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January 17, 2025

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CERTIFICATE OF SERVICE

The undersigned counsel for Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace, Ch. 63, certifies that on January 17, 2025 the foregoing Petition was served electronically by PACER on the parties, counsel, and others listed below in accordance with Rule 15(c), Fed. R. App. P.:

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(Slip Opinion)

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

_____)	
In re)	
U.S. Department of Energy and)	
Triad National Security, L.L.C.)	
)	NPDES Appeal No. 23-04
Permit No. NM0028355)	
)	
_____)	

[Decided September 24, 2024]

ORDER DENYING REVIEW

***Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake,
and Mary Kay Lynch.***

**IN RE U.S. DEPARTMENT OF ENERGY AND TRIAD
NATIONAL SECURITY, L.L.C.**

NPDES Appeal No. 23-04

ORDER DENYING REVIEW

Decided September 24, 2024

Syllabus

Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace (“Petitioners”) filed a petition for review with the Environmental Appeals Board challenging a National Pollutant Discharge Elimination System (“NPDES”) permit issued by the U.S. Environmental Protection Agency Region 6 to the U.S. Department of Energy and Triad National Security L.L.C. on September 28, 2023, pursuant to the Clean Water Act. The permit authorizes the discharge of pollutants from eleven outfalls at the Los Alamos National Laboratory, including the discharge of treated wastewater from the Radioactive Liquid Waste Treatment Facility into Mortandad Canyon at Outfall 051.

Petitioners’ sole challenge is to the Region’s decision to authorize discharges at Outfall 051. Petitioners contend, among other things, that the Region lacks authority to issue an NPDES permit for Outfall 051 and that the Region failed to exercise considered judgment in issuing the permit.

This appeal follows the Board’s remand of the NPDES permit previously issued by the Region for the Laboratory in 2022. *In re U.S. Dep’t of Energy & Triad Nat’l Sec., L.L.C.*, 18 E.A.D. 797 (EAB 2022). The Board remanded that permit to provide the public with an opportunity to comment on Outfall 051 discharge data from 2021, to consider any comments received, to revise its Response to Comments document, and to take further action, as appropriate, in reissuing its permit decision. *Id.* at 817. Following that remand, the Region issued the Final Permit that is the subject of this appeal.

Held: Petitioners have not demonstrated that review of the permit is warranted on any of the grounds presented. Therefore, the Board denies the petition for review in all respects.

- (1) The Board concludes that Petitioners fail to establish that the Region clearly erred or abused its discretion in issuing an NPDES permit authorizing discharges at Outfall 051. The Clean Water Act and its implementing regulations

authorize issuance of an NPDES permit for the discharge or proposed discharge of pollutants. The record contains ample evidence demonstrating that discharges have taken place at Outfall 051 in the past, and Permittees have applied for approval to continue discharging at the outfall in the future. Petitioners provide no basis for their argument that the Region clearly erred or abused its discretion by failing to require Permittees to provide more certainty regarding the timing and extent of future discharges.

(2) Petitioners' argument that the Region failed to exercise considered judgment lacks merit. The record demonstrates that the Region duly considered the issues raised during the comment period and reached a permitting decision that is rational in light of all of the information in the record.

Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake, and Mary Kay Lynch.

Opinion of the Board by Judge Avila:

I. INTRODUCTION

In September 2023, the U.S. Environmental Protection Agency Region 6 issued a National Pollution Discharge Elimination System ("NPDES") permit ("Final Permit") to the U.S. Department of Energy and Triad National Security L.L.C. (collectively, "Permittees") pursuant to the Clean Water Act ("CWA" or "Act"). The Final Permit authorizes the Los Alamos National Laboratory to discharge pollutants from eleven outfalls, including discharges of treated wastewater from the Radioactive Liquid Waste Treatment Facility into Mortandad Canyon through what is referred to as Outfall 051.

This is not the first time the Environmental Appeals Board has been called upon to adjudicate a challenge to the permitting of Outfall 051. *See In re U.S. Dep't of Energy & Triad Nat'l Sec., L.L.C.*, 18 E.A.D. 797 (EAB 2022) ("*Triad I*"); *see also In re Los Alamos Nat'l Sec., L.L.C.*, 17 E.A.D. 586 (EAB 2018) (informal appeal of 2014 permit), *pet. for rev. dismissed for lack of juris. sub nom. Concerned Citizens for Nuclear Safety, Inc. v. EPA*, No. 18-9542 (10th Cir. Apr. 23, 2020), *cert. denied*, 141 S. Ct. 1464 (Mar. 1, 2021). This appeal follows the Board's remand of the Laboratory's 2022 NPDES permit. The Board remanded that permit for the Region to provide the public with an opportunity to comment on Outfall 051 discharge data from 2021, to consider any comments received, to revise its Response to Comments document, and to take further action, as appropriate, in reissuing its permit decision. *Triad I*, 18 E.A.D. at 817. Following the remand, the Region issued the Final Permit, which does not differ materially from the 2022 Permit.

The same group of petitioners that appealed the Region’s 2022 permitting decision (Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace—collectively “Petitioners”) now petition the Board for review of the Final Permit. Petitioners’ challenge focuses solely on Outfall 051. Petitioners contend, among other things, that the Region lacks authority to issue an NPDES permit for Outfall 051 and that the record fails to demonstrate that the Region exercised considered judgment in reaching its permitting decision.

For the reasons set forth below, the Board denies review as to all issues raised in the petition.

II. *PRINCIPLES GOVERNING BOARD REVIEW*

The Board has discretion to grant or deny review of a permit decision. 40 C.F.R. § 124.19(a); *see In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394-95 (EAB 2011) (citing Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)), *vacated & remanded on other grounds sub nom. Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014). The Board ordinarily denies a petition for review of a permit decision (and thus does not remand it) unless the petitioner demonstrates that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g., In re La Paloma Energy Ctr., LLC*, 16 E.A.D. 267, 269 (EAB 2014). “When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised ‘considered judgment.’” *Triad I*, 18 E.A.D. at 799 (citing *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000)). In considering whether to grant or deny review of a permit decision, the Board is guided by the preamble to the regulations authorizing appeal under part 124, in which the Agency stated that the Board’s power to grant review “should be only sparingly exercised,” and that “most permit conditions should be finally determined at the [permit issuer’s] level.” Consolidated Permit Regulations, 45 Fed. Reg. at 33,412.

III. *LEGAL FRAMEWORK*

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). To help achieve this objective, the Act prohibits the discharge of pollutants into waters of the United States unless authorized by an NPDES permit or other specified provision of the Act. *See* CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342.

The NPDES permitting program is the Act’s primary means of authorizing discharges into waters of the United States. *See* CWA § 402, 33 U.S.C. § 1342. A “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” CWA § 502(12), 33 U.S.C. § 1362(12). Federal regulations implementing the NPDES program are codified, in part, at 40 C.F.R. parts 122, 125, and 131. Regulations governing application for an NPDES permit are set forth at 40 C.F.R. § 122.21.

Under the Act’s implementing regulations, a person who “discharges or proposes to discharge” pollutants has a “duty to apply” for an NPDES permit prior to the date on which the discharge will commence. 40 C.F.R. § 122.21(a), (c). The holder of an existing NPDES permit wishing to retain coverage must reapply at least 180 days before its permit expires. *Id.* § 122.21(d). The regulations specify the information that must be included in the reapplication. *Id.* § 122.21(f), (g). A reapplication seeking approval for intermittent flows must include, among other things, “a description of the frequency, duration and flow rate of each discharge occurrence.” *Id.* § 122.21(g)(4).

IV. *FACTUAL BACKGROUND AND PROCEDURAL SUMMARY*

The Los Alamos National Laboratory is a “large multi-disciplinary facility” located in Los Alamos County, New Mexico, that conducts “national defense research and development, scientific research, space research and technology development, and energy development.” Region 6, U.S. EPA, *NPDES Permit No. NM0028355 Fact Sheet* at 4 (Feb. 26, 2020) (A.R. A.7) (“EPA Fact Sheet”).¹ The Laboratory has at least eleven outfalls, including Outfall 051, that discharge into various tributaries of the Rio Grande Basin. *Id.*

A. *The Radioactive Liquid Waste Treatment Facility and Outfall 051*

The Radioactive Liquid Waste Treatment Facility (“Treatment Facility”) receives and treats radioactive liquid waste—including process liquid, cooling water, and storm water—from various generator facilities located throughout the Laboratory. Los Alamos Nat’l Lab’y, *Industrial and Sanitary Outfalls 2019 NPDES Permit Re-Application Outfall 051 Fact Sheet* at 5 (Mar. 2019) (contained

¹ Documents contained in the administrative record are indicated with “A.R.” followed by the document identification number. The index to the administrative record is attached to the Region’s response brief as attachment 12 and includes links to the indexed documents. All of the docket entries in this matter are available under the “EAB Dockets” tab on the Environmental Appeals Board website at www.epa.gov/eab.

in A.R. A.2 at 1150-1292) (“Outfall 051 Fact Sheet”); *see also* Los Alamos Nat’l Lab’y, *Notice of Planned Change and Updated Fact Sheet*, attach. 1 at 5 (Feb. 25, 2021) (A.R. F.3) (“Notice of Planned Change & Updated Fact Sheet”). Treated wastewater from the Treatment Facility is either conveyed to evaporation equipment or discharged at Outfall 051.² Los Alamos Nat’l Lab’y, *NPDES Permit No. NM0028355, 2012 NPDES Permit Re-Application, Fact Sheet for Outfall 051*, at 1, 5 (Feb. 2012) (contained in A.R. A.14 at PDF 931-41). Permittees have explained that while the evaporation equipment is designed to handle most of the Treatment Facility’s wastewater, discharge at Outfall 051 is necessary when the evaporation equipment is either unavailable (for example, due to malfunction or maintenance) or when the volume of influent into the Treatment Facility is high. *See Permittees’ Supplemental Comments on Draft 2019 NPDES Permit No. NM0028355 for Los Alamos National Laboratory* at 12-13 (Feb. 25, 2021) (A.R. F.1 attachment 1).

The record contains a thorough history of Outfall 051’s usage over the past two decades.³ Between 2007 and 2010, the outfall was used regularly. *See* Los Alamos Nat’l Lab’y, *DMR Outfall Data Summary – 051*, at 1 (Feb. 2012) (contained in A.R. A.14 at PDF 942-952) (providing average and maximum flow rates for each month between August 2007 and November 2010). Although the record reflects that Outfall 051 was not used for a period of nearly nine years (between December 2010 and June 2019), *see* EPA Fact Sheet at 15, the record also reflects that the outfall was used on multiple occasions from 2019 through 2022: at least once in 2019, twice in 2020, fifteen times in 2021, and fourteen times in 2022. Region 6, U.S. EPA, *NPDES Permit No. NM0028355 Response to Comments* at 11,

² The record indicates that the Treatment Facility is equipped with two types of evaporation equipment: a mechanical evaporator system and solar evaporation tanks. *See generally* Outfall 051 Fact Sheet at 5. It is unclear, however, whether the solar evaporation tanks are currently operational. *See Permittees’ Supplemental Comments on Draft 2019 NPDES Permit No. NM0028355 for Los Alamos National Laboratory* at 18 (Feb. 25, 2021) (A.R. F.1 attachment 1) (indicating that, as of February 2021, the solar evaporation tanks were “not in service”). In their response brief in this permit appeal, Permittees state “passive evaporation is not presently an option.” *Permittees’ Response to Petition for Review* at 6 n.9 (Dec. 13, 2023).

³ The Laboratory has held an NPDES permit approving discharges at various outfalls since at least 1978. Los Alamos Nat’l Lab’y, *Los Alamos National Laboratory Industrial and Sanitary Outfalls 2019 NPDES Permit Re-application*, Introduction at 3 (Mar. 2019) (contained in A.R. A.1 at PDF 169-189).

83-84 tbl.3 (Sept. 27, 2023) (A.R. J.3) (“Resp. to Cmts.”). And on the days when Outfall 051 was used, the record includes data regarding the amount of those discharges. For example, the average daily flow volume for the discharges that took place in 2019 and 2020 was 15,936 gallons per day and the maximum daily flow volume was 21,345 gallons per day. Notice of Planned Change & Updated Fact Sheet attach. 1 at 7 tbl.4. For the discharges that took place in 2021 and 2022, the average daily flow volume was 15,741 gallons per day and the daily maximum flow volume was 18,629 gallons per day. Resp. to Cmts. at 83-84 tbl.3.

B. The 2019 Permit Application and Draft Permit

In March 2019, Permittees submitted an application for an NPDES permit to replace the permit then in effect.⁴ Los Alamos Nat’l Lab’y, *Los Alamos National Laboratory 2019 Industrial and Sanitary Outfalls 2019 NPDES Permit Re-application* (Mar. 2019) (A.R. A.1) (“Permit Application”). Part of the application consisted of a request for approval to continue discharging intermittently at Outfall 051. Outfall 051 Fact Sheet at 5.

As required by the regulations governing the issuance of NPDES permits, Permittees provided detailed information about Outfall 051, including descriptions of Laboratory operations that contribute wastewater to the outfall, flow rates, frequency and duration of intermittent flows, and effluent characteristics. See Los Alamos Nat’l Lab’y, *Application for Permit to Discharge Wastewater for Existing Manufacturing, Commercial, Mining and Silviculture Operations, Form 2C, Outfall 051*, at 1-3 (March 2019) (contained in A.R. A.1 at PDF 154-68) (“Form 2C”); see also 40 C.F.R. § 122.21(g). Permittees projected that discharges at Outfall 051 would take place on average four days a week for twelve months of the year—for a total of 208 days per year—with a long-term average daily flow volume of 20,000 gallons per day and a maximum daily flow volume of 39,840 gallons per day. Form 2C at 2. Two years later, Permittees revised those projections downward based on actual data, estimating an average daily flow volume of 15,936 gallons per day and a maximum daily flow volume of 21,345 gallons per day. Notice of Planned Change & Updated Fact Sheet attach. 1 at 7

⁴ The Laboratory’s previous NPDES permit was issued by the Region in August 2014 and modified in March 2015. See Region 6, U.S. EPA, *Los Alamos National Security, L.L.C. and U.S. Department of Energy, NPDES Permit No. NM0028355* (May 1, 2015) (contained in A.R. A.13 at PDF 5-34); see generally *Los Alamos Nat’l Sec.*, 17 E.A.D. 586.

tbl.4. The estimated frequency of discharges remained the same—an average of four days a week for twelve months of the year. *Id.*

In November 2019, the Region issued a draft permit for the Laboratory and provided notice regarding the opportunity for public comment. Region 6, U.S. EPA, *[Draft] Authorization to Discharge, NPDES Permit No. NM0028355* (Nov. 30, 2019) (A.R. A.8 through A.11) (“Draft Permit”); Region 6, U.S. EPA, *Public Notice of Authorization to Discharge to Waters of the United States, NPDES Permit No. NM0028355* (Nov. 30, 2019) (A.R. A.5). The Region provided a sixty-day public comment period from November 30, 2019, through January 28, 2020; extended the initial public comment period through March 31, 2020; and, at the request of Permittees, provided an additional public comment period from January 30 through February 28, 2021. *See* EPA Region 6’s Response to Petition for Review at 5-6 (Dec. 13, 2023) (“Region’s Resp. Br.”). The Region also held a public hearing. *Id.* at 5; *see* Transcript of Proceedings, Public Meeting Re Proposed Changes to the LANL Industrial Wastewater Permit (NPDES Permit No. NM0028355) (Jan. 15, 2020) (A.R. B.2).

Petitioners and Permittees each submitted extensive comments on the draft permit. *Comments of Concerned Citizens for Nuclear Safety et al. on Proposed Renewal of Permit # NM0028355* (Oct. 15, 2020) (A.R. C.2) (“Petitioners’ 2020 Cmts.”); *Supplemental Comments of Concerned Citizens for Nuclear Safety et al. on Proposed Renewal of NPDES Permit # NM0028355* (Mar. 29, 2021) (A.R. F.4) (“Petitioners’ 2021 Cmts.”); *Triad Comments on Draft Industrial and Sanitary Wastewater NPDES Permit No. NM0028355* (Oct. 28, 2020) (A.R. C.7 enclosure 1); Los Alamos Nat’l Lab’y, *Supplemental Comments and Information in Support of Proposed Renewal of NPDES Permit No. NM0028355*, at 12-13 (Feb. 25, 2021) (A.R. F.1 attachment 1) (“Permittees’ 2021 Cmts.”).

In their comments, Petitioners objected to the reauthorization of discharges at Outfall 051, characterizing the outfall as non-discharging and maintaining that the Region lacks authority under the CWA to issue an NPDES permit for non-discharging outfalls. *See* Petitioners’ 2020 Cmts. at 24-25 (“As there is neither a ‘discharge’ through Outfall 051, nor any plan or proposal to commence to discharge through Outfall 051, there is no legal basis for a CWA permit authorizing such a discharge.”); Petitioners’ 2021 Cmts. at 4 (“Where there is no discharge, EPA has no authority to issue a permit.”); Petitioners’ 2021 Cmts. at 12 (“The CWA regulates only an outfall that actually discharges or proposes to discharge.”). Petitioners also contended that Permittees were seeking permit coverage for Outfall 051 in order to qualify for the “wastewater treatment unit” exemption under the Resource Conservation and Recovery Act (“RCRA”). Petitioners’ 2020 Cmts. at 3-4, 30-31;

Petitioners' 2021 Cmts. at 16; *see* RCRA § 1003, 42 U.S.C. § 6903(27) (definition of "solid waste"); 40 C.F.R. §§ 260.10 (definition of "wastewater treatment unit"), 264.1(g)(6) (exempting "wastewater treatment units" from certain hazardous waste management regulations under RCRA).

Permittees, in their comments, explained their basis for seeking continued authorization to discharge at Outfall 051. They explained that although they had "designed the [Laboratory's] evaporation equipment to handle the currently expected volume of wastewater," there are times when discharges at Outfall 051 are necessary. Permittees' 2021 Cmts. at 12-13. For example, they explained, the outfall is needed when the evaporation equipment is unavailable due to maintenance or malfunction, or when higher volumes of wastewater are generated. *Id.* at 13. Permittees also commented that whereas in the past Outfall 051 has served as a back-up, a "more integral role" for the outfall is anticipated for the future.⁵ *Id.* at 13-14.

C. *The 2022 Permit*

In March 2022, the Region issued the Laboratory an NPDES permit under the CWA authorizing discharges at eleven outfalls. Region 6, U.S. EPA, *Authorization to Discharge, NPDES Permit No. NM0028355* (Mar. 30, 2022) (A.R. H.1 through H.4) ("2022 Permit"). With respect to Outfall 051, the 2022 Permit reauthorized "intermittent" discharges of treated radioactive liquid waste and established monitoring requirements and effluent limits for those discharges, but the permit did not include flow limits. 2022 Permit pt. I.A at 7.

Shortly thereafter, Petitioners filed a petition with the Board seeking review of the 2022 Permit. Petition for Review under 40 C.F.R. § 124.19, *In re U.S. Dep't of Energy & Triad Nat'l Sec., L.L.C.*, NPDES Appeal No. 22-01 (May 9, 2022). Among the issues raised was a challenge to the Region's decision to authorize further discharges at Outfall 051. Petitioners argued that the Region lacks authority under the CWA to permit the outfall because "Congress did not include in the CWA any authority to issue a permit for a discharge that 'could occur,' nor for a

⁵ In an affidavit submitted with Permittees' 2021 comments, a Facilities Operations Director for the Laboratory explained that Outfall 051 is an "integral component" of the Treatment Facility, that the outfall "has been and will be used routinely in conjunction with [other equipment] to support the Laboratory's operational priorities," and that the outfall "is required to maintain operational flexibility." Permittees' 2021 Comments attach. B ¶ 5 (Affidavit of Stuart A. McKernan).

‘potential’ or a ‘capability’ to discharge,” *id.* at 38, and that “the CWA regulates only an outfall that actually discharges or proposes to discharge,” *id.* at 50.

D. *Remand of the 2022 Permit*

Without ruling on the merits of the issues raised in the petition, the Board remanded the 2022 Permit on the grounds that the public had lacked an adequate opportunity to comment on certain discharge data from 2021 that the Region had considered in issuing the 2022 Permit. *Triad I*, 18 E.A.D. at 808-10. In the course of briefing before the Board, the Region revealed that it had “considered” discharge data from 2021 that post-dated the close of the comment period for the Draft Permit and that it had “inadvertently omitted” the data from its Response to Comments document. *Id.*; see EPA Region 6’s Response to Petition for Review, *In re U.S. Dep’t of Energy & Triad Nat’l Sec., L.L.C.*, NPDES Appeal No. 22-01, at 4 n.5 (July 7, 2022). The Board remanded the 2022 Permit, concluding that “a remand to the Region in this matter is necessary because the public, including Petitioners, lacked an adequate opportunity to comment on critical Outfall 051 discharge data that the Region relied upon in making its final permitting decision, or to address the Region’s reliance on that data in a petition filed with the Board.” *Triad I*, 18 E.A.D. at 808-09.

On remand, the Region sought comments on 2021-2022 discharge data from six outfalls at the Laboratory, including Outfall 051. See *Public Notice – Los Alamos National Lab, NPDES Permit No. NM0028355*, at 2 (Feb. 25, 2023) (A.R. I.2) (opening public comment period from February 25 through March 27, 2023); *Public Notice – Los Alamos National Lab, NPDES Permit No. NM0028355* at 2 (Mar. 7, 2023) (A.R. I.3) (extending public comment period for eleven days, through April 7, 2023). Petitioners and Permittees each submitted comments. See Concerned Citizens for Nuclear Safety et al., *Comments on Proposed Renewal of NPDES Permit # NM0028355* (Apr. 7, 2023) (A.R. I.6) (“Petitioners’ 2023 Cmts.”); Los Alamos Nat’l Lab’y, *Permittees’ Comments and Data in Support of Reissuance of NPDES Permit No. NM0028355* (Apr. 5, 2023) (A.R. I.5 enclosure 1) (“Permittees’ 2023 Cmts.”).

Petitioners’ comments reiterated their view that the Region lacks authority to issue an NPDES permit for “possible” discharges. See Petitioners’ 2023 Cmts. at 6. Petitioners also commented that in their view the Treatment Facility “could operate indefinitely without discharging” and that “[t]he idea that Outfall 051 would be an ‘integral component’ of [Permittees’] operations is so vague that it is not clear how it could be confirmed or, if so, how that would be significant.” *Id.* at 6-7. Petitioners also expressed concern regarding what they perceived to be a lack of specificity in the permit application regarding when future discharges at the

outfall would take place and what the volume of those discharges would be. *See id.* at 5, 11. With respect to the actual discharges from Outfall 051 in the record, Petitioners characterized Permittees' use of the outfall as strategic and maintained that "the recent discharges must be viewed as calculated to influence the Region's decision." *Id.* at 13. Petitioners reiterated their view that Permittees' ultimate goal in seeking NPDES permit coverage for Outfall 051 was to maintain the RCRA wastewater treatment unit exemption for the Treatment Facility and that Permittees' reasons for increasing their use of Outfall 051 were related to that goal. *See id.* at 4, 8-9, 14.

Permittees focused their comments on the 2021–2022 discharge data, indicating that the data confirm that discharges are taking place at Outfall 051 "on an ongoing basis" and that the estimates of discharge volumes they provided in their permit application were consistent with the actual discharge data.⁶ Permittees' 2023 Cmts. at A-4 through A-5.

E. *The Final Permit and Petition for Review*

After considering the comments submitted on the additional discharge data, the Region issued the Final Permit with no material changes from the 2022 Permit. Region 6, U.S. EPA, *Authorization to Discharge, NPDES Permit No. NM0028355* (Sept. 28, 2023) (A.R. J.1 & J.2) ("Final Permit"). The Region revised the Response to Comments document by adding responses to address the additional comments received and included that document in the administrative record for the Final Permit. Resp. to Cmts. at 76.

On October 30, 2023, Petitioners filed a petition for review with the Board challenging the Final Permit with respect to Outfall 051.⁷ Petition for Review

⁶ Permittees submitted daily flow volumes for each of the twenty-nine days that discharges occurred at Outfall 051 during 2021 and 2022. Permittees' 2023 Cmts. attach. B.

⁷ The Board's 2022 remand order states, "Anyone dissatisfied with the Region's decision on remand must file a petition seeking Board review in order to exhaust administrative remedies under 40 C.F.R. § 124.19(I)." *Triad I*, 18 E.A.D. at 817 n.10. In their petition, Petitioners state that they seek review of Permit No. NM0028355 issued on March 24, 2022, describing the petition as "the second installment" of the Board's review of the Los Alamos National Laboratory permit. Petition for Review under 40 C.F.R. § 124.19, at 1 (Oct. 30, 2023). As noted above, in response to the Board's remand, the

under 40 C.F.R. § 124.19 (Oct. 30, 2023) (“Pet.”). Notably, Petitioners challenge the Region’s authority under the CWA to issue *any* NPDES permit for the discharge of treated wastewater at Outfall 051 but do not challenge the Region’s authority to permit discharges from other outfalls, nor do they challenge the Final Permit’s specific terms and conditions. *See id.*

V. ANALYSIS

Petitioners continue to characterize Outfall 051 as non-discharging and argue that the Region lacks authority to permit a non-discharging outfall. Pet. at 12-13. They also continue to argue that the Permittees have not submitted a proposal to discharge and that Outfall 051 has only a potential to discharge. *See id.* at 14-15. With respect to the actual discharge data in the record from Outfall 051, Petitioners argue that Permittees deliberately increased discharges at the outfall to “influence this litigation.” *Id.* at 16.

Petitioners also argue that the Region has not adequately explained its reasoning for permitting the outfall. They contend that the Region’s explanations have shifted over time and that the Region’s legal theories are “incomplete, dubious, and sometimes contradictory.” *Id.* at 17. In Petitioners’ view, the record does not demonstrate considered judgment by the Region in authorizing the discharges. *Id.* at 20; *see also id.* at 16-17.

Region issued a replacement permit on September 28, 2023, that does not differ materially from the 2022 Permit.

Permittees argue that the petition is defective on the grounds that Petitioners have failed to appeal the replacement permit—that is, the 2023 Final Permit. Permittees’ Response to Petition for Review at 23-25 (Dec. 13, 2023). In their reply brief, Petitioners clarify that they seek review of the 2023 Final Permit, explaining, “Petitioners had assumed that a reference to the original draft permit (dated March 2022) would include successive drafts in that series, including the draft issued in September 2023. Both bore the number NM0028355.” Reply Brief for Petitioners at 27 (Jan. 11, 2024). Based on the filings, it is clear that the Region and the Permittees understood Petitioners to be challenging the 2023 Final Permit. Both the Region and the Permittees submitted response briefs addressing the merits of arguments raised by Petitioners in their petition, and we conclude that Petitioners’ reference to the 2022 Permit did not result in any confusion on the part of the Region or Permittees. Therefore, the Board interprets the petition for review to be a challenge to the 2023 Final Permit with respect to Outfall 051.

As discussed below, the administrative record contains ample evidence demonstrating that Outfall 051 has been used for discharges in the past and that Permittees have sought approval to continue discharging there in the future. Petitioners have not pointed to any legal authority that would require Permittees to submit more information than they already have regarding future plans for intermittent discharges at Outfall 051. We conclude that the record demonstrates considered judgment by the Region in issuing the Final Permit.

Because Petitioners have not demonstrated that review is warranted on any of the grounds presented, we deny the petition for review.

A. Petitioners Fail to Establish that the Region Clearly Erred or Abused Its Discretion in Issuing an NPDES Permit that Authorizes Discharges at Outfall 051

1. The CWA and Its Implementing Regulations Authorize the Region to Issue a Permit for the Discharge or Proposed Discharge of Pollutants

The CWA established the NPDES permitting program as its primary means of authorizing discharges of pollutants from a point source into waters of the United States. *See* CWA § 402, 33 U.S.C. § 1342; *see also* CWA § 502(12), 33 U.S.C. § 1362(12) (defining “discharge of a pollutant”). A person who “discharges or proposes to discharge” pollutants has a “duty to apply” for an NPDES permit prior to the date on which the discharge will commence. 40 C.F.R. § 122.21(a).

Section 402(a) of the CWA provides that the permit issuer may issue an NPDES permit for the discharge of pollutants after providing an opportunity for a public hearing, provided the discharge meets the applicable requirements of the Act. CWA § 402(a), 33 U.S.C. § 1342(a).

2. Actual Discharges Have Taken Place at Outfall 051 in the Past

To the extent Petitioners continue to argue that the Region lacks authority to permit Outfall 051 on the grounds that the outfall is non-discharging, that the Permittees have not submitted a proposal to discharge, or that Outfall 051 has only a potential to discharge, those arguments lack merit based on the record in this matter. The record contains ample evidence, including the additional discharge data from 2021 and 2022, demonstrating that actual discharges have taken place at

Outfall 051, including during 2019 through 2022. *See, e.g.*, Resp. to Cmts. at 73, 83 tbl.3.⁸

Petitioners have questioned why Permittees have increased discharges at Outfall 051 in recent years given that the Laboratory has other options for managing its treated wastewater. Petitioners' 2023 Cmts. at 3; *see also* Pet. at 3. Permittees have explained that, while other methods for managing wastewater do exist, those options are not always available, for example when the evaporation equipment is undergoing maintenance or malfunctions. Permittees' 2021 Cmts. at 13. In addition, Permittees have explained that the outfall is "integral" to the Laboratory's operations and that it will continue to discharge at Outfall 051 under certain circumstances, such as when the volume of wastewater being treated at the Treatment Facility is high. *Id.* at 13-14.; *see also* Permittees' Response to Petition for Review at 6 (Dec. 13, 2023) ("Permittees' Resp. Br.").

Petitioners dispute the relevance of the 2021–2022 discharge data, arguing that "the Board should give no weight to the 2021 discharges" because, in Petitioners' view, "Permittees have no innocent explanation for the sudden change in discharge protocol" and that "the 2021 discharges were motivated to influence the outcome of this litigation." Pet. at 16. Petitioners also contend that the Permittees seek NPDES authorization for discharges at Outfall 051 as a means of avoiding regulation under RCRA. *See* Pet. at 5.

Petitioners misapprehend the relevance of the 2021-2022 discharge data. The data demonstrate that actual discharges have been taking place, and they have been taking place recently. Permittees submitted an application seeking approval to continue discharging intermittently at Outfall 051, and Petitioners have not pointed to anything that would have required the Region to delve further into the reasoning behind Permittees' use of the outfall given the circumstances of this case. As the Region observed, "The rules do not set standards or restrictions on the rationales for discharge." Resp. to Cmts. at 95. And Petitioners fail to identify

⁸ Given the record of discharges from Outfall 051 in this case, the Board has no occasion to address Petitioners' arguments regarding the ability of a permitting authority to issue an NPDES permit for hypothetical discharges or a non-discharging outfall.

anything in the CWA or its implementing regulations that would prohibit the issuance of an NPDES permit if doing so might trigger a RCRA exemption.⁹

3. *Petitioners Provide No Basis for Their Argument that the Region Must Require More Certainty Regarding the Timing and Extent of Future Discharges*

Petitioners acknowledge that under the applicable regulations a person who “discharges or proposes to discharge” has a duty to apply for an NPDES permit. 40 C.F.R. § 122.21(a). For example, Petitioners state, “One may obtain a permit in advance of a discharge if one ‘proposes’ to discharge, *i.e.*, states that in the future a discharge will occur.” Reply Brief for Petitioners at 8 (Jan. 11, 2024) (“Reply Br.”). But Petitioners assert that a permitting authority may not issue a permit unless a degree of certainty exists as to the plan for proposed discharges. *See* Pet. at 14-15; *see also* Reply Br. at 8. Despite taking that position, Petitioners do not point to any legal authority to support it, nor do they explain how a permitting authority would determine what degree of certainty is enough.

According to Petitioners, “A ‘proposed discharge’ that may be the basis for an application is not the same as a ‘possible’ or ‘potential’ discharge. It has a date. It is a discharge on a future date or time frame, not an imaginary or hypothetical discharge.” Reply Br. at 8 (citing 40 C.F.R. § 122.21). Thus, as Petitioners’ argument goes, Permittees’ application here was lacking because it “does not have a date or time frame for a future discharge” from Outfall 051 and, therefore, the Region clearly erred in issuing the permit for the discharge of treated wastewater at Outfall 051. *Id.* We disagree.

In accordance with the regulations contained at 40 C.F.R. § 122.21(d), Permittees submitted an application for a replacement permit at least 180 days

⁹ In addition, as the Region explained in response to Petitioners’ comments, Permittees’ “compliance with RCRA is outside the scope of this NPDES permitting action.” *E.g.*, Resp. to Cmts. at 11. And, according to the Region, because the RCRA program is administered by the State of New Mexico, any determinations as to the applicability of an exemption will be determined independently at the state level, not by EPA. *See* Region’s Resp. Br. at 25. Furthermore, the Region notes that the wastewater treatment unit exemption “is not a required part of the federal minimum requirements” for a state-administered RCRA program, so a state may choose to not include the exemption, or a state could choose to remove it from its program. *Id.* at 25-26.

before the previous permit expired.¹⁰ In that application, Permittees sought renewed authority to discharge at Outfall 051 in anticipation that they would continue to discharge from that outfall intermittently in the future. As discussed in Part IV.B, above, Permittees submitted all the information required on Form 2C, including estimates of the frequency, duration, and flow rates for the intermittent discharges. *See* Form 2C, at 2; *see also* Outfall 051 Fact Sheet at 5-6, 7 tbl.4; Notice of Planned Change & Updated Fact Sheet attach. 1, at 5-6, 7 tbl.4.

The Region explained that it issued the Final Permit and established permit requirements for Outfall 051 based on information provided by Permittees, including the information Permittees provided on Form 2C of the permit application and the Laboratory's Discharge Monitoring Reports. *Resp. to Cmts.* at 95, 98; *see also* Region's *Resp. Br.* at 3. Petitioners have not pointed to any requirement under the CWA or its implementing regulations that would, in the circumstances of this case, require the Region to seek additional information.

Petitioners argue that Permittees should have specified precisely how the outfall will be used in the future, faulting the Region for failing to require Permittees to identify "a date or time frame for a future discharge." *Reply Br.* at 8. To the extent Petitioners contend that the permit application does not constitute a "proposal to discharge," that argument is inapposite. *See id.* at 9. Permittees did not submit a proposal for hypothetical discharges at an outfall that has never been used—they applied for authority to continue discharging intermittently at an outfall that they have been using regularly, including over the past few years. Permittees submitted a complete application consistent with the requirements of the NPDES regulations, including all the information required on Form 2C, and Petitioners have not pointed to any legal authority that would require Permittees to submit any further details. As a practical matter, given that the Laboratory's NPDES permit is issued for a five-year term, requiring Permittees to specify in advance exactly when the intermittent discharges will take place simply is not feasible and would undoubtedly hamper the Laboratory's operational flexibility.

The Board recognizes that Petitioners are dissatisfied with the level of detail they have received regarding how and when the outfall will be used in the future, but Petitioners' desire for additional information does not render the Region's

¹⁰ The 2014 permit, which was modified in 2015, was due to expire on September 30, 2019. Permittees submitted a completed application for a replacement permit on March 25, 2019. *See* Permit Application at 2 (signature page dated Mar. 25, 2019).

permitting decision clearly erroneous. Issuing a permit authorizing intermittent discharges necessarily involves a degree of uncertainty. Permit issuers must evaluate the information they have in front of them and, as warranted, request whatever additional detail is needed. But, as the Region explained, requiring a permit issuer to evaluate the likelihood that each future discharge will occur and then issuing or denying a permit based on that evaluation would put permitting authorities in an “impossible position.” Region’s Resp. Br. at 17. Petitioners fail to identify any legal requirement that would have compelled the Region to require the Permittees to provide more detail than they did.

Accordingly, the Board concludes that Petitioners have not demonstrated that the Region clearly erred or abused its discretion in issuing the Final Permit.

B. Petitioners’ Argument that the Region Failed to Exercise Considered Judgment Lacks Merit

It is a long-standing principle that “[w]hen evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised ‘considered judgment.’” *Triad I*, 18 E.A.D. at 799 (citing *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997)). As a whole, the record must demonstrate that the permit issuer “duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all information in the record.” *In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001). In *Triad I*, we emphasized that “[t]he response to comments document should contain a permit issuer’s final rationale for its decisions, because this ‘ensures that interested parties have an opportunity to adequately prepare a petition for review.’” 18 E.A.D. at 811 (citing *In re Springfield Water & Sewer Comm’n*, 18 E.A.D. 430, 491 (EAB 2021)); *see also In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 147 (EAB 2006); *In re City of Marlborough*, 12 E.A.D. 235, 245 (EAB 2005).

Petitioners argue that the record in this instance does not demonstrate considered judgment by the Region, pointing to what Petitioners view as the Region’s “inability to articulate its explanation” for permitting Outfall 051. Pet. at 20; *see also id.* at 16. According to Petitioners, “Critically, despite this Board’s firm request [in *Triad I*] for an explanation of the change in discharge practices, Region 6 did not in 2022 and does not in 2023 set forth its understanding.” *Id.* at 16-17. We disagree.

As an initial matter, Petitioners' argument reflects a misunderstanding of the Board's remand in *Triad I*. We remanded the 2022 Permit for the Region to provide the public with an opportunity to comment on Outfall 051 discharge data from 2021, to consider any comments received, to revise its Response to Comments document, and to take further action, as appropriate, in reissuing its permit decision. *Triad I*, 18 E.A.D. at 817. Despite Petitioners' characterization of the proceeding, the Board did not remand for the Region to provide "an explanation of the change in discharge practices." Pet. at 16-17.

In the Response to Comments document, the Region explained the basis for issuing the permit, pointing out that section 402(a)(1) of the CWA "allows EPA to issue 'a permit for the discharge of any pollutant.'" Resp. to Cmts. at 10 (quoting 33 U.S.C. § 1342(a)(1)). The Region noted that its "authority to issue permits for potential or future discharges is evident in the structure" of the NPDES permitting program and that "it is generally illegal to discharge without a permit." *Id.* (citing CWA §§ 301(a), 402(a), 33 U.S.C. §§ 1313(a), 1324(a)). The Region explained that "facilities must have a permit in place before they discharge" and that authorization of discharges that may be infrequent or irregular—including at Outfall 051—was appropriate given that Permittees sought permit coverage for those discharges. *Id.* at 10-11.

Following remand, the Region revised the Response to Comments document to respond to the comments received on the 2021–2022 discharge data. With respect to comments on the relevance of the 2021–2022 discharge data, the Region explained:

[There is] evidence of actual discharges from at least some of these Outfalls [at the Laboratory]. Though actual discharges are not required for permit authorization, the history of actual discharges from Outfall 051 is directly responsive to public comments made during the 2020 comment periods, which included inaccurate assertions that Outfall 051 was non-discharging and should therefore be denied permit authorization.

Id. at 92; *see also id.* at 100.

The Region further explained that flow estimates provided by Permittees in their permit application were consistent with the actual discharge data from 2021–2022:

In their application, [Permittees] used estimated values for flow per the Form 2C requirements and instructions. EPA can confirm that in 2021 and 2022, the flow estimated values used in their permit

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application were consistent with the sixteen (16) months of discharges in 2021-2022, including twenty-nine (29) days that Outfall 051 actually discharged.

Id. at 95.

In response to Petitioners' comments that Permittees had failed to explain why Outfall 051 was being used more frequently and that Permittees had offered differing explanations for the outfall's use, the Region stated that, as long as applicable requirements are met, nothing in the CWA or its implementing regulations requires a permit applicant to provide justification for, or explain its rationale for, discharging at a given location:

[N]either Section 402(a)(1) nor the NPDES permitting regulations at 40 C.F.R. [§] 122 require permit applicants to provide the type of justification for discharge that the commenter finds lacking. Section 402(a)(1) provides that EPA may issue a permit for discharge following public comment, so long as applicable requirements of the Clean Water Act are met. Commenters seem to imply that because permittees have, over time, offered different rationales for discharge, EPA may not grant NPDES permit authorization. However, commenters do not cite to any requirement of the Clean Water Act or applicable regulations to support this claim.

Id. at 93.

The Region further explained that the NPDES regulations do not prohibit permit applicants from "changing the basis of their request for NPDES permit authorization" and that Petitioners' comments did not "identify any requirement of the NPDES permitting regulations that would cause the loss of permit authorization due to an increased number of permitted discharges." *Id.*

With respect to Petitioners' comment that Permittees did not need to use Outfall 051 because they had other options for managing treated wastewater from the Treatment Facility, the Region responded that Petitioners had not cited to any regulatory provision that requires Permittees to exhaust all other options before discharging at Outfall 051. *Id.* at 94.

In response to Petitioners' comments that "[Permittees] have changed their operating protocol in an effort to influence the Region's permit decision," the Region responded that the regulations for permit applications are set forth at 40 C.F.R. § 122.21 and that Petitioners, in their comment, did not cite to any regulatory requirements that the application fails to satisfy. *Id.* at 94-95. The

Region further explained that it had not identified any requirement that would prohibit permit applicants from amending the basis of their request for permit authorization, that would require applicants to “justify the necessity of operational changes,” or that would “cause the loss of permit authorization due to an increase of permitted discharges.” *Id.* at 95.

We conclude that the record demonstrates that the Region duly considered the issues raised during the comment period and reached a permitting decision that is rational in light of all of the information in the record. We therefore reject Petitioners’ argument that the record demonstrates a lack of considered judgment.

VI. CONCLUSION

For the reasons stated above, the Board denies the petition for review.¹¹

So ordered.

¹¹ Petitioners requested that the Board hold oral argument in this matter. Pet. at iv. In their response briefs, the Region and Permittees each stated they believe the issues before the Board are capable of resolution on the briefs, without oral argument. Region’s Resp. Br. at 39; Permittees’ Resp. Br. at 25-26. The Board agrees with the Region and Permittees on this point and has concluded that oral argument would not materially assist its deliberations. Petitioners’ request for oral argument is therefore denied.

We have considered all of the issues raised and arguments made in the petition and deny review as to all of them, regardless of whether we specifically discussed the issue or argument in this decision.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Review* in the matter of U.S. Department of Energy and Triad National Security, L.L.C., NPDES Appeal No. 23-04, were sent to the following persons by email:

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January 17, 2025

Mr. Lindsay Alexander Lovejoy Jr.
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RE: 25-9506, Concerned Citizens for Nuclear Safety, et al v. EPA, et al
Dist/Ag docket: 23-04

Dear Counsel:

Your petition for review has been docketed, and the case number is above. **Within 14 days** from the date of this letter, Petitioner's counsel must electronically file:

- **An entry of appearance and certificate of interested parties** per 10th Cir. R. 46.1(A) and (D).
- **A docketing statement** per 10th Cir. R. 3.4.

In addition, any counselled entities that are required to file a Federal Rule of Appellate Procedure 26.1 disclosure statement must do so **within 14 days of the date of this letter**. All parties must refer to Federal Rule of Appellate Procedure 26.1 and Tenth Circuit Rule 26.1 for applicable disclosure requirements. All parties required to file a disclosure statement must do so even if there is nothing to disclose. Rule 26.1 disclosure statements must be promptly updated as necessary. *See* 10th Cir. R. 26.1(A).

Also within 14 days, Respondent's counsel must electronically file an entry of appearance and certificate of interested parties. **Attorneys that do not enter an appearance within the specified time frame will be removed from the service list.**

Within 40 days from the date of service of the petition for review, the respondent agency shall file the record or a certified list. *See* Fed. R. App. P. 17. If a certified list is filed, the entire record, or the parts the parties may designate, must be filed on or before the deadline set for filing the respondent's brief. *See* 10th Cir. R. 17.1.

We have served the petition for review on the respondent agency via electronic notice using the court's ECF system. Petitioner must serve a copy of the petition for review on

all parties, other than the respondent(s), who participated in the proceedings before the agency. *See* Fed. R. App. P. 15(c).

The [Federal Rules of Appellate Procedure](#), the [Tenth Circuit Rules](#), and [forms](#) for the aforementioned filings are on the court's [website](#). The Clerk's Office has also created a set of [quick reference guides](#) and [checklists](#) that highlight procedural requirements for appeals filed in this court.

Please contact this office if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chris Wolpert', with a long horizontal flourish extending to the right.

Christopher M. Wolpert
Clerk of Court

cc: James T. Banks
Correspondence Control Unit
Maureen Dolan
Merrick Garland
Stephen Jochem
Maxine Martin McReynolds
Jay Przyborski
Renea Ryland
Jessica Zomer

CMW/jjh