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

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

EPA REGION 6's RESPONSE TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

Pursuant to 40 C.F.R. § 124.19(b)(2), U.S. Environmental Protection Agency, Region 6 ("EPA") respectfully submits to the Environmental Appeals Board ("EAB" or "the Board") this Response to the Petition for Review filed by Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace, Chapter #63 (collectively, "Petitioners"), in connection with National Pollutant Discharge Elimination System ("NPDES") Permit No. NM0028355 ("2022 Permit") issued by EPA under the Clean Water Act ("CWA") for discharges from the Los Alamos National Laboratory ("LANL" or "the Facility").

Petitioners request denial of permit authorization for six LANL outfalls, arguing that the CWA does not allow EPA to issue NPDES permits for discharges that have not occurred or are not certain to occur in the future. To support this claim, Petitioners make factually incorrect and misleading statements regarding discharge history and possibility of future discharge from the six outfalls. In addition, Petitioners claim that the 2022 Permit reissuance creates statutory conflicts between the CWA and the Resource Conservation and Recovery Act ("RCRA"). Such arguments are in fact facial attacks on a regulatory exemption from RCRA requirements that was established on November 17, 1980. 45 Fed. Reg. 76074 (Nov. 17, 1980). Challenges to long-established regulations are outside the scope of appeals of NPDES permits under 40 C.F.R. § 124.19. Consistent with a long line of EAB precedent, the Board lacks jurisdiction over such misplaced challenges to regulations.

EPA respectfully submits that Petitioners have not met their burden of showing a clearly erroneous finding of fact or conclusion of law in EPA's reissuance of the 2022 Permit, nor have

Petitioners identified any exercise of discretion or policy consideration that warrants the Board's review.

II. ISSUE PRESENTED FOR REVIEW

The issue presented for the Board's review is whether EPA made a clearly erroneous finding of fact or conclusion of law in determining it has authority to issue permits where a point source anticipates possible future discharge.

III. FACTUAL BACKGROUND

LANL is a United States Department of Energy facility operated by Triad National Security, LLC (collectively, "Permittees") in New Mexico, with the primary mission of reducing nuclear danger through "stockpile stewardship," along with multidisciplinary research to address civilian issues such as health, national infrastructure, energy, education, aeronautics, and the environment. Attachment ("Att.") C at 2. LANL currently operates under an NPDES permit issued in 2014 ("2014 Permit") that has been administratively continued since its expiration on September 30, 2019.

On March 28, 2019, EPA received Permittees' application for permit reissuance. EPA held an initial sixty-day public comment period on the draft permit, beginning on November 28, 2019, and extended to March 31, 2020. *See* Att. E. A public hearing was held on January 15, 2020. *Id.* Upon request by Permittees, EPA reopened public comment for thirty days beginning on January 30, 2021. *See* Att. F. EPA issued the 2022 Permit on March 30, 2022. The 2022 Permit authorizes LANL to discharge from eleven sanitary and/or industrial outfalls.

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

those outfalls must therefore be denied permit coverage.[1] *See generally* the Petition for Review ("Pet.")[2][3]

The Petition for Review is concerned almost entirely with Outfall 051, though it also includes an offhand request for denial of permit authorization for five additional outfalls. The Petition for Review contains factual errors and misleading omissions regarding discharges from the challenged outfalls.[4] The following corrects Petitioners erroneous version of the facts:

Outfall 051

[1] 40 C.F.R. § 124.19(a)(1) requires petitions for review of NPDES permits to be filed with the Clerk of the Board within thirty days of the final permit decision. Since EPA issued Permit No. NM0028355 on March 30, 2022, the deadline to file a petition for review was April 29, 2022. On May 2, 2022, Petitioners contacted the Board via email and represented to the Board that the deadline to file a petition was May 2, 2022, and that wildfires in New Mexico necessitated an extension of time to file. EPA did not oppose the motion for an extension, even though the deadline to file had passed. The Board granted Petitioners' motion, with a new deadline of May 9, 2022 (noting, "At this time, the Board relies on Concerned Citizens' statement that the original deadline for Concerned Citizens to file a petition for review in the matter was May 2, 2022, and the Board makes no determination as to the timeliness of this request for an extension."). *See* Order Granting Extension of Time. NPDES Appeal No. 22-01 (May 2, 2022).

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

[3] In accordance with 40 C.F.R. § 124.16(a)(1) and (2)(ii) and § 124.60, the contested permit conditions are stayed, and EPA provided notice to the Environmental Appeals Board, Permittees, and Petitioners of the uncontested and severable conditions of the final permit on June 28, 2022. Those uncontested conditions become effective thirty days after the notice required in § 124.19(a)(2)(ii). For contested conditions of the 2022 Permit, Permittees must comply with the analogous conditions in the administratively continued 2014 Permit.

[4] Petitioners reference *ground water* discharges, authorized by the New Mexico Environmental Department Ground Water Quality Bureau, as a basis for EPA to deny the LANL's NPDES permit application. Pet. 13, 17. EPA's final decision on the 2022 Permit reissuance was not based on ground water discharges, and such authorization by the State of New Mexico does not negate EPA's authority to issue an NPDES permit.

The Petition for Review acknowledges discharges from Outfall 051 for decades prior to 2010 (Pet. 27. *See also* Pet. 16-17, 21 n.13, 23 n.25, 24 n.30, 25-27, and 33) and more recent discharges, in 2019 and 2020. Pet. 17, 32. Elsewhere, however, the Petition for Review contains many false and misleading statements that would lead the Board to believe Outfall 051 does not actively discharge and will never discharge in the future. For example, Petitioners state, "As there is neither a 'discharge' through Outfall 051, nor any plan or proposal to discharge through Outfall 051, there is no legal basis for a CWA permit." Pet. 38.

In fact, Outfall 051 actively discharges treated radioactive liquid waste from the Radioactive Liquid Waste Treatment Facility ("RLWTF") through Outfall 051 into Mortandad Canyon. Att. D.6 at 5.

LANL's discharge monitoring reports, submitted monthly, reflect numerous discharges from Outfall 051 in the following months. Att. B at 46.[5]

Location ID	**Month Reported**	**Parameter Name**	**Monthly Average** (MGD*)	**Daily Maximum** (MGD*)
NPDES Outfall 051	06/30/2019	Flow	0.021345	0.021345
NPDES Outfall 051	03/31/2020	Flow	0.016253	0.016253
NPDES Outfall 051	08/31/2020	Flow	0.010209	0.010209
NPDES Outfall 051	04/30/2021	Flow	0.018104	0.018629
NPDES Outfall 051	05/31/2021	Flow	0.015926	0.015926
NPDES Outfall 051	06/30/2021	Flow	0.017392	0.017392
NPDES Outfall 051	07/31/2021	Flow	0.016185	0.017543
NPDES Outfall 051	08/31/2021	Flow	0.571	0.982
NPDES Outfall 051	09/30/2021	Flow	0.017043	0.017221
NPDES Outfall 051	10/31/2021	Flow	0.017435	0.017435

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

NPDES Outfall 051	11/30/2021	Flow	0.012218	0.017374
NPDES Outfall 051	01/31/2022	Flow	0.012161	0.016726

*Millions of Gallons per Day

In comments made during the public comment period, Permittees elaborated upon the facility's need for permit authorization for Outfall 051:

> … The operating principle has been that, if the evaporation equipment operates reliably and continuously, and if the wastewater volume does not increase due to a change in the Laboratory's mission, then Outfall 051 should not be needed. But if the evaporation equipment becomes unavailable due to malfunction or maintenance needs, and/or there is an increase in treatment demands, the LANL would need an authorization to discharge treated wastewater.
>
> ….
>
> Furthermore... LANL now envisions a more integral role for Outfall 051 than it has in the past. Whereas the outfall will remain as a back-up alternative when evaporation equipment is unavailable, as before, the outfall will henceforth be utilized even when evaporation equipment is on line but influent volume is of a magnitude that operational efficiency makes it advisable to rely on both the evaporation equipment and Outfall 051." Att. A at 44-45.

Permittees' application for permit reissuance reflects that Outfall 051 is designed, constructed, and maintained to discharge. *See generally* Att. D.6.

Petitioners' assertion that there is no "plan or proposal" to discharge through Outfall 051 is factually inaccurate.

Outfall 03A160

Petitioners falsely state that "Permittees reported, 'No Discharge During Monitoring Period,' on the monthly, quarterly and yearly DMRs'" for Outfall 03A160. Pet. 51 n.4.

In fact, Outfall 03A160 discharges treated cooling water to Ten Site Canyon, a tributary to Mortandand Canyon. Att. D.3 at 5. Permittees submitted discharge monitoring reports reflecting regular discharges from Outfall 03A160 prior to May 2018. Att. B at 77-87.

Petitioners also falsely assert that Permittees do not propose to discharge from Outfall 03A160. Pet. 33, 51 n.4.

In fact, in comments made during the public comment period, Permittees elaborated upon the purpose of this outfall, noting that "LANL intends to discharge from this outfall if an operational upset prevents the discharge of cooling water to the [sanitary wastewater system treatment facility]." Att. A 48-49. In addition, Permittees' application for permit reissuance reflects that Outfall 03A160 is designed, constructed, and maintained to discharge. *See generally* Att. D.3.

Outfall 03A113

Petitioners falsely state that Permittees neither discharge nor intend to discharge from Outfall 03A113. Pet. 33, 51 n.3.

In fact, Outfall 03A113 actively discharges treated cooling water to an ephemeral reach of Sandia Canyon. Att. D.1 at 5. Discharge monitoring reports show that LANL discharged from the outfall every month but one in the five-year period from 2017 through February 2022. Att. B at 63. In line with the discharge monitoring reports, Permittees' public comments note that the outfall discharged 529,234 gallons in 2017, 436,400 gallons in 2018, 198,530 gallons in 2019, and 154,390 gallons from the beginning of 2020 till October 30,2020. Att. A at 48.

Regarding future discharges, Permittees noted in their public comments that while the cooling towers that had discharged to the outfall were in operational standby during the permit application review period, "the permit application proposes this as a future discharge source to the outfall." Att. A at 48.

Outfall 13S

Petitioners falsely state that Permittees neither discharge nor intend to discharge from Outfall 13S. Pet. 33, 50 n.1.

In fact, application materials reflect that Outfall 13S is designed, constructed, and maintained to discharge treated sanitary wastewater effluent to Canada del Buey. Att. D.5 at 5. While this is not an actively discharging outfall, Permittees submit that the outfall is routinely maintained and fully capable of receiving treated effluent from the sanitary wastewater system. Att. A at 47-48. The purpose of the outfall is to provide operational flexibility during equipment maintenance activities and to serve as a critical backup when outfalls at higher elevations are unavailable due to equipment failure or increased effluent volumes. *Id.*

Outfall 03A027

Petitioners state that Permittees neither discharge nor intend to discharge from Outfall 03A027. Pet. 33, 51 n.2.

In fact, while this is not an actively discharging outfall, Permittees state in the permit application and in their public comments that the outfall is designed, constructed, and maintained to receive cooling tower blowdown discharges when required due to demand, volume, and the availability of equipment and other outfalls. Att. D.2 at 5; Att. A at 42. In addition, permit application materials reflect that the outfall is designed, constructed, and maintained to discharge. *See generally* Att. D.2.

Outfall 05A055

Petitioners state that Permittees neither discharge nor intend to discharge from Outfall 05A055. Pet. 33, 51 n.5.

In fact, while this is not an actively discharging outfall, permit application materials reflect that Outfall 05A055 is designed, constructed, and maintained to discharge treated wastewater to an ephemeral tributary of Canon De Valle. Att. D.4 at 5. In their public comments, Permittees note that Outfall 05A055 "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 (i.e., evaporator) will require discharge to 05A055." Att. A at 49.

IV. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act

The CWA generally prohibits discharges of pollutants into navigable waters unless authorized by a permit. *See* 33 U.S.C. §§ 1311(a), 1342(a). The Act empowers EPA to issue permits under the NPDES permitting program. *See* 33 U.S.C. § 1342. These permits, which have five-year terms and are renewable, allow facilities to legally discharge pollutants if they comply with certain requirements. *See* 33 U.S.C. §§ 1342(a)(1)-(3), (b)(1)(B); 40 C.F.R. § 122.21(d). The Administrator may prescribe such regulations as are necessary to carry out his duties under the Act. 33 U.S.C. § 1361(a).

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

B. The Resource Conservation and Recovery Act

RCRA governs the disposal of solid waste and hazardous waste. Under RCRA, EPA can authorize states to administer and enforce their own hazardous waste programs in lieu of the

federal program. 42 U.S.C. § 6926(b). EPA has authorized New Mexico, and the state's program is promulgated under the New Mexico Hazardous Waste Act. N.M. Stat. § 74-4-1 et seq. (2020).

EPA's regulations exempt certain wastewater treatment units from specific RCRA rules. *See* 40 C.F.R. §§ 264.1(g)(6), 265.1(c)(10), 270.1(c)(2)(v). To qualify for that exemption, the wastewater treatment unit must, among other things, be part of a facility that is subject to regulation under certain CWA provisions, including the NPDES permitting program. *See* 40 C.F.R. § 260.10 (defining "wastewater treatment unit").

While state programs may be more stringent than federal requirements, New Mexico has adopted the federal exemption for wastewater treatment units.[6] Accordingly, the New Mexico Department of Environmental Quality has the primary responsibility of implementing the RCRA hazardous waste program in New Mexico, not EPA.

The wastewater treatment unit exemption is limited in scope: It frees the qualifying unit only from technical standards on the unit itself and permitting requirements. *See generally* 40 C.F.R. parts 264, 265, 270. The exemption, however, does not apply to the hazardous waste managed, so any leaks or releases of hazardous waste from the unit would still be regulated under RCRA.

V. PRINCIPLES GOVERNING BOARD REVIEW

The Board is a tribunal of limited jurisdiction; its authority to review permit decisions is "limited by the statutes, regulations, and delegations that authorize and provide standards for

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

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

The Board's scope of review is limited to "contested permit condition[s] or other specific challenge[s] to the permit decision." 40 C.F.R. § 124.19(a)(4). The Board's review "does not ordinarily extend to considerations of the validity of prior, predicate regulatory decisions that are reviewable in other fora." *In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001); *In re USGen New Eng., Inc.*, 11 E.A.D. 525, 555-56 (EAB 2004); *In re City of Irving*, 10 E.A.D. 111, 124 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003).

The Board has discretion to grant or deny review of a permit decision. 40 C.F.R. § 124.19; *see In re Avenal Power Ctr.*, LLC, 15 E.A.D. 384, 394-95 (EAB 2011) (citing Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)), *remanded on other grounds sub nom. Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014). Ordinarily, the Board will deny review of a permit and thus not remand it, unless the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves a matter of policy or an exercise of discretion that warrants review. 40 C.F.R. §§ 124.19(a)(4)(i)(A)-(B); *accord, e.g., In re Prairie State Generating Co.*, 13 E.A.D. 1, 10 (EAB 2006), *aff'd sub. nom Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007) . The Board's decision whether to grant or deny review of a permit is guided

by the preamble to the regulations authorizing appeal under part 124, in which EPA stated that the Board's power to grant review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." 45 Fed. Reg. 33,290 33,412; *In re City and County of San Francisco*, 18 E.A.D. 322, 325 (EAB 2020).

The burden of demonstrating that the Board should review a permit rests with the petitioner. 40 C.F.R. § 124.19(a)(4). A petitioner must specifically state its objections to the permit and explain why the permit issuer's previous responses to those comments were clearly erroneous or otherwise warrant review. 40 C.F.R. §§ 124.19(a)(4)(i)-(ii); *e.g.*, *In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004). It is insufficient to "merely… reiterate comments previously submitted on the draft permit." *In re Springfield Water and Sewer Commission*, 18 E.A.D. 430, 439 (EAB 2021) (citations omitted).

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

In reviewing the exercise of discretion by the permitting authority, the Board applies an abuse of discretion standard. *In re Guam Waterworks Auth.*, 15 E.A.D. 437, 443 n.7 (EAB 2011). The Board will uphold a permit issuer's reasonable exercise of discretion if that decision is

cogently explained and supported in the record. *See, e.g.*, *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997).

VI. ARGUMENT

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

As described above, Outfalls 051 and 03A113 currently discharge on an ongoing basis, and discharge monitoring reports reflect significant discharges from Outfall 03A160 in the five-year period prior to issuance of the 2022 Permit. Petitioners ignore these facts and request denial of permit authorization for all six of the challenged outfalls based on an incorrect proposition that the CWA does not allow NPDES permit authorization when discharges are not certain to occur. Petitioners make no attempt to reconcile the stark disconnect between their primary legal argument and the record.

To be clear, Petitioners' arguments regarding CWA authority for possible future discharges are not relevant to Outfalls 051, 03A113, and 03A160, as the record clearly reflects extensive discharge histories and a strong likelihood of future discharge. As for the three remaining challenged outfalls, EPA has clear authority to permit them, even if future discharges are uncertain.

EPA has authority under the CWA and federal regulations to issue an NPDES permit to the operator of a facility that seeks NPDES authorization to cover a possible future discharge, even if the possible future discharge would only be intermittent, infrequent, irregular, rare, or even uncertain or unlikely. Section 402 of the CWA created the NPDES program, under which the Administrator of EPA may, after opportunity for public hearing, issue permits for the

discharge of pollutants upon condition that such discharge meets all applicable requirements of the CWA. 33 U.S.C. § 1342(a). Pursuant to CWA section 301(a), any discharge from a point source into waters of the U.S. is unlawful unless the discharger possesses a valid permit or is excluded from coverage by law or regulation. 33 U.S.C. § 1311(a). Under the requirements of sections 301 and 402(a) of the CWA, NPDES permit authorization must be obtained prior to discharge. Once a discharge has occurred, the discharger is liable for enforcement under section 309 of the Act if the necessary permits are not in place and effective. *See* 33 U.S.C. § 1319.

Petitioners' assertion that "Congress did not include in the CWA any authority to issue a permit for a discharge that 'could occur,' nor for a 'potential' or a 'capability' to discharge" (Pet. 38) is illogical and inconsistent with the operational structure of the NPDES program. If EPA had no authority to issue NPDES permits for possible future discharges, then it would be impossible for operators of facilities with such discharges to obtain a permit in advance so as to avoid enforcement liability. Prior to the actual discharge, operators of facilities would be unable to obtain NPDES permit authorization, yet if they discharged and then sought permit authorization, they would be in violation of the CWA. It is an established rule of statutory interpretation that Congress is presumed not to have intended illogical or absurd results. *See Hughey v. JMS Development*, 78 F.3d 1523, 1528 (11th Cir. 1996) ("Interpreting the liability provisions of the CWA we realize that Congress is presumed not to have intended absurd (impossible) results."); *Towers v. United States (In re Pacific-Atlantic Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir. 1995) ("We will not presume Congress intended an absurd result."); *Bechtel Constr., Inc. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1225 (9th Cir. 1987) ("Legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious.")

Petitioners invent an entirely new theory of NPDES permit application review in which the permitting authority must evaluate the likelihood of occurrence for each discharge that permit applicants seek to authorize and deny coverage for any discharge that, in the permitting authority's opinion, is not certain to occur – or to occur frequently enough. Such a requirement would undermine the CWA's goal of eliminating the discharge of all pollutants unless otherwise authorized. 33 U.S.C. § 1251(a)(1). Petitioners' theory would put permitting authorities in the impossible position of denying a permittee's request for authorization for discharges that may only occur in rare, emergency, or even catastrophic situations, but that may well occur, and if they do, will be uncontrolled and will subject the permittees to substantial penalties.[7] Nothing in EPA's regulations or long history of issuing NPDES permits suggests such an absurd obligation for NPDES permit issuers, or such an absurd result for permittees. 40 C.F.R. §§ 124.51-124.66, 122 *et seq*.

Federal case law illustrates the importance of obtaining NPDES authorization even when the ongoing nature of discharges is in doubt: past violators may be subject to citizen suits for ongoing discharges until any real likelihood of future discharges is eliminated. The court in *American Canoe Ass'n v. Murphy Farms, Inc*., 412 F.3d 536 (4th Cir. 2005) held that even when past violators have made affirmative, good-faith remedial efforts, the past violator may remain subject to CWA citizen suits. The court reasoned that the violation remains ongoing until there is no real likelihood of future discharges. Citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987), the court said that past violators continue to violate the CWA, for purposes of citizen suits, while there remains an actual likelihood of recurring

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

violations. These cases illustrate the need to seek NPDES permit authorization for point sources that have discharged in the past and for which possible future discharge is anticipated.

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

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

Petitioners misread the holdings in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) ("*National Pork Producers*") and *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) ("*Waterkeeper*"). Petitioners cite the federal rulings in these cases in support of their argument that the CWA does not grant "any authority to issue a permit for a discharge that 'could occur,' nor for a 'potential' or a 'capability' to discharge." Pet. 38. However, in each of these cases, the reviewing court examined EPA's authority to *require* operators of Concentrated Animal Feeding Operations ("CAFOs") to apply for NPDES permit authorization when there had been no evidence of an actual discharge nor a *request* for authorization by the would-be permittee. In *Waterkeeper*, the Second Circuit found that EPA had exceeded its statutory authority by requiring all CAFOs to apply for an NPDES permit whether or not they actually discharged. The *Waterkeeper* court found that the CWA, "on its face,

prevents the EPA from imposing, upon CAFOs, the *obligation* to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge." *Waterkeeper* at 506 (emphasis added). Likewise, in *National Pork Producers*, the Fifth Circuit found that EPA could not "impose a duty to apply for a permit on a CAFO that 'proposes to discharge' or any CAFO before there is an actual discharge." The agency could require discharging CAFOs to obtain NPDES permits. *National Pork Producers* at 751.

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

In this instance, Permittees specifically sought permit authorization for discharges that will or may occur from all six of the challenged outfalls, albeit rarely or irregularly, from Outfalls 13S, 03A027, and 05A055. In their application for NPDES permit authorization, Permittees clearly explained in detail the operational circumstances that necessitate authorization to discharge from each of the challenged outfalls. Therefore, EPA properly issued an NPDES permit for the requested outfalls.

2. EPA has not conceded any lack of authority to issue NPDES permit authorization sought by an applicant for possible future discharge.

Petitioners misconstrue EPA's actions subsequent to the Fifth Circuit's decision in *National Pork Producers*. Pet. 41, 46. EPA did amend its CAFO regulations in 2012 to comply with the Court's vacatur of provisions that imposed a duty for CAFOs to apply for NPDES permits, or otherwise demonstrate that they had no potential to discharge. 77 Fed. Reg. 44494 (Monday, July 30, 2012). In the preamble to its 2012 regulatory revisions, EPA characterized

the vacated portion of the 2008 CAFO rule as the "propose to discharge" requirement. *Id*. at 44495. However, as explained by the *National Pork Producers* court, EPA's regulation of CAFOs that "propose to discharge" was not the same as regulating CAFOs that *want* to discharge.

> Instead, the EPA's definition of a CAFO that "proposes" to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to this definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging.

National Pork Producers at 750.

Thus, when EPA explained that it had accepted "the decision of the Court that vacated the requirement that CAFOs that propose to discharge apply for NPDES permits and the EPA lacks the discretion to reach a different conclusion" (77 Fed. Reg. 44494 at 44496), the Agency was speaking only of its acceptance of the *National Pork Producers* court's decision that EPA lacked authority to impose a duty to apply for an NPDES permit on facilities that "proposed to discharge" within the meaning of the former rule as described above. EPA in no way conceded that it lacks authority to issue permits to facilities requesting authorization for possible future discharge.

3. EPA's authority to issue NPDES permit authorization sought by an applicant for possible future discharge is not precluded under other previous federal court rulings or administrative proceedings cited by Petitioners.

None of the additional opinions cited by Petitioners is applicable to the facts at hand. In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the issue before the court was whether EPA had a nondiscretionary duty to regulate dam-caused pollution under the NPDES program. EPA argued that water quality changes caused by dams did not meet the definition of "addition of pollutant" under the CWA, and therefore EPA had no mandatory duty

to regulate dams. *National Wildlife Federation v. Gorsuch* at 165. The D.C. Circuit upheld EPA's interpretations of the terms as reasonable and entitled to deference. *Id.* at 183. In *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), EPA argued that defendant's movement of pollutants already in the water was not an "addition" of pollutants to navigable waters such as to require the facility to obtain NPDES permit coverage. *National Wildlife Federation v. Consumers Power Co.* at 583. Again, the federal court deferred to and upheld EPA's interpretation of the Act. *Id*. at 590. *In re Lowell Vos*, EPA Docket No. CWA-07-2007-0078 (ALJ, June 8, 2009) dealt with whether EPA had established facts sufficient to demonstrate an illegal discharge in an enforcement action. None of these cases dealt with EPA's ability to authorize a future possible discharge in response to an application for an NPDES permit.

Petitioners also cite several cases in support of the perplexing claim that "…regulatory exclusions from the requirement of a permit for a discharge cannot stand." Pet. 47. Petitioners have not identified, much less challenged, any "regulatory exclusion" from the requirement of a permit for a discharge that is relevant to the present case. The cited cases involved challenges to regulations exempting certain classes of dischargers from NPDES permitting requirements: *National Cotton Council v. U.S. EPA*, 553 F. 3d 927 (6th Cir. 2009) (concerning exemptions for certain pesticide applicators), *Northwest Environmental Advocates v. U.S. EPA*, 537 F.3d 1006 (9th Cir. 2008) (concerning exemptions for certain discharges from marine vessels*), Northern Plains Research Council v Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2001) (concerning state law exemptions for certain coal bed methane extraction activities), *Natural Resources Defense Council, Inc. v. Costle*, 568 F 2.d 1369 (D.C. Cir. 1977) (concerning EPA's discretion to exempt point source classes from permitting requirements), and *Defenders v.*

Forsgren, 309 F. 3d 1181 (9th Cir. 2001) (concerning whether aerial spraying of pesticides is point source pollution). Exemptions from NPDES permitting requirements for certain classes of dischargers are not relevant to the present matter. None of the cited cases address, much less cast doubt on, EPA's authority to issue NPDES permits for possible future discharges.

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

EPA's NPDES regulations allow, and sometimes explicitly require, authorization of future discharges, even when the likelihood of discharge is remote.

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

The effluent guidelines for the CAFO point source category have similar provisions. The regulations prohibit discharges unless they are overflow from a facility designed, constructed, operated, and maintained to contain all process wastewaters plus the runoff from either a 10-year or 25-year rainfall event (*See* 40 CFR §§ 412.12, 412.13, 412.15, 412.25, 412.26, 412.31(a), 412.32-35, and 412.43-45).

EPA's authority to permit intermittent and infrequent future discharges is also illustrated by the stormwater permitting program. CWA § 402(p) directs EPA to regulate stormwater discharges under the NPDES program and establish regulations setting forth permit application requirements for stormwater discharges from industrial and municipal point sources. 33 U.S.C. § 1342(p). To manage the immense scope of regulated activity, EPA often issues general stormwater permits. To gain coverage under a general permit, eligible facilities submit a notice of intent and, among other things, implement a stormwater pollution prevention plan that may contain a variety of control measures to slow and reduce discharges.

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

In New Mexico alone, EPA has issued at least two NPDES permits that authorize discharges which are very unlikely to occur. EPA issued NPDES Permit No. NM0031216 to Kirtland Air Force Base, near Albuquerque, New Mexico, in 2019. *See* Att. J. The permittee operates a ground water treatment plant to address a plume resulting from a fuel leak. The treated effluent is used for golf course irrigation during warm months and is also returned to the regional aquifer as authorized under an underground injection control permit. As a backup only, in the event of infrastructure failure at the golf course or injection wells, the permittee is authorized to

discharge treated effluent to Tijeras Arroyo. Permittees have reported no discharges from the authorized outfall. *See Id*. at 4 of Part II.

EPA initially issued NPDES Permit No. NM0030996 to El Segundo Mine in 2008 and then reissued it in 2014 and 2020. *See* Att. I. The permittees operate a surface coal mine with many sediment ponds that are each permitted as an individual outfall. These ponds are designed to absorb at least a 10-year, 24-hour precipitation event and have not discharged since 2008. The facility also has a sewage pond that is not intended to discharge to surface water, however, authorization to discharge is provided in the event of severe precipitation. *See Id*. at p.4 of Part I. Yet, the permit continues to authorize and provide limits for any future discharge that may occur if the ponds were to reach capacity.

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

C. The NPDES permit appeals process under 40 C.F.R. § 124.19 is not the appropriate forum for Petitioners' demands for a RCRA permit nor vague challenges to existing CWA and RCRA regulations.

Proceedings initiated under 40 C.F.R. § 124.19 are limited to appeals of final permit decisions issued under 40 C.F.R. § 124.15. The rules governing these proceedings make no mention of requests for other unrelated permits or challenges to established regulations. Petitioners ignore the narrow scope of the NPDES permit appeals process and attempt to lead

EPA and the Board down a winding road to the imposition of state administered RCRA permitting requirements. Here, in a nutshell, Petitioners show that this NPDES appeal is merely the means to an end:

> The reality is that the RLWTF manages hazardous waste, and RCRA directs that such a facility must have a hazardous waste permit. 42 U.S.C. § 6925. Thus, this case poses the question: Should RCRA be applicable to the RLWTF, in accordance with the 42 U.S.C. § 6925, or should the CWA, 33 U.S.C. § 1342, which regulates discharges, be deemed applicable to the non-discharging RLWFT, to render it exempt from RCRA regulation?
>
> That question presents a possible conflict between two federal statues, the CWA and RCRA.

Pet. 54.

Petitioners further assert that by issuing the 2022 Permit, EPA impermissibly picks and chooses between statutes, impliedly repeals RCRA, and creates a supposed statutory conflict by "invoking" RCRA's wastewater treatment unit exemption. Pet. 55-56. To the contrary, EPA has never used the 2022 Permit reissuance to invoke RCRA's wastewater treatment unit exemption; Petitioners have.[8]

The State of New Mexico, not EPA, administers the RCRA program in New Mexico, and if Petitioners desire changes to New Mexico's RCRA program or seek particular RCRA permitting decisions, then they should petition the RCRA permitting authority, which is the New Mexico Environmental Department, *not EPA.* The wastewater treatment unit exemption is not a

[8] Petitioners underpin their appeal on the assumption that the RLWTF would be subject to RCRA permitting requirements if EPA terminated NPDES authorization for Outfall 051. Pet.54. In fact, EPA has issued guidance indicating that the wastewater treatment unit exemption could continue to apply to facilities that completely eliminate discharges, or even in the absence of an NPDES permit. Sylvia K. Lowrance, *Exemption from Permitting Requirements for Waste Water Treatment Units* (Letter) (January 16, 1992), https://rcrapublic.epa.gov/files /13526.pdf. In any case, determinations of RCRA applicability would be made by the State of New Mexico, which has primary authority to implement the RCRA program in lieu of EPA. Such determinations are outside the scope of federal NPDES permitting issuance and subsequent appeals.

required part of the federal minimum requirements for the RCRA program, and any state that wishes to remove it from their RCRA rules may do so. New Mexico is free to make the state hazardous waste program more stringent than federal minimum requirements, but EPA cannot make that decision for the State in a federal NPDES permitting action.

Petitioners' argument against the RCRA wastewater treatment unit exemption is a challenge to a long-established RCRA rule, not a challenge to CWA NPDES permit conditions. The Board addressed such oblique challenges to regulations in *In re USGen New England, Inc*. 11 E.A.D. 525 (EAB 2004). In that case, the petitioner filed a request for an evidentiary hearing years after EPA amended procedural regulations to eliminate the evidentiary hearing requirement. The Board held that the motion was "in essence" a challenge to the amended regulations that did not overcome the extremely high bar for Board review:

> …the Board generally does not entertain challenges to final Agency regulations in the context of permit appeals. Order at 3; *accord In re City of Irving,* 10 E.A.D. 111, 123-25 (EAB 2001), *petition for review denied*, 325 F.3d 657 (5th Cir. 2003), *see also In re Suckla Farms, Inc.* 4 E.A.D. 686, 699 (EAB 1993); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991). Significantly, the regulations governing the Board's review of permits authorizes the Board to review *conditions* of the permit decision, not statutes or regulations which are the predicates for such conditions. *See* 40 C.F.R. § 124.19(a); *see also City of Irving*, 10 E.A.D. at 124; *Ford Motor,* 3 E.A.D. at 682 n.2. Moreover, the "presumption of nonreviewability in the administrative context is especially appropriate when Congress has set precise limits on the availability of a judicial forum for challenging particular kinds of regulations." *In re Woodkiln, Inc.*, 7 E.A.D. 254, 269 (EAB 1997) (relying on *In re Echevarria,* 5 E.A.D. 626, 634-35 (EAB 1994)); *see also City of Irving*, 10 E.A.D. at 123 (explaining that, in general, a permit appeal cannot be used "as a vehicle for collateral challenge of regulatory provisions when the time for such challenge has long since passed"); *In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001) (holding that the Board will not review "the validity of prior, predicate regulatory decisions that are reviewable in other fora").

In re USGen New England, Inc. 11 E.A.D. at 555.

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

In their misplaced attempt to mount an attack on the RCRA wastewater treatment unit exemption, Petitioners concoct a conflict between RCRA and the CWA. Pet. 54. In doing so, however, they omit relevant law.

RCRA § 1006(a) anticipates overlap with other environmental statutes, providing that nothing in RCRA "…shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act … except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts. 42 U.S.C. § 6905(a). In administering RCRA, Congress directed EPA to "avoid duplication, *to the maximum extent practicable,* with the appropriate provisions of … the Federal Water Pollution Control Act [and certain other environmental statutes]…." 42 U.S.C. § 6905(b) (emphasis added).

Simply put, in this case, there is no conflict between the CWA and RCRA wastewater treatment unit exemption regulations at 40 C.F.R. §§ 264.1(g)(6), 265.1(c)(10), 270.1(c)(2)(v). In fact, the Petition for Review fails to mention 40 C.F.R. § 270.1(c)(2)(v), which provides that owners and operators of wastewater treatment units are specifically "excluded and exempted" from the requirement to obtain a RCRA permit. The RCRA wastewater treatment unit exemption

regulation has existed since November 17,1980, and has co-existed without conflict or duplication with CWA regulations for all these decades.

To the extent Petitioners have concerns over these RCRA regulations, they are out of place in an NPDES permit appeal.

D. Petitioners provide no basis for their claim that EPA's Response to Comments does not support issuance of the 2022 Permit.

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

Petitioners assert that EPA's Response to Comments does not support EPA's action, however, they do not provide any basis for this claim. Rather, they merely repeat factually incorrect statements and misplaced legal theories found elsewhere in the Petition for Review. They restate their contentions that the LANL discharges are "imaginary" and that EPA therefore has no power to authorize them. Pet. 58. They restate incorrect interpretations of the *National Pork* and *Waterkeeper* decisions. *Id.* They again mischaracterize Permittees' statements regarding facility operations and likelihood of discharge from Outfall 051. *Id.* at 59. Finally, they restate their belief that EPA is required to consider state RCRA program implications when making NPDES permitting decisions. *Id.*

Not one of these incorrect, rehashed claims identifies any deficiency with EPA's Response to Comments or any failure to meet the requirements of 40 C.F.R. § 124.17.

VII. ORAL ARGUMENT

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

VIII. CONCLUSION

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

Respectfully submitted,

JAY PRZYBORSKI

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STATEMENT OF COMPLIANCE WITH WORD LIMIT

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

JAY PRZYBORSKI

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2022, I served the foregoing document on the following persons in the manner indicated:

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