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STATEMENT OF COMPLIANCE

As required by 40 CFR 22.30(a)(3), undersigned counsel hereby certify that this brief complies with the 14,000 word limitation and was prepared in 12-point Times New Roman typeface using Microsoft Word for Microsoft 365, and that the body of the brief contains 7,539 words.

REQUEST FOR ORAL ARGUMENT

Pursuant to 40 CFR 22.30(d), Petitioner hereby requests oral argument. Petitioner believes that oral argument will be helpful to the resolution of this case because the issues before the Board are unique and because the Board may have questions concerning the underpinnings of the issues that can only be answered if oral argument is allowed.

**APPELLATE BRIEF OF THE ALBUQUERQUE BERNALILLO COUNTY WATER
UTILITY AUTHORITY**

The Albuquerque Bernalillo County Water Utility Authority (“Permittee” or “Petitioner”) seeks review of National Pollutant Discharge Elimination System (“NPDES”) Permit No. NM0022250 (the “Permit”) issued by the United States Environmental Protection Agency (“EPA”) Region 6 Water Division (“Region”) to the Petitioner on December 9, 2025. Pursuant to 40 C.F.R. §§ 22.30, 124.19 and the Order Granting Extension of Time to File Brief (filed 1/6/2026), Petitioner files this appellate brief to supplement its notice of appeal, filed January 5, 2026.

Statement of the Issues Presented for Review:

The central issue in this appeal is the Region’s improper imposition of a Total Dissolved Solids (“TDS”) effluent standard that was not included in the draft permit. Because the TDS standard was only added in response to a third-party comment on the draft permit, the Petitioner and the public were denied due process and a meaningful opportunity to comment on the impacts from its inclusion, including the technical, economic and environmental impacts of compliance with the new standards. Additionally, the Region’s determination regarding the reasonable potential for excursion with respect to TDS and other constituents was erroneous because it was based on critical low flow at a river gage in Albuquerque, rather than the best available information at the Pueblo of Isleta (“POI”) boundary. That erroneous determination of reasonable potential served as the basis for both the third-party comment and the justification for the Region’s imposition of the TDS effluent standard. The new TDS limitations added to the final permit constituted a substantial change from the draft permit without allowing the Petitioner or the public the ability to present important technological, economic, environmental and other considerations rendering the decision unsupported by the record and contrary to both law and fact.

Furthermore, the Region exceeded its regulatory scope by adopting the EPA Guidance for the National Secondary Drinking Water Standards (“NSDWS”) — promulgated under the Safe Drinking Water Act (“SDWA”)¹ for aesthetic considerations — to determine the wastewater effluent TDS limits. The Region’s use of a secondary drinking water standard based on the SDWA to establish an effluent discharge standard under the Clean Water Act² (“CWA”) ignores the differing regulatory purposes of both acts. This application of drinking water standards to free-flowing rivers presents an important policy consideration that warrants review by the EAB.

Introduction and Nature of the Case:

Pursuant to 40 C.F.R. § 124.19(a), Petitioner respectfully submits this Brief in support of its Petition for Review (“Petition”) of the Permit dated December 9, 2025, issued by the Region. *See* Attachment A, Final 2025 Permit. The Permit regulates discharge from Petitioner’s Southside Wastewater Reclamation Plant (“SWRP”). The SWRP processes and discharges approximately 55 million gallons per day (“MGD”) of the City of Albuquerque and Bernalillo County’s wastewater effluent serving approximately 675,000 residential, industrial and commercial customers. The SWRP’s wastewater effluent discharges directly into the Rio Grande approximately 0.7 miles south of Rio Bravo Boulevard and about five miles upstream of the Pueblo of Isleta and is effectively the fifth largest tributary of the Rio Grande.

Prior iterations of the NPDES permit issued to Petitioner through 2019 required collection of ambient data related to TDS within its effluent discharge and at other locations in the Rio Grande. The Region’s proposed draft permit allowed for continuing collecting data along “to make decisions in the next permit renewal taking into account any updates to the [Pueblo of Isleta Water Quality Standards (“POIWQS”)].” *See* Attachment B, Permit No. U.S. Environmental

¹ 42 U.S.C.A. §300f *et seq.* (1974)

² 33 U.S.C. §§ 1251-1387.

Protection Agency, NPDES Permit No. NM0022250 Fact Sheet at 12. However, when the final Permit was issued, the Region changed the continued monitoring and data collection requirement in the draft permit to include new effluent limitations, imposing an immediate limit of 536 mg/L with a final permit limit of 500 mg/L.

Part of the basis for imposing this limitation was the determination by the Region that there was a “reasonable potential to exceed the Pueblo of Isleta water quality criteria”. Attachment C, EPA Response to Comments at 6 (filed Dec. 1, 2025). However, the Petitioner contested the finding of reasonable potential because the Region should have used the river gage at the upstream border of the Pueblo of Isleta jurisdiction rather than one in the City of Albuquerque. *Id.* at 8, Response to Comment 19. Specifically, the Petitioner requested that the Region utilize USGS gage 08330875 Rio Grande at Isleta Lakes as the basis for determining critical low flow at the Pueblo of Isleta boundary because it includes all contributing flows where the tribal water quality standards apply. *Id.* In evaluating the reasonable potential for excursion of TDS, the critical low flow determination at the Pueblo of Isleta boundary would more accurately measure the flow data for tribal waters and whether there is any dilution. The Region denied the Petitioners request and used zero flow (no dilution) in evaluating reasonable potential for excursion. *Id.*

After making the erroneous determination of reasonable probability, the Region relied on third-party public comment to impose new TDS limits. Those limits were sourced from the NSDWS³ which are non-mandatory drinking water standards “established as guidelines to assist public water systems in managing their *drinking water* for aesthetic considerations, such as taste, color, and odor.”⁴ The secondary drinking water standards were promulgated under the SDWA applicable to treated drinking water provided for human consumption. Critically, while the SDWA

³ See Attachment C at 6.

⁴ <https://www.epa.gov/sdwa/secondary-drinking-water-standards-guidance-nuisance-chemicals> (*emphasis added*).

is designed to regulate the quality of a finished consumer product delivered to the tap, the CWA is intended to manage the ecological health and designated uses of ambient surface waters. The Region's discretionary use of these secondary drinking water standards to establish water quality stream standards in the Rio Grande represents a significant deviation from past practice and constitutes a significant change in policy for the EPA to implement.

Because the proposed TDS limit was imposed between the issuance of the draft and final permit, the Petitioner was not afforded a full and complete opportunity to review and comment on the new TDS discharge limitations incorporated by the Region in the final permit. Had the Petitioner had opportunity to comment, they would have demonstrated the imposition of an aesthetic arbitrary drinking water standard was not supported by the record, and the imputed a standard that would have significant technological, financial and environmental impacts for the Petitioner to achieve. Because the imputation of the new TDS limitation was not sufficiently supported by the Region in the administrative record, the standard was based upon an incomplete and clearly erroneous conclusion of fact.

Further, because the imputation of TDS limitations occurred between the issuance of the draft and final permits, the Petitioner and the public were denied due process when they were not provided adequate opportunity to respond to the overly restrictive, unreasonable and burdensome standards, -- standards which were not required by the CWA or other applicable laws, and that would apply to discharge that would be mixed with untreated river water and other discharges within the five river miles upstream of the Pueblo of Isleta boundary.

Therefore, Petitioner respectfully requests the Environmental Appeals Board ("EAB") grant review of this Petition and impose only those conditions that are based on reasonable findings of fact in the administrative record and are in accordance with the law. Alternatively, Petitioner

would welcome a remand of the TDS limitations for further collaboration with the Region, or participate in the EPA’s Alternative Dispute Resolution, including a requirement to reopen the comment period specifically for the TDS issue.

Procedural History:

1. Prior to this case, Permit No. NM0022250 (the “Permit”) was renewed and reissued on October 10, 2019. Attachment B at 1.

2. This current dispute arose during ABCWUA’s application to renew the Permit, which was completed on November 14, 2024.⁵

3. On May 24, 2025, the Region published the NPDES Fact Sheet for the Permit. *See* Att. B.

4. The Fact Sheet found that the SWRP effluent met New Mexico Water Quality Standards, and that because the neighboring Pueblo of Isleta Water Quality Standards (“POIWQS”) had not been updated since the last permit renewal process, that the EPA would continue to allow “ABCWUA to collect more ambient data in this permit term instead of establishing the new above limits for TDS, chlorides, sulfates and other parameters specified in the permit”. Att. B at 12.

5. The draft permit was publicly noticed on May 24, 2025. U.S. Environmental Protection Agency, Public Notice of Draft NPDES Permit for ABCWUA Southside WWTP (EPA Region 6, May 24, 2025).

6. Comments on the draft permit were received from the following parties: ABCWUA, Amigos Bravos, the New Mexico Acequia Association, Augusta Riley, and the New Mexico Environment Department (“NMED”). Att. C at 3.

⁵ *See* Attachment E, Relevant Correspondence between Region and Petitioner. November 14, 2024 Letter determining NPDES application was administrative complete.

7. The draft permit was consistent with its treatment of mercury, salinity/mineral and molybdenum. With respect to molybdenum, EPA determined that there was a reasonable potential for excursion, but stated “to be consistent with the analyses for mercury, salinity/mineral in term of critical low flow for POIWQS, EPA proposes monitoring of molybdenum instead.” Att. B at 11. With respect to mercury, the Region declined to implement any new permit condition. Att. C at 10. For all three constituents (mercury, molybdenum and salinity/mineral), the Region determined that a reasonable potential existed to exceed the water quality criterion in terms of critical low flow⁶, but allowed for continuation of previous permit requirements.

8. When the Region used the POIWQS to examine the reasonable potential for excursions of molybdenum, mercury and salinity/mineral (*i.e.* TDS), the Petitioner requested that Region use “the USGS gage 08330875 Rio Grande at Isleta Lakes flow data ... because the location is on the upstream border of the Pueblo of Isleta.” The Region denied the Petitioner’s request. Att. C at 8. Because the flow data at Isleta Lakes represents the best available data regarding the actual river flow near the POI boundary, Petitioner believes consideration of that data would have affected the determinations of reasonable potential.

9. On August 22, 2025, NMED provided its state Water Quality Certification pursuant to Section 401 of the CWA to ensure that the action is consistent with state law (New Mexico Water Quality Act, New Mexico Statutes Annotated (NMSA) 1978, §§ 74-6-1 to -17). Attachment D, Comment on Draft NPDES Permit No. NM0022250, at 6 (August 22, 2025). NMED provided sixteen separate comments to the draft permit during the public notice and comment period.

⁶ As stated above, the determination of critical low flow significantly affects the Reasonable Potential analysis. A critical low flow of zero means that there is no dilution and that the effluent is the only water in the river at the Pueblo of Isleta boundary.

10. In Comment 15, NMED requested EPA evaluate the characterization of the effluent for TDS, chloride, and sulfates to determine *if* a water quality-based effluent limitation is needed. *Id* (*italics added*). NMED stated that if the Region determined an effluent limit would be required, that Petitioner be given “a compliance schedule to allow the permittee to address the additional effluent limitations.” *Id*. Notably, NMED did not suggest, propose, or otherwise recommend any specific TDS limitation nor did they request the Region to establish a new limit in this permit. NMED simply proposed a three-year timeline for the Petitioner to “determine operational changes” that would be needed to be implemented to meet the additional limitations. Att. D. at 9.

11. While the POI comment period was still open, representatives for Petitioner corresponded with the Region to discuss the final Permit.⁷ The Petitioner requested the Region continue allowing it to collect more TDS ambient data, or if a limit was imposed that the Region provide an extended compliance timeline, as it would be needed to make the necessary changes to industrial pretreatment requirements and implementation before the Petitioner could assess if additional treatment would be needed at the SWRP.

12. In response, the Region noted that 500 mg/L was more achievable in the interim because it was closer to the average of 536 mg/L. In the final permit issued, the Region established a final 30-day average TDS limit of 500 mg/L pursuant to the EPA Guidance for NSDWS on TDS under the SDWA. Attachment C, at 7. The Region also provided a compliance schedule to the last day of the permitting term to attain final effluent limitations. *See* Att. A, Part I.B.

13. The Final Permit was issued on December 9, 2025, without a meaningful opportunity for ABCWUA to respond to the imputation of TDS limits and included only a single,

⁷ *See* Attachment E, November 17, 2025 Email from Danielle Shurn to Tung Nyugen.

unsupported reference to the economic consequences of the new TDS limitation on Petitioner. Att. C at 7.

Threshold Legal Issues:

14. In determining whether to grant review of a petition filed under 40 C.F.R. § 124.19(a), the EAB first considers whether the petitioner has met threshold pleading requirements such as timeliness, standing, and issue preservation. *See* 40 C.F.R. § 124.19; *In re Beeland Group LLC*, UIC Appeal No. 08-02, slip op. at 8 (EAB Oct. 3, 2008), 14 E.A.D. ___; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 704-08 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000).

15. Specifically, a petitioner seeking EAB review must file its appeal within thirty days of permit issuance and ordinarily must have filed comments on the draft permit or participated in the public hearing. 40 C.F.R. § 124.19(a). In addition, a petitioner must demonstrate that any issues being appealed were raised with reasonable specificity during the public comment period or were not reasonably ascertainable during the public comment period. 40 C.F.R. §§ 124.13, 124.19(a); *see, e.g., Indeck*, 13 E.A.D. at 143; *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 363 & n.7 (EAB 2004); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.8 (EAB 1999). Issues pertaining to changes from the draft to final permit decision may be raised for the first time on appeal. *In Re: Teck Cominco Alaska Incorporated, Red Dog Mine*, 2004 WL 1658594, at *2.

16. In this case, Petitioner has standing as it is the Permittee in this matter and participated at all stages of the underlying proceedings. All of the issues raised in this Petition were raised during the public comment period, and therefore, are preserved for review. The Region also imposed new or altered conditions that could not have been assessed or commented on prior

to the issuance of the final Permit. The Petition is timely filed. 40 C.F.R. §§ 124.19(a)(3) and 124.20. The Permit and letter notice of the issuance of the final NPDES Permit are dated December 9, 2025. Petitioner timely filed its notice of appeal on January 5, 2026, and was granted an extension to February 23, 2026 to file this brief. Order Granting Extension of Time to File Brief (filed 1/6/2026).

Standard of Review:

17. Pursuant to 40 C.F.R. § 124.19(a)(4)(i), the EAB should grant review of the Region’s decision on an NPDES Permit where the Permit conditions: 1) are based findings of fact or conclusions of law that are clearly erroneous, or 2) involve an exercise of discretion on important policy considerations that the Board should determine warrant review. *See* also 5 U.S.C. § 706 (establishing scope of review before a court). When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised “considered judgment.” *In re Steel Dynamics, Inc.*, 8 E.A.D. 165, 191, 224-225 (EAB 2000). On appeal to the Board, a petitioner has the burden of demonstrating that review should be granted. 40 C.F.R. 124.19(a).

18. To the extent that the disputed permit conditions are water quality-based requirements, the Region must satisfy the requirement that the discharge from the SWRP “will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard.” 40 C.F.R. § 124.44(d)(i).

Argument:

- i. *Petitioner, and the public, were denied due process when the Region imposed new TDS limits of 500 mg/L based on drinking water standards that were not included in the draft permit.*

19. When the Region issued its draft permit, it stated its intent to continue to allow “ABCWUA to collect more ambient data in this permit term instead of establishing the new above limits for TDS, chlorides, sulfates and other parameters specified in the permit Part I.F.2.” Att. C at 12. However, the Region changed course after reviewing a portion of a comment from the NMED. Crucially, NMED’s comment did not suggest the immediate imposition of any specific numeric limit, but rather requested that the Region merely evaluate the effluent characterization to determine *if* such a limitation might be necessary in the future.

20. The Region then selected a drinking water standard established under the SDWA and decided to apply it to effluent from the SWRP - discharge that would immediately return to the Rio Grande, as opposed to being used for actual drinking water. The Petitioner was only informed of these proposed changes one month before the Region would assess a standard to its effluent in the final Permit, and that that standard would be derived from drinking water standards.

21. Generally, “[e]ffluent limitations and/or conditions established in the draft permit are in compliance with applicable State/Tribal WQS and applicable State/Tribe water quality management plans to assure that surface WQS of the receiving waters are protected and maintained or attained.” Att. C at 6. And in absence of promulgated guidelines for the discharge, permit conditions may be established based “on Secondary Treatment Regulation for [Publicly Owned Treatment Works (“POTW”)], on [Best Professional Judgment (“BPJ”)] in the absence of guidelines, or on a combination of these.” *Id.* at 5.

22. Under the Administrative Procedure Act, EPA must provide the public with notice and opportunity to comment before it issues NPDES permits. 5 U.S.C. §§ 553(b)-(c), 554; *see* 40 C.F.R. §§ 124.6(d), .10(a)(1)(ii); *see also* *NRDC v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988) (applying the notice and comment requirement to NPDES permitting procedures); *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (same). The law does not require that every alteration in a proposed rule be reissued for notice and comment, but it must be a “logical outgrowth” of the proposed permit. *In Re: District of Columbia Water and Sewer Authority*, 2008 WL 782611, at *34

23. A final permit that differs from a proposed permit and is not subject to public notice and comment must be a “logical outgrowth” of the proposed permit. *See NRDC, 279 F.3d at 1186. See also In re Old Dominion Electric Corp, 3 E.A.D., 779, 797.* To determine whether the proposed changes that appear in the Final Permit raise “substantial new questions” or fail to meet the “logical outgrowth” standard, which are fact-based inquiries, we must consider the evolution of the permit condition at issue, and the Regions corresponding statements. *In re D.C. Water and Sewer Auth.* 13 E.A.D., 714, 760.

24. The previous NPDES permit was issued in December 2019. In that NPDES permit, the Region evaluated the Reasonable Potential for TDS and determined that there was a potential for excursion based on the POIWQS. Att. B at 12. At the time of this renewal, instead of proposing any effluent limitation on TDS, the Fact Sheet continued to note that “the POIWQS has not been updated since the last permit renewal process” and that the Petitioner should be allowed to continue “to collect more ambient data in this permit term instead of establishing the new above limits for TDS, chlorides, sulfates and other parameters specified in the permit Part IF.2.” *See* Att. B at 12. The Region followed the same analytical process from the previous permit in the draft permit

allowing the Petitioner to collect more ambient data in the Draft Permit because the POIWQS needed to be updated and had not yet been updated since 2005.

25. For mercury, the Region similarly determined that there was a reasonable potential for excursion based on POIWQS, but stated that “EPA proposes to retain the prior permit limits and the following condition: Continuing to implement the plan to reduce mercury in the plant influent and effluent” rather than establishing a new effluent limit. *See* Fact Sheet page 11 of 19. Similarly, with respect to molybdenum, the Region determined that there was a reasonable potential for excursion, but stated “to be consistent with the analyses for mercury, salinity/mineral in term of critical low flow for POIWQS, EPA proposes monitoring of molybdenum instead.” Att. B at 11.

26. Throughout the fact sheet, the Region had consistently determined that a reasonable potential existed to exceed the POIWQS for mercury, TDS and molybdenum based on a determination of a critical low flow⁸ of zero.⁹ While the Petitioner challenged the determination of reasonable potential for excursion, the Petitioner relied on the Region’s analysis from previous permits and the policy statements in the Draft Permit that provided for continued data collection until the POIWQS have been updated.

27. The Petitioner provided comments on the draft permit to the Region based on its consistent application of the policy to allow for continued data collection until the POIWQS have been updated. The Petitioner could not have anticipated that the Region would change course and implement a new standard in the final permit. The Region, however, disregarded its past practice

⁸ The determination of critical low flow significantly affects the Reasonable Potential analysis. The Water Authority requested that “the USGS gage 08330875 Rio Grande at Isleta Lakes flow data are used because the location is on the upstream border of the Pueblo of Isleta.” EPA denied the Water Authority’s request. *See* Comment and Response 19, Response to Public Comments, page 12.

⁹ Petitioner challenges the determination of reasonable potential for excursion in section *iv.* below.

and decided to implement new limitations on TDS based on a comment received by NMED, even though the POIWQS still have not been updated. Att. B at 12. Significantly, the draft permit did not merely remain silent on TDS limits; it affirmatively proposed continued monitoring as the appropriate regulatory mechanism for this permit cycle. By jumping directly to a numeric mandate in the final version, the Region did not perform a mere adjustment of the draft's terms, but rather executed a total reversal of its stated policy without providing the required opportunity for public scrutiny.

28. After the Region determined it would impose a limitation, rather than further monitoring, based on its review of the comment from the NMED, the Region selected a new TDS standard which was based on EPA guidance regarding NSDWS and decided to apply it to effluent from the SWRP. Importantly, NMED did not specifically request that a new water quality limit be established but rather “evaluate the characterization of the effluent for TDS, chlorides and sulfates to determine if a water quality-based effluent limitation is needed.” *Id.* Requesting that EPA use the data collected to determine whether to implement a new standard is very different than NMED requesting that EPA add the new limitation.

29. The Petitioner was only informed of the potential for the proposed change roughly one month prior to the Region implementing the new TDS limitation in the final Permit. *See* Att. E, Email to Permit Writer dated November 17, 2025. The public, however, was not informed of the new limitation until after the final permit was issued and thus had no opportunity to provide any meaningful comment on the significant change.

30. Because the Region's draft permit stated its intent to continue to allow “Petitioner to collect more ambient data in this permit term instead of establishing the new above limits for

TDS, chlorides, sulfates and other parameters specified in the permit Part I.F.2”¹⁰ and its stated justification (no update to the POIWQS), implementing a new TDS standard from the draft permit to the final permit was not a logical outgrowth from the Draft Permit and represents a substantial new question. By subsequently implementing a numeric TDS standard in the final permit, the Region did not merely adjust its proposal; it executed a wholesale reversal of its stated regulatory path. This pivot from affirmatively proposed monitoring to an immediate numeric mandate—despite the acknowledged lack of updated POIWQS—precluded any meaningful public comment. Such a radical departure cannot be considered a 'logical outgrowth' of the draft permit and represents a substantial new question that requires a remand.

31. As the new, substantial question was raised in the issuance of the final permit, Petitioner and the public were denied due process when the Region implemented a new limitation on TDS without providing a meaningful opportunity to comment. Implementing a new standard in the final permit was not a logical outgrowth from the draft permit because it was inconsistent with the Region’s previous analytical process and policy and is a substantial change.

ii. The substantial change included in the final permit did not consider the technical, economic, environmental, and other impacts, when it imposed a 500 mg/L TDS limitation based on drinking water standards.

32. Because the Region implemented changes between the draft and final permits that raised substantial new questions, the Petitioner and the public did not have the opportunity to provide meaningful comment on the substantial impacts from the new TDS limitation in the final permit. Had the Petitioner or the public had an opportunity to, they would have provided evidence on the anticipated technical, economic, environmental and other impacts for implementing the new

¹⁰ Att. B at 12.

TDS limitation that the Region would have considered. Because these issues relate to changes from the draft to final permit decision, they may be raised for the first time on appeal.¹¹

33. The implementation of the new TDS water quality standard will require additional treatment to remove the TDS in the wastewater prior to discharge. Without the ability to adequately study the issue, the Petitioner anticipates that the treatment will likely consist of either reverse osmosis, nanofiltration or ion exchange, or some combination thereof. All of these technologies require additional expense to construct and operate, and would all require significant additional energy demand at the SWRP, which operates 24 hours a day, 7 days a week. The treatment will require additional infrastructure and permitting and will create hazardous wastes requiring disposal. For example, the brine removed from the treatment process will need to be disposed of by either injecting deep into the groundwater aquifer or evaporated and removed in very large ponds. The disposal processes will require additional consideration of environmental issues related to storage, transportation, air quality and other issues for land application that will need to be addressed. In other words, the Region is imposing a “cleaner” water standard that may result in additional hazardous wastes requiring disposal and significant additional energy consumption.

34. The Petitioner would also be required to implement new pre-treatment standards for its industrial customers, requiring those entities to remove TDS from the wastewater prior to discharge. The regional economic impact of this change is not known, but the requirement of additional pre-treatment standards will greatly impact customers who may not have the ability or facilities required to meet such new standards. Impacted customers were not provided the

¹¹ *In Re: Teck Cominco Alaska Incorporated, Red Dog Mine*, 2004 WL 1658594, at *2.

opportunity to comment on the potential impacts from the need to revise existing pre-treatment regulations.

35. The newly required treatment and disposal facilities that would be required to implement the TDS standards will increase wastewater rates for all customers. The Region should have noticed this new proposed limitation so that all interested parties could have had opportunity to submit facts, and arguments to be considered on the record. 5 U.S.C.A. § 554(c). However, because the public was not made aware of the economic and financial consequences of the substantial change in the final permit they were not able to provide meaningful comment.

36. Additionally, implementation of all the necessary improvements, as well as incorporating them into Petitioner's current and future plans is anticipated to come with significant costs and long-term planning. The Petitioner was not afforded an opportunity to develop these specific costs and timeline estimations as part of the record. Clearly, if this requirement is not economically feasible, the Petitioner will have to consider alternatives to surface water discharge.

37. As discussed above, the Petitioner's discharge is considered the fifth largest tributary in the Rio Grande and is a primary source of water for downstream communities, including the Pueblo of Isleta. But if the cost of treatment proves too onerous, the Petitioner may have to consider the option of zero discharge and total reuse of the wastewater effluent, as the New Mexico groundwater injection standards only require TDS to be treated to 1,000 mg/l, which the Petitioner currently easily satisfies. 20.6.2.3103 (B) NMAC.

38. While the Region makes a passing reference to consideration of "economic sustainability",¹² the Region provides no citation to exactly what it considered to support such a claim. In fact, there is no evidence in the record, as we discussed above, because the Petitioner

¹² Att. C at 7.

had no adequate notice or opportunity to meaningfully comment on the impact a new TDS limitation would have had. Had the Petitioner had such notice or opportunity, it would have demonstrated on the administrative record what the anticipated costs, technical, economic, environmental and other impacts to the community to meet the new TDS standard.

39. Petitioners have firsthand experience with nearby neighborhoods who are often impacted by activities at the SWRP. Those adjacent neighborhoods are routinely active in matters concerning the SWRP and were not informed of the new limits for TDS and the potential impacts to the neighborhood.

40. When “any data information or arguments submitted during the public comment period, including information or arguments required under § 124.13, appear to raise substantial new questions concerning a permit”, the Regional Administrator is permitted to perform several actions that the Region failed to avail the Petitioner of at the time the final Permit was amended. 40 C.F.R. § 124.14. The Region may: 1) prepare a new draft permit; 2) prepare a revised fact sheet and reopen the comment period; or 3) reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted. *Id.*

41. Because the changes to the final permit raise substantial questions regarding the impact of the permit on the Petitioner, the Region should have taken any of the actions authorized under 40 C.F.R. § 124.14 to fully develop the evidentiary record and consider all the implications of such a standard.

42. While costs and other impacts are not presently known, the benefit is likely miniscule, at best, because this effluent discharge will be returning to the river combining with other surface water flows subject to existing water quality constituents present in the river.

43. Considering the costs and benefits of agency actions has been a guiding principle in pursuit of informed and prudent agency decision-making. The CWA specifies that effluent limitations for industrial wastewater must be technology-based and include consideration of the cost of applying the technology in relation to the effluent reduction benefits to be achieved.¹³ See e.g., 33 U.S.C. § 1314(b)(1)(B) (1976) (describing factors to be taken into account when determining control measures applicable to point sources required to meet effluent limitations); 51 Fed. Reg. 24974-01 (July 9, 1986) (establishing a POTW) and Industry Cost-Effectiveness Test for establishing effluent limitations).

44. All of these options will require additional study and development of an infrastructure and financing plan which the Petitioner had no opportunity to discuss the impact of the new limitations with the Region or the POI. The result is bad public policy, and the Final Permit decision should be remanded to the Region to allow the Petitioner, POI, NMED and the public the opportunity to comment and provide feedback on the impacts and benefits if any from the proposed new water quality standard for TDS.

iii. The policy decision by the Region to apply NSDWS standards to establish water quality limitations to meet stream standards under the Clean Water Act is an important question that the EAB should review.

45. Generally, in establishing water quality limitations, “[e]ffluent limitations and/or conditions established in the draft permit are in compliance with applicable State/Tribal WQS and applicable State/Tribe water quality management plans to assure that surface WQS of the receiving waters are protected and maintained or attained.” Att. B at 6, citing Section 301(b)(1)(C) of the CWA.

46. However, here, the Region considered the “EPA Guidance for the National Secondary Drinking Water Standards (NSDWS)”, established under the SDWA, to determine appropriate limits for the SWRP regarding TDS. Att. C at 6. These secondary drinking water standards are non-enforceable standards for drinking water that is provided for human consumption. They are authorized under the Safe Drinking Water Act and do not relate to water quality standards established for streams under the Clean Water Act.

47. The Region provided no legal or technical basis for establishing a stream standard based on drinking water in the Administrative Record. In addition, there is nothing in the record that establishes how the drinking water standard will meet the designated uses of the stream as it relates to the POIWQS.

48. The policy decision to use drinking water standards as an enforceable water quality standard for an NPDES permit raises significant questions about the Region’s discretion and judgment in implementing the TDS limits in the final permit.

49. If the EPA is going to begin applying drinking water standards to free flowing bodies of water, that change would represent an important policy consideration that the EAB should review

iv. The Region erred when it declined to use the proper gage to evaluate critical low flow for its reasonable potential calculations.

50. The Petitioner requested that EPA use the existing USGS gage 08330875 Rio Grande at Isleta Lakes to determine critical low flow. *See* Response to Comments 19, page 8 of 12.

51. In the Fact Sheet, the Region stated that “using the lowest flow over last 20 years, EPA applies no dilution (zero cfs) in term of critical flow rate in this permit renewal review. That means applicable POIWQS must be met at the end of discharge.” Att. B at 7. The Petitioner

commented that the “[l]ow Flow Rate used to assess the downstream conditions for the [POIWQS] should represent the flow data of the tribal waters where the [POIWQS] are applicable.” Att. C at 8. The Petitioner requested that the USGS gage 08330875 Rio Grande at Isleta Lakes because the location is on the upstream border of the Pueblo of Isleta jurisdiction. *Id.*

52. However, the Region denied this request, stating “USGS Gage 08330875 is downstream from the discharger; the continuous effluent discharge is included at this gage. When there is no upstream/ambient flow (zero flow), the effluent discharge literally becomes the instream flow, which is required to meet POI SWQS at the tribe boundary.” *Id.* Based on this analysis, the Region determined that critical low flow is zero and that the Petitioner’s discharge is the only flow in the Rio Grande at the POI boundary.

53. The Region’s statement assumes that there are no intervening flow contributions between the Petitioner’s discharge and the POI boundary and thus the wastewater discharge is the only flow at the POI boundary. There are several discharges on the Rio Grande between the Petitioner’s discharge and the POI boundary including the Albuquerque Riverside Drain (Isleta Lakes) owned and operated by the Middle Rio Grande Conservancy District that contribute flow in the Rio Grande at the POI boundary.¹⁴

54. The Region stated that “When there is no upstream/ambient flow (zero flow), the effluent discharge literally becomes the instream flow, which is required to meet POI SWQS at the tribe boundary.” Att. C. at 8. This statement assumes that there are no discharges into the river between the effluent discharge and the POI boundary. The Albuquerque Riverside Drain

¹⁴ See e.g. Middle Rio Grande Conservancy District, Albuquerque Riverside Drain, https://mrgcd.onerain.com/site/?site_id=218&site=d35693d3-504f-438b-b0fb-361ebd2d1854 (last accessed 2/20/2026).

(Isleta Lakes) discharges into the Rio Grande. Thus, the Region's assumption that the effluent discharge literally becomes the instream flow is not correct.

55. If the critical low flow is not zero, then the calculation to determine reasonable potential includes the dilution provided by the additional flows as shown in the reasonable potential calculation for mercury. *See* Fact Sheet, page 10 of 19. The refusal to use the Isleta Lakes gage demonstrate a failure of the Region to exercise "considered judgment" based on the best available data.

56. The Petitioner requested that the Region use USGS gage 08330875 because it represents the best available data for river flows at the POI boundary. The Regions denial was in error.

Alternative Dispute Resolution:

The Permittee is willing to stay this appeal and participate in Alternative Dispute Resolution.

Conclusion and Relief Sought:

For the foregoing reasons, the Permittee respectfully seeks review by the EAB of the terms and provisions of the final NPDES Permit challenged by the Permittee as set forth herein. After such review, the Permittee requests EAB to:

- A. Set briefing schedule for this appeal to assist the EAB in resolving the issues in dispute;
- B. Provide an opportunity for oral argument; and
- C. Vacate and remand the contested permit condition to EPA Region VI with an order to issue an amended NPDES Permit that conforms to the EAB's findings on the terms and provisions appealed by the Petitioner; and
- D. Such other relief that may be appropriate under these circumstances.

Alternative Findings of Fact:

Critical Low Flow and Dilution Data

1. **Representativeness of Data:** USGS gage 08330875 represents the best available data for determining actual river flows and potential dilution at the specific boundary where Pueblo of Isleta Water Quality Standards (“POIWQS”) apply.
2. **Flow Calculation:** Because intervening discharges contribute to the river's volume, the Petitioner’s effluent does not constitute the entirety of the instream flow at the Pueblo of Isleta boundary, even during periods of low upstream ambient flow.
3. **Reasonable Potential Re-Evaluation:** The use of zero flow (no dilution) for reasonable potential calculations was a conclusion of fact not supported by the available geographic and hydrological data

Procedural Evolution of TDS Limits

4. **Draft Permit Provisions:** The draft permit published on May 24, 2025, did not contain a numeric effluent limitation for Total Dissolved Solids (“TDS”).
5. **Nature of Third-Party Comments:** The New Mexico Environment Department (“NMED”) did not request a specific numeric TDS limit, but rather suggested a characterization study to determine if a future limit was necessary.
6. **Lack of “Logical Outgrowth”:** The sudden imposition of a 500 mg/L TDS limit in the final permit, after the draft permit expressly declined to set such a limit, was not a logical outgrowth of the public notice and comment process.

Technical and Economic Impacts

7. **Treatment Requirements:** Achieving a 500 mg/L TDS limit would likely require the Petitioner to construct and operate advanced treatment facilities.

8. **Absence of Record Evidence:** The administrative record contains no detailed analysis of the technical feasibility, regional economic impact, or specific environmental consequences of the new TDS limitations.
9. **Inappropriate Standard Application:** The 500 mg/L TDS limit is derived from National Secondary Drinking Water Standards (“NSDWS”), which are non-mandatory guidelines for aesthetic considerations in treated drinking water, not enforceable Clean Water Act standards for free-flowing stream bodies

Alternative Conclusions Regarding Issues of Law:

- A. **Failure of Notice:** The Region committed a reversible error of law by failing to provide the public with notice and an opportunity to comment on the numeric TDS limits included in the final Permit.
- B. **Substantial New Questions:** The shift from monitoring to immediate numeric limitation raised “substantial new questions” regarding technical and economic feasibility that the Region was legally required to address by reopening the comment period under 40 C.F.R. § 124.14.
- C. **Improper Regulatory Basis:** The Region’s decision to establish a CWA effluent standard based on NSDWS constitutes an abuse of discretion.
- D. **Policy Precedent:** Utilizing drinking water standards to meet stream standards represents a significant policy shift that warrants EAB review to ensure EPA discretion is not used to bypass the formal water quality standard-setting process.
- E. **Refusal of Best Available Data:** Declining to use USGS gage 08330875—which is located at the specific jurisdictional boundary of the Pueblo of Isleta—precluded the

Region from making a “considered judgment” based on the most accurate hydrological data available.

F. Incomplete Record: The Region violated 40 C.F.R. § 124.44 and the principles of reasoned decision-making by imposing limits without an evidentiary record regarding the resulting energy consumption, hazardous waste generation, or regional economic impacts.

G. Arbitrary Policy: Imposing a standard for aesthetic drinking water quality on an effluent that discharges into a free-flowing river—without weighing the “miniscule” benefits against the significant infrastructure costs—results in an arbitrary and capricious policy outcome.

DATE: February 23, 2026

Respectfully submitted,

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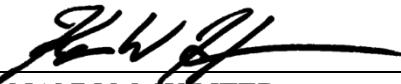
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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Appellate Brief was sent on February 23, 2026 to the following persons in the manner indicated.

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