that requires either a temporary or permanent reduction or elimination of any discharge * * * controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a)(4). As noted, the regulation states plainly that termination is an action that occurs “during [the permit’s] term.” *Id.* Therefore, “[a] change” for purposes of termination is one that occurs after permit issuance. *See also* 40 C.F.R. § 122.62(a)(1) (similarly requiring certain “changes” to have “occurred after permit issuance” to allow modification of a permit). And to read “[a] change” for purposes of termination some other way would effectively write the phrase “during its term” out of 40 C.F.R. § 122.64(a). The Informal Appeal, however, does not allege “[a] change in any condition” at Outfall 051 since issuance of the 2014 Permit. Indeed, in quoting the language of this provision, Concerned Citizens omits the reference to “[a] change in any condition.” *See* Informal Appeal at 3

(quoting only the portion of section 122.64(a)(4) referring to the “elimination of any discharge * * * controlled by the permit.”). Thus, on its face, the Informal Appeal fails to demonstrate that the Region clearly erred or abused its discretion in denying the request to terminate.

The record supports the Region’s determination that there has not been “[a] change in any condition” at Outfall 051 since issuance of the 2014 Permit. Although not explicitly stated, Concerned Citizens appears to suggest that the passage of additional time since issuance of the 2014 Permit by itself constitutes a sufficient basis for termination. *See id.* at 5. However, when Permittees applied for renewal of their permit, they advised the Region that discharges from Outfall 051 had not occurred “since November 2010” and would only be necessary “*should* the Mechanical Evaporator and/or Zero Liquid Discharge * * * tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory’s] scope/mission.” 2012 Re-Application Fact Sheet at 5 (emphasis added).¹⁴ As the Region explained in the Fact Sheet accompanying the 2013 draft permit, “[Los Alamos Laboratory] includes

¹⁴ *See also* 2012 Re-Application Fact Sheet, Form 2C at 6-14 (same). Form 2C of the 2012 Re-Application Fact Sheet states further that an effluent sample “will be collected from Outfall 051 *when/if* the [Treatment Facility] discharges effluent to Mortandad Canyon.” *Id.* (emphasis added). Further, in their comments on the 2013 draft permit, Permittees stated that “*if* discharges to the Outfall 051 resume, it is estimated that [Treatment Facility] would only discharge intermittently.” Los Alamos Laboratory Comments on 2013 Draft Permit at 7 (emphasis added).

[Outfall 051] in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage.” NPDES Permit No. NM0028355, Fact Sheet for the Draft [NPDES] Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN to Termination Request) (emphasis added). And when the Region issued the 2014 Permit, it reiterated that discharges from Outfall 051 had not occurred “since November 2010,” imposing certain monitoring requirements only “if discharges resume.” Response to Comments at 17; *see also* 2014 Permit Part I.E. at 26 (requiring that Permittees take a one-time grab sample of effluent from Outfall 051 “*if* a discharge occurs”) (emphasis added). Thus, the passage of additional time without a discharge from Outfall 051 since issuance of the 2014 Permit was expected, was made known during the permit proceeding, and does not amount to a change in any condition justifying termination. Under these circumstances, the Informal Appeal fails to demonstrate the Region clearly erred or abused its discretion in denying the termination request.

In its Reply, Concerned Citizens makes conclusory claims that there have in fact been “massive and obvious” changes to the Treatment Facility and its operation that, according to Concerned Citizens, justify termination of the 2014 Permit for Outfall 051 under 40 C.F.R. § 122.64(a)(4). Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) (“Concerned Citizens Reply”) (Nov. 3, 2017) at 7. However, these alleged changes – the use of a mechanical evaporator and the anticipated use of the Zero Liquid Discharge tanks

designed to reduce or eliminate discharges from the Treatment Facility – were identified in the 2012 Permit Re-Application and the Region’s Fact Sheet for the 2013 draft permit prior to the 2014 Permit’s issuance. Thus, they do not reflect “[a] change in any condition” since issuance of the 2014 Permit warranting termination pursuant to 40 C.F.R. § 122.64(a)(4).¹⁵

And maintaining the integrity and finality of the permitting process for permittees and other stakeholders requires Concerned Citizens to show that there has been “[a] change in any condition” since issuance of the 2014 Permit. When EPA is deciding whether to issue or renew a permit, the public is given a full opportunity to participate in and challenge any aspect of the permit. EPA’s permitting regulations direct EPA to issue a draft permit, to seek public comment for no less than thirty days, to hold a public hearing where there is a significant degree of public interest in a draft permit, and to issue a response to significant comments received at the time the final permit is issued. 40 C.F.R. § 124.6 - .12, .17. The public in turn is required to raise “all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the

¹⁵ During oral argument, Concerned Citizens objected to any finding that its termination request was untimely because the issues raised in that request were not raised during the proceedings leading to issuance of the 2014 Permit. Tr. at 61-62. The Board’s decision, however, is not based on any finding that the termination request was untimely, but rather the Region’s finding that the request fails to demonstrate a basis for termination because there has been no “change of any condition” since permit issuance under 40 C.F.R. § 122.64(a)(4).

close of the comment period.” *Id.* § 124.13. And under section 124.19, a party may seek to challenge any condition of a final permit so long as it files a petition for review with the Board within thirty days of issuance. *See id.* § 124.19(a)(3), (4).

Once the permit is issued, however, the regulations at 40 C.F.R. § 122.64(a) and § 124.5 specify that EPA may only terminate a permit during its term for one of four listed reasons. Initially, EPA’s permitting regulations applicable to state NPDES programs allowed the Agency to terminate a permit for cause, “including, but not limited to,” “[a] change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.” *State Program Elements Necessary for Participation in the NPDES*, 37 Fed. Reg. 28,390, 28,397 (Dec. 22, 1972). EPA included identical language in promulgating regulations applicable to federal NPDES programs in 1973. *See National Pollution Discharge Elimination System*, 38 Fed. Reg. 13,528, 13,533 (May 22, 1973). In 1979, however, EPA revised the regulations to remove the phrase “including, but not limited to” so as to allow for termination “only in certain limited circumstances.” *See National Pollution Discharge Elimination System; Revision of Regulations*, 44 Fed. Reg. 32,854, 32,868, 32,912 (June 7, 1979). In addition, the Agency agreed with commenters that the causes for permit modification should be listed separately from the “more ‘severe’ measure” of termination. *Id.* In 1980, when EPA issued consolidated regulations governing its permitting programs, it expressed the expectation that the bases for termination in 40 C.F.R. § 122.64(a)

would not be read broadly. *See Consolidated Permit Regulations*, 45 Fed. Reg. 33,290, 33,316 (May 19, 1980). Further, although the proposed rule included “other good cause” as a ground for termination, EPA chose not to include this as a basis for termination in the 1980 consolidated regulations because it was too “vague and open ended.” *Id.* at 33,317. The limited scope of 40 C.F.R. § 122.64(a) has remained unchanged for almost forty years now.

And the more abbreviated process EPA must follow before denying a request to terminate (as opposed to the process for issuing or renewing a permit) further supports the point that a request to terminate was not intended to be a basis to reopen the original permit decision. EPA does not need to issue a public notice or provide an opportunity for comment before denying a request to terminate. Instead, EPA need only “send the requester a brief written response giving a reason for the decision” not to terminate. 40 C.F.R. § 124.5(b); *see also id.* § 124.10(a)(2).

Notably, although much of the Informal Appeal focuses on Concerned Citizens’ assertion that the Region erred in issuing the 2014 Permit in the first instance,¹⁶ it does not seek, nor could it seek, to

¹⁶ *See, e.g.*, Informal Appeal at 2 (contesting the Region’s “*issuance of an NPDES permit*” for possible discharges from Outfall 051), 2-3 (stating that the Region’s position that it may “*issue an NPDES permit*” for possible discharges is “in error”), 5 (discussing EPA’s limited authority under the CWA to “*issue NPDES permits*” for potential discharges), and 7-8 (challenging the Region’s position that it can “*issue an NPDES permit*” at the request of the owner or operator) (emphasis added).

challenge the 2014 Permit now. And it fails to demonstrate that the Region erred or abused its discretion in denying the request to terminate the 2014 Permit under 40 C.F.R. § 122.64(a)(4). Instead, Concerned Citizens may raise the issues it raises here, or any other issue it chooses, in any future permit renewal process for the Los Alamos Laboratory when the 2014 Permit expires in September 2019, and file a petition for review with the Board from any future permit at that time under 40 C.F.R. § 124.19. *See also* Tr. at 40-41.¹⁷

B. *Concerned Citizens' Contention That Permittees Never Disclosed that Discharges to Outfall 051 Might Not Occur is Untimely and Not Supported by the Record Here*

In its Reply, Concerned Citizens argues further that it could not have contested the 2014 Permit at the time the Permit was issued, implying that Los Alamos Laboratory never disclosed the possibility that discharges to Outfall 051 might not occur. *See* Concerned Citizens Reply at 8. Specifically, Concerned Citizens now asserts that during the 2014 Permitting process, Los Alamos Laboratory expressed an intent to make use of Outfall 051. *Id.* (claiming that during the permitting process Los Alamos Laboratory represented

¹⁷ Because the Region did not clearly err or abuse its discretion in finding that there has been no “change in any condition,” the Board does not address the Region’s further argument that any such change must be of a condition “that requires *** elimination of any discharge *** (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a)(4); *see* Region’s Response at 6-7.

that “discharges through Outfall 051 would be required”). From there, Concerned Citizens argues that it relied on Los Alamos Laboratory’s representations that it intended to discharge from Outfall 051 and thus could not have raised an earlier challenge to the 2014 Permit. *See id.* at 8-12.

However, Concerned Citizens did not make this argument before filing its Reply or otherwise claim that termination was appropriate under 40 C.F.R. § 122.64(a)(2) because of a “failure * * * to disclose” or “misrepresentation of any relevant facts” during the 2014 permitting process. And because this argument is raised for the first time in Concerned Citizens’ Reply, it is beyond the scope of the Informal Appeal and is therefore untimely. *Cf. In re Russell City Energy Ctr. LLC*, 15 E.A.D. 1, 53 (EAB 2010) (declining to consider new issues raised for the first time in a reply brief); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) (new issues raised in reply briefs are equivalent to late-filed appeals and are thus untimely).

Even had Concerned Citizens timely raised this argument, however, the argument is contradicted by the record here. Although Permittees acknowledged during the application process that the use of the mechanical evaporator had resulted in no discharges from Outfall 051 since 2010, Permittees nevertheless sought a permit for continued discharges under certain circumstances. As discussed above, the permitting record for the 2014 Permit made clear that discharges from Outfall 051 would only be necessary if the mechanical evaporator or Zero Liquid Discharge tanks become unavailable due to malfunction, maintenance,

or capacity shortage. Indeed, the permitting record refers to Outfall 051 requirements in multiple places as applying only “if” discharges resume. Thus, contrary to Concerned Citizens’ assertion, the record alerted the public to the fact that discharges might not occur at all.

This argument is also at odds with Concerned Citizens’ own prior statements. As early as November 2015, Concerned Citizens raised concerns about the 2014 Permit demonstrating its understanding that Permittees had sought and the Region had issued the 2014 Permit covering Outfall 051, even though it was known that there had been no discharges since 2010. *See* Region’s 2015 Response Letter (Ex. UU to Termination Request) (referencing Concerned Citizens’ Nov. 2015 letter). Further, in its termination request, Concerned Citizens acknowledged that the Permittees had stated that there had been no discharges to Outfall 051 since 2010 and had expressly requested a permit for Outfall 051 “only for a possible discharge,” and as a “fallback” for use in possible contingencies. *See* Termination Request at 9; *see also id.* at 10 (stating that 2012 Permit Re-Application sought leave to provide effluent characteristics for Outfall 051 only “*if discharges * * * are initiated* during the life of the new permit”), 11 (stating that the final permit refers to regulation of discharges from Outfall 051 “*if discharges resume*”) (emphasis in original). In short, there is no merit in Concerned Citizens’ argument that the Permittees never disclosed the possibility that

discharges from Outfall 051 might not occur at all, as Concerned Citizens' own submissions demonstrate.¹⁸

V. CONCLUSION

For the reasons stated above, the Board concludes that Concerned Citizens has not established that the Region clearly erred or abused its discretion in denying Concerned Citizens' request to terminate the 2014 Permit for Outfall 051. Concerned Citizens' Informal Appeal is therefore denied.¹⁹

So ordered.

*** Certificate of Service omitted ***

¹⁸ In a post-argument brief, Concerned Citizens now contends that it could not have known during the comment period on the draft permit that the Zero Liquid Discharge tanks had been constructed, and on that basis, claims termination is appropriate. *See* Concerned Citizens for Nuclear Safety Post-Argument Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) at 7 (Feb. 27, 2018). The Board did not grant the parties leave to file post-argument briefs but instead only directed the filing of publicly-available information regarding the status of the State permitting process for the Zero Liquid Discharge tanks, Tr. at 67-68, and this argument raised for the first time in a post-argument brief is untimely. In any event, regardless of when the Zero Liquid Discharge tanks were constructed, the permitting record – and specifically the 2012 Permit Re-Application and the Region's Fact Sheet for the 2013 draft permit – alerted the public that with either the mechanical evaporator or the Zero Liquid Discharge tanks, discharges might not occur at all.

¹⁹ Because we conclude that the Region did not clearly err or abuse its discretion in denying the termination request, we do not need to address Concerned Citizens' argument that EPA lacked authority under the CWA to issue a permit for potential discharges.

APPENDIX C

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

REGION 6

1445 ROSS AVENUE, SUITE 1200

DALLAS TX 75202-2733

[Dated: August 16, 2017]

Lindsay A. Lovejoy, Jr.
Attorney at Law
3600 Cerrillos Road, Unit 1000A
Santa Fe, NM 87507

Jonathan Block, Eric D. Jantz,
Douglas Meiklejohn, Jaimie Park,
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87506

RE: Request to Terminate NPDES Permit
#NM0028355 as to Outfall #051 for Radioactive
Liquid Waste Treatment Facility

Dear Mr. Lovejoy and Mr. Jantz:

This letter is in response to the above-referenced request to terminate permit coverage, which was filed pursuant to 40 C.F.R. § 124.5 with the Acting Regional Administrator of EPA Region 6 (Region 6) by Concerned Citizens for Nuclear Safety (CCNS) on March 9, 2017 ("Request to Terminate"). CCNS asks the Region to terminate permit coverage for Outfall 051

under NPDES Permit #NM0028355, 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 facility located at Los Alamos, NM (LANL). 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.

CCNS argues that because LANL's RLWTF facility was redesigned as a zero discharge facility in the early 2000's and has not discharged since 2010, Outfall 051 does not require NPDES permit coverage, and that in fact issuing such coverage is outside the jurisdiction of EPA pursuant to federal court rulings 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 further argues that NPDES coverage for Outfall 051 is improper because it makes LANL's RSWTF eligible for a Waste Water Treatment Unit (WWTU) regulatory exemption under the Resource Conservation and Recovery Act (RCRA) despite no actual Clean Water Act (CWA) discharges.

Region 6 does not agree with CCNS's arguments and has determined not to unilaterally propose termination of LANL's NPDES permit coverage for Outfall 051. Under 40 C.F.R. § 124.5(b), if the Regional Administrator decides a request to terminate NPDES permit coverage filed by an interested party is not justified, the Regional Administrator must send the

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requester “a brief written response giving a reason for the decision.” Accordingly, Region 6 provides the following response.

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. That section provides the following 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 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. In addition, there is no information to support a determination that the permitted discharge

endangers human health or the environment and could only be regulated through termination of the permit.

Finally, EPA is not aware of a change in any condition (e.g., facility closure or termination of the discharge by connection to a POTW) that would warrant termination of permit coverage for Outfall 051 pursuant to § 122.64(a)(4). In their application for permit coverage, LANS and DOE described the “no discharge” nature of the RLWTF and specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. The permittees indicated that under certain circumstances, e.g. if one or both evaporative systems have to be taken off-line, a discharge could occur. Without permit authorization, such a discharge could subject the permittees to liability under the CWA for discharging without a permit.

40 C.F.R. § 122.21 places the burden on the owner/operator of a facility to obtain NPDES permit coverage prior to discharge. If the owner/operator does not seek coverage and a discharge occurs, the owner/operator is strictly liable under the CWA and subject to civil and/or criminal penalties. Consequently, EPA generally defers to an owner/operator’s determination that a discharge could occur and that permit coverage is needed. It is not unusual for facilities that do not routinely discharge to seek and retain permit coverage to protect against liability in the event of an unanticipated discharge.

Region 6 does not read *National Pork Producers* or *Waterkeeper* to prohibit EPA from issuing an NPDES permit to a facility seeking coverage to protect against liability in the event of a discharge. Those cases dealt

with EPA's authority to **require** operators of Concentrated Animal Feeding Operations (CAFOs) to obtain NPDES permit coverage when there had been no discharge. The Courts in those cases found that EPA could require discharging CAFOs to obtain NPDES permits, but that the agency could not mandate coverage in cases where there was no actual discharge. The burden was on the CAFO owner/operator to determine whether to seek permit coverage or to risk liability in case of a discharge. Neither *National Pork Producers* nor *Waterkeeper* address EPA's authority to issue a permit to a facility **requesting** coverage for a possible discharge. In such cases, as in the current situation, EPA has authority under CWA § 402 (a) to issue a permit authorizing the discharge of pollutants should one occur. Otherwise, the CWA's requirement that facilities obtain NPDES permit coverage **prior to discharge** would be impossible for the agency to implement.

As to CCNS's argument that LANL's NPDES permit for discharges from Outfall 051 should be terminated because the NPDES permit coverage allows LANL to obtain a Waste Water Treatment Unit (WWTU) regulatory exemption under the Resource Conservation and Recovery Act (RCRA), Region 6 has determined this argument to be outside the scope of our decision. Whether or not issuance of NPDES permit coverage might trigger the RCRA WWTU regulatory exemption has no bearing on EPA's NPDES permitting decisions, which must be based on the requirements of the CWA and implementing regulations.

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For the above reasons, Region 6 has determined CCNS's Request to Terminate LANL's NPDES permit coverage for Outfall 051 under NPDES Permit No. NM0028355 is not justified. Should you have any question regarding this matter, please contact Ms. Stacey Dwyer of my staff at (214) 665-6729, or Renea Ryland at (214) 665-2130.

Sincerely,

/s/ W K Honker
William K. Honker, P.E.
Director
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APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**No. 18-9542
(EPA No. 17-05)
(Environmental Protection Administration)**

[Filed: June 23, 2020]

CONCERNED CITIZENS FOR)
NUCLEAR SAFETY, INC.,)
)
Petitioner,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, et al.,)
)
Respondents.)

ORDER

Before **MATHESON**, **MURPHY**, and **EID**, Circuit Judges.

Petitioner's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

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in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX E

33 U.S.C. 1342(a)-(b)

33 U.S.C. 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State

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permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the

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last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

- (A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;
 - (B) are for fixed terms not exceeding five years;
- and

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(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;

(D) control the disposal of pollutants into wells;

(2)

(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the

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Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works

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from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

42 U.S.C. 6925(a)

42 U.S.C. 6925. Permits for treatment, storage, or disposal of hazardous waste

(a) Permit requirements

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any

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such hazardous waste is prohibited except in accordance with such a permit. No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 2605(e) of title 15 for the incineration of polychlorinated biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subchapter.