

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

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

NPDES Appeal No. 23-04

PERMITTEES' RESPONSE TO PETITION FOR REVIEW

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 5

A. The Los Alamos National Laboratory 5

B. The 2019 Permit Re-Application and the 2023 Permit 7

III. STANDARD OF REVIEW 9

IV. ARGUMENT 11

**A. The Record Provides More Than Sufficient Support for Issuance of the 2023 Permit
 12**

 1. *The Region Provided Clear Explanations for Issuing the 2023 Permit and Identified
 the Crucial Facts Upon Which it Relied..... 12*

 2. *The Region Has Clear Authority to Permit Both Continuing and Proposed Discharges
 13*

**B. The Board Should Deny Review Because Petitioners Have Failed to Demonstrate Any
 Clear Error of Fact or Law..... 17**

 1. *The Reasons for Permittees’ Discharges Are Not Relevant to NPDES Permit Issuance
 17*

 2. *Accusations of Improper Motives Are Baseless..... 19*

 3. *Petitioners Cannot Establish That, But-For the NPDES Permit, RCRA Would Apply to
 the Treatment Facility..... 21*

**C. Petitioners Have Presented No Important Policy Considerations Warranting Board
 Review 22**

D. The Petition is Defective and the Requested Relief is Improper 23

 1. *Any Challenge to the 2023 Permit is Untimely and No Special Circumstances Exist to
 Provide for Review..... 23*

 2. *Assuming the Petition is a Valid Challenge to the Permit, the Only Permit Conditions
 at Issue Are Those That Apply to Outfall 051 and So a Request for Blanket Remand or
 Vacatur is Improper..... 25*

V. CONCLUSION 25

VI. ORAL ARGUMENT 25

TABLE OF AUTHORITIES

Cases

Concerned Citizens for Nuclear Safety v. U.S. EPA, No. 18-9542 (Apr. 23, 2020)..... 7

Concerned Citizens for Nuclear Safety, Inc. v. U.S. E.P.A., 2020 WL 8674182 21

In re Ash Grove Cement Co., 7 E.A.D. 387 (EAB 1997) 10

In re Avenal Power Ctr., L.L.C., 15 E.A.D. 384 (EAB 2011)..... 9

In re City of Lowell, 18 E.A.D. 115 (June 29, 2020) 10, 11, 17, 18, 21

In re City of Moscow, 10 E.A.D. 135 (EAB 2001)..... 10

In re Gov’t of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. 323 (EAB 2002)..... 10

In re Los Alamos National Security LLC and the U.S. Department of Energy, 17 E.A.D. 585 (E.A.B. 2017)..... 5

In re Minergy Detroit, LLC, PSD Appeal Nos. 02-01 & 02-02, Order Denying Review (unpublished) 24

In re NE Hub Partners, L.P., 7 E.A.D. 561 (EAB 1998) 10

In re Springfield Water & Sewer Comm’n, 18 E.A.D. 430 (EAB 2021)..... 10

In re Steel Dynamics, Inc., 9 E.A.D. 165 (EAB 2000)..... 10

In re Sutter Power Plant, 8 E.A.D. 680 (EAB 1999) 24

Nat’l Pork Prods. Council v. U.S. Env’l Prot. Agency, 635 F.3d 738 (5th Cir. 2011)..... 16

Penn Fuel Gas, Inc. v. EPA, 185 F.3d 862 (3d Cir. 1999) 10

Sierra Club v. EPA, 762 F.3d 971 (9th Cir. 2014)..... 9

Waterkeeper All., Inc. v. U.S. Env’l Prot. Agency, 399 F.3d 486 (2d Cir. 2005) 16

Statutes

33 U.S.C. § 1311..... 15

33 U.S.C. § 1342..... 1, 9, 15

42 U.S.C. § 6905(a) 24

Regulations

40 C.F.R. § 122.21(a)..... 14

40 C.F.R. § 122.21(d)(2)..... 15

40 C.F.R. § 124.17 9

40 C.F.R. § 124.19 1

40 C.F.R. § 124.19(a)(3)..... 23

40 C.F.R. § 124.19(a)(4)..... 5, 9, 24

40 C.F.R. § 124.19(a)(4)(i) 9, 24, 25

40 C.F.R. § 124.19(a)(4)(ii) 9

40 C.F.R. § 124.19(b)(3)..... 1

40 C.F.R. § 124.19(l) 24

40 C.F.R. § 124.19(l)(2)(iii)..... 24

40 C.F.R. § 264.1 22

40 C.F.R. § 270.1 22

40 CFR § 124.19(a)(4)..... 11

TABLE OF ATTACHMENTS

| No. | Document Name (Administrative Record (A.R.) reference noted parenthetically, where possible) |
|-----|---|
| A | Permit Application, Appendix D, Map 2 (A.R. at A.1) |
| B | Permit Applicants' Response Brief to Petition for Review, NPDES Appeal No. 22-01, dated July 1, 2022 |
| C | Permittees' 2023 Comments and Data in Support of Reissuance, dated April 5, 2023 (A.R. at I.5) |
| D | Letter Responding to Order for Additional Briefing and Affidavit of Michael Thomas Saladen, dated October 12, 2017 |
| E | Outfall 051 DMR Table (A.R. __, https://www.epa.gov/system/files/documents/2022-05/Outfall%20051%20DMRs%20June2019%20-%20Jan2022.pdf) |
| F | Excerpt of Triad Comments on the Draft Industrial and Sanitary Wastewater NPDES Permit, dated October 28, 2020 (A.R. at C.7) |
| G | Notice of Planned Change for the Radioactive Liquid Waste Treatment Facility (RLWTF) Outfall 051, dated February 25, 2021 (A.R. at F.3) |
| H | Triad's Supplemental Comments and Affidavit, dated February 25, 2021 (A.R. at F.1) |
| I | Excerpt from 2019 Permit Re-Application, Volume I Forms 1 and 2 (A.R. at A.1) |
| J | Answer Brief of the Department of Energy, National Nuclear Security Administration and Triad National Security, LLC, dated March 16, 2023 |
| K | Affidavit of Robert Clifford Mason, dated March 29, 2018 |
| L | 2018 Oral Argument Transcript |
| M | 2023 Response to Comments Document, dated September 27, 2023 (A.R. at J.3) |
| N | 2019 NPDES Re-Application – Introduction, dated March 2019 (A.R. at A.1) |
| O | Excerpt from Outfall 051 Fact Sheet, dated March 2019 (A.R. at A.2) |
| P | 2019 NPDES Permit Reapplication - Supplemental Package 3, dated August 20, 2019 (A.R. at A.4) |
| Q | Order Dismissing for Lack of Subject Matter Jurisdiction, dated April 23, 2020 |
| R | 2020 Fact Sheet (A.R. at A.7) |
| S | NMED's Response to Motion to Reverse Issuance of DP-1132, dated August 29, 2022 |

STATEMENT OF COMPLIANCE WITH WORD LIMIT

This document complies with the word limitation of 40 C.F.R. 124.19(d)(3), because, excluding the parts of the document exempted by 40 C.F.R. 124.19(d)(3), this document contains less than 14,000 words.

Dated: December 13, 2023

/s/ James T. Banks _____
James T. Banks
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: 202-637-5802
E-mail: james.banks@hoganlovells.com
Attorney for Triad National Security, LLC

Pursuant to 40 C.F.R. § 124.19(b)(3), the U.S. Department of Energy, by and through the National Nuclear Security Administration Los Alamos Field Office, and Triad National Security, LLC (collectively, “Permittees”), submit this response to the Petition for Review filed by Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace (collectively, “Petitioners”) on October 30, 2023 (“Petition”), requesting that the Environmental Appeals Board (the “Board”) of the U.S. Environmental Protection Agency (“EPA”) undertake review pursuant to 40 C.F.R. § 124.19 of the issuance by EPA Region 6 (the “Region”) “of a Clean Water Act, 33 U.S.C. § 1342 (‘CWA’), permit, No. NM0028355 . . . on March 24, 2022.” For the reasons set forth below, Permittees respectfully submit that the Petition should be denied.

I. INTRODUCTION

The record demonstrates that the Region duly considered the issues raised in the comments and adopted an approach that is rational in light of all information in the record. Whether this Board or the Petitioners would give different consideration or weight to the facts before the Region is not the issue. The Petition fails to demonstrate that the Region’s decision was based on either a finding of fact or conclusion of law that was clearly erroneous or was an abuse of discretion.

On September 28, 2023, the Region issued NPDES Permit No. NM0028355 (the “2023 Permit”), which reauthorizes Permittees to discharge from eleven outfalls located across the Los Alamos National Laboratory (the “Laboratory”).¹ The 2023 Permit “supersedes and replaces NPDES Permit No. NM0028355 issued March 30, 2022.” NM0028355 - Final Permit Part I. The Petition addresses the permit issued by the Region on March 24, 2022, which was the

¹ Los Alamos National Laboratory, EPA ID No. NM0890010515, is located in remote Northern New Mexico, with operations spread out over approximately 40 square miles. See **Attachment A**, Los Alamos National Laboratory NPDES Permit Re-Application, Permit No. NM0028355 (Mar. 2019) (“2019 Permit Re-Application”), Appendix D, Map 2 (A.R. at A.1).

subject of prior Board review in NPDES Appeal No. 22-01. The Petition presents no facial challenge to the conditions contained in the 2023 Permit nor does it allege that the 2023 Permit fails to meet the objectives of the CWA. Additionally, although the Petition objects generally to issuance of a renewed discharge permit for one outfall, namely Outfall 051, of the Laboratory's eleven permitted outfalls,² it requests that the Board vacate the permit in full, which would impact ten unchallenged outfalls.³ Petitioners' unambiguous goal is to have the Board intervene and terminate permit coverage – under any possible theory – for Outfall 051, the sole outfall servicing a mission-critical treatment facility referred to as the Radioactive Liquid Waste Treatment Facility (“Treatment Facility” or “RLWTF”).

Permittees have discharged from Outfall 051 during both past and the most recent permit periods. These discharges are described in several documents in the administrative record.⁴ In their certified application to the Region, the Permittees stated their intention to continue

² Petition mentions Outfall 051 at least 30 times and all arguments are directed toward that outfall alone. Note that in a prior proceeding, Petitioners addressed – in passing, by a single footnote reference alone – the Laboratory's other five outfalls that have had similar operational shifts (*i.e.*, periods of non-use, based on operational need) over time. To the extent the Board considers these arguments, Permittees also incorporate by reference and rely on their Response Brief in NPDES Appeal No. 22-01, attached hereto as **Attachment B**; and **Attachment C**, Permittees' 2023 Comments (Apr. 5, 2023) (A.R. at I.5); and also **Attachment D**, 2017 Letter Response and Affidavit in NPDES Appeal No. 17-05, p. 1, 7 (describing Outfall 051 as integral to RLWTF operations and explaining that ongoing permit coverage for Outfall 051 is required for operational need such as maintenance or malfunction or changes in Laboratory mission needs).

³ The Petition's sole prayer for relief is that the Board vacate and remand. Pet. 1, 25. Even if the Board were to construe the prayer for relief as a request to remand issuance of the *September 28, 2023 Permit*, there is no basis to vacate and remand where the Petition challenges conditions purportedly relevant to only one aspect of a permit.

⁴ See **Attachment E**, Outfall 051 DMR Table (A.R. __, <https://www.epa.gov/system/files/documents/2022-05/Outfall%20051%20DMRs%20June2019%20-%20Jan2022.pdf>) (summarizing discharges for 2019, 2020, 2021, and early 2022); **Attachment F**, Excerpt of Permittees' Comments on the Draft NPDES Permit No. 0028355 Published November 30, 2019 (Oct. 28, 2020) (A.R. at C.7) (“Permittees' 2020 Comments”) (addressing Outfall 051 discharge data for June 2019, March 2020, and August 2020); **Attachment G**, Permittees' Notice of Planned Change (Feb. 25, 2021) (A.R. at F.3) (addressing changes to the Outfall 051 Fact Sheet based on discharge data from 2019, 2020, and 2021); **Attachment H**, Permittees' 2021 Supplemental Comments and Affidavit (Feb. 25, 2021), at p. 34, ¶ 5 (A.R. at F.1); Permittees' 2023 Comments (A.R. at I.5) (addressing 2021 and 2022 discharge data for several outfalls, including Outfall 051).

discharging from Outfall 051 into the future. **Attachment I**, 2019 Permit Re-Application, Volume I, Forms 1 and 2 (A.R. at A.1).⁵

Permittees also have provided the Region with affidavits and prior testimony to this Board, attesting to Permittees' long-standing plans to continue discharges from Outfall 051 and the integral nature of Outfall 051 to the Treatment Facility. *See, e.g.*, Permittees' 2021 Supplemental Comments and Affidavit, p. 34, ¶ 5 (A.R. at F.1);⁶ **Attachment L**, 2018 Oral Argument Transcript, 52:9-22; 53:1-9.⁷

In an attempt to contradict this evidence, Petitioners make unsupported assertions that Permittees discharged from Outfall 051 for unclear or improper purposes. Not only is the motivation for the discharges during a prior permit term irrelevant to the issuance of an NPDES permit for a new permit term, but the record shows that the Laboratory discharged for operational reasons. *See Attachment M*, 2023 Response to Comments Document (Sept. 27, 2023), pp. 10-11 (A.R. at J.3) (Permittees needed to discharge from Outfall 051 due to

⁵ Unlike Petitioners, who here argue that the NPDES permit should be vacated and remanded because evaporative systems will make discharge through the permitted outfall unnecessary in the future and who simultaneously challenge issuance of the state groundwater permit that is necessary to bring these evaporative systems online, **Permittees have been consistent in their arguments and expression of intent to discharge from Outfall 051 across regulatory proceedings.** To the extent this Board considers the filings provided in state groundwater permit proceedings, Permittees request the Board to consider the full record of those proceedings rather than Petitioners' selective excerpts. *See, e.g., Attachment J*, Answer Brief of the Department of Energy, National Nuclear Security Administration and Triad National Security, LLC (Mar. 16 2023), *In re the Petition for Review of the Decision of the New Mexico Environment Department Issuing Groundwater Discharge Permit No. DP-1132, Concerned Citizens for Nuclear Safety and Honor Our Pueblo Existence, Petitioners* ("In re DP-1132"), pp. 2-3 ("DP-1132 Answer Brief"); **Attachment K**, 2018 Affidavit, *In re DP-1132*, ¶ 7; and *see, generally, Concerned Citizens for Nuclear Safety and Honor Our Pueblo Existence v. New Mexico Water Quality Control Commission, et al.* N.M. Ct. App. Case No. A-1-CA-41226 (filed Jul. 3, 2023).

⁶ Affirming that "RLWTF is a mission-critical facility" that treats the Laboratory's low-level and transuranic liquid wastewater from across the site, and that "**Outfall 051 is an integral component of the RLWTF, and is required to maintain operational flexibility and readiness to meet the Laboratory's mission demands.**" Furthermore, also affirming that "**Outfall 051 is not used only as a back-up, but also has been and will be used routinely in conjunction with the MES to support the Laboratory's operational priorities, such as when influent to the RLWTF makes such use advisable and to confirm operability.**"

⁷ This Board has previously addressed the reasonableness of a permittee's request for permit coverage where there are different options for disposing of treated effluent, when options in addition to the outfall may be subject to breakdown or malfunction. 2018 Oral Argument Transcript, 17:8-21.

unavailability of other evaporation options at least once in 2019). To support their position, Petitioners continue to rely on a decades-old document discussing a discharge *goal* for the Laboratory under a prior operating contractor, while ignoring the operational realities of the intervening decades, changes in the Laboratory's operations and evolving mission needs, and evidence of record. *See, e.g.*, 2017 Letter Response and Affidavit (describing in 2017 that Outfall 051 would be utilized as mission needs increase into the future).

Four years of documented actual discharges from Outfall 051 during the prior permit term are sufficient demonstration to overcome the unsupported and irrelevant statements contained in the Petition. Even if no actual discharges had occurred during the prior permit period, ample basis for affirming issuance of the permit is provided by the Laboratory's clear statements included in the administrative record explaining the Laboratory's expected need to discharge into the future.

The Petition betrays a fundamental misunderstanding of the CWA, the Resource Conservation and Recovery Act ("RCRA"), and EPA's regulations implementing those statutes. It dismisses the repeated, clear explanations, in the Region's 2023 Response to Comments Document, of its authority to issue NPDES permits for continuing dischargers as well as for applicants who propose to discharge. *See e.g.* 2023 Response to Comments Document at 10, 31, 58, 93 (A.R. at J.3). And no support is to be found in the statute, regulations, or the Second and Fifth Circuit opinions cited in the Petition for Petitioners' novel proposition that a person must

first violate the CWA's prohibition against unpermitted discharges before EPA may issue a permit for "actual" discharges.⁸

Permittees respectfully submit that the Board should dismiss the Petition, as a) there is no possibility that a petition challenging the 2023 Permit can be timely filed and, b) the Petition's requested relief is overbroad and would impact unchallenged outfalls. Should the Board allow the Petition to proceed, the Board should affirm issuance of the 2023 Permit because Petitioners have not met their burden under 40 C.F.R. § 124.19(a)(4) to support the Board's review.

II. BACKGROUND

A. The Los Alamos National Laboratory

The Board has previously described the Los Alamos National Laboratory, and the 2019 Permit Re-Application also describes the Laboratory. *See In re Los Alamos National Security LLC and the U.S. Department of Energy*, 17 E.A.D. 585, 589 (E.A.B. 2017); **Attachment N**, 2019 Permit Re-Application, Introduction at ¶ 2.2 (A.R. at A.1). The Laboratory is "a complex organization comprised of multiple disciplines and programs that include stockpile stewardship and extensive basic research in physics, chemistry, metallurgy, mathematics, computers, earth sciences, and electronics." 2019 Permit Re-Application, Introduction at ¶ 2.2 (A.R. at A.1). The mission of the Laboratory is "to solve national security challenges through scientific excellence" and its goals include "to deliver national nuclear security and broader global security mission solutions and to foster excellence in science and engineering disciplines essential for national security missions." *Id.*

The Laboratory discharges from its various outfalls for operational reasons. As early as 2017, the Laboratory explained that it would need to utilize Outfall 051 into the future, not only

⁸ This Board has previously considered the lack of support these cases provide for the proposition that EPA may not issue a permit when an applicant submits a permit application. *See* 2018 Oral Argument Transcript, 26:1-22, 27:1-7.

because evaporative systems may be unavailable due to maintenance or malfunction, but also because of increases in treatment needs created by changes in Laboratory operations. *See* 2017 Letter Response and Affidavit, p. 6 ¶ 6. Permittees owe no duty to explain any of the details of its dynamic operational need to use any of its permitted outfalls more or less frequently, and Petitioners' attempts to use procedures before this Board to elicit such operational details is improper.

In the course of its work the Laboratory generates various types of wastewater including radioactive wastewater. *See* **Attachment O**, 2019 Permit Re-Application, Fact Sheet – Outfall 051 at ¶ 2 (“Fact Sheet – Outfall 051”) (A.R. at A.2).⁹ When certain work occurs more frequently, more wastewater of various types may be generated. There are two ways to deal with this wastewater. One is to evaporate the liquid portion of treated wastewater in a mechanical evaporator and ship residual solids offsite for disposal. *Id.* The other is to discharge the wastewater, after treatment to ensure such discharges meet state water quality standards and other requirements, through an outfall such as Outfall 051. *Id.*

Since 1978 the Laboratory has had an approved NPDES permit authorizing discharges from its various outfalls. 2019 Permit Re-Application, Introduction at ¶ 2.3 (A.R. at A.1).¹⁰ The 2019 Permit Re-Application contains a historical summary of NPDES Permit No. NM0028355, demonstrating that the Laboratory has made significant outfall reduction efforts over the past

⁹ The administrative record demonstrates that the Laboratory utilizes a combination of mechanical evaporation and discharging at several of its outfalls, so in this regard Outfall 051 is not unique. *See, e.g.,* **Attachment P**, 2019 Permit Re-Application, Supplemental Package 3 (A.R. at A.4) (discussing operational changes for mechanical evaporators associated with discharges that also flow to Outfall 05A055, Outfall 03A027, and Outfall 001). In the future, a third way to dispose of such water from the Treatment Facility may be passive evaporation. Passive evaporation is not presently an option because two of the Petitioners in this matter have opposed, a key state permit that is required for this option, *see, fn. 5, supra* (the *In re DP-1132* filings and ongoing appeal).

¹⁰ The Laboratory has held an NPDES permit, including for Outfall 051, since before the RCRA regulations and the New Mexico Hazardous Waste Act requirements raised in the Petition as applicable to the Laboratory existed, which alone rebuts bald statements that the Laboratory has sought to avail itself of an NPDES permit for the singular purpose of avoiding other regulatory requirements.

several decades, moving from 141 permitted outfalls prior to 1990 to eleven permitted outfalls by 2012. *Id.*; and *see id.* at Table 1.¹¹ A review of the historical summary of the Laboratory's outfalls demonstrates that the Laboratory has a practice of requesting elimination of permit coverage for outfalls that are no longer in use or that will no longer discharge to the environment. *Id.* at 7.

As demonstrated in this proceeding, and in prior proceedings before the Board, the Laboratory has maintained that Outfall 051 is integral to Treatment Facility operations. *See* 2017 Letter Response and Affidavit, at 1; 2021 Supplemental Comments and Affidavit, at ¶ 5 (A.R. at F.1).

B. The 2019 Permit Re-Application and the 2023 Permit

In March 2019, Triad National Security, LLC¹² and the U.S. Department of Energy submitted a *certified* application for renewal of the Laboratory's then-existing NPDES permit, issued in October 2014, and modified in May 2015, to reauthorize discharges from eleven outfalls, including continued discharges from the Treatment Facility via its sole outfall, Outfall 051. *See* 2019 Permit Re-Application at ¶ 2.3 & Table 1. The Treatment Facility treats low-

¹¹ Petitioners would have this Board find fault in the current operator of the Laboratory for not having actually eliminated all discharges, but over the years prior operators of the Laboratory were able to reduce the number of outfalls and its discharges by an impressive degree.

¹² As noted by the Tenth Circuit, Triad National Security LLC has operated the Laboratory – which is a government-owned, contractor operated facility – on behalf of the United States Department of Energy's National Nuclear Security Administration only since fall of 2018. At the time of prior Laboratory NPDES permit re-applications, other entities were operating the Laboratory on behalf of the federal government, including Los Alamos National Security LLC who was operating the Laboratory at the time of the 2012 permit re-application. *See Attachment Q, Order Dismissing for Lack of Subject Matter Jurisdiction, Concerned Citizens for Nuclear Safety v. U.S. EPA*, No. 18-9542, 2020 WL 8674182 (Apr. 23, 2020) (this order is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel; it may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1). It would be erroneous to hold Triad National Security, LLC to prior stated operational goals of prior operators of the Laboratory.

level and transuranic radioactive liquid waste from various locations at the Laboratory. Fact Sheet – Outfall 051 at ¶ 2 (A.R. at A.2).

The Petition addresses the permit issued by the Region on March 24, 2022, which was the subject of prior Board review, in NPDES Appeal No. 22-01. In that matter, the Board remanded to the Region to provide the public with an opportunity to comment on 2021 discharge data for Outfall 051 that the Region had considered after close of public comment, but prior to issuance of the March 24, 2022 permit; consider any comments received; revise the Response to Comments document; and take further action, as appropriate, in reissuing a permit decision. Remand Order, p. 21 (A.R. I.1). Since then, the Region noticed the additional discharge data and received public comment. 2023 Response to Comments Document, p. 87 (A.R. at J.3) (“EPA complied with the EAB remand order and provided public notice and opportunity to comment on 2021 discharge data for Outfall 051 . . . and 2022 data for Outfall 051.”). Permittees filed comments that addressed technical corrections to discharge data, described the numerous discharges from Outfall 051, and explained how Outfall 051 discharge data were consistent with the Form 2C estimates provided with the 2019 Permit Re-Application. *See, id.*, pp. 76-86. Petitioners also submitted comments. The Region responded to public comment and then issued the 2023 Permit and the Response to Public Comments Document on September 28, 2023.

The Petition, filed on October 30, 2023, requests that the Board undertake review...of the Region’s issuance “of a Clean Water Act, 33 U.S.C. § 1342 (‘CWA’), permit, No. NM0028355 . . . on March 24, 2022.” *See* Pet. ¶¶ 4, 22. On November 15, 2023, the Region issued a Notice of Uncontested and Severable Permit Conditions, noting that the Petition “does not identify specific permit conditions for review or include a section specifically articulating issues presented” for

Board review but that the Petition “does include many objections to the issuance of permit authorization for Outfall 051, which is also the only outfall referenced.” Dkt. #4.

III. STANDARD OF REVIEW

Section 124.19 of title 40 of the Code of Federal Regulations governs Board review of NPDES permitting decisions. In an appeal from a permitting decision issued under part 124, Petitioners bear the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). (“[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.”). *In re GSP Merrimack L.L.C.* 18 E.A.D. 524, 528 (EAB 2021); 40 C.F.R. § 124.19(a)(4)(i). If the petition raises an issue that the Region addressed in the response to comment document issued pursuant to 40 C.F.R. § 124.17, petitioners “must provide a citation to the relevant comment and response” and explain why the response to comment “was clearly erroneous” or “otherwise warrants review.” 40 C.F.R. § 124.19(a)(4)(ii). The Board has discretion to grant or deny review of a permit decision. *See In re Avenal Power Ctr., L.L.C.*, 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).

Ordinarily, the Board will deny a petition for review and thus not remand the permit unless the underlying permit decision is based on a clearly erroneous finding of fact or conclusion of law, or an exercise of discretion that the Board, in its discretion, should review. *GSP Merrimack*, 18 E.A.D. 528; 40 C.F.R. § 124.19(a)(4)(i). In considering whether to grant or deny a petition for review, the Board is guided by the preamble to the regulations authorizing

appeal under part 124, which states 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.

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.” *See, e.g., 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). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion. *Ash Grove*, 7 E.A.D. at 417. 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 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 re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998), *pet. for review denied sub. nom.*; *Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

Clear error is a difficult standard for Petitioners to meet. *In re Springfield Water & Sewer Comm’n*, 18 E.A.D. 430, 463 (EAB 2021) (citations omitted). The Board “defers to a permit issuer’s technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record.” *In re City of Lowell*, 18 E.A.D. 115, 132 (June 29, 2020). The consequence of the Board’s deferential approach is that:

Clear error in a permit issuer’s technical determination cannot be “established simply because petitioners document a difference of opinion or an alternative theory.” *NE Hub Partners*, 7 E.A.D. at 570. Rather, “[i]n cases where the views of the [permit issuer] and the petitioner indicate bona fide

differences of...judgment on a technical issue, the Board typically will defer to the [permit issuer].” *Id.* at 567-68

Id. (emphasis added).

IV. ARGUMENT

The Petition should be dismissed. The Region has provided clear explanation for issuance of the 2023 Permit and the administrative record provides ample support for issuance. The Region’s 2023 Response to Public Comment Document provides adequate, clear explanation. Petitioners have not met their burden under 40 CFR § 124.19(a)(4). The Petition fails to identify the permit conditions challenged, does not establish that the Region’s issuance of the 2023 Permit was an abuse of discretion, and does not demonstrate that the Region’s Response to Comment Document was clearly erroneous or otherwise warrants review. The Region’s issuance of the 2023 Permit is supported by the record as to all eleven outfalls, including Outfall 051, and the Region has clear authority to issue the 2023 Permit.

With respect to Outfall 051 in particular, the Board should deny review because Permittees: (1) clearly stated their plan to discharge in the 2019 Permit Re-application; (2) have made actual discharges confirming their planned discharges; and (3) the record establishes that Permittees anticipate discharges in the future. The fact of such planned, actual, and anticipated future discharges is more than sufficient to support the permit decision, particularly in light of the opportunity for public comment on discharge data for Outfall 051 from 2019, 2020, 2021, and 2022. Although there is no basis for requiring it, Permittees have explained how and why discharges change based on operational need. The Petition identifies no requirement for applicants to justify their operational changes to the Region, and baseless accusations about a permittee’s reasons for discharging should have no bearing upon the Region’s permitting

decisions. Finally, since Congress has already resolved the supposed policy questions Petitioners raise, the Petition poses no important policy consideration warranting the Board's review.

A. The Record Provides More Than Sufficient Support for Issuance of the 2023 Permit

1. The Region Provided Clear Explanations for Issuing the 2023 Permit and Identified the Crucial Facts Upon Which it Relied

The record on which the Region based its permit decision supports that Permittees discharged from Outfall 051 during the prior permit term and that Permittees intend to discharge from Outfall 051 in the future.¹³ As was the case with the Laboratory's 2012 Permit Re-Application, in 2019 Permittees submitted a certified re-application to the Region wherein the Permittees reiterated that they would continue discharging from Outfall 051 into the future. 2019 Permit Re-Application, Volume I, Forms 1 and 2 (A.R. at A.1).¹⁴ The Region's 2020 Fact Sheet (**Attachment R**), issued with the draft permit, explained that permit conditions for Outfall 051 were calculated based upon data provided by the Permittees for actual discharges in 2019. 2020 Fact Sheet at 13 (A.R. at A.7). During the public comment period, Permittees provided statements affirming their intent to continue discharging from Outfall 051 and affirming the

¹³ See, e.g., 2017 Letter Response and Affidavit, p. 1, 7 (describing Outfall 051 as integral to RLWTF operations and explaining that ongoing permit coverage for Outfall 051 is required for operational need such as maintenance or malfunction or changes in Laboratory mission needs); Permittees' 2020 Comments (A.R. at C.7) (addressing Outfall 051 discharge data for June 2019, March 2020, and August 2020); Permittee's 2021 Notice of Planned Change (A.R. at F.3) (addressing changes to the Outfall 051 Fact Sheet based on discharge data from 2019, 2020, and 2021); Permittees' 2021 Supplemental Comments and Affidavit, p. 34, ¶ 5 (A.R. at F.1); and Permittees' 2023 Comments (addressing 2021 and 2022 discharge data for several outfalls, including Outfall 051) (A.R. at I.5).

¹⁴ Unlike Petitioners, who here argue that the NPDES permit should be vacated and remanded because evaporative systems will make discharge through the permitted outfall unnecessary in the future and who simultaneously challenge issuance of the state groundwater permit that is necessary to bring these evaporative systems online, **Permittees have been consistent in their arguments and expression of intent to discharge from Outfall 051 across regulatory proceedings.** To the extent this Board considers the filings provided in state groundwater permit proceedings, Permittees request the Board to consider the full record of those proceedings rather than Petitioners' selective excerpts. See, e.g., **Attachment J**, Answer Brief of the Department of Energy, National Nuclear Security Administration and Triad National Security, LLC, *In re the Petition for Review of the Decision of the New Mexico Environment Department Issuing Groundwater Discharge Permit No. DP-1132, Concerned Citizens for Nuclear Safety and Honor Our Pueblo Existence, Petitioners* ("In re DP-1132"), pp. 2-3 ("DP-1132 Answer Brief"); **Attachment K**, 2018 Affidavit, *In re DP-1132*, ¶ 7; and see, generally, *Concerned Citizens for Nuclear Safety and Honor Our Pueblo Existence v. New Mexico Water Quality Control Commission, et al.* N.M. Ct. App. Case No. A-1-CA-41226 (filed Jul. 3, 2023).

integral nature of Outfall 051 to the Treatment Facility. Permittees' 2021 Supplemental Comments and Affidavit, p. 34, ¶ 5 (A.R. at F.1) (“Outfall 051 is not used only as a back-up, but also has been and will be used routinely in conjunction with the MES to support the Laboratory’s operational priorities, such as when influent to the RLWTF makes such use advisable and to confirm operability.”).

In issuing the 2023 Permit, the Region also based its decision on a record of actual discharges. In its 2023 Response to Comments, the Region notes that Outfall 051 discharged in 2019 and 2020. 2023 Response to Comments Document, p. 11 (A.R. at J.3) (describing 2019 and 2020 discharges occurring because evaporators were unavailable, and another 2020 discharge due to influent volumes). The Region also notes that Permittees discharged from Outfall 051 for a total of twenty-nine days over sixteen months in 2021 and 2022. 2023 Response to Comments Document, p. 81 (A.R. at J.3). The 2019 Permit Re-Application’s estimated effluent flows for Outfall 051 were consistent with the actual discharge flows. *Id.* at 84.¹⁵

2. The Region Has Clear Authority to Permit Both Continuing and Proposed Discharges

The Region initially set out the bases for its exercise of permitting authority in the February 26, 2020 Fact Sheet it issued with the draft permit. 2020 Fact Sheet at 7 (A.R. at A.7). The Region discussed the statutory authority and need for its permit action, stressing that the

¹⁵ Petitioners made comments about wanting a further “explanation” from Permittees, which the Region addressed. 2023 Response to Comments Document, pp. 92-93 (A.R. at J.3) (noting that “neither 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” requested).

CWA “made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions.” *Id.*

Following its review of comments submitted by Petitioners and Permittees in February and March 2021, the Region issued the 2022 permit and its Response to Comments on March 24, 2022. The Region specifically addressed Petitioners’ comment that “[g]overning law precludes a permit for non-discharging outfalls.” 2022 Response to Comments at 10 (A.R. at H.3).

The Region’s response was two-fold. First, “the CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis,” and moreover “to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual.” *Id.* The CWA fully supports EPA’s conclusions of law. 33 U.S.C. § 1342 (“[t]he Administrator may...issue a permit for the discharge of any pollutant...”); *id.* § 1311 (“Except as in compliance with this section and section[.]...1342...of this title, the discharge of any pollutant by any person shall be unlawful.”). In other words, the Region determined that it has authority to issue permits for proposed discharges.

Second, the Region pointed to three discharges that had occurred in 2019-2020, and to the Permittees’ clear statement in their comments that Outfall 051 would operate as “an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future.” 2022 Response to Comments, at 11 (A.R. at H.3). That is, the Region’s concluded that, because the record showed the RLWTF was *not* a “non-discharging facility,” EPA could exercise its authority to permit continuing discharges.

In sum, the Region concluded in 2022 that a permit may be issued both for anticipated discharges and for the continuation of existing discharges. The Region’s position tracks with the long-standing regulatory basis for NPDES permit issuance: “[a]ny person who *discharges or proposes to discharge* pollutants must apply for a permit.” 40 C.F.R. § 122.21(a) (emphasis added). As the Region recognized, the Laboratory had done both.

Later, following the Board’s December 28, 2022 remand of the 2022 permit decision, the Region published additional discharge data on February 25, 2023, and sought public comment. A.R. at I.2. The Region then issued the 2023 Permit and its September 27, 2023 Response to Comments. A.R. at J.1-J.3. The Region again addressed Petitioners’ arguments challenging the Region’s authority to issue the permit, the Region stated:

The import to the EPA of the additional 2022 data for Outfall 051...is that it is evidence of actual discharges...Though actual discharges are not required for permit authorization, the history of actual discharges from Outfall 051 is directly responsive to public comments... which included inaccurate assertions that Outfall 051 was non-discharging and therefore should be denied permit authorization.

[...]

40 CFR 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.*

2023 Response to Comments at 92 (A.R. at J.3). (emphasis added).

These statements explain the Region’s decision and satisfy the concerns the Board set forth in its remand order regarding what it saw as the Region’s procedural error and lack of clarity. The Region duly considered issues raised in comments, and the Region adopted an approach that is rational and supportable. First, the CWA (by implication from its structure,

especially its prohibition against unpermitted discharges) and EPA’s regulations (in plain language), *do* authorize permit issuance for proposed discharges. Second, a permit application *is* a proposal to discharge and it *is* a “voluntary” request for permission to discharge. Petitioners maintain that, to be a “proposal,” the permit application must be submitted at least 180 days before discharges will commence. Pet. ¶¶ 33, 38. In the context of a continuing discharger, such as the Laboratory, this means 180 days prior to expiration of the existing permit. 40 C.F.R. § 122.21(d)(2). Permittees submitted their renewal application 186 days prior to expiration of the then-current permit, so even by Petitioners’ yardstick the application must be considered a “proposal to discharge.” 2019 NPDES Re-Application - Intro at 8 (A.R. at A.1); 2020 Fact Sheet at 4 (A.R. at A.7). Third, the detailed elements required for a permit application, and contained in the Laboratory’s renewal application, *do* amount to a “plan” to discharge specific “components” of the discharge (*i.e.*, pollutants) -- in this instance *confirmed* by a history of actual discharges under prior permits, and further confirmed by the Permittees’ unequivocal statements that they intend (*i.e.*, “plan”) to utilize Outfall 051 regularly.

The Region’s explanations align precisely with the law. In the prior petition for review of the 2022 permit, the Parties exhaustively briefed Petitioners’ assertion that two Circuit Court decisions – *Waterkeeper All., Inc. v. U.S. Env’l Prot. Agency*, 399 F.3d 486 (2d Cir. 2005) and *Nat’l Pork Prods. Council v. U.S. Env’l Prot. Agency*, 635 F.3d 738 (5th Cir. 2011) -- require an actual discharge, not merely a proposal to discharge, before EPA may grant a permit. The Permittees and the Region explained to the Board that those two decisions addressed EPA’s authority to compel the filing of a permit *application* (EPA’s so-called “duty to apply”), not its authority to grant a *permit* actually requested by an applicant. To hold otherwise would badly misread those decisions and turn the NPDES program upside down.

The Board should conclude that the Region “articulate[d] with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion.” Remand Order, at 3-4. First, in support of its conclusion that it had authority to permit proposed discharges, the Region cited the fact that the Laboratory had proposed to discharge in the future by applying for permission to do so. Second, in support of its conclusion that it had authority to permit continuing discharges, the Region cited the fact that the Laboratory was not a non-discharging facility, in that it had numerous, actual discharges in 2021-2022. It then clearly explained the legal basis for both conclusions. Not only is EPA’s conclusion correct and in conformance with law, but this is precisely the type of judgment as to which the Board has said it will defer to the permit writer’s experience. *City of Lowell*, 18 E.A.D. at 132.

B. The Board Should Deny Review Because Petitioners Have Failed to Demonstrate Any Clear Error of Fact or Law

The Region has sufficiently explained its rationale for issuing the 2023 Permit. Following remand, the Region made additional facts available for public comment, considered public comment, and issued responses to public comment received. These facts further reinforce the Region’s rationale for issuing the 2023 Permit. The administrative record as a whole provides a clear and defensible rationale for permit issuance. Petitioners have not established otherwise.

1. The Reasons for Permittees’ Discharges Are Not Relevant to NPDES Permit Issuance

The Petition conflates the Region’s obligation to provide its permitting rationale with a non-existent obligation that Permittees supply an explanation for their discharges. The reasons for a discharge are not within the purview of this Board’s review: it is enough that a discharge occurs or is planned to occur. The Petition’s demands for detailed operational explanations are

unfounded. *See, e.g.*, Pet. ¶¶ 18, 36, 54. Other than the items specified in EPA’s permit application forms, no law or regulation requires permit applicants to provide information about operations, and nothing compels applicants to explain the reasons for any changes from prior operating procedures. 2023 Response to Comments Document at 93 (A.R. at J.3). As the Region explained, “[t]he rules do not set standards or restrictions on the rationales for discharge,” *id.*, “nor [do they prescribe] any requirement for applicants to justify the necessity of operational changes.” *Id.* at 94. Permittees demonstrated an intent to discharge, and Permittees did discharge. That is sufficient to justify issuance of the 2023 Permit.

In contrast to the record evidence of operational need for use of Outfall 051, *see, e.g.*, 2023 Response to Comments Document, pp. 11, 81 (A.R. at J.3), the Petition offers unsubstantiated alternative theories for Permittees’ discharges from Outfall 051. Pet. ¶¶ 40, 42, 46. However, there is no contradiction in Permittees utilizing Outfall 051 as a backup to other methods of discharge and having an operational need to utilize it, and there is no evidence that Permittees have discharged for anything other than operational need. Fundamentally, “clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, *particularly when the alternative theory is unsubstantiated.*” *City of Lowell*, 18 E.A.D. at 132 (quotations and citations omitted) (emphasis added). Where petitioners fail to substantiate an alternative theory, the Board will defer to EPA’s experience and judgment. *Id.* Here, the Petition offers only an inference based solely on the timing of 2021 discharges, Pet. ¶¶ 15-18, 40, 42, and speculation that those discharges were not really in support of operational needs. This alternative theory is not substantiated and, furthermore, ignores the fact that Permittees discharged in 2019 and 2020.

Even if the Board were to credit inference as substantiation, the Petition concedes that Outfall 051 performs (at least) a backup role. The record also demonstrates that in 2019 and 2020, the Laboratory discharged precisely because there was no other option. 2023 Response to Comments Document, pp. 10-11 (A.R. at J.3). Petitioners could prevail here only if the Board discounts all the other evidence of planned and actual discharges, and also decides that EPA lacks authority to issue a permit when both actual (during the prior permit period) and future proposed discharges serve as an operational backup mechanism. There is no basis for the Board to do so.

2. Accusations of Improper Motives Are Baseless

As discussed above, the record contains ample demonstration of the Laboratory's continuing operational need to discharge from Outfall 051. This need predates any challenges by Petitioners. Yet, without evidence, Petitioners persist in theorizing that the Laboratory could not have utilized Outfall 051 except to influence this litigation. Pet. ¶ 40. Further, Petitioners incorrectly argue that "Region 6 does not assert that Permittees...had any purpose *other than* to influence the outcome of this proceeding," and therefore "[it] must be taken as admitted that the 2021 discharges were motivated to influence the outcome of this proceeding." *Id.* ¶ 42. Petitioners' contention ignores two important things.

First, Petitioners' argument says nothing at all about the 2022 discharges, to which the Region also pointed (i) as refuting Petitioners' claim that Outfall 051 could not be permitted because it was a non-discharging outfall, and (ii) as "*confirm[ing]*...that there was no lack of a plan or proposal to discharge." 2023 Response to Comments Document, p. 92 (A.R. at J.3). The Region cited the 2021 and 2022 discharges equally as support for these two important conclusions. Petitioners therefore have conceded that no inference unfavorable to Permittees can

be drawn from the 2022 discharges and that no further “innocent explanation” for them can be expected or demanded. Second, quite aside from any supposed motive for those earlier discharges, the Region is on solid ground in basing its permit decision on Permittees’ proposal to discharge in the future.

More fundamentally, Permittees *did* provide a straight-forward explanation of their motive for the 2021 and 2022 discharges. Prior to the 2021 discharges, Permittees affirmed that “Outfall 051 is an integral component of RLWTF, and is required to maintain operational flexibility and readiness to meet the Laboratory’s mission demands. Outfall 051 is not used only as a backup,” (though use as a backup is an unexceptional operational need for a permit) “but also has been *and will be used routinely* in conjunction with the MES to support the Laboratory’s operational priorities....” 2021 Supplemental Response and Affidavit. The Laboratory explained its operational needs and plans before making the 2021 and 2022 discharges, and it did so at a time when there was no litigation to influence. This was also true when the Laboratory submitted the 2019 Permit Re-Application, which demonstrated a plan to discharge consistent with operational needs. The Region acknowledges that the subsequent actual discharge data for Outfall 051 affirms and is consistent with the stated intention to discharge contained in the 2019 Permit Re-Application. 2023 Response to Comments Document, pp. 81-84 (A.R. at J.3).

In short, especially in light of the significant record evidence to the contrary, the Petition’s mere allegations are insufficient to demonstrate clear error or any abuse of discretion by the Region. “Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, *particularly when the alternative theory is unsubstantiated.*” *City of Lowell*, 18 E.A.D. at

132 (quotations and citations omitted) (emphasis added). Petitioners' accusations of improper motives are irrelevant and baseless.

3. Petitioners Cannot Establish That, But-For the NPDES Permit, RCRA Would Apply to the Treatment Facility

The Petition's mistaken assertion that, should the permit be terminated for Outfall 051, RCRA would apply to the Treatment Facility is unsupported. Fundamental to this position is Petitioners' unfounded conclusion that "[t]he RLWTF could operate on a zero-liquid-discharge basis indefinitely," Pet. ¶ 7. The Petition provides no evidence to support this claim, and yet nevertheless asserts – again without citation or evidence – that exemption from hazardous waste regulation is Permittees' sole and insidious motivation for seeking a CWA permit that includes authorization to discharge from Outfall 051. Pet. ¶ 15. In so doing, the Petition wholly ignores the fact that the Laboratory obtained a CWA permit in 1978, before the requirements Petitioners so vehemently seek to have imposed could have applied, and that this exemption for the Treatment Facility in particular has been recognized by both the Tenth Circuit and New Mexico. *See Concerned Citizens for Nuclear Safety, Inc. v. U.S. E.P.A.*, 2020 WL 8674182 at *1; and **Attachment S**, NMED's Response to Motion to Reverse the Issuance of DP-1132, 4-5 (Aug. 29, 2022).

While it is a truism that the Wastewater Treatment Unit ("WWTU") exemption means that performing a full RCRA regulatory analysis is unnecessary, it does not follow that absent the WWTU exemption that RCRA permitting provisions would apply to the Treatment Facility. *See* 2022 Response Brief, pp. 39-40; *see also*, Answer Brief of DOE and Triad, *In re DP-1132*, pp. 1-20. Permittees do not concede that the Treatment Facility "manages" hazardous waste, as the Petition alleges (Pet. ¶ 9). There has been neither a technical nor a legal determination that, in an alternate reality where there was no permitted NPDES outfall integral to the Treatment Facility,

permitting provisions of RCRA would in fact apply.¹⁶ Petitioners' assertions to the contrary are simply unfounded. They are, moreover, irrelevant. RCRA's application, or not, to the RLWTF has no bearing on the issuance, or not, of the discharge permit.

C. Petitioners Have Presented No Important Policy Considerations Warranting Board Review

Because there is no statutory conflict, no important policy consideration is presented for the Board to address. Congress and EPA decided long ago how to deal with the potential overlap between the CWA and RCRA. Even so, the Petition alleges that "Region 6 is required to consider the effect of its actions on RCRA enforcement" (Pet. ¶ 25.e), suggesting that the Board should regard that issue as an important policy consideration warranting review. In fact, during briefing before the Board on the 2022 permit, Petitioners couched their contention as presenting a conflict between two federal statutes that the Region was obliged to avoid by giving effect to both statutes, and criticized the Region's refusal to do so, saying: "[] EPA does not have discretion to formulate environmental policy in disregard of the enactments of Congress." 2022 Pet. at 54-57. But in enacting RCRA, Congress recognized the potential for conflict and addressed that issue itself by requiring EPA to fashion its regulations so as to defer to the CWA and other environmental statutes, not RCRA.

In RCRA, Congress said: "Nothing in this chapter 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 [the CWA, the Safe Drinking Water Act, the Marine Protection, Research and Sanctuaries Act, or the Atomic Energy Act]." 42 U.S.C. § 6905(a). EPA implemented this

¹⁶ Just as the Petition supposes that RCRA permitting provisions would apply to the Treatment Facility, one could equally suppose that the Laboratory could make operational adjustments or identify another exemption from RCRA such that *neither* permitting under the CWA *nor* permitting under RCRA would be relevant to the Treatment Facility.

Congressional policy by promulgating two exemptions from RCRA requirements for qualifying WWTUs that are subject to the CWA. The first exempts WWTUs from RCRA permitting requirements. 40 C.F.R. § 270.1. The second exempts WWTUs from RCRA substantive requirements. 40 C.F.R. § 264.1. If the tanks treating hazardous waste at the Treatment Facility qualify under these two exemptions, Congress (in RCRA itself) and EPA (in promulgating two exemptions) have determined that RCRA does not apply to them. Thus, as a matter of policy, *Congress* decided to authorize EPA to exempt from RCRA any hazardous waste treatment units at a wastewater treatment facility that is subject to the CWA.

The Region exercised no discretion and faced no choice between conflicting statutes because Congress had already eliminated the purported conflict. The Region’s responsibility was to decide whether discharges from Outfall 051 continue to be subject to the CWA permitting program. For all of the reasons discussed above, the Region correctly decided the Treatment Facility’s discharges are subject to that program. Based upon that decision, the WWTU exemptions automatically apply, or do not apply, depending on the facts associated with the Treatment Facility. An evaluation of the applicability of the WWTU exemptions simply has no place in the NPDES permitting process, as the Region correctly noted. 2023 Response to Comments Document at 102 (A.R. at J.3).

D. The Petition is Defective and the Requested Relief is Improper

1. Any Challenge to the 2023 Permit is Untimely and No Special Circumstances Exist to Provide for Review

On its face, the Petition requests review only of the NPDES permit issued by Region 6 on March 24, 2022, and repeatedly refers to that permit throughout the Petition. Pet. ¶¶ 1, 4, 19. The operative September 28, 2023 permit plainly states that it “supersedes and replaces NPDES

Permit No. NM0028355 issued on March 30, 2022,” 2023 Permit, at 1, but nowhere in their Petition do Petitioners challenge that permit.

The opportunity to challenge the 2023 Permit has now passed, because a petition must be filed within 30 days after the Regional Administrator serves notice of the issuance of a final permit decision. 40 C.F.R. § 124.19(a)(3). Therefore, the permit challenged by Petitioners in this proceeding no longer exists, and the filing deadline for challenging the current permit has passed. The Board has said: “The EAB requires strict adherence to the filing deadlines in the regulations. The filing requirements for a petition for review serve an important role as they help bring repose and certainty to the administrative process. The Board will not excuse a late-filed petition for review unless it finds special circumstances justify the untimeliness.” Guide to the [U.S. EPA’s] Environmental Appeals Board at 17 (March 2023); *see In re Minergy Detroit, LLC*, PSD Appeal Nos. 02-01 & 02-02, Order Denying Review (unpublished) at 1 n.2; *In re Sutter Power Plant*, 8 E.A.D. 680, 695 (EAB 1999). Since the Petition fails to mention the 2023 Permit, there is no basis for hearing the Petition.

The Board made clear that 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(l).” Remand Order, n.10. Pursuant to 40 C.F.R. § 124.19(l), a “final permit decision must be issued by a regional administrator . . . [u]pon the completion of remand proceedings if the proceedings are remanded” unless the Board’s remand order “specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.”

40 C.F.R. § 124.19(l)(2)(iii). The Region made its decision on remand to issue the 2023 Permit, and Petitioners have not challenged that 2023 Permit.

2. Assuming the Petition is a Valid Challenge to the Permit, the Only Permit Conditions at Issue Are Those That Apply to Outfall 051 and So a Request for Blanket Remand or Vacatur is Improper

To justify review by the Board, a petition must “identify the contested permit condition or other specific challenge to the permit decision.” 40 C.F.R. § 124.19(a)(4)(i). Here, the Petition fails to explicitly state which conditions it purports to challenge. However, all of its arguments and examples are directed to Outfall 051. The Petition neither asserts specific challenges to conditions that apply to other outfalls nor argues that its reasoning applies to any other outfalls or permit conditions. Although the Petition concludes that “[t]he *permit* should be vacated” (Pet. ¶ 58, emphasis added), Petitioners have not provided any basis for review, as required under 40 C.F.R. § 124.19(a)(4), of any conditions other than those that apply to Outfall 051. If the Board allows any review of the Region’s decision to proceed, it should limit the scope of its review accordingly. The other outfalls (13S, 03A027, 03A113, 03A160 and 05A055) previously addressed in NPDES Appeal No. 22-01 are never mentioned.

V. CONCLUSION

If the Board concludes it has jurisdiction to hear this appeal (despite the Petition’s explicit reference to a superseded permit), Permittees respectfully submit that the Petition should be denied. Petitioners have not carried their burden of demonstrating that the Region’s permit decision either was based on a finding of fact or conclusion of law that is clearly erroneous or that the record presents an exercise of discretion or an important policy consideration that the Board should review. 40 C.F.R. § 124.19(a)(4)(i).

VI. ORAL ARGUMENT

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

Dated: December 13, 2023.

*Respectfully Submitted,**

/s/ James T. Banks

James T. Banks
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Tel: 202.637.5802
E-mail: james.banks@hoganlovells.com

/s/ Maureen C. Dolan

Maureen C. Dolan
Maxine M. McReynolds
Office of General Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, NM 87545
Tel: 505-667-3766
E-mail: dolan@lanl.gov
E-mail: mcreynolds@lanl.gov

***Attorneys for Permittee
Triad National Security, LLC***

*The Department of Energy, National Nuclear Security Administration's Site Counsel for the Los Alamos Site Office joins in this Response.

/s/ Stephen P. Jochem

Stephen P. Jochem

U.S. Department of Energy

National Nuclear Security Administration

Los Alamos Site Office

3747 W. Jemez Rd.

Los Alamos, NM 87544

Telephone: 505-423-3681

E-mail: stephen.jochem@nnsa.doe.gov

Attorney for Permittee

U.S. Department of Energy

National Nuclear Security Administration

CERTIFICATE OF SERVICE

I hereby certify that, on December 13, 2023, I served the foregoing document on the following persons by e-mail in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals:

**For: Concerned Citizens for Nuclear Safety,
Honor Our Pueblo Existence,
Veterans for Peace**

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
Telephone: 505-983-1800
Email: lindsay@lindsaylovejoy.com

For: EPA

Jay Przyborski
Assistant Regional Counsel
U.S. EPA, Region 6
1201 Elm Street, Suite 500
Dallas, TX 75270-2102
Telephone: 214-665-6605
Email: przyborski.jay@epa.gov

Renea Ryland
U.S. EPA, Region 6
1201 Elm Street, Suite 500
Dallas, TX 75270-2102
Telephone: 214-665-2130
Email: Ryland.renea@Epa.gov

/s/ James Banks
James Banks
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW Washington, DC
20004
Telephone: 202-637-5802
E-mail: james.banks@hoganlovells.com
Attorney for Triad National Security, LLC
Dated: December 13, 2023