BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTON AGENGY
WASHINGTON, D.C.

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

EPA REGION 6's RESPONSE TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

Pursuant to 40 C.F.R. § 124.19(b)(2), U.S. Environmental Protection Agency, Region 6 ("EPA") respectfully submits to the Environmental Appeals Board ("EAB" or "the Board") this Response to the Petition for Review filed by Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace, Chapter #63 (collectively, "Petitioners" or "CCNS"), in connection with National Pollutant Discharge Elimination System ("NPDES") Permit No. NM0028355 ("2023 Permit") issued by EPA under the Clean Water Act ("CWA") for discharges from the Los Alamos National Laboratory ("LANL" or "the Facility" or "Permittees") on September 28, 2023.

Petitioners request denial of permit authorization for one outfall: Outfall 051. Petitioners do not specifically identify the issues presented for EAB review, but EPA believes their arguments can be summarized as follows:

First, Petitioners assert that EPA was required to deny permit authorization for discharges from Outfall 051 because the CWA does not allow EPA to issue NPDES permits for discharges that have not occurred or are not certain to occur in the future. They also assert that EPA was required to deny authorization for discharges from Outfall 051 because LANL's rationale for the discharges is insufficient or changed over time. In addition, the Petitioners assert that NPDES permit authorization for discharges from Outfall 051 triggers state RCRA permitting exemptions, and consequently EPA is required to deny NPDES permit authorization. Petitioners also argue that EPA's issuance of permit coverage for Outfall 051 must be overturned because EPA's Response to Comments document does not reflect EPA's considered judgement.

EPA disagrees with all four of these assertions. EPA disagrees with the first three because they are not supported by the CWA or its implementing regulations. EPA regulations require Petitioners to identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. 40 C.F.R. § 124.19(a)(4). Petitioners provide no citations to the CWA or its regulations in support of their contentions that the CWA does not allow EPA to issue NPDES permits for discharges that have not occurred or are not certain to occur in the future, or for discharges for which a permittee's rationale for the discharges is insufficient or has changed over time, or that EPA must deny NPDES permit authorization if such authorization would trigger a state RCRA permitting exemption.

Petitioners' fourth assertion, that EPA's Response to Comments document does not reflect EPA's considered judgement, is not supported by the administrative record in this matter. EPA provided a line-by-line response to Petitioners' public comments that fully addresses each of Petitioners' claims in detail. EPA's Response to Comments document clearly explained that EPA had determined to issue permit coverage for discharges from Outfall 051 in response to a complete and accurate application submitted to EPA by LANL in satisfaction of the regulatory requirements for such applications at 40 C.F.R. parts 122 and 124. *See* Attachment A (Attachment A is the Response to Comments and will be referred to as "RtC.") at 91-102.

As noted in the EAB's guide to practice before the Board, "[t]he permitting process begins when a person or entity files a permit application seeking authorization to release or discharge pollutants in a particular manner. The permit applicant (Permittees) provides information with its permit application detailing, among other things, information about the site or source to be permitted, including the relevant processes and the type and quantity of the

pollutants to be released or discharged." ENVTL. APPEALS BD., U.S. ENVTL. PROT. AGENCY, PUB. NO. 100B23001, GUIDE TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ENVIRONMENTAL APPEALS BOARD 12 (2023) ("EAB, GUIDE TO EAB").

EPA's Response to Comments document explained that LANL's submittal of a complete and accurate application constituted a request for NPDES authorization for discharges from Outfall 051. RtC. at 92-93 & 100. Form 2C of the application included information regarding the location of the outfall and its discharges, effluent characteristics, treatment, and estimated values for flow, in accordance with the Form 2C requirements and instructions (*See* Att. I). In drafting the permit, EPA used the information provided by LANL for Outfall 051 in Form 2C of the application, in addition to the actual discharge data for Outfall 051 submitted to EPA by LANL in its Discharge Monitoring Reports, to determine the appropriate permit requirements to be included for Outfall 051 in NPDES Permit No. NM0028344. RtC. at 95 & 98.

Although the discharges from Outfall 051 are actual and anticipated to continue in the future, EPA does not concede that it has no authority to issue NPDES permit coverage for possible, future discharges, even if those discharges may be infrequent or uncertain. As discussed in EPA's Response to Comments, CWA § 402(a)(1) allows EPA to issue "a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges for permitting purposes and does not limit EPA's authority on that basis. Furthermore, EPA's authority to issue permits for potential or future discharges is evident in the structure of the CWA's NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. *See* CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313(a) and 1342(a). Therefore, to comply with the Act, facilities must have a permit in place

before they discharge, which necessarily means that EPA must at times issue permits for discharges that are not yet actual. RtC. at 10-11, 31-36, 38, 55-60, 72-74, 93 & 97.

In cases such as this, where EPA addressed in its Response to Comments document an issue raised in the petition, 40 C.F.R. §124.19 (a)(4)(ii) requires that the petitioner "must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii). As explained by the EAB in its guide to practice before the Board, "[I]t is not sufficient to simply repeat arguments made in public comments without addressing how the permit issuer responded to those comments and explaining why that response is clearly erroneous or otherwise warrants review." EAB, GUIDE TO EAB at 18. Yet, that is exactly what Petitioners do. The Petition for Review simply repeats arguments already made by Petitioners in their public comments, most of which amount to speculation or opinion without any legal or factual support provided, and requests new analyses of issues that EPA addressed in detail in the Response to Comments. The Petition does not substantively address EPA's responses to the comments or put forth any citations to the CWA or its implementing regulations showing that EPA's authorization of Outfall 051 is clearly erroneous, or otherwise warrants EAB review.

EPA respectfully submits that Petitioners have not met their burden of showing a clearly erroneous finding of fact or conclusion of law in EPA's reissuance of the 2023 Permit, nor have Petitioners identified any exercise of discretion or policy consideration that warrants the Board's review.

II. ISSUES PRESENTED FOR REVIEW

1. Does any uncertainty related to the discharges from Outfall 051 render EPA's issuance of NPDES permit authorization for that outfall clearly erroneous?

2. Does LANL's rationale for discharge from Outfall 051, or the fact that LANL's rationale for discharge has changed over time, render EPA's issuance of NPDES permit authorization for that outfall clearly erroneous?

3. Is EPA's issuance of NPDES permit authorization clearly erroneous because such authorization may trigger an exemption from state RCRA permitting requirements?

4. Does EPA's Response to Comments document demonstrate a lack of considered judgement on the part of EPA such that EPA's issuance of permit authorization for Outfall 051 should be vacated?

III. FACTUAL BACKGROUND

LANL is a United States Department of Energy facility operated by Triad National Security, LLC (collectively, "Permittees") in New Mexico, with the primary mission of reducing nuclear danger through "stockpile stewardship," along with multidisciplinary research to address civilian issues such as health, national infrastructure, energy, education, aeronautics, and the environment. EPA issued an NPDES permit to LANL in 2014, which was administratively continued on September 30, 2019.

On March 28, 2019, EPA received Permittees' application for permit reissuance. EPA held an initial sixty-day public comment period on the draft permit, beginning on November 30, 2019, and extended to March 31, 2020. A public hearing was held on January 15, 2020. Upon request by Permittees, EPA reopened public comment for thirty days beginning on January 30,

2021. In their application, LANL requested, in part, reissuance of authorization for Outfall 051, the outfall at issue here, which is described in the application as discharging treated effluent from the Radioactive Liquid Waste Treatment Facility ("RLWTF"). The RLWTF receives and treats radioactive liquid waste process, cooling, and stormwater from various generator facilities located throughout LANL. Attachment ("Att.") B at 5. In their public comments, LANL explained that while the outfall would indeed continue to serve as a back-up alternative when evaporation equipment is unavailable, in the future it would also be used "even when evaporation equipment is online but influent volume is of a magnitude that operational efficiency makes it advisable [to use the outfall as well.]" RtC. at 45.[1]

EPA issued the 2022 Permit on March 30, 2022, authorizing LANL to discharge from eleven sanitary and/or industrial outfalls.

On May 9, 2022, Petitioners filed a petition for review under 40 C.F.R. § 124.19(a) asking the Board to find that EPA has no legal basis for permitting six of those outfalls and that those outfalls must therefore be denied permit coverage.[2]

The 2022 Petition for Review almost entirely concerned Outfall 051, though it also included one offhand request for denial of permit authorization for five additional outfalls. The

[1] The application also described "future improvements" to the RLWTF including a newly constructed treatment facility. The application states that the new facility is not expected to impact outfall location, flow rates, or discharge frequency and that LANL will submit a Notice of Change prior to start of operations and impacts to the outfall. As of the date of this filing, EPA has not received the referenced Notice of Change. Att. B at 7.

[2] In 2017, Petitioners requested termination of permit coverage for Outfall 051 under 40 C.F.R. § 124.5(a). EPA denied the request, and Permittees appealed the denial to the Board. The Board denied the appeal, finding no clear error or abuse of discretion in EPA's actions. *See In re Los Alamos Nat'l Sec. LLC*, 17 E.A.D. 586 (EAB 2018). Petitioners then asked the Tenth Circuit for review of the Board's denial. The Tenth Circuit dismissed the appeal on jurisdictional grounds, finding that Petitioners lacked standing. *See Concerned Citizens for Nuclear Safety, Inc. v. EPA*, No. 18-9542 (10th Cir. April 23, 2020). The United States Supreme Court denied Petitioners' writ of certiorari. *Concerned Citizens for Nuclear Safety, Inc. v. EPA*, 141 S. Ct. 1464, 209 L. Ed. 2d 180 (2021).

2022 Petition for Review contained factual errors and misleading omissions regarding discharges from the challenged outfalls. In correcting Petitioners' false statements, EPA noted,

> In EPA's Response to Comments on the proposed 2022 Permit reissuance, EPA specifically noted the discharges from Outfall 051 in 2019 and 2020, but inadvertently omitted 2021 and 2022 discharges. Att. A at 11. EPA considered all discharges from Outfall 051 in its final decision, including 2021 and 2022 discharges that occurred prior to permit issuance, and, accordingly, included in the administrative record all discharge monitoring reports received prior to the 2022 Permit reissuance on March 30, 2022.[3]

Resp. to Pet. at 4 n.5.

Over the following months, Petitioners replied to EPA's Response, and the Petitioners and Permittees filed cross-motions regarding Permittees' request to file a surresponse. Then, on December 28, 2022, the Board remanded the 2022 Permit to the Region, finding that EPA first revealed in a footnote in its Response Brief that it relied on Outfall 051 discharge data from 2021 and that neither Petitioners nor the public had an adequate opportunity to comment on that data during the permitting process or to address that data in a petition for review before the Board. In addition, the Board viewed the Region's mention of the 2021 Outfall 051 data for the first time in its Response Brief as part of the Region's "shifting articulation of the rationale for the permitting decision with respect to Outfall 051." Remand Order, NPDES Appeal No. 22-01 at 813 ("Remand Order"). The Board stated that "[t]he nature and import of the 2021 discharge data, upon which the Region states in its Response Brief it relied, is not clear and is now in dispute." Remand Order at 812. In a footnote, the Board added, "Anyone dissatisfied with the Region's decision on remand must file a petition seeking Board review in order to exhaust

[3] In EPA's September 1, 2022, Response to Order Requesting Clarification, EPA stated that the recorded search parameters of a March 8, 2022, report clearly indicated that EPA reviewed 2021, but not 2022 data prior to issuance of the 2022 permit. *See, e.g.*, Resp. to Order.

administrative remedies under 40 C.F.R. § 124.19(l). All pending motions are denied as moot." Remand Order at 817 n.10.

In response to the Board's Remand Order, on February 25, 2023, the Region provided public notice and opportunity to comment on the 2021 Outfall 051 data. In addition, to provide the public with an opportunity to review and comment on any additional discharge data that the Region might rely on in reissuing the Permit in response to the Remand, the Region provided public notice and opportunity for comment on 2022 Outfall 051 discharge data, as well as 2021-2022 discharge data for the additional five outfalls that were the subject of the Petitioners' appeal of the 2022 Permit, *i.e.*, Outfalls 13S, 05A055, 03A160, 03A027, and 03A113. The 30-day public comment period was set to run from February 25, 2023, until March 27, 2023. On March 7, 2023, the Region re-published some of the data because of a duplication error and extended the comment period until April 7, 2023. The Region received comments only from the Permittees and the Petitioners.

Region 6 reissued the permit on September 28, 2023 (Att. K), and, as required by 40 C.F.R. § 124.17(a), concurrently issued a Response to Comments. In their public comments, CCNS reiterated the Board's concern, as stated in the Remand Order, that EPA had not articulated the role of 2021 discharges from Outfall 051 in its permitting decision, nor how the outfall's changing role in facility operations impacted EPA's decision-making. As explained in greater detail in section D.1 below, EPA's Response to Comments states,

> The EPA considered the import of the 2021 DMR data from Outfall 051 to be the fact that it evidences actual discharges from an Outfall that Petitioners argued EPA has no authority to permit because the Outfall does not discharge. The import of the data for EPA was not related to the particulars, e.g., the amounts, of the pollutants discharged, nor as to whether Outfall 051 serves as a backup outfall or an "integral component" of facility operations…. 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.

RtC. at 100.

The Petition for Review challenges Outfall 051 and requests the Board vacate and remand "the permit." The Petition does not identify specific issues for Board review,[4] but as best EPA can tell, the Petition seems to base the request to vacate and remand on (1) the Petitioners' perceived uncertainty of the discharges, (2) the Permittees' rationale and whether that rationale has changed over time, (3) the potential impact of NPDES permit authorization on the Permittees' requirements under the state RCRA permitting program, and (4) the assertion that EPA's Response to Comments document demonstrated a lack of considered judgement on the part of EPA in making its permit decision. The Petition casts doubt on the bases for actual discharges from Outfall 051 and, at the same time, questions the existence and possibility of actual discharges. EPA believes these two positions cannot be reconciled.

For ease of reference, EPA provides the table below, which shows flow totals for each month in 2019-2022 when discharges occurred:[5]

[4] The Petition does include as background an enumerated list of issues from the 2022 appeal of this permit. The current, active petition, which does not contain an enumerated issues list, raises some but not all of the same issues. This lack of clarity required EPA to exercise some degree of interpretation in determining which issues are currently before the Board. 40 C.F.R. § 124.19(a)(4)(i) provides that, "…a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(a)(4)(ii) further requires petitioners to demonstrate, "…by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period…." And, "if the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to § 124.17, then petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review." *Id*.

[5] In many cases, LANL discharged more than once per month. LANL provided in their public comments a list of individual discharges from Outfall 051 from 2019-2023. RtC. at 83. Because EPA's NPDES discharge database maintains only the monthly average and daily maximum, EPA is providing a table with information presented on a monthly basis. Att. C at 44-45 & Att. D. at 4.

Location ID	Month Reported	Parameter Name	Monthly Average (MGD*)	Daily Maximum (MGD*)
NPDES Outfall 051	06/30/2019	Flow	0.021345	0.021345
NPDES Outfall 051	03/31/2020	Flow	0.016253	0.016253
NPDES Outfall 051	08/31/2020	Flow	0.010209	0.010209
NPDES Outfall 051	04/30/2021	Flow	0.018104	0.018629
NPDES Outfall 051	05/31/2021	Flow	0.015926	0.015926
NPDES Outfall 051	06/30/2021	Flow	0.017392	0.017392
NPDES Outfall 051	07/31/2021	Flow	0.016185	0.017543
NPDES Outfall 051	08/31/2021	Flow	0.571	0.982
NPDES Outfall 051	09/30/2021	Flow	0.017043	0.017221
NPDES Outfall 051	10/31/2021	Flow	0.017435	0.017435
NPDES Outfall 051	11/30/2021	Flow	0.012218	0.017374
NPDES Outfall 051	01/31/2022	Flow	0.012161	0.016726
NPDES Outfall 051	03/31/2022	Flow	0.017389	0.017389
NPDES Outfall 051	07/31/2022	Flow	0.016927	0.017056
NPDES Outfall 051	08/31/2022	Flow	0.01635	0.01709
NPDES Outfall 051	09/30/2022	Flow	0.015904	0.016522
NPDES Outfall 051	10/31/2022	Flow	0.016492	0.016492
NPDES Outfall 051	11/30/2022	Flow	0.014859	0.014859
NPDES Outfall 051	12/31/2022	Flow	0.016391	0.016416

On November 15, 2023, to satisfy 40 C.F.R. §§ 124.16 and 124.60(b), EPA provided Notice of Contested Permit Conditions to the Board, the Permittees, and the Petitioners.

In EPA's November 15, 2023, Notice of Uncontested and Severable Conditions, EPA noted that the Petition did not specifically identify challenged permit conditions or include a section listing issues for EAB review. It did include confusing and contradictory language making it difficult for EPA to understand the scope of review. Careful review of the Petition and the requirements for petition contents ultimately led EPA to the conclusion that Petitioner only challenged permit authorization for Outfall 051, only.

IV. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act

The CWA generally prohibits discharges of pollutants into navigable waters unless authorized by a permit. *See* 33 U.S.C. §§ 1311(a), 1342(a). The Act empowers EPA to issue permits under the NPDES permitting program. *See* 33 U.S.C. § 1342. These permits, which have five-year terms and are renewable, allow facilities to legally discharge pollutants if they comply with certain requirements. *See* 33 U.S.C. §§ 1342(a)(1)-(3), (b)(1)(B); 40 C.F.R. § 122.21(d).

Because the State of New Mexico does not have an approved state NPDES program under § 402(b) of the CWA, EPA is the NPDES permitting authority within the State.

B. The Resource Conservation and Recovery Act

RCRA governs the disposal of solid waste and hazardous waste. Under RCRA, EPA can authorize states to administer and enforce their own hazardous waste programs in lieu of the federal program. 42 U.S.C. § 6926(b). EPA has authorized New Mexico, and the state's program is promulgated under the New Mexico Hazardous Waste Act. *See* N.M. Stat. Ann. § 74-4-1 *et seq*. (2020). Accordingly, the New Mexico Department of Environmental Quality has the primary responsibility of implementing the RCRA hazardous waste program in New Mexico, not EPA.

EPA's regulations exempt certain wastewater treatment units from specific RCRA rules. *See* 40 C.F.R. §§ 264.1(g)(6), 265.1(c)(10), 270.1(c)(2)(v). To qualify for that exemption, the wastewater treatment unit must, among other things, be part of a facility that is subject to

regulation under certain CWA provisions, including the NPDES permitting program. *See* 40 C.F.R. § 260.10 (defining "wastewater treatment unit").

While state programs may be more stringent than federal requirements, New Mexico has adopted the federal exemption for wastewater treatment units.[6] The wastewater treatment unit exemption is limited in scope: It frees the qualifying unit only from technical standards on the unit itself and permitting requirements. *See generally* 40 C.F.R. parts 264, 265, & 270. The exemption, however, does not apply to the hazardous waste managed, so any leaks or releases of hazardous waste from the unit would still be regulated under RCRA.

V. PRINCIPLES GOVERNING BOARD REVIEW

The Board is a tribunal of limited jurisdiction; its authority to review permit decisions is "limited by the statutes, regulations, and delegations that authorize and provide standards for such review." *In re Carlton, Inc.*, 9 E.A.D. 690, 692 (EAB 2001); *See also* 57 Fed. Reg. 5,320 (Feb. 13, 1992). The statute relevant to the Board's jurisdiction in this case is the CWA, particularly its § 402 NPDES permitting requirements. The Board's authority to review NPDES permit decisions is found generally at 40 C.F.R. part 124, which sets out "EPA procedures for issuing, modifying, revoking and reissuing, or terminating all…NPDES permits." 40 C.F.R. § 124.1(a). The EPA Regional Administrator issues a final permit decision under 40 C.F.R. § 124.15(a), and such permits are, in turn, appealable to the Board under 40 C.F.R. § 124.19(a).

The Board's scope of review is limited to "contested permit condition[s] or other specific challenge[s] to the permit decision." 40 C.F.R. § 124.19(a)(4). The Board's review "does not

[6] *See* N.M. Code R. §§ 20.4.1.100-.101 (incorporating 40 C.F.R. part 260 with exceptions not relevant here), 20.4.1.500-.501 (incorporating 40 C.F.R. part 264 with exceptions not relevant here), 20.4.1.600-.601 (incorporating 40 C.F.R. part 265 with exceptions not relevant here), 20.4.1.900 & .902 (incorporating 40 C.F.R. part 270 with exceptions not relevant here).

ordinarily extend to considerations of the validity of prior, predicate regulatory decisions that are reviewable in other fora." *In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001); *In re USGen New Eng., Inc*., 11 E.A.D. 525, 555-56 (EAB 2004); *In re City of Irving*, 10 E.A.D. 111, 124 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003).

The Board has discretion to grant or deny review of a permit decision. 40 C.F.R. § 124.19; *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)), *remanded on other grounds sub nom*; *Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014). Ordinarily, the Board will deny review of a permit and thus not remand it, unless the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves a matter of policy or an exercise of discretion that warrants review. 40 C.F.R. §§ 124.19(a)(4)(i)(A)-(B); *accord, e.g., In re Prairie State Generating Co*., 13 E.A.D. 1, 10 (EAB 2006), *aff'd sub. nom Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007). The Board's decision whether to grant or deny review of a permit is guided by the preamble to the regulations authorizing appeal under part 124, in which EPA 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." 45 Fed. Reg. 33,290, 33,412; *In re City and County of San Francisco*, 18 E.A.D. 322, 325 (EAB 2020).

The burden of demonstrating that the Board should review a permit rests with the petitioner. 40 C.F.R. § 124.19(a)(4). A petitioner must specifically state its objections to the permit and explain why the permit issuer's previous responses to those comments were clearly erroneous or otherwise warrant review. 40 C.F.R. §§ 124.19(a)(4)(i)-(ii); *e.g., In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004). It is insufficient to "merely…

reiterate comments previously submitted on the draft permit." *In re Springfield Water and Sewer Commission*, 18 E.A.D. 430, 439 (EAB 2021) (citations omitted).

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised "considered judgment." *E.g.*, *id.* The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. *E.g.*, *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007) (quoting *In re Carolina Power & Light Co*., 1 E.A.D. 448, 451 (Acting Adm'r 1978)). As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all the information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 334 (EAB 2002).

In reviewing the exercise of discretion by the permitting authority, the Board applies an abuse of discretion standard. *In re Guam Waterworks Auth*., 15 E.A.D. 437, 443 n.7 (EAB 2011). The Board will uphold a permit issuer's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *See, e.g.*, *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997).

VI. ARGUMENT

A. Uncertainty related to the discharges from Outfall 051 does not render EPA's permit issuance for Outfall 051 clearly erroneous.

1. Discharges from Outfall 051 are actual and anticipated to continue in the future.

As described above, Outfalls 051 discharged in nineteen months from 2019-2023, and the Permittees have stated an expectation that discharges will continue in the future. Permittees submitted a lengthy fact sheet describing the construction and operation of the outfall with its permit application, along with Form 2C, which contains operational information, effluent characteristics, and flow estimates, which EPA used to draft the proposed permit. Petitioners ignore these facts and request denial of permit authorization based, in part, on an incorrect proposition that the CWA does not allow NPDES permit authorization when discharges are not certain to occur. Petitioners make no attempt to reconcile the stark disconnect between their primary legal argument and the record.

To be clear, Petitioners' arguments regarding CWA authority for possible future discharges are not relevant to Outfall 051, as the record clearly reflects a history of discharge and a strong likelihood of future discharge. Petitioners concede this point when describing discharges from Outfall 051 that began in April 2021 as "…blatant demonstration of their capability and intention to discharge the RLWTF's wastewater…." Pet. at 5. In light of the discharge history from Outfall 051, the permittees' statements attesting to the likelihood of future discharge, and Petitioners' acknowledgment of the "capability and intention to discharge[,]" it is unclear why Petitioners submit arguments related to unlikelihood of discharges. Petitioners have not explained how their position – that EPA must evaluate the likelihood of discharge and deny permits where discharge is unlikely – has any relation to Outfall 051. In any case, EPA has clear authority to permit outfalls even if future discharges are somewhat uncertain.

2. The CWA authorizes issuance of NPDES permits for possible future discharges.

Although the discharges from Outfall 051 are actual and anticipated to continue in the future, EPA does not concede that it has no authority to issue NPDES permit coverage for anticipated or possible future discharges. As explained in the Response to Comments, EPA has authority under the CWA and federal regulations to issue an NPDES permit to the operator of a facility that seeks NPDES authorization to cover a possible future discharge, even if the possible future discharge would only be intermittent, infrequent, irregular, rare, or even uncertain or unlikely. *See, e.g.* RtC. at 93. Section 402 of the CWA created the NPDES program, under which the Administrator of EPA may, after opportunity for public hearing, issue permits for the discharge of pollutants upon condition that such discharge meets all applicable requirements of the CWA. 33 U.S.C. § 1342(a). Pursuant to CWA § 301(a), any discharge from a point source into waters of the U.S. is unlawful unless the discharger possesses a valid permit or is excluded from coverage by law or regulation. 33 U.S.C. § 1311(a). Under the requirements of §§ 301 and 402(a) of the CWA, NPDES permit authorization must be obtained prior to discharge. Once a discharge has occurred, the discharger is liable for enforcement under § 309 of the Act if the necessary permits are not in place and effective. *See* 33 U.S.C. § 1319.

If EPA had no authority to issue NPDES permits for possible future discharges, then it would be impossible for operators of facilities with such discharges to obtain a permit in advance so as to avoid enforcement liability. Prior to the actual discharge, operators of facilities would be unable to obtain NPDES permit authorization, yet if they discharged and then sought permit authorization, they would be in violation of the CWA and potentially subject to civil or criminal

penalties. It is an established rule of statutory interpretation that Congress is presumed not to have intended illogical or absurd results.[7]

Petitioners invent an entirely new theory of NPDES permit application review in which the permitting authority must evaluate the likelihood of occurrence for each discharge that permit applicants seek to authorize and then deny coverage for any discharge that, in the permitting authority's opinion, is not certain to occur – or to occur frequently enough. Such a requirement would undermine the CWA's goal of eliminating the discharge of all pollutants unless otherwise authorized. 33 U.S.C. § 1251(a)(1). Petitioners' theory would put permitting authorities in the impossible position of denying a permittee's request for authorization for discharges that may only occur in rare, emergency, or even catastrophic situations, but that may well occur, and if they do, will be uncontrolled and will subject the permittees to substantial penalties.[8] Nothing in EPA's regulations or long history of issuing NPDES permits suggests such an absurd obligation for NPDES permit issuers, or such an absurd result for permittees. 40 C.F.R. §§ 124.51-124.66, 122 *et seq.*

Federal case law illustrates the importance of obtaining NPDES authorization even when the ongoing nature of discharges is in doubt: past violators may be subject to citizen suits for ongoing discharges until any real likelihood of future discharges is eliminated. The court in *American Canoe Ass'n v. Murphy Farms, Inc.*, 412 F.3d 536 (4th Cir. 2005) held that even when past violators have made affirmative, good-faith remedial efforts, the past violator may remain

[7] *See Hughey v. JMS Development*, 78 F.3d 1523, 1528 (11th Cir. 1996) ("Interpreting the liability provisions of the CWA we realize that Congress is presumed not to have intended absurd (impossible) results."); *Towers v. United States (In re Pacific-Atlantic Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir. 1995) ("We will not presume Congress intended an absurd result."); *Bechtel Constr., Inc. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1225 (9th Cir. 1987) ("Legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious.").

[8] Petitioners' position also makes unavailable the provisions of bypass and upset that apply only to permitted facilities, and which protect the discharger in certain circumstances. *See* 40 C.F.R. § 122.41(m) and (n).

subject to CWA citizen suits. The court reasoned that the violation remains ongoing until there is no real likelihood of future discharges. Citing *Gwaltney of Smithfield, Ltd. V. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987), the court said that past violators continue to violate the CWA, for purposes of citizen suits, while there remains an actual likelihood of recurring violations. These cases illustrate the need to seek NPDES permit authorization for point sources that have discharged in the past and for which discharge is anticipated.

EPA's regulation at 40 C.F.R. § 122.21 places the burden on the owner and/or operator of a facility to obtain NPDES permit authorization prior to discharge. If the owner and/or operator does not seek authorization and a discharge occurs, the owner and/or operator is strictly liable under the CWA and subject to possibly substantial civil and/or criminal penalties. 33 U.S.C. § 1319. It is not unusual for facilities that do not routinely discharge to nevertheless seek and maintain permit authorization to protect against liability in the event of an unanticipated discharge, even if the discharge would be infrequent, irregular, or rare.

Petitioners also doubt that a permit application can constitute a "proposal" to discharge, reasoning that "it depends on what the application says." Pet. at 13. Petitioner is correct to the extent that, as explained in the Response to Comments, permit applications must be complete and accurate in satisfaction of 40 C.F.R. § 122.21. RtC. at 92. Petitioners have not identified any way the application did not meet these requirements.

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

Petitioners misread the holdings in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) ("*National Pork Producers*") and *Waterkeeper Alliance, Inc. v. EPA*, 399

F.3d 486 (2d Cir. 2005) ("*Waterkeeper*"). Petitioners cite the federal rulings in these cases in support of their argument that actual discharges must be established as a prerequisite to permit issuance. *See* Pet. at 12. However, in each of these cases, the reviewing court examined EPA's authority to *require* operators of Concentrated Animal Feeding Operations ("CAFOs") to apply for NPDES permit authorization when there had been no evidence of an actual discharge nor a *request* for authorization by the would-be permittee. In *Waterkeeper*, the Second Circuit found that EPA had exceeded its statutory authority by requiring all CAFOs to apply for an NPDES permit whether or not they actually discharged. The *Waterkeeper* court found that the CWA, "on its face, prevents the EPA from imposing, upon CAFOs, the *obligation* to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge." *Waterkeeper*, 399 F.3d at 506 (emphasis added). Likewise, in *National Pork Producers*, the Fifth Circuit found that EPA could not "impose a duty to apply for a permit on a CAFO that 'proposes to discharge' or any CAFO before there is an actual discharge." The agency could require discharging CAFOs to obtain NPDES permits. *Nat'l Pork Producers,* 635 F.3d at 751.

Neither *National Pork Producers* nor *Waterkeeper* address EPA's authority to issue a permit where a point source voluntarily requests authorization for future discharge. If a facility voluntarily seeks permit authorization for a possible future discharge of pollutants, CWA § 402(a) provides authority for EPA to issue a permit authorizing that future discharge.

EPA's Response to Comments includes lengthy rebuttals to Petitioners' assertions related to the *National Pork Producers* and *Waterkeeper Cases*. RtC. at 73-74. Instead of addressing the substance of EPA's responses, Petitioners merely repeat their public comments. As explained in detail in section D.2 below, the Board denies review when a petitioner leaves EPA's analysis unrebutted.

Petitioners also cite federal case law in support of the cryptic statement that "…EPA's statutory duty to regulate is commensurate with its authority." The cited case (*National Cotton Council v. U.S. EPA*, 553 F. 3d 927 (6th Cir. 2009)) concerns the regulatory exemption of aerial pesticide applicators from NPDES permitting requirements. Petitioners do not explain how the case relates to this permit appeal. Exemptions from NPDES permitting requirements for certain classes of dischargers are not relevant to the present matter. The cited case does not address, much less cast doubt on, EPA's authority to issue NPDES permits for possible future discharges.

4. The CWA and NPDES regulations clearly anticipate, and in some instances require, the issuance of permits for intermittent and infrequent future discharges, and EPA routinely issues such permits.

EPA's NPDES regulations allow, and sometimes explicitly require, authorization of future discharges, even when the likelihood of discharge is remote. In fact, permits for nondischarging outfalls are a common feature of NPDES permitting programs in Region 6 – including those administered both by EPA and delegated states.

EPA performed a search of individual NPDES permits within New Mexico that are active but report no discharges in their discharge monitoring report ("DMR") for the past five years. In the State of New Mexico, where EPA implements the NPDES program, there are twenty (20) active NPDES permits reporting no discharge from 2018-2023.[9] *See generally* Att. E.[10]

[9] These permits were not part of EPA's decision-making with regard to issuance of Permit No. NM0028355 and so they are not included in the administrative record. EPA includes mention of these permits to illustrate that EPA authorization for rarely discharging outfalls is a common feature of the NPDES program. A determination that uncertainty or rarity of discharge should result in loss of NPDES coverage would cause a titanic shift in implementation of the NPDES program throughout the nation.

[10] EPA's initial electronic search for permits including outfalls which discharge rarely or never produced thousands of pages. To provide the Board with a manageable example, EPA attaches information only on New Mexico permits.

There are several examples of other programs where EPA currently and routinely issues permits covering anticipated discharges. The effluent guidelines governing discharges from phosphate fertilizer manufacturers require that permits contain special provisions for discharge in the event of rare rainfall events. 40 C.F.R. § 418.17(b) provides that process wastewater storage piles designed to maintain a surge capacity equal to the runoff from a 25-year, 24-hour rainfall event *may* discharge when chronic or catastrophic precipitation causes inventory water levels to rise into surge capacity and *must* discharge when water levels reach the midpoint of surge capacity. By the plain letter of the rule, discharges under this provision would rarely be expected and are obviously unpredictable.

The effluent guidelines for the CAFO point source category have similar provisions. The regulations prohibit discharges unless they are overflow from a facility designed, constructed, operated, and maintained to contain all process wastewaters, plus the runoff from either a 10-year or 25-year rainfall event. *See* 40 C.F.R. §§ 412.12-13, 412.15, 412.25-26, 412.31(a), 412.32-35, and 412.43-45.

EPA's authority to permit intermittent and infrequent future discharges is also illustrated by the stormwater permitting program. CWA § 402(p) directs EPA to regulate stormwater discharges under the NPDES program and establish regulations setting forth permit application requirements for stormwater discharges from industrial and municipal point sources. 33 U.S.C. § 1342(p). To promote efficiency and cost-effectiveness and as an optional alternative to individual NPDES stormwater permit, EPA often issues general stormwater permits. *See* 40 C.F.R. § 122.28. To gain coverage under a general permit, eligible facilities submit a notice of

intent and, among other things, implement a stormwater pollution prevention plan that may contain a variety of control measures to slow, reduce, or eliminate the discharge of pollutants.[11]

The uncertainty of discharge under these permits is not only found in the proverbial question of when it will rain. Use of control measures like sediment basins creates even greater uncertainty. For example, the current construction general permit (which is implemented by EPA in New Mexico) says that sediment basins and other impoundments must provide storage for either (1) a 2-year, 24-hour storm, or (2) 3,600 cubic feet per acre drained. Att. F at 13. This means that discharges resulting from overflow of the basin would only occur in the event of severe precipitation events. Such events are uncommon and unpredictable.

As noted above, EPA has issued individual permits in New Mexico, besides LANL's, for outfalls that do not discharge. For example, EPA issued NPDES Permit No. NM0031216 to Kirtland Air Force Base, near Albuquerque, New Mexico, in 2019. *See* Att. G. The permittee operates a ground water treatment plant to address a plume resulting from a fuel leak. The treated effluent is used for golf course irrigation during warm months and is also returned to the regional aquifer as authorized under an underground injection control permit. As a backup only, in the event of infrastructure failure at the golf course or injection wells, the permittee is authorized to discharge treated effluent to Tijeras Arroyo. Permittees have reported no discharges from the authorized outfall. *See id*. at 4 of Part II.

EPA initially issued NPDES Permit No. NM0030996 to El Segundo Mine in 2008 and then reissued it in 2014 and 2020. *See* Att. H. The permittees operate a surface coal mine with

[11] *See, e.g.*, U.S. ENVTL. PROT. AGENCY, 2021 MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY 12 (2021), https://www.epa.gov/sites/default/files/2021-01/documents/2021_msgp_-_permit_parts_1-7.pdf.

many sediment ponds that are each permitted as an individual outfall. These ponds are designed to absorb at least a 10-year, 24-hour precipitation event and have not discharged since 2008. The facility also has a sewage pond that is not intended to discharge to surface water, however, authorization to discharge is provided in the event of severe precipitation. *See id.* at 4 of Part I. Yet, the permit continues to authorize and provide limits for any future discharge that may occur if the ponds were to reach capacity.

The New Mexico permits, EPA's effluent guidelines, and the stormwater program highlight a truism underpinning all NPDES permitting: the need to discharge cannot always be planned or anticipated, and unexpected circumstances may require discharge. But, by permitting prospectively, permitting authorities gain some degree of control over future discharges, even if they are intermittent and uncertain, setting pollutant limitations that would not be in place in the absence of a permit, and permittees are able to limit their liability for such discharges.

B. LANL's rationale for discharges from Outfall 051, even if that rationale has changed over time, does not render EPA's issuance of NPDES permit authorization for that outfall clearly erroneous.

As discussed above, EPA determined to issue permit coverage for discharges from Outfall 051 in response to a complete and accurate application submitted to EPA by LANL in satisfaction of the regulatory requirements for such applications at 40 C.F.R. parts 122 and 124. LANL's submittal of a complete and accurate application constituted a request for NPDES authorization for discharges from Outfall 051. Form 2C of the application included estimated values for flow from Outfall 051 in accordance with the Form 2C requirements and instructions. In drafting the permit, EPA used the information provided by LANL for Outfall 051 in Form 2C of the application, in addition to information provided by LANL during the public comment

process and discharge data for Outfall 051 submitted to EPA by LANL in its Discharge Monitoring Reports, to determine the appropriate permit requirements to be included for Outfall 051 in NPDES Permit No. NM0028344.

Section 402(a)(1) provides that EPA may issue a permit for discharge following public comment, so long as applicable requirements of the CWA are met. EPA's regulations at 40 C.F.R. part 122 set forth NPDES permitting requirements, including requirements for NPDES permit applications. Petitioners seem to argue that because the Permittees have, over time, offered different rationales for the need to discharge, EPA may not grant NPDES permit authorization. However, Petitioners do not cite to any requirement of the CWA or applicable regulations to support this claim. Neither Section 402(a)(1) of the CWA nor the NPDES permitting regulations at 40 C.F.R. part 122 require permit applicants to provide the type of justification for discharge that Petitioners finds lacking. The Petition does not cite any requirement of 40 C.F.R. part 122 or any other applicable regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants changing the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Neither do the comments identify any requirement of the NPDES permitting regulations that would cause the loss of permit authorization due to an increased number of permitted discharges. Note that 40 C.F.R. § 122.41(l) requires permittees to give notice to the director of Planned Changes, including those that would significantly change the nature or increase the quantity of the pollutants discharged. This requirement was included in Part III of the Permit. The NPDES rules do not set standards or restrictions on the rationales for discharge. *See* RtC. at 93.

C. EPA's issuance of NPDES permit authorization is not clearly erroneous on the basis that said authorization may trigger an exemption from state RCRA permitting requirements.

Petitioners assert that LANL seeks NPDES permit coverage for Outfall 051 so that the outfall will not be subject to state RCRA permitting requirements (*see* Pet. at 5) and imply that EPA issued the permit so LANL may enjoy this regulatory relief. Pet. at 18.

EPA issued permit coverage for discharges from Outfall 051 in response to a complete and accurate application submitted to EPA by LANL in satisfaction of the regulatory requirements for such applications at 40 C.F.R. parts 122 and 124. Neither CWA §402(a)(1) nor EPA's permitting regulations prohibit the issuance of an NPDES permit if such issuance may trigger applicability of a RCRA exemption. Any exemption that legally flows from EPA's independent decision to grant NPDES authorization for a discharge is not properly before the Board. Proceedings initiated under 40 C.F.R. § 124.19 are limited to appeals of final permit decisions issued under 40 C.F.R. § 124.15. The rules governing these proceedings make no mention of requests for other unrelated permits or challenges to established regulations.

The State of New Mexico, not EPA, administers the RCRA program in New Mexico. If Petitioners desire changes to New Mexico's RCRA program, then they should petition the New Mexico Environment Department, *not EPA*.[12] If they have concerns over a particular state RCRA permitting decision, they may participate in the permit proceeding as provided under state law.[13] The wastewater treatment unit ("WWTU") exemption is not a required part of the federal

[12] N.M. Code R. § 1.24.25.10 grants members of the public the right to initiate rulemaking processes with New Mexico agencies.
[13] N.M. Code R. § 20.1.4.300 sets forth the process for participating in hearings for New Mexico environmental permits. N.M. Stat. Ann. § 74-4-4.2 provides opportunity for public hearing prior to hazardous waste permit issuance.

minimum requirements for the RCRA program, and any state that wishes to remove it from their RCRA rules may do so. California, for example, has no WWTU exemption,[14] whereas other states have established added criteria not found in the federal rules.[15]

New Mexico is free to make the state hazardous waste program more stringent than federal minimum requirements, but EPA cannot make that decision for the State in a federal NPDES permitting action.

Any objection Petitioners have to the RCRA wastewater treatment unit exemption is a challenge to a long-established RCRA rule, not a challenge to CWA NPDES permit conditions. The Board "…generally does not entertain challenges to final Agency regulations in the context of permit appeals" and only reviews "…conditions of the permit decision, not statutes or regulations which are the predicates for such conditions." *In re USGen New England, Inc*., 11 E.A.D. 525 (EAB 2004).[16]

RCRA § 1006(a) anticipates overlap with other environmental statutes, providing that nothing in RCRA "…shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act … except to the extent that such application (or regulation) is not inconsistent with

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[14] *See* Cal. Code Regs. tit. 22, § 66270.1.

[15] New Hampshire's Hazardous Waste Management program requires owners and operators of NPDES permitted WWTUs to obtain a 'Limited Permit,' to handle hazardous waste within a wastewater treatment unit. This limited permit establishes requirements which apply to any applicable federal and state water act requirements. *See* N.H. Code Admin. R. Env-Hw 304.04. Washington's program provides NPDES permitted WWTUs with a 'Permit-by-Rule' without requiring an application for a 'Final Facility Permit,' provided certain conditions are met. *See* Wash. Admin. Code § 173-303-802.

[16]. The Board further concluded that there is "'an especially strong presumption' against entertaining a challenge to the validity of a regulation subject to a preclusive judicial review provision[,]" such as the CWA § 509(b) prohibition on challenges to regulations 120 days after they become effective. *Id.* (citing *In re Echevarria*, 5 E.A.D. 626, 635 (EAB 1994)). RCRA has an analogous preclusive judicial review provision, providing that judicial review of final RCRA regulations may be filed only in the United States Court of Appeals for the District of Columbia within ninety days of the date of promulgation. 42 U.S.C. § 6976. *In re USGen New England, Inc*., 11 E.A.D. at 555.

the requirements of such Acts. 42 U.S.C. § 6905(a). In administering RCRA, Congress directed EPA to "avoid duplication, *to the maximum extent practicable,* with the appropriate provisions of … the Federal Water Pollution Control Act [and certain other environmental statutes]…." 42 U.S.C. § 6905(b) (emphasis added). In accordance with this statutory directive to avoid duplication, EPA has promulgated other regulatory exclusions, besides the wastewater treatment unit exemption, where potential overlap between RCRA and the CWA exist. For example, 40 C.F.R. § 261.4(a)(2) provides that industrial wastewater discharges that are point source discharges subject to regulation under CWA § 402 are not RCRA solid wastes. Additionally, 40 C.F.R. § 261.4(g) excludes dredged material subject to the requirements of a permit issued under CWA § 404 from regulation as a RCRA hazardous waste. In other words, the WWTU exemption is not exceptional, and there is no conflict between the CWA and RCRA wastewater treatment unit exemption regulations at 40 C.F.R. §§ 264.1(g)(6), 265.1(c)(10), 270.1(c)(2)(v), much less any statutory directive for EPA to analyze or avoid triggering the WWTU exemption when issuing NPDES permits.[17]

D. EPA's Response to Comments demonstrates considered judgment.

1. EPA fully responded to every significant comment submitted during the public comment periods.

40 C.F.R. § 124.17 requires two things of the Response to Comments on the draft permit: (1) EPA must specify which provisions, if any, have changed from the draft to the final permit, and the reasons for the change, and (2) EPA must briefly describe and respond to significant comments raised during the comment period.

[17] In fact, the Petition for Review fails to mention 40 C.F.R. § 270.1(c)(2)(v), which provides that owners and operators of wastewater treatment units are specifically "excluded and exempted" from the requirement to obtain a RCRA permit.

In the present matter, EPA did respond in detail to each significant public comment. CCNS's assertions regarding the adequacy of EPA's Response to Comments amount to no more than differences of opinion, restatements of objections already made during the public comment period, and requests for new analyses of issues that EPA already addressed.[18] Petitioners did not grapple with the substance of EPA's Response to Comments. For ease of reference, EPA lists Petitioners assertions individually, below.

In some instances, Petitioners assert that EPA failed to adequately articulate the application of the law to the facts at hand.

- "Region 6 did not make factfindings supporting the application of the various legal theories that it referred to, nor did it state which theories it relied upon in issuing the Permit." Pet. at 7.

- "But to state that the 2021 discharges made a debating point does not specify their role, if any, in supporting issuance of a permit. Region 6 did not explain why the 2021 discharges were made, reversing years of consistently evaporating waste water. And Region 6's 2023 Response still does not disclose the test that the Region used to identify a "discharge of any pollutant," as it must do to issue a permit. 33 U.S.C. § 1342 (a)(1)." Pet. at 11.

- "Thus, Region 6 said that "actual discharges are not necessary for permit authorization." (2023 Response at 86-103, ¶ 23). This statement does not identify the facts that are necessary to be established. Moreover, the National Pork and Waterkeeper Alliance cases hold that a permit must regulate an actual discharge." Pet. at 12.

- "Region 6 did not say what facts demonstrate a 'potential discharge.' It is definitely not a "discharge." Moreover, the concept appears to contradict the statutory requirement of a "discharge," as was noted in National Pork, 635 F.3d at 750, and Waterkeeper Alliance, 399 F.3d at 504-05 ." Pet. at 12.

- "Most basically, where is the statutory authority to issue unnecessary permits in response to 'voluntary' requests?" Pet. at 13.

[18] In its review of responses to comments, the Board has articulated the principle that "the adequacy of a permit issuer's response to comments must be evaluated in the context of the content, specificity, and precision of the submitted comments.... Where a comment lacks specificity and precision, the permit issuer's obligation to respond is similarly tempered." *In re Tucson Electric Power*, 17 E.A.D. 675 (EAB 2018) Nor must the permit issuer "guess the meaning behind imprecise comments...." *Id*., quoting *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 723 EAB 2006).

- "Its narrative reviews hypothetical situations at level of abstraction but lacks a straightforward statement of the facts and the reasoning that Region 6 actually followed in issuing this Permit." Pet. at 16-17.

- "This statement mentions issues that might apply here, namely: a permit for a "possible" or "potential" discharge; a permit application as a 40 C.F.R. § 122.21(a) "proposal" to discharge; issuance of a permit to one who "voluntarily requests" one; the significance of the "rationale" for discharges. But it fails to explain the application of such issues to this case." Pet. at 17.

- "One theory postulates a 'potential' discharge, and another assumes a 'future' discharge. But Region 6 does not say which theories might apply here." Pet. at 17.

- "The legal theories that Region 6 presents are incomplete, dubious, and sometimes contradictory. One theory postulates a "potential" discharge, and another assumes a "future" discharge. But Region 6 does not say which theories might apply here. Its Responses read more like a treatise about CWA permits than a reasoned decision of this specific case." Pet. at 17.

- "Did Region 6 issue this permit to regulate a "potential" discharge? (2023 Response ¶¶ 23, 26, 39). Or was it because Region 6 considered Permittees' application to be a "proposal" to discharge? (2023 Response ¶¶ 23, 39). Or was the Permit issued because the Permittees made a "voluntary request" for a permit? (2023 Response ¶ 23). Or was it because the Permittees proposed a future discharge? (2023 Response ¶¶ 26, 32). Or did Region 6 issue the permit so that the Permittees could obtain an exemption from RCRA? Region 6 refuses to say. (2023 Response ¶ 14). Did Permittees make discharges in 2021 to influence the outcome of this proceeding? Region 6 refuses to say. (2023 Response ¶¶ 29, 30, 36, 37, 38, 40, 42). Perhaps it was based on a combination of rationales. It is just not clear. Pet. at 18.

As EPA stated in its Response to Comments document and repeats in this Response brief, EPA issued permit coverage for discharges from Outfall 051 in response to a complete and accurate application submitted to EPA by LANL in satisfaction of the regulatory requirements for such applications at 40 C.F.R. parts 122 and 124. LANL's complete and accurate application constituted a request for such authorization. Section 402(a)(1) of the CWA allows EPA to issue permits for discharge and does not differentiate between actual or proposed discharges. EPA

explained that "facilities must have a permit in place before they discharge, which necessarily means that EPA must at times issue permits for discharges that are not yet actual." RtC. at 93. EPA's reference to § 402 is simply a statement of the law, not a "legal theory," as Petitioners contend.

As instructed by the EAB, EPA provided opportunity for comment on 2021 data from Outfall 051. EPA also provided 2021-2022 discharge for all the outfalls challenged in the 2022 appeal. EPA addressed the significance of these discharges as follows:

> The EPA considered the import of the 2021 DMR data from Outfall 051 to be the fact that it evidences actual discharges from an Outfall that Petitioners argued EPA has no authority to permit because the Outfall does not discharge. The import of the data for EPA was not related to the particulars, e.g., the amounts, of the pollutants discharged, nor as to whether Outfall 051 serves as a backup outfall or an "integral component" of facility operations. The import to the EPA of the additional 2022 data for Outfall 051 and for the 2021-2022 data for the other five outfalls, is that it is evidence of actual discharges from at least some of these Outfalls. 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.
>
> 40 C.F.R. [§]122.21(a) provides that "(a)ny person who discharges or proposes to discharge pollutants…must submit a complete application" in accordance with applicable regulations. By submitting a complete application, permittees propose to discharge. The permit application materials and the permit applicant's comments submitted during the public comment period in 2020 constitute a request for authorization from Outfall 051, and other outfalls, which are indeed capable of discharging. Actual discharges in 2021 and 2022 are not necessary to support EPA's decision to grant permit authorization; however, the discharges confirm the possibility of discharge and that there was no lack of a plan or proposal to discharge.

RtC. at 23.

Given EPA's explanation of the basis for its permit decision and the clear authority articulated in the CWA, it is unclear what kind of fact-finding or legal analysis Petitioners find lacking, nor have petitioners identified any provision of the CWA or its regulations that would require additional analysis under these facts.

Petitioners point out that the word "discharge" is used as part of the phrase "discharge of a pollutant[,]" arguing that this is "a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water." For support, they cite dicta in *S.D. Warren Co. v. Me. Bd. Of Envtl. Prot*., 547 U.S. 370, 380-381 (2006), wherein the court explains that *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004) ("*Miccosukee*") does not apply to an inquiry as to the meaning of "discharge" in CWA § 401. The Court in *S.D. Warren* clarified,

> The question in *Miccosukee* was whether a pump between a canal and an impoundment produced a "discharge of a pollutant" within the meaning of § 402, see 541 U.S., at 102–103, 124 S.Ct. 1537, and the Court accepted the shared view of the parties that if two identified volumes of water are "simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants," *id*., at 109.

547 U.S. at 381.

The Petition does not explain what this fact pattern has to do with actual or anticipated discharges from Outfall 051. Neither *S.D. Warren* nor *Miccosukee* supports Petitioners' notion that EPA must include in its decision-making a recorded analysis of "which components of a statutorily defined 'discharge'" are satisfied in a permitting decision, particularly when this question was not raised in the public comments. To be clear, CCNS's public comments, which acknowledge discharges from Outfall 051 (*see, e.g.*, "…Applicants have discharged from the outfall in an effort to influence the outcome of this proceeding." RtC. at 94), did not contend that discharges from Outfall 051 fail to meet the definitions of "discharge" at CWA § 502 or 40 C.F.R. § 122.2. This being the case, there was no significant comment for EPA to address in the Response to Comments.

CCNS's public comments on 2021-2022 discharges and subsequent Petition, which demonstrate knowledge of Outfall 051's discharge history and operation, are irreconcilable with CCNS's confusion over the "crucial facts" constituting possible or potential discharge: CCNS's

Petition concedes that LANL is capable of discharging from Outfall 051 and intends to do so. Pet. at 5-6. In addition, EPA explained that LANL submitted information on Outfall 051 in its Form 2C that EPA used to draft permit conditions. Accordingly, the proposed permit, upon which CCNS provided comments, notes the precise location where the outfall discharges treated liquid radioactive waste into Mortandad Canyon and sets effluent limitations for a defined set of pollutants. Att. J at 6. Petitioners have identified no lack of clarity regarding the facts relevant to Outfall 051 as presented in the Response to Comments or in the permit.

Regarding CCNS's citations to the *Waterkeeper* and *National Pork Producers* cases, EPA included lengthy analysis of those cases in the Response to Comments that Petitioners have not rebutted. RtC. at 73-74.

In some instances, Petitioners seem to assert that because EPA did not evaluate LANL's rationale for discharge, or demand that LANL explain certain changes in rationale, the Response to Comments is inadequate.

- "Region 6 avoids the issue the issue that the Board asked about, namely: the significance of the 2021 discharges. Region 6 does not assert that Permittees, in abruptly changing their operating protocols, had any purpose *other than* to influence the outcome of this proceeding." Pet at 16.

- "Critically, despite this Board's firm request for an explanation of the change in discharge practices, Region 6 did not in 2022 and does not in 2023 set forth its understanding." Pet. at 16-17.

- Did Permittees make discharges in 2021 to influence the outcome of this proceeding? Region 6 refuses to say. (2023 Response ¶¶ 29, 30, 36, 37, 38, 40, 42). Perhaps it was based on a combination of rationales. It is just not clear." Pet. at 18.

- "There is a clear need for explanation of the abrupt and total interruption of the zero-liquid-discharge regimen and the switch to discharges after a hiatus of more than 10 years, foregoing the MES and the SET evaporation systems that had been built at significant expense to the Lab. Remanding, the Board asked for one. Permittees' supplemental comments (April 7, 2023) supplied only the specifications of the discharges. As for the reason for them, Permittees were no

help. There is no indication that anyone at Region 6 asked Permittees for an explanation." Pet. at 22.

- "Permittees had openly claimed that a CWA permit would give them a RCRA exemption (Permittees' Responding Brief at 14), casting a spotlight on the Permittees' eligibility for a CWA permit, which depends upon a "discharge of pollutants." 33 U.S.C. § 1342 (a)(1). The sudden stream of discharges where none were made a month before, and for which no need had even been suggested, begs for explanation." Pet. at 22.

- "Petitioners suggested that Permittees had managed the RLWTF to make discharges, to support the sought-after CWA permit. The Board looked to Region 6 for its answer." Pet. at 22.

The Petitioners misstate the Remand Order. The Board instructed EPA "to provide the public with an opportunity to comment on the 2021 discharge data, to consider any comments received, and to revise its Response to Comments document and take further action, as appropriate, in reissuing its permit decision." Remand Order at 817. The Board did not make a "firm request for an explanation of the change in discharge practices[,]" as Petitioners state. Notably, Petitioners provide no citation in support of this assertion.

In the Response to Comments, EPA addressed the Petitioners' assertion that EPA must interrogate permit applicants as to their rationales and necessity for discharge:

> EPA has not found in its regulations any prohibition from permit applicants changing the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Neither do the comments identify any requirement of the NPDES permitting regulations that would cause the loss of permit authorization due to an increased number of permitted discharges. Note that 40 C.F.R. [§] 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

RtC. at 93. In its public comments and Petition, CCNS seems to assert that an NPDES permit applicant has a burden to explain its rationale for discharge, including a demonstration of the necessity for discharge (*see, e.g.,* "The output of the RLWTF could be evaporated, not

discharged. It is a matter of choice by the Applicants." RtC. at 93). The Response to Comments addressed this contention:

> This comment appears to characterize permittees' operational decision-making. Commenters do not cite to any requirement that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Commenters do not provide any citation showing that NPDES regulations require the permittees to exhaust the option to evaporate before discharge is permissible.

Rtc. at 94.

Also, where CCNS alleges that LANL seeks NPDES permit coverage to escape RCRA permitting requirements, EPA notes that LANL's RCRA compliance is outside the scope of the NPDES permitting action *See, e.g.*, RtC. at 102.

The Petition for Review does not address the substance of EPA's explanations or provide any citation in rebuttal; it merely repeats Petitioners' public comments and requests new analyses of issues that EPA addressed in detail in the Response to Comments. The Petition also demands EPA consider factors outside the bounds of the CWA. It is well established that an agency's decision-making is arbitrary and capricious when the agency considers factor that Congress did not intend. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The CWA grants EPA no authority to interrogate permit applicants as to the rationale for discharging – nor has EPA in its administration of the NPDES program ever required such an explanation from applicants. To do so here, on an ad hoc basis, would be arbitrary, capricious, and clearly erroneous.

In some instances, Petitioners assert that EPA's Response to Comments does not contain clear explanation of certain NPDES permit application requirements and, as a result, is deficient.

- "Is Region 6 stating that a 'request' alone suffices for permitting?" Pet. at 14.

- "What 'plan' does Region 6 see? How a few months of discharge in 2021 give Region 6 assurance for the future is not explained." Pet. at 14.

In the Response to Comments, EPA articulated its understanding of LANL's "request" for permit authorization as follows:

> 40 C.F.R. [§] 122.21 (a) provides that "(a)ny person who discharges or proposes to discharge pollutants…must submit a complete application" in accordance with applicable regulations. By submitting a complete application, permittees propose to discharge. The permit application materials and the permit applicant's comments submitted during the public comment period in 2020 constitute a request for authorization from Outfall 051, and other outfalls, which are indeed capable of discharging.

Rtc. at 92.

Regarding LANL's "plan" for future discharge, the Response to Comments contains a description of LANL's discharge projections that were included in the permit application:

> EPA regulations at 40 C.F.R. [§] 122.21 establish permit application requirements for applicants seeking coverage under individual permits. During the permit draft process in 2019, the EPA used the permit application Form 2C for Outfall 051 to draft permit requirements into the NPDES Permit No. NM0028344. In their application, LANL 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 application were consistent with the sixteen (16) months of discharges in 2021-2022, including twenty-nine (29) days that Outfall 051 actually discharged.

RtC. at 95. The Petition ignores these explanations entirely.

In some instances, Petitioners appear to express confusion over common terms and assert that because the meanings of the words are not clear and EPA did not provide definitions, EPA's Response to Comments is deficient:

- "However, a "potential discharge" is an undefined, unexplained term." Pet. at 12.

- "What is a 'voluntary' request, given Region 6's view that a person who 'discharges' or has a 'potential discharge' needs a CWA permit, and that need is not voluntary?" Pet. at 13

- "Thus, Region 6 repeats the undefined element, a 'possibility' of a discharge, and the 'plan or proposal,' which is likewise undefined." Pet. at 14.

- "Region 6's statement implies that an applicant must show that a discharge is 'possible' and that a plan or proposal exists. This asks again: What is a 'possible discharge' and how was it established here? What is a "plan" or 'proposal'? Region 6 does not say." Pet. at 14.

EPA is not required to define or explain common words, nor can agencies fairly be expected to anticipate which commonplace words might elude petitioners. Petitioners' confusion over common words such as "future," "potential," "possible," and "voluntary" is not evidence that EPA's Response to Comments is not reasonably clear, nor that EPA failed to fully consider and respond to all significant comments. EPA provided a clear statement of its permitting decision and of the law as set forth in the CWA and its regulations, and instead of rebutting EPA's responses, Petitioners claim that new analyses of common words are required.[19]

In some instances, Petitioners assert that the Response to Comments is deficient because it does not clarify the import of the 2021 discharge data for Outfall 051:

- "Petitioners' comment clearly does address the 2021 discharges. Region 6 avoids the issue that the Board asked about, namely: the significance of the 2021 discharges." Pet. at 16.

- "Here, the 2022 Response to Comments does not contain the "Agency's final rationale for its decision." (Id. 16). The Board noticed a "lack of clarity" (Id. 16) on the part of Region 6 about the significance and purposes of discharges from Outfall 051, particularly in 2021…. The Region's treatment of the 2021 discharge data fails to reflect "considered judgment…." Pet. at 21.

Petitioners ignore EPA's Response to Comments, which directly addresses this question: "The EPA considered the import of the 2021 DMR data from Outfall 051 to be the fact that it evidences actual discharges from an Outfall that Petitioners argued EPA has no authority to permit because the Outfall does not discharge. Actual discharges in 2021 and 2022 are not necessary to

[19] Where disagreements arise over the meanings of common words or phrases that are not terms of art, the Board has analyzed the expression pursuant to its common sense meaning (*In re Ray & Jeanette Veldhuis*, 11 E.A.D. 194 (EAB 2003) and has taken into account both the plain meaning and "EPA's contemporaneous and longstanding interpretation." *In re: Carbon Injection Systems, LLC*, 17 E.A.D. 1 (EAB 2016).

support EPA's decision to grant permit authorization; however, the discharges *confirm* the possibility of discharge and that there was no lack of a plan or proposal to discharge." RtC. at 91,92 and 100.

2. Because the Petition for Review fails to grapple with the substance of EPA's Response to Comments or demonstrate that the EPA's Response to Comments (the Region's basis for its decision) is clearly erroneous, the Board should deny review.

The EAB has explained that, "[o]ne way that the Board implements the standard of review in 40 C.F.R. § 124.19 is to require petitioners to state their objections to a permit and to explain why the permitting authority's response to those objections (for example, in a response to comments document) is clearly erroneous or otherwise warrants review. *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, *5 (EAB 1995) (citations omitted). In *In re Springfield Water and Sewer Commission*, 18 E.A.D. 430, 439 (EAB 2021), the Board described petitioners' burden in seeking review of EPA's permitting decisions:

> When evaluating a 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" in rendering its decision. *In re Gen. Elec*., 17 E.A.D. at 446. The Board does not find clear error simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter. Id. at 446-47.
>
> Indeed, it is well settled that mere allegations of error are insufficient for a successful appeal of a permit decision. *E.g., In re City of Lowell*, 18 E.A.D. 115, 157 (EAB 2020) ("By failing to grapple with the substance of the Region's position, [petitioner] leaves the Region's analysis unrebutted."); *In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 111, 180, 182-83, 189 (EAB 2016) (same), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019). In a situation such as this, where a petitioner fails to confront a permit issuer's substantive explanations in the response to comments, and further fails to carry its burden under the regulations and Board case law to provide sufficient justification for supplanting the permit issuer's technical judgment, the Board denies review. *See, e.g., In re Indeck-Elwood, L.L.C*., 13 E.A.D. 126, 170 (EAB 2006) ("[A] petitioner's failure to address the permit issuer's response to comments is fatal to its request for review."); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001) (noting, in light of burden petitioners bear in seeking review of

> technical issues, that "clear error is not established simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter").

In *In re LCP Chems*., 4 E.A.D. 661, 664 (EAB 1993), the Board held that it is not enough to simply reiterate comments made to the permitting authority. When a petition fails to respond to EPA's response to comments, the EAB is left with a record that supports EPA's approach; that is the case here.

CCNS's Petition does not identify any requirement of the CWA or its regulations that the permit application or EPA fail to satisfy. EPA's Response to Comments explains EPA's issuance of permit authorization in response to a complete and accurate application, sets forth the agency's authority to issue NPDES permits upon request and explains that the comments did not articulate any deficiency of requirements in the CWA or 40 C.F.R. part 124. In its assertions that the Response to Comments does not demonstrate EPA's considered judgement, the Petition does not tackle EPA's explanations. Instead, it repackages assertions that EPA already addressed in the Response to Comments, requests definitions of commonplace terms, and demands consideration of factors that EPA has no discretion to consider in its review of an NPDES permit application. The EAB has confronted similar situations, where petitioners fail to explain how a permit is inconsistent with regulatory standards:

> In order to establish that review of a permit is warranted, § 124.19 requires a petitioner to include in his petition for review "a statement of the reasons supporting review, including a showing that the condition in question is based on" either a clearly erroneous finding of fact or conclusion of law or on a policy or exercise of discretion warranting review. [Thus a petition must contain]: (1) clear identification of the conditions in the permit at issue, and (2) argument that the conditions warrant review.
>
> *Id*. (citing *In re LCP Chemicals – New York*, 4 EAD 661, 664 (EAB 1993); *In re Genesee Power Station L.P.*, 4 EAD 832, 866 (EAB 1993); *In re Terra Energy Ltd.*, 4 EAD 159, 161 (EAB 1992)). Further, "it is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections (the

> Region's basis for its decision) is clearly erroneous or otherwise warrants review." *LCP Chemicals* at 664.
>
> Because petitioners have not explained how the permit conditions described above (or any other permit conditions) are inconsistent with the regulatory standards, or how the permit conditions allegedly create a risk of failure of the proposed wells, we must deny review on the basis of this issue.

In re Envoech, L.P. Milan, Michigan, 6 E.A.D. 250 (EAB 1996).

EPA's Response to Comments addressed all significant comments in detail and explained how LANL's permit application satisfied all applicable requirements under the CWA and its implementing regulations. Petitioners have not rebutted any of EPA's explanations with any relevant legal support under the CWA or its implementing regulations. In such circumstances, when Petitioners fail to explain how the permit is inconsistent with regulatory standards, the Board must deny review.

VII. ORAL ARGUMENT

The Region does not agree with Petitioners' request for oral argument before the EAB on the Petition. The Region believes the issues are capable of resolution upon review of the briefs and cited portions of the record so that oral argument is not necessary.

VIII. CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMIT

I, Jay Przyborski, certify that, in accordance with 40 C.F.R. § 124.19 (d)(3), this Response to Petition for Review does not exceed 14,000 words in length.

__/s/_Jay Przyborski_____

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2023, I served the foregoing document on the following persons in the manner indicated:

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