

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

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

PERMIT APPLICANTS’ MOTION FOR LEAVE TO FILE SURRESPONSE

Permit Applicants, the National Nuclear Security Administration of the U.S. Department of Energy (“DOE/NNSA”) and Triad National Security, LLC (“Triad”) (collectively, “Permittees”), respectfully move the Board for leave to file a surrespose to the Petition for the purpose of responding to new arguments and factual assertions made by Petitioners in their Reply Brief on Petition for Review (“Reply”). The Petition in this matter was filed on May 9, 2022. On May 23, 2022, the Board issued an order requiring response briefs to be filed by July 8, 2022, and allowing Petitioners to file a reply by July 25, 2022. Triad filed its Response on July 1, 2022, and EPA Region 6 filed its Response on July 7, 2022. Petitioners filed their Reply on July 25, 2022.

In their Reply, Petitioners advance numerous, new legal positions and arguments, and make new factual assertions, that were not set forth in their Petition. The Permittees have not had an opportunity to address these positions, arguments, and assertions. Permittees submit that addressing these numerous points at oral argument would be unduly complex and time consuming, and if the Board does not schedule oral argument, Permittees would be foreclosed from addressing

them. If this motion is granted, Permittees would concur with the Region's judgment that oral argument is not necessary in this matter.

The points to be addressed are too numerous to catalog here, but the following examples illustrate Permittees' need for leave to file a surrejoinder.

- Petitioners repeatedly assert, for the first time, that Permittees intentionally manipulated the timing and volume of discharges from Outfall 051 to strengthen their position in this matter, and that Permittees hid the evidence from the public. Reply, pars. 57-58.
- Petitioners argue, for the first time, that the administrative record for this Permit closed, or should have closed, at the end of the public comment period, long before EPA Region 6 made its decision to issue the Permit. Reply, par. 50.
- Petitioners contend, for the first time, that facts about discharges from Outfall 051 were not available to the public until after the record was closed. Reply, par. 50.
- Petitioners argue, for the first time, that EPA Region 6 lacks the legal authority to issue the Permit in the absence of a "commitment" from Permittees to discharge treated effluent from Outfall 051. Reply, par. 13.
- Petitioners assert, for the first time, that construing the Clean Water Act ("CWA") to authorize EPA's issuance of permits under the CWA for potential discharges would cause the CWA to constitute an unconstitutional delegation of legislative authority to EPA. Reply, par. 26.
- Petitioners assert, for the first time, that wastewater from the RLWTF is shipped offsite for treatment, storage or disposal, Reply, pars. 44-45, and they imply that

pumping treated wastewater to the mechanical evaporator or the solar evaporation tanks would constitute offsite shipment and/or would entail treatment of hazardous wastewaters in the evaporator and/or the tanks. Reply, par. 46.

Petitioners' Reply contains numerous other instances of factual assertions and legal arguments made for the first time. Permittees can address these issues in a manner most useful to the Board by submitting a surresponse.

Counsel for Triad consulted with counsel for EPA Region 6 as to the Region's position on this motion. Region 6 does not oppose this motion.

Counsel for Triad consulted with counsel for Petitioners as to Petitioners' position on this motion. Petitioners take no position on the relief requested in this motion.

For the reasons outlined, Permittees request that the Board grant leave for Permittees to file a surresponse in this matter.

Dated: August 2, 2022

Respectfully submitted*,

/s/ James T. Banks

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

CERTIFICATE OF SERVICE

I hereby certify that, on August 2, 2022, I served the foregoing Permit Applicants' Motion for Leave to File Surreponse, in connection with *In re U.S. Dep't of Energy & Triad Nat'l Sec., 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:

For: Concerned Citizens for Nuclear Safety, et al.

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