

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

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In re: )  
U.S. Department of Energy and )  
Triad National Security, L.L.C. )  
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Permit No. NM0028355 )  
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NPDES Appeal No. 22-01

**PERMIT APPLICANTS' RESPONSE TO PETITION FOR REVIEW**

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Dated: July 1, 2022

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<b>Exhibit No.</b>	<b>Document Name</b>
A	Los Alamos National Laboratory EPA Permit Reapplication (March 2019)
B	Draft Permit No. NM0028355 (November 28, 2019)
C	Notice of Public Commentary Extending Period to March 31, 2020
D	Transcript of January 15, 2020 Public Hearing
E	Second Notice of Public Commentary Reopening Period to February 28, 2021
F	Triad Supplemental Comments, Information, and Response Regarding NGO Comments on Draft NPDES Permit No. NM0028355 for Los Alamos National Laboratory (February 25, 2021)
G	Concerned Citizens for Nuclear Safety, et al. Supplemental Comments on Proposed Renewal of NPDES Permit NM 0028355 (March 29, 2021)
H	Additional Comments Submitted During Public Commentary Period
I	NPDES Permit No. NM0028355 Fact Sheet (February 26, 2020)
J	DMR Summary for Permit NM0028355
K	DMR Outfall 051 (June 2019-January 2022)
L	Los Alamos National Laboratory Request for an Extension of Time to Complete SET Pipeline Water Tightness Testing, Radioactive Liquid Waste Treatment Facility (June 15, 2021)
M	EPA Region 6 Response to Comments (March 24, 2022)
N	Triad's Planned Change for the Radioactive Liquid Waste Treatment Facility Outfall 051 (February 25, 2021)

## STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

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: July 1, 2022

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## I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(b)(3), Permit Applicants, the National Nuclear Security Administration of the U.S. Department of Energy (“DOE/NNSA”) and Triad National Security, LLC (“Triad”) (collectively, “Permittees”), submit this response to the petition, filed by Concerned Citizens for Nuclear Safety (“CCNS”), Honor Our Pueblo Existence (“HOPE”) and Veterans for Peace, Chapter #63 (“VFP”) (collectively, “Petitioners”) for review of National Pollutant Discharge Elimination System (“NPDES”) Permit No. NM0028355, issued pursuant to the Clean Water Act (“CWA” or “the Act”) by the U.S. Environmental Protection Agency (“EPA”) Region 6 on March 30, 2022 (“Petition”), authorizing discharges from multiple outfalls at the Los Alamos National Laboratory (“LANL” or the “Laboratory”).

The Petition should be denied. EPA exercised considered judgment, and Petitioners have identified no finding of fact or conclusion of law that is clearly erroneous. Rather, Petitioners have selectively relied upon obsolete snippets from the records of prior permitting processes dating back two decades, while omitting key facts documented in the administrative record for *this permit*, including reports detailing actual ongoing discharges, that completely undermine their principal contentions. As Petitioners have in the past before the EPA Environmental Appeals Board (“the Board”) and several federal courts, their Petition in this appeal advances mistaken interpretations of the CWA and the relationship between the CWA and other environmental statutes. Petitioners have contorted holdings of federal court decisions beyond recognition to advance an unsupported argument that EPA lacks authority to issue permits for discharges that will be made only when certain circumstances arise. Petitioners’ underlying inference, that the Laboratory maintains CWA permitting as a sham to avoid other environmental regulatory requirements, is demonstrably false. Region 6 has committed no error or abuse of



discretion, and the Petition presents no agency exercise of discretion or important policy consideration warranting the Board's review.

## II. PROCEDURAL AND FACTUAL BACKGROUND

The Board has previously reviewed and described the Laboratory's wastewater treatment and discharge facilities and has considered much of the NPDES permitting history pertaining to those facilities. *See In re Los Alamos Nat'l Sec., LLC*, 17 E.A.D. 586, 589-91 (EAB 2018) (order denying informal review of Region 6 denial of CCNS request to terminate LANL's NPDES permit) ("2018 Final Decision"). Shortly after the Board's 2018 Final Decision, the Permit Applicants filed an application to renew the NPDES permit.<sup>1</sup> Due to the complex nature of the 2019 Reapplication, Permittees requested that "all previous applications, modifications, maps, data, and pertinent correspondence submitted in reference to NPDES Permit No. NM0028355 transmitted to EPA" up to permit issuance be considered part of the reapplication.<sup>2</sup> Region 6 issued a draft permit on November 28, 2019<sup>3</sup>, opened a public comment period from November 30, 2019 to January 28, 2020, extended that comment period to March 31, 2020,<sup>4</sup> held a public hearing on January 15, 2020,<sup>5</sup> and provided an additional public comment period from January 30, 2021 to February 28, 2021.<sup>6</sup> Triad, CCNS, and others provided supplemental comments during the re-opened comment period.<sup>7</sup>

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<sup>1</sup> Ex. A, LANL March 2019 Permit Reapplication (hereinafter "2019 Reapplication").

<sup>2</sup> *Id.* at 1.

<sup>3</sup> Ex. B, November 28, 2019 Draft Permit No. NM0028355

<sup>4</sup> Ex. C, Notice of Public Commentary Extending Period to March 31, 2020

<sup>5</sup> Ex. D, Transcript of January 15, 2020 Public Hearing

<sup>6</sup> Ex. E, Notice of Public Commentary Reopening Period to February 28, 2021.

<sup>7</sup> *See generally* Ex. F, February 25, 2021 Triad Supplemental Comments; Ex. G, March 29, 2021 CCNS Supplemental Comments; and Ex. H, Additional Comments Received During Re-Opened Comment Period.

LANL has operated pursuant to NPDES Permit No. NM0028355 for more than 40 years under a variety of changing conditions. The Laboratory, which is currently operated by Triad on behalf of the DOE/NNSA, has had an approved NPDES Permit since 1978.<sup>8</sup> Prior to 1990, the Laboratory operated 141 permitted outfalls.<sup>9</sup> Through a significant outfall reduction effort, the Laboratory was able to move to 11 permitted outfalls by the 2012 renewed NPDES Permit No. NM0028355.<sup>10</sup> The Laboratory’s 2012, 2015, and 2019 permit renewal applications each sought permit coverage for these remaining 11 outfalls.<sup>11</sup> These remaining 11 outfalls are located at seven administrative areas, referred to as “Technical Areas” or “TAs,” that are spread out over approximately 36 square miles within the Laboratory’s boundaries.<sup>12</sup>

Within this effective footprint, the Laboratory operates a large, complex organization comprised of multiple disciplines and programs that include nuclear weapons stockpile stewardship and extensive basic research in physics, chemistry, metallurgy, mathematics, computers, earth sciences, and electronics.<sup>13</sup> The 11 Laboratory outfalls are categorized in the 2019 Reapplication in Table 2,<sup>14</sup> (reproduced below) and are each discussed, in connection with their associated facilities, further below.

<b>Outfall Category</b>	<b>Number of Outfalls</b>	<b>Designation(s)</b>
Power Plant (001)	1	001
Sanitary Wastewater System Facility (13S)	1	<b>13S</b>
Radioactive Liquid Waste Treatment Facility (051)	1	<b>051</b>
		<b>03A027</b>
		03A048

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<sup>8</sup> Ex. A at 1.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 13.

Treated Cooling Water (03A)	6	<b>03A113</b>
		<b>03A160</b>
		03A181
		03A199
Non-Contact Cooling Water, Storm Water, and Roof Drain Water (04A)	1	04A022
High Explosives Wastewater Treatment Facility (05A)	1	<b>05A055</b>

Petitioners seek to exclude 6 of the 11 remaining outfalls from the Laboratory’s NPDES permit. Petitioners’ primary efforts are aimed at Outfall 051. CCNS has previously sought, unsuccessfully, to have Outfall 051 terminated from the Laboratory’s NPDES permit. *C.f.* 2018 Final Decision, *appeal denied*, *Concerned Citizens for Nuclear Safety v. U.S. Env’l Prot. Agency, et. al.*, No. 18-9542 (10th Cir. Apr. 23, 2020), *reh’g en banc. denied*, (10th Cir. June 23, 2020), and *cert. denied*, No. 18-9542 (S. Ct. Mar. 1, 2021). Petitioners now also summarily seek to exclude Outfall 13S, Outfall 03A027, Outfall 3A113, Outfall 03A160, and Outfall 05A055. Petition ¶¶ 66; *id.* n.52.

#### **A. Outfall 051**

The Petition focuses primarily on the Radioactive Liquid Waste Treatment Facility (“RLWTF”) at LANL. The RLWTF receives and treats radioactive liquid waste process wastewater, cooling water, and/or storm water from various generator facilities located throughout the Laboratory, and discharges effluent through an outfall designated as Outfall 051.<sup>15</sup> The Permittees estimated that Outfall 051 would discharge at a rate and frequency of 0.0159 million gallons per day (MGD), 4 days per week, twelve months per year, with an average volume of 15,936 gallons per day.<sup>16</sup>

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<sup>15</sup> *Id.*; *see also* Ex. N, February 25, 2021 Triad Planned Change for RLWTF at Attachment 1 §2.2, Revised Outfall 051 Fact Sheet.

<sup>16</sup> *Id.* § 2.3.

At different times in the past, Outfall 051 has served primarily as the single discharge point for all RLWTF effluent. The RLWTF was designed and constructed over sixty years ago, and was specifically designed to discharge from the outfall.<sup>17</sup> In more recent years, Outfall 051 has been a complimentary discharge point used when the RLWTF's Mechanical Evaporator System ("MES") was unavailable due to malfunction or maintenance.<sup>18</sup> LANL has also developed Solar Evaporation Tanks (the "SET") to augment the RLWTF's treatment capacity, but construction flaws, permitting issues, and disuse and disrepair have prevented the SET from ever being used. While Petitioners correctly point out that the SET's preliminary permitting issues may now be resolved with issuance of a key state permit,<sup>19</sup> the remaining issues mean that any near-term use of the SET is unlikely.<sup>20</sup>

Most recently, due to operational need, the Laboratory has again envisioned a significant role for Outfall 051 whereby it will be utilized even when evaporation equipment is online.<sup>21</sup> Outfall 051 has served, and will continue to serve, as an integral component of the operational program of the RLWTF.<sup>22</sup> As described *infra* in Section IV.A.1, the record is unequivocal that the Laboratory continues to actively discharge from Outfall 051.

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<sup>17</sup> Ex. F, Attachment 1 at 18.

<sup>18</sup> *Id.* at 12.

<sup>19</sup> Petitioners in this matter have, contradictorily, challenged issuance of this final key state permit that authorizes the SET's usage asserting, among other things, that the State of New Mexico lacks legal authority to issue the permit, and yet in the instant Petition they assert that the state permit authorizing use of the SET will render use of Outfall 051 unnecessary. *Verified Petition for Review on Behalf of Concerned Citizens for Nuclear Safety and Honor our Pueblo Existence*, Petition for Review of the Decision of the New Mexico Environment Department Issuing Groundwater Discharge Permit No. DP-1132, WQCC No. 22-21 (Jun. 6, 2022).

<sup>20</sup> Ex. F, Attachment B ¶ 5, Aff. of Stuart A. McKernan in Support of Triad Supplemental Comments.

<sup>21</sup> *Id.*, Attachment 1 at 13.

<sup>22</sup> *Id.* at 18.

## B. Outfall 13S

Outfall 13S has not discharged because, thankfully, to date there has been no equipment failure, but it is fully capable of discharging and will be used when circumstances warrant.

Permittees described the need for and function of Outfall 13S in their Supplemental Comments as follows:

Outfall 13S is associated with the LANL sanitary wastewater system (SWWS) treatment facility. **This facility and Outfall 13S are located at a lower elevation than all of the other outfalls at LANL, and [the 2019 Reapplication] clearly states that treated effluent from the SWWS can be discharged to Outfall 13S or pumped to the Power Plant Reuse Tank (located at a higher elevation).** Treated SWWS effluent that is pumped to the Power Plant Reuse Tank is either discharged to Outfall 001 or treated for reuse at the Sanitary Effluent Reclamation Facility (SERF). **Outfall 13S is routinely maintained, has an automatic flow meter, automatic sampler, and is fully capable of receiving SWWS treated effluent based upon demand, volume, and availability of equipment to pump, store, discharge, and/or treat using facilities and equipment located at an elevation that is much higher than SWWS.** The outfall provides operational flexibility for maintenance, repair, and replacement of equipment (i.e., pumps, SERF, Reuse Tank, Outfall 001) and serves as a critical backup should LANL be unable to pump to a higher elevation due to equipment failure or an increase in treated effluent volume.<sup>23</sup>

As these comments make clear, the Permittees intend and propose to discharge from Outfall 13S when pumping to facilities and equipment at higher elevations is not possible due to equipment failure or when there is a need to maintain, repair or replace such equipment. Even absent equipment maintenance or repair, there may be a need to utilize Outfall 13S if required by an increase in treated effluent volume.

## C. Outfall 03A027

The Laboratory uses Outfall 03A027 to discharge cooling tower blowdown in support of the Strategic Computing Complex (“SCC”). The effluent is comprised of potable water and/or

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<sup>23</sup> Ex. F, Attachment 1 at 19-20 (emphases added).

recycled Sanitary Wastewater System (“SWWS”) effluent from the Sanitary Effluent Reclamation Facility (“SERF”) that is treated by the cooling tower water treatment system. The blowdown discharged from 03A027 can be routed to either Outfall 03A027, Outfall 001, or the SWWS based on operational needs; the most recent discharge event from Outfall 03A027 was in September 2016.<sup>24</sup> In their Supplemental Comments, Permittees stated: “Outfall 03A027 is . . . capable of receiving SCC Cooling Tower blowdown discharges. In September 2016, the valving on the blowdown line was modified to allow discharge to Outfall 03A027, Outfall 001, the Reuse Tank at the Power Plant for recycle at SERF, or the SWWS treatment plant . . . based upon demand, volume, and outfall/equipment availability.”<sup>25</sup> Thus, influent loading and the operational status of other equipment dictate the need to use Outfall 03A027.

#### **D. Outfall 03A113**

The Laboratory has utilized Outfall 03A113 in the past and will continue to do so in the future. Outfall 03A113 discharges treated cooling water.<sup>26</sup> Permittees’ Supplemental Comments stated: “The TA-53-952 cooling tower discharges routinely to the outfall as shown in Fact Sheet Attachment D and the various Discharge Monitoring Reports [(“DMRs”)] . . . . The outfall discharged 529,234 gallons in 2017, 436,400 gallons in 2018, 198,530 gallons in 2019, and 154,390 gallons as of October 30, 2020. Cooling Tower TA-53-293 is in operational standby and is currently not discharging to the outfall, but the permit application proposes this as a future

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<sup>24</sup> Ex. I, February 26, 2020 Fact Sheet at 5

<sup>25</sup> Ex. F, Attachment 1 at 20-21.

<sup>26</sup> Ex. I at 5-6.

discharge source to the outfall.”<sup>27</sup> The DMR Summary in the administrative record for the Permit confirms these facts.<sup>28</sup>

### **E. Outfall 03A160**

The Laboratory has utilized Outfall 03A160 in the past, most recently through April 2018, and will continue to do so in the future based on operational need. Outfall 03A160 discharges cooling tower blowdown. The Permittees’ Supplemental Comments described the current situation as follows:

The cooling tower blowdown discharged to Outfall 03A160 was routed to SWWS in May of 2018 to support the recycling of water through the SERF facility and to allow the NHMFL [National High Magnetic Field Laboratory] to construct a water treatment system and perform rehabilitation of the cooling system (i.e., replace heat exchangers, tank cleaning, tank integrity testing). The 2019 NPDES Permit Re-Application proposed discharges to that outfall based upon historical data and the use of the outfall as an operational backup. The proposed water treatment system mentioned in the permit and the cooling system rehabilitation were completed in the summer of 2020.<sup>29</sup>

### **F. Outfall 05A055**

The Laboratory has utilized Outfall 05A055 in the past and will continue to do so in the future. This outfall is described in the Permittees’ Supplemental Comments as follows:

The 2019 NPDES Permit Re-Application clearly states “The treatment process is designed to circulate the wastewater through the process multiple times prior to storage in the post treatment tanks and discharge to either electric evaporators or to Outfall 05A055” (05A055 Fact Sheet Section 2.2.). **Outfall 05A055 is fully capable of receiving treated HEWTF [High Explosives Wastewater Treatment Facility] effluent based upon demand, volume, and availability of evaporation equipment. The outfall provides operational flexibility for maintenance, repair and replacement of equipment (i.e., evaporator), and serves as a critical backup should LANL be unable to evaporate effluent. There will be occasions when the volume of effluent or equipment availability**

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<sup>27</sup> Ex. F, Attachment 1 at 20-21.

<sup>28</sup> Ex. J, DMR Summary at 62-63.

<sup>29</sup> Ex. F, Attachment 1 at 22.

**(i.e., evaporator) will require discharge to Outfall 05A055. This is demonstrated in the discharge monitoring reports submitted to the EPA for previous discharges to the outfall.<sup>30</sup>**

As with several of the other outfalls, Outfall 05A055 will be used when necessary based upon operational need.

### **III. STANDARD OF REVIEW**

EPA's consolidated permitting regulations provide detailed procedures for EPA's issuance or renewal of permits under NPDES and other permit programs. Those regulations require EPA to issue a draft permit, seek public comment, hold a public hearing where there is significant public interest in the draft permit, and respond to significant comments received when a final permit decision is issued. *See* 40 C.F.R. §§ 124.6-.12, .17. The regulations specify the procedures and grounds for an appeal of a permit decision at 40 C.F.R. § 124.19.

Petitioners bear the burden of demonstrating that review is warranted. *In re GSP Merrimack L.L.C.* 18 E.A.D. 524, 528 (EAB 2021). To satisfy its burden, Petitioners must “clearly set forth, with legal and factual support, [their] contentions for why the permit decision should be reviewed.” *Id.* Because the Board's power is to be only sparingly exercised, “[t]he Board will ordinarily deny a petition for review . . . unless the underlying permit decision is based on a clearly erroneous finding of fact or conclusion of law or an exercise of discretion or important policy consideration that the Board, in its discretion, should review.” *Id.*

A petition should be denied when the permit issuer has explained itself clearly and has support for its decision in the record. When evaluating a permit decision for clear error, the Board examines the administrative record to determine whether the permit issuer “exercised

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<sup>30</sup> *Id.* at 23 (emphasis added).



‘considered judgment’” in rendering its decision. *In re Gen. Elec.*, 18 E.A.D. 575, 608 (EAB 2022) (citations omitted). Clear error is a difficult standard for a petitioner to meet, as the record need only demonstrate that the permit issuer “duly considered the issues raised in the comments,” *In re Gov’t of D.C. Mun. Sep. Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002), and ultimately adopted an approach that “is rational and supportable,” *In re Springfield Water & Sewer Comm’n*, 18 E.A.D. 430, 463 (EAB 2021) (citations omitted). Similarly, the permitting authority’s exercise of discretion is reasonable if it is “cogently explained and supported in the record.” *In re Sierra Pacific Indus.*, 16 E.A.D. 1, 15 (EAB 2013).

In the discussion below, the Permittees will demonstrate that the Board should deny the Petition. Petitioners’ contentions are based on glaring factual errors, not factual support, and what Petitioners refer to as legal support amounts to evident misinterpretation of the statute, case law, and EPA guidance. Region 6 made no clearly erroneous finding of fact or conclusion of law, its decision is both rational and supportable, and therefore Region 6 cannot be seen as having abused its discretion. The Petition raises no important policy considerations warranting this Board’s exercise of authority.

#### **IV. ARGUMENT**

##### **A. Fatal Factual Flaws Undermine Petitioners’ Principal Argument.**

###### *1. The Record is Clear That the Laboratory Has Been Actually Discharging from Outfall 051.*

Petitioners have placed their legal argument—that Region 6 erred by issuing a permit for discharges from Outfall 051 because the Laboratory had no intention of using the outfall—on a foundation of sand. The sand has been shifting erratically for some time. On the one hand, Petitioners are insisting that LANL has no plan to use Outfall 051, while on the other hand

Petitioners demonstrated in their briefing to the Board in the prior appeal that the Laboratory had made clear that “Outfall 051 would be put to use.” *See* CCNS Reply Br. at 8, *In re Los Alamos Nat’l Sec., LLC*, NPDES Appeal No. 17-05 (Nov. 7, 2017). Petitioners pointed out, for example, that eleven outfalls had been listed in the Laboratory’s prior permit application “as ‘potential no-flow outfall[s],’” but that “Outfall 051 is *not so listed*.” *Id.* (citation omitted). Petitioners also emphasized that “LANL’s Fact sheet on Outfall 051 . . . states that Outfall 051 ‘discharges treated radioactive liquid wastewater’” and “is likely to be needed in the future.” *Id.* at 8-9 (citation omitted). And CCNS asserted that “[o]ther passages describe Outfall 051 as an ongoing source of discharge.” *Id.* at 9. While the Board has previously found no merit in legal arguments based on such assertions, *see In re Los Alamos Nat’l Sec., LLC*, 17 E.A.D. 586, 602, the fact remains that CCNS has *conceded* that the Laboratory had articulated specific plans to utilize Outfall 051 when necessary. Which is it? Is the Laboratory using, or planning to use, Outfall 051 or is it not? CCNS does not reveal the answer, because it omits the relevant facts from the current Petition.

Instead of confronting dispositive evidence detailing the Laboratory’s *actual, ongoing use* of Outfall 051 to discharge effluent from the RLWTF, discussed below, Petitioners cling to portions of obsolete documents from past proceedings to perpetuate their myth that Outfall 051 remains a seldom-used backup option. Petitioners point to statements from 1998, 1999, 2000 and 2008 describing a long-abandoned prior goal of achieving zero liquid discharge. Petition ¶¶ 10-21.<sup>31</sup> All of this ancient history is intended to support Petitioners’ erroneous factual conclusion

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<sup>31</sup> We note that, despite the aspirational statements from over twenty years ago upon which Petitioners heavily rely, and despite remarkable outfall reductions achieved at the Laboratory, the RLWTF has never been, and is not now, a zero liquid discharge facility. We further note that such documents were authored by prior Laboratory operators, not the Laboratory’s current operator.

that the RLWTF “has not discharged any liquid since November 2010, except for certain releases in June 2019, March and August 2020 . . . .” *Id.* ¶¶ 10, 35-37.

The record proves otherwise. Region 6 included in the administrative record a summary of DMRs for the five years preceding permit issuance. These records have been available to the public for some time. The Laboratory’s DMRs document that discharges were made from Outfall 051 in April, May, June, July, August, September and November of 2021, in addition to the discharges noted by the Petitioners in June 2019, March 2020 and August 2020.<sup>32</sup> Flows ranged from about 10,000 gallons per day (“GPD”) in August 2020 to about 980,000 GPD in August 2021.<sup>33</sup> Moreover, these DMRs capture data on discharges from Outfall 051 on a total of 19 days between June 18, 2019 and November 29, 2021, each of which was a batch discharge representing the accumulation of treated liquid wastewater on even more days of operations at the RLWTF.<sup>34</sup>

Petitioners, perhaps not fully aware, make no mention of these facts demonstrating that Outfall 051 actually is discharging at significant flow rates and has been doing so for over a year. However, the Petition fails to note that the Laboratory made clear in its February 25, 2021 supplemental comments that “discharges from the outfall are expected to be more routine and frequent in the future” and that “there will be occasions on which influent to the RLWTF will be significant enough that LANL will choose to use both the mechanical evaporator and Outfall 051

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<sup>32</sup> Ex. J at 45.

<sup>33</sup> *Id.*

<sup>34</sup> Ex. K, June 2019-January 2022 DMR Outfall 051; *see also NPDES Outfall 051051 Flow Rates*, Intellus New Mexico Database, <https://www.intellusnm.com/reporting/quick-search/quick-search.cfm> (selecting applicable data provider, data type, and analytical parameters).

simultaneously.”<sup>35</sup> And Petitioners conveniently overlook the affidavit of Stuart A. McKernan, LANL’s Facility Operations Director in charge of the RLWTF, who stated for the record:

RLWTF is a mission-critical facility that treats low-level and transuranic liquid wastewater from processes at generator facilities throughout the Laboratory. The Laboratory is authorized under the NPDES Permit to discharge wastewater from the facility through Outfall 051, the Mechanical Evaporator System (MES), and/or the Solar Evaporation Tanks (SET). All three discharge options are available for use as needed to support RLWTF operations. 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 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 addition, as in the past, Outfall 051 will remain available in the event the MES is taken out of service for repair, replacement, or maintenance. Outfall 051 is especially critical due to the fact that the SET is not currently available for use.<sup>36</sup>

Nor does it matter that the New Mexico Environment Department (“NMED”) issued a permit on May 5, 2022, authorizing the use of the SET. Contrary to Petitioners’ assertion, that state-level permitting action does not make it “unlikely that there should be any discharge through Outfall 051,” Petition ¶ 42, because the SET will play no role in the operation of the RLWTF any time soon. On June 15, 2021, LANL requested from NMED, and was granted, an extension of the deadline to complete required actions on the SET because, among other things, the primary liner must be replaced.<sup>37,38</sup> The new deadline is January 15, 2023, but given the significant work needed on the SET, and because the Laboratory’s capital project budget cycles

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<sup>35</sup> Ex. F, Attachment 1 at 18-19.

<sup>36</sup> *Id.*, Attachment B ¶ 5 (emphasis added).

<sup>37</sup> Ex. L, June 15, 2021 Letter Requesting Extension of Time to Complete SET Pipeline Water Tightness Testing, Radioactive Liquid Waste Treatment Facility.

<sup>38</sup> The Permittees respectfully request that the Board take official notice of this and other public documents cited in this Response. *See, e.g. In re Los Alamos Nat’l Lab.*, 17 E.A.D. 586, 594 n.6 (EAB 2018) (citing *In re Donald Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004)) (explaining that information in the public domain is subject to official notice by the Board).

on the federal fiscal year, the timeline for the SET is likely well beyond this time. Therefore, the SET cannot possibly have near-term effect on LANL's need to utilize Outfall 051. In any case, the record is clear that the MES and SET are designed to work with, not in lieu of, the Laboratory's use of Outfall 051.<sup>39</sup>

It also is of no moment that Region 6 responded to CCNS's comments by explaining that it authorized discharges from Outfall 051 because the Laboratory had requested that authorization, or that Region 6 mentioned only some of the discharges from Outfall 051 that occurred during the past five years.<sup>40</sup> The record before the Agency included all of the ongoing discharges. Region 6 knew full well that the Laboratory has in fact utilized the outfall and had made clear its intention to continue to utilize the outfall into the future.<sup>41</sup>

These facts render irrelevant Petitioners' laborious legal argument that Region 6 lacked authority to issue the permit authorizing "potential" discharges from Outfall 051, as well as their contention that the Region erred by "not giving effect" to the Resource Conservation and Recovery Act ("RCRA") to regulate the RLWTF as a hazardous waste facility. Petitioners concede that the CWA confers authority to issue NPDES permits for actual discharges, and it concedes that an NPDES permit triggers the wastewater treatment unit ("WWTU") exemption from RCRA's permitting requirements and standards. Petition ¶ 55. Outfall 051 has actually been discharging for some time and will continue to do so. Since the NPDES permit was lawfully issued for an actual discharge, the WWTU exemption clearly applies, even under Petitioners' narrow view of the law, which the Laboratory disputes in the discussion below.

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<sup>39</sup> Ex. F, Attachment B ¶ 5.

<sup>40</sup> Ex. M at 11, March 24, 2022 EPA Region 6 Response to Comments

<sup>41</sup> Ex. F, Attachment 1 at 18-24.

Petitioners have come nowhere near carrying their burden of demonstrating clear error or an abuse of discretion by Region 6. The unremarkable fact that Region 6 reissued a long-standing NPDES permit authorizing continuation of ongoing discharges from Outfall 051 hardly qualifies as an exercise of discretion or important policy consideration warranting the Board's review.

## 2. *Other Outfalls.*

Petitioners also assert that no discharges have occurred from Outfalls 13S, 03A027, 03A113, 03A160 and 05A055. *Id.* ¶¶ 41-43. With respect to Outfalls 03A113 and 03A160, that claim is also not true. The DMR summaries in the record for these two outfalls evidence that significant discharges have occurred during the past five years.<sup>42</sup> There is no question, even under Petitioners' flawed legal theories, that Region 6 had authority to issue the permit authorizing these actual discharges from Outfall 03A113 and 03A160.

As to the other outfalls, Permittees plainly have proposed to use them for discharges when circumstances require it. Outfall 13S will be used when the Laboratory experiences equipment failure or when there is a need to maintain, repair or replace such equipment, and it will be used if required by an increase in treated effluent volume. While Outfalls 03A027 and 05A055 were not used in the most recent permit cycle, both outfalls have been used by the Laboratory and will be used when operational needs require (i.e., when the volume of influent demand is sufficient and/or when other equipment is unavailable). As we demonstrate in the discussion below, Region 6 properly exercised its authority and discretion under the CWA in permitting these outfalls.

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<sup>42</sup> Ex. J. at 62-63, 80.

It should be noted that the lack of continuous discharges from Outfalls 13S, 03A027 and 03A160 is attributable in large measure to the Laboratory's efforts to recycle and reuse treated effluent, as discussed above. These outfalls are necessary to sustain the Laboratory's important operations when the utilization of available capacity for water recycling and reuse has been maximized. Requiring that NPDES permit coverage be available only for continuous or frequent discharges would necessitate changes to this practice that would run counter to sound water conservation policy and undercut the CWA's objective of minimizing effluent discharges.

**B. The Petition is Based on Incorrect Interpretations of the CWA, RCRA, and the Relationship Between the Two Statutes.**

Petitioners base the current Petition on incorrect interpretations of the CWA, RCRA, and the relationship between the two statutes. First, Petitioners erroneously assert that EPA lacks authority under the CWA to issue a discharge permit for outfalls that have not been utilized recently and/or continuously in the past and have not been described as meeting immediate future needs. Second, Petitioners mistakenly contend that the WWTU exemption under RCRA applies only when a wastewater treatment unit has been issued a discharge permit under the CWA. The discussion below addresses each point in turn.

To be clear, the issue Petitioners raise concerning Region 6's statutory authority is not relevant to Outfalls 051, 03A113 and 03A160, as the record demonstrates that these outfalls are utilized to discharge treated effluent on an ongoing basis. Even the Petitioners concede that permitting such actively discharging outfalls is proper.

In the instant Reapplication, Permittees also proposed to utilize Outfalls 13S, 03A027 and 05A055 to discharge effluent in the future when circumstances require their use, as described

above. The argument below demonstrates that Region 6's inclusion of those three outfalls in the permit was proper.

*1. Region 6 Has Clear Authority Under the CWA to Include All Requested Outfalls in the Permit.*

Region 6's authority to issue this permit is sound and well supported. The text, structure and purposes of the CWA and EPA regulations support Region 6's authority to issue the permit for proposed discharges that will occur only in certain circumstances. The case law does not undermine that authority. Moreover, the CWA's extensive storm water permitting program and its effluent guidelines program for unplanned, episodic pollutant discharges demonstrate by analogy that Congress did not intend to limit EPA's authority to issuing NPDES permits only for ongoing or imminent discharges. And Region 6's long standing practice of industrial and municipal wastewater permitting for contingent discharges confirms that there is nothing unusual about the permit at issue here.

*2. Statutory and Regulatory Provisions Provide Clear Authority for Permitting Presently Non-Discharging Outfalls, Including Outfalls 13S, 03A027 and 05A055.*

The CWA provides that EPA "may . . . issue a permit for the discharge of any pollutant . . . upon condition that such discharge will meet" various statutory limitations. 33 U.S.C. § 1342(a). This language only makes sense if it is viewed as forward looking – *i.e.*, the issuance of a permit for future discharges that "will" comply with the statutory requirements. It would be pointless for Congress to authorize EPA to grant permission for past discharges, and it would be impossible for the Agency to ensure that such past discharges "will meet" effluent limitations. Clearly, Congress envisioned that EPA would first grant permission, conditioned as directed in the statute, and that thereafter such discharges would be legally sanctioned.



EPA's implementing regulations provide that a permit may be issued to "[a]ny person who discharges *or proposes* to discharge pollutants." 40 C.F.R. § 122.21 (a)(1) (emphasis added). Petitioners appear to accept and endorse this formulation of EPA's statutory authority under § 1342(a). Petition ¶ 55. Because, as explained above, Permittees have repeatedly discharged and/or proposed to discharge from each of the Laboratory's outfalls, Petitioners' acceptance of the regulatory language leaves no dispute for the Board to address.

Petitioners nonetheless appear to contend that a permit applicant must propose to make a very *definite, unconditional, and imminent* future discharge in order that EPA would have such authority to issue a permit. Petitioners maintain that the CWA contains no "authority to issue a permit for a discharge that 'could occur,' nor for a 'potential' or a 'capability' to discharge." *Id.* ¶ 51. Nothing in the statute or EPA's longstanding practice supports this hair splitting.

As noted, Petitioners' contention boils down to an argument that the applicant must show it has an unconditional intention to discharge in the near future, regardless of circumstances, or the applicant must have demonstrated that circumstances make a discharge highly likely, before EPA would have authority to grant the application. The statute does not mention any such limit on EPA's authority, and for good reason.

Permit applicants who know they must discharge in unusual or rare circumstances are in fact meeting their responsibility to avoid unpermitted, and unlawful, discharges by ensuring they have permit authorization to cover such possibilities. They do so by requesting permit authorization, as the Permittees have done here. It would be bizarre, to say the least, if Congress had imposed on EPA an obligation to assess the likelihood that circumstances would arise necessitating a discharge, and to issue a permit only when satisfied that its crystal ball has

deemed the probabilities to be sufficiently large. In the context of such a requirement, EPA could hardly justify enforcing the statute’s prohibition on unpermitted discharges if it had previously deemed such discharges too remote to justify issuing a permit. The statutory scheme makes no provision for such a fanciful scenario.

It would seem equally bizarre to suppose that Congress did not authorize EPA to provide permit coverage for redundant systems or equipment designed and used to ensure that industrial wastewater can be handled responsibly in all circumstances. Prudent owners and operators of point sources should be *expected* to design and manage their operations in this fashion, and denying EPA the authority to approve these actions would discourage such responsible behavior, jeopardizing the fundamental goals of the Act.

### *3. The Case Law Does Not Undermine EPA’s Statutory Authority.*

Petitioners reach their remarkable position by misapplying the holdings in two decisions from the Second and Fifth Circuit Courts of Appeals. *Id.* ¶¶ 52-54. Those decisions have nothing to do with whether EPA has authority to issue a requested permit under the CWA.

In the first decision, industry petitioners challenged a provision in EPA’s programmatic regulation governing Concentrated Animal Feeding Operations (CAFOs). The provision had required CAFO owners and operators to apply for a CWA discharge permit if there was a “potential to discharge” from their operations. *Waterkeeper All., Inc. v. U.S. Env’l Prot. Agency*, 399 F.3d 486 (2d Cir. 2005). EPA had termed this requirement a “duty to apply,” and said the duty was based on a presumption that every CAFO has the potential to discharge. *Id.* at 505. Thus, the “duty to apply” was an EPA command requiring that all CAFOs *must* submit themselves to regulation that would control and constrain the operation of their businesses. The

“duty to apply” *was itself an enforceable requirement*, punishable by civil and criminal penalties independent of whether there had been any discharge of pollutants from the CAFOs.

The Second Circuit concluded that the CWA conferred no authority on EPA to *compel the filing of a permit application* in the absence of an actual discharge. *Id.* Because a mere potential to discharge lacks all of the elements triggering the statute’s prohibition against unpermitted discharges (actual addition of pollutants to navigable waters from a point source), the court said there was “no statutory obligation of point sources to seek or obtain a [CWA] permit in the first instance.” *Id.* Thus, there could be “no duty to apply” based on a mere potential to discharge. But the court *never addressed whether EPA could issue a permit in response to a voluntary permit application*. The court could not have decided that question because the challenged regulation did not address it and no petitioner had raised it.

Despite this context and with no regard for the limits of the case or controversy before the court, Petitioners focus on a single sentence in the Second Circuit’s decision, calling it a “categorical ruling”; the court said, “the Clean Water Act gives EPA jurisdiction to regulate and control only actual discharges—not potential discharges, and certainly not point sources themselves.” Petition ¶ 52 (quoting *Waterkeeper All.*, 399 F.3d at 505). Petitioners spotlight the court’s language – “jurisdiction to regulate and control” – in support of their theory that EPA’s permit issuance authority depends on the high likelihood of a discharge. *Id.* Petitioners’ reliance on this passage misuses the court’s language and should be rejected as unpersuasive for several reasons.

First, because no party had brought a challenge to EPA’s authority to issue permits (as opposed to its authority to compel submission of permit applications), the court had no occasion

to address it, and interpreting the court’s language to cover EPA’s permit-issuance authority, as Petitioners endeavor to do, renders the court’s passage mere dictum. *Monod v. Futura, Inc.*, 415 F.2d 1170, 1173 (10th Cir. 1969) (“Because this issue was not properly before that court the conclusion is mere dicta and must be read as such.”). *See also Tokoph v. United States*, 774 F.3d 1300, 1303 (10th Cir. 2014) (“[D]icta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.”) (quoting *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1328 n.3 (10th Cir. 2009)). Reading a court’s language so as to reduce it to dicta can hardly be seen as a plausible interpretation of the decision.

Second, the context of the case leads to a different interpretation of the court’s language – one that supports the common-sense notion that EPA has jurisdiction to *require submission to* “regulat[ion] and control” of private activity only when that activity would otherwise be unlawful (*e.g.*, the prohibited discharge of a pollutant without a permit). The court was dealing with an EPA effort to *compel* CAFOs’ submission to a regulatory regime. EPA sought to unilaterally impose requirements on CAFOs, in the absence of pollutant discharges or any otherwise unlawful actions, by requiring them to seek a permit which, according to the regulations, inevitably would restrict the CAFOs’ operations. This is what the Second Circuit said could not be done, and the quoted passage stands for no more than that.

In the second decision, industry petitioners had challenged EPA’s attempt to draft around the limitation that had been imposed by the Second Circuit. *Nat’l Pork Prods. Council v. U.S. Env’l Prot. Agency*, 635 F.3d 738 (5th Cir. 2011). Instead of regulating a CAFO with the “potential to discharge,” EPA revised the CAFO regulation to enforce its “duty to apply” where a CAFO “proposes to discharge,” but EPA defined that phrase as being a CAFO “designed,

constructed, operated, and maintained in a manner such that the CAFO will discharge.” *Id.* at 750. In other words, even in the absence of an *actual proposal to discharge*, as the Permittees have provided in this matter, EPA would infer such a proposal from the physical characteristics of the CAFO. The Fifth Circuit rejected this attempt. As with the Second Circuit’s decision in *Waterkeeper*, the Fifth Circuit in *National Pork* addressed only the EPA’s authority to compel permit *applications* in the absence of actual discharges, not the Agency’s quite different authority to *issue a CWA permit* in response to a voluntary application describing an *actual proposal to discharge*.

4. *The CWA Storm Water Permitting and Effluent Guidelines Programs Demonstrate That Congress Did Not Constrain EPA’s Authority to Issue This Permit.*

EPA can exercise its jurisdiction whenever a person applies for a permit in order to remain in compliance with the law if circumstances make a discharge necessary. Nowhere is this authority better illustrated than in the storm water permitting and effluent guidelines programs of the Act.

a. The CWA Storm Water Permitting Program Authorizes Permits for Indeterminate Discharges.

Storm water permitting constitutes a central feature of the Act’s Section 402 NPDES program. The statutory authority to permit future, uncertain, episodic discharges of storm water has existed in the CWA since passage of the landmark 1972 Federal Water Pollution Control Act Amendments, which later became known as the CWA. Pub. L. No. 92-500, 86 Stat. 816 (1972). The 1972 legislation established the Section 301 prohibition on unpermitted pollutant discharges and the Section 402 NPDES permit program. *Id.* at 844, 880. The same, original statutory commands and definitions that provide EPA’s authority to permit discharges from the Laboratory’s outfalls also provide the basis for permitting episodic storm water discharges.

In 1987, Congress enacted amendments to the CWA that required EPA to undertake rulemaking and implement comprehensive permitting for storm water pollutant sources. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987). While the 1987 amendments breathed new life into EPA's storm water permitting program, they did not augment the original statutory authority to deal with these future, episodic discharges. The amendments added subsection 402(p), which directs EPA to issue permits that will authorize future storm water discharges from municipal and industrial point sources in the event that precipitation, together with other circumstances at a facility, result in a discharge. Pub. L. No. 100-4, 101 Stat. 7, 6970 (1987) (codified as amended at 33 U.S.C. § 1342(p)(2)(B)—(D)).

The CWA stormwater permitting program is vast. The National Academy of Sciences estimated in 2009 that EPA and approved States had provided NPDES storm water discharge authorizations to about 7,000 municipalities and 100,000 industrial facilities. *See Nat'l Research Council, et al., Urban Stormwater Management in the United States* 36 (2009). In addition, NPDES storm water permit coverage is authorized for about 200,000 construction projects each year. *Id.* Storm water discharge permit holders are required to implement a variety of best management practices to retard, retain and control the runoff of storm water containing pollutants ranging from eroded soil at construction sites to petroleum and chemicals at industrial sites. *Id.*

Retention basins are a typical and widely used control measure to retard and retain storm water so as to capture sediment and other pollutants washed by precipitation runoff from the facility property. Retention basins are designed to impound storm water for a time sufficient for the pollutants to settle out and leave the storm water clean enough to be discharged by releasing the cleaner water near the basin's surface into receiving waters. 3 Michael L. Clar, Billy J.

Barfield & Thomas P. O'Connor, *Stormwater Best Management Practice Design Guide: Basin Best Management Practices* § 222 (2004). Water levels in retention basins also can be lowered to create storage capacity for runoff from the next storm.

Retention basins are designed to control precipitation events of a certain size—*e.g.*, the 25-year storm or the 50-year storm. *Id.* § 2-2. In other words, if a future precipitation event does not exceed the “design storm,” the control measure should be sufficient to promote settling of pollutants and should result in a discharge that meets water quality objectives. If a precipitation event exceeds the design and a discharge of partially treated storm water occurs, however, the permit shields the facility from liability for that exceptional circumstance.

Thus, the CWA allows EPA to issue permits authorizing future discharges—both expected discharges based upon approved design criteria (discharges from drawing down the basin following a smaller storm), and unexpected discharges that were not planned for in the design (overflow from a storm larger than the basin’s design will accommodate). Unplanned discharges can occur due to a number of meteorological and other circumstances beyond the discharger’s control, but EPA is not required to deny permit coverage because it believes the circumstances that would result in a discharge may be remote.

For storm water permitting, the relevant circumstances include extreme swings between periods of normal-to-heavy precipitation and periods of dry weather, including drought. It is not uncommon for extended periods of time to pass without any discharge pursuant to the discharge authorization granted by a storm water permit. *See generally Drought Monitoring*, National Weather Service, <https://www.weather.gov/ilm/drought> (last visited June 29, 2022). Extreme

and prolonged drought conditions can leave geographic areas with no precipitation for years, especially in the arid Western and Southwestern regions of the United States. *Id.*

If prolonged periods devoid of discharges were to provide a basis for denying applications for renewal of NPDES storm water discharge permits, EPA's Section 402(p) permitting program would be in shambles. Large, unanticipated storms do occur, and when they do, there will be discharges of only partially treated water because runoff will exceed the design capacity of retention basins.

For a number of years, the Laboratory occupied a similar situation with respect to Outfall 051. The Laboratory designed the evaporation equipment to handle the expected volume of wastewater. The operating principle had been that, **if** the evaporation equipment operated reliably and continuously, **and if** the wastewater volume did not increase due to a change in the Laboratory's mission, **then** Outfall 051 should not be needed. But if the evaporation equipment became unavailable due to malfunction or maintenance needs, and/or there was an increase in treatment demands, then the Laboratory would need an authorization to discharge treated wastewater via Outfall 051. The Laboratory has made this perfectly clear in its submissions, as Petitioners acknowledge. Like the storm water discharger in an arid region, the operating plan had been that the Laboratory might not discharge via Outfall 051 for extended periods, but LANL consistently sought a permit that specifically would authorize the use of Outfall 051 if circumstances made a discharge necessary – a permit that would make that discharge lawful. Thus, even if the Laboratory had not changed its operational plan to make regular use of Outfall 051, as it has done, the statute contemplates that EPA would have authority to permit the outfall for use when circumstances require.



The same must be said with respect to Outfalls 13S, 03A027 and 05A055. Permittees have proposed to use these outfalls when necessary, and have clearly explained the operational circumstances that would require a discharge, and that in several cases in the past have so required discharges. Permitting those contingent future uses of the outfalls is a legitimate and appropriate exercise of EPA's authority.

b. The CWA Effluent Guidelines Program Authorizes Permitting for Indeterminate Discharges.

EPA's implementation of the Act's effluent limitation guidelines ("ELG") program provides another useful analogy demonstrating that the Agency has authority to regulate indeterminate discharges by establishing effluent limitations, to be applied through NPDES permits, in the event that circumstances necessitate a discharge. EPA's authority for its ELG program derives from the same provisions of the CWA that govern its establishment of effluent limitations in the Permit for all outfalls at the Laboratory. 33 U.S.C. §§ 1311, 1314.

EPA has promulgated the full suite of ELGs for new and existing direct and indirect dischargers in the Fertilizer Manufacturing Point Source Category. 40 C.F.R. § 418. For the Phosphate Subcategory, EPA determined that direct dischargers are capable of achieving "no discharge of process wastewater pollutants to navigable waters." *E.g., id.* § 418.12(a). The Agency recognized, however, that despite adequate conservation and recirculation of water, discharges could occur via runoff from calcium sulfate storage piles at such facilities due to "chronic or catastrophic precipitation events" that could overwhelm the surge capacity of water storage infrastructure. EPA therefore allowed such discharges in the event of storms greater than the applicable design criteria. *Id.* The Fertilizer ELGs illustrate that, beyond the broad stormwater permitting program, indeterminate discharges of *process wastewater* may be

authorized under the NPDES permitting program in circumstances that, while they may be rare, have been anticipated and stated in the permit application. Thus, Petitioners' contrary interpretation of the statute should be rejected.

*5. Region 6's Practice Shows That This Permit is Not Unusual.*

Petitioners insinuate that the permit in this matter was issued for some unique and improper purpose. The Region 6 pattern of practice refutes that suggestion. EPA Region 6 has a long-standing and consistent practice of issuing NPDES permits to facilities that are not currently discharging and will only do so if necessary, when certain circumstances arise.

The permit in this proceeding is by no means unusual. In New Mexico, for example, EPA has issued NPDES permits authorizing:<sup>43</sup>

- Discharges of contaminated wastewater as necessary to sustain a remediation program when underground injection facilities are not available to dispose of withdrawn groundwater (Kirtland Air Force Base (NM0031216));
- Discharges of wastewater from coal preparation areas when necessary to prevent interference with the preparation process (Lee Ranch Coal Co., Lee Ranch Mine (NM0029581));
- Discharges when necessary to respond to emergencies (Navajo Dam DWC & NSW, Inc. (NM0030953)); and
- Discharges of industrial and sanitary wastewater when required due to significant precipitation events (Chevron Mining Inc., Ancho Mine (NM0030180), Chevron

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<sup>43</sup> New Mexico NPDES permits are readily available online. *See* EPA, *New Mexico NPDES Permits*, <https://www.epa.gov/npdes-permits/new-mexico-mpdes-permits> (June 27, 2022).

Mining Inc., Questa Mine (NM0022306), Lee Ranch Coal Co., El Segundo Mine (NM0030996), Village of Springer Water Treatment Plant (NM0030627), PAA-KO Communities Sewer Association (NM0030724), Maxwell Wastewater Treatment Plant (NM0029149), Mora Independent School District (NM0031097), City of Raton Water Filtration Facility (NM0029891), Rio Grande Resources Corp., Mt. Taylor Mine (NM0028100)).

6. *Petitioners' Arguments are Based on a False Premise – the Assertion that RLWTF is Categorically Required to Obtain a RCRA Permit Absent the Permit for Discharges from Outfalls 051 is In Error.*
  - a. The RLWTF is Exempt from RCRA Permitting Regardless of Whether EPA issues the Permit for Discharges From Outfall 051.

As explained above, of all the facilities integrated with the outfalls that are subject to challenge in the Petition, Petitioners only make allegations concerning RCRA requirements for the RLWTF and Outfall 051. *See, e.g.*, Petition ¶ 13 (citing Petition Ex. A,<sup>44</sup> which discusses that the RLWTF is not authorized to receive listed hazardous waste but did receive a small amount of corrosive characteristic waste). Thus, even if Petitioners are correct in their view that NPDES permit coverage is improper for outfalls that may not constantly discharge, which we demonstrated above is not the case, Petitioners' arguments relating to RCRA standards and permitting could apply, at most to this one outfall, not to the other five outfalls addressed by the Petition. But even the possibility of RCRA applicability at Outfall 051 does not arise because: (1) the permit was properly issued for actual discharges from Outfall 051 (and thus the Board need not even reach Petitioners' RCRA issue); and (2) Petitioners' assertion that the WWTU

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<sup>44</sup> David Moss, et al., *Report – Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility*, Los Alamos Nat'l Lab. (June 1998).

exemption would be inapplicable to the RLWTF and Outfall 051 in the absence of NPDES permit coverage is incorrect.

Petitioners misrepresent the applicable legal requirements in arguing that only EPA's issuance of the permit gives effect to the WWTU exemption from RCRA permitting. *Id.* ¶¶ 13-16. Petitioners point to 40 C.F.R. § 264.1(g)(6), which exempts the RLWTF tanks and associated ancillary equipment (such as Outfall 051) from the substantive RCRA standards. *Id.* at 36. But Petitioners never mention 40 C.F.R. § 270.1(c)(2)(v), which provides that owners and operators of exempt wastewater treatment units also “are not required to obtain a RCRA permit.” *Id.*

Both section 264 and section 270 contribute to the WWTU exemption, one for substantive RCRA requirements, and one for RCRA permitting. Both provisions point to section 260.10 for the definition of a “wastewater treatment unit.” The key element of that definition is that such a unit must be “subject to regulation under either section 402 or 307(b)” of the CWA. 40 C.F.R. § 260.10.

EPA has a long standing and consistent interpretation of what is meant by this definition in its regulation. Over 30 years ago, EPA's Office of Solid Waste and Emergency Response (OSWER) issued an official directive addressing the issue.<sup>45</sup> OSWER emphasized that:

It is important to note that it is not necessary that...Clean Water Act permits actually be issued for the units to be eligible for the RCRA exemption; it is sufficient that the facility be subject to the requirements of the Clean Water Act.<sup>46</sup>

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<sup>45</sup> Ex. F, Attachment A, Exemption from Permitting Requirements for Waste Water Treatment Units, OSWER 9522.1992(01), 1992 WL 754630 (Jan. 16, 1992).

<sup>46</sup> *Id.* at 27.

Explaining further, OSWER made clear that the key phrase in § 260.10 –“subject to regulation under . . . Section 402” – covers facilities “which are permitted, were ever permitted, or should have been permitted under NPDES.”<sup>47</sup>

The Agency’s directive settles the question of whether the RLWTF and Outfall 051 are exempt from RCRA permitting under 40 C.F.R. §§ 270.1 and 260.10. The Board should give deference to EPA’s (*i.e.*, OSWER’s) well-settled and reasonable interpretation of its own regulation. *See, Kisor v. Wilkie, Sec’y of Veterans Affairs*, 139 S. Ct. 2400 (2019). Because the Laboratory has held an NPDES permit for Outfall 051 since 1978, and clearly was required to do so, the directive concludes that the WWTU exemption applies.<sup>48</sup>

As Petitioners point out, in the past Laboratory technical staff also had examined the issue of continuous renewal of the NPDES permit for Outfall 051 in relation to the question of retaining the WWTU exemption. Petition ¶¶ 13-14. To the extent that such examination included an assumption made as a basis to provide a technical analysis, the assumption was mistaken then, just as Petitioners are mistaken now.

In the end, however, even if Petitioners’ understanding of the WWTU exemption were correct, the exemption would still apply to the RLWTF and Outfall 051. Region 6 properly issued the NPDES permit authorization for discharges from this outfall, originally in 1978 and

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<sup>47</sup> *Id.*, Attachment A at 15.

<sup>48</sup> Petitioners’ contention that Region 6 should have resolved a supposed “conflict” between the CWA and RCRA by interpreting the CWA to exclude permitting authority for a “possible” discharge, Petition ¶¶71-73, has no relevance here, as the ongoing discharges from Outfall 051 are not merely “possible.” As explained earlier, those discharges are actual and fully documented in the administrative record.

again most recently in 2022, as explained above, and even Petitioners agree that the Region’s permitting action triggers the exemption.

b. Applicability of RCRA Permitting Requirements for RLWTF Absent the WWTU Exemption is a Complex Question that Would Require Significant Analysis of Current Operations to Address.

While the question of whether the RLWTF would be subject to RCRA permitting requirements absent the WWTU exemption is not before the Board, it is important to briefly address Petitioners’ assertions that Triad has *conceded* that the RLWTF is subject to a RCRA permitting requirement absent the exemption. Neither Triad, the DOE, or prior operators of the Laboratory have made such a concession. To the extent that Petitioners rely on a report from over a quarter century past, that technical (non-legal) analysis was conducted to examine how to strengthen administrative controls over operations at that time in a manner that would obviate the need for RCRA permitting for the RLWTF. Petition Ex. A. Furthermore, corrective action, including for remediation of legacy solid waste management units referenced by Petitioners, is governed by a separate requirement and is explicitly *not* subject to RCRA permitting requirements. Petition Ex. WW (addressing that obligations under the Consent Order are expressly not covered by RCRA permitting requirements).<sup>49</sup>

In other words, the “either/or” choice that Petitioners attempt to frame is, at best, subject to significant uncertainties. The Laboratory has engaged in litigation at both the federal and state levels which, in part, opposes counter-factual categorical statements about a RCRA permit requirement for the RLWTF. *See, generally, United States v. N.M. Env’l Dept.*, No. 10-CV-01251 (D. N.M. Dec. 29, 2010); *United States v. Curry*, No. A-1-CA-31030 (N.M. Ct. App.

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<sup>49</sup> Dennis J. Erickson & Tom Baca, *Radioactive Liquid Waste Zero Discharge Project Memorandum*, Los Alamos Nat’l Lab. (July 10, 1998)

Dec. 29, 2010). Petitioners misstate the record on this issue in an attempt to frame a false choice between the CWA and RCRA at a theoretical level, which is in any case not relevant in light of issuance of the Permit authorizing actual, ongoing discharges from Outfall 051.

## V. CONCLUSION

The Petition reveals no clear factual or legal error, no abuse of discretion by Region 6, and no exercise of discretion or policy consideration warranting the Board's review. The Board should deny the Petition.

Dated: July 1, 2022

*Respectfully submitted,\**

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**CERTIFICATE OF SERVICE**

I hereby certify that, on July 1, 2022, I served the foregoing Permit Applicant's Response to Petition for Review and Statement of Compliance with Word Limitations, in connection with *In re U.S. Department of Energy & Triad National Security, L.L.C.*, 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:

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