

**NPDES PERMIT NO. NM0028355  
RESPONSE TO COMMENTS**

RECEIVED ON THE SUBJECT DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT IN ACCORDANCE WITH REGULATIONS LISTED AT 40CFR124.17

APPLICANT:           Triad National Security, LLC  
                          Los Alamos National Laboratory  
                          PO Box 1663, K491 3747 West Jemez Road  
                          Los Alamos, New Mexico 87544

AND

U.S. Department of Energy  
Los Alamos Area Office, A316  
Los Alamos, NM 87544

ISSUING OFFICE:   U.S. Environmental Protection Agency  
                          Region 6  
                          1201 Elm Street, Suite 500  
                          Dallas, Texas 75270-2102

PREPARED BY:      Ruben Alayon-Gonzalez & Isaac Chen (Retired)  
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PERMIT ACTION:    Final permit decision and response to comments received.

DATE PREPARED:   September 27, 2023

Note: Inclusion of permit requirements to comply with conditions of certification are required by 40 CFR § 124.55(a)(2). Challenges to conditions of certification must be made through NMED. In any case, if conditions are based on procedures or guidelines, rather state regulations, EPA would treat those conditions as recommendations or comments, and would respond accordingly. If any condition will result in less stringent permit conditions, then EPA would treat those conditions as a statement of the extent to which the permit could be made less stringent (see 40 CFR §124.53(e)(3)). Unless otherwise stated, citations to 40CFR refer to promulgated regulations listed at Title 40, Code of Federal Regulations, revised as of September 27, 2023.

**SIGNIFICANT CHANGES FROM DRAFT PERMIT**

There are significant changes from the draft permit modification publicly noticed on November 28, 2019. All changes and their rationale for changes can be found in the following response to conditions of certification or response to comments.

**State Certification**

State certification letter from Ms. Shelly Lemon (NMED) to Mr. Charles Maguire (EPA), dated November 30, 2020, conditionally certified that the discharge will comply with the applicable provisions of the Clean Water Act and with appropriate requirements of State law. NMED also included comments in the certification letter. On December 30, 2020, the U.S. Department of Energy National Nuclear Security Administration and Triad National Security, LLC submitted a petition for review of Conditions #1 and #2 of the original State Certification to Secretary of the Environment Department. NMED issued this modified certification on January 31, 2022, as a result of the petition for review and resulting Settlement Agreement between NMED and DOE/Triad.

The modified certification does not include any changes to the background and regulatory support for the following conditions, include the following modifications to the State's CWA Section 401 Certification of LANL Industrial Discharge Permit, NPDES Permit No. NM0028355 dated November 30, 2020:

<b>Original Certification</b>	<b>Topic</b>	<b>Modified Certification</b>
Condition #1	Related to PFAS Monitoring	Deleted
Condition #2	Related to PCBs	Condition #1
Condition #3	Other limitations	Condition #2
Comments	Various	Added Comment #3

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**Conditions of Certification from New Mexico Environment Department****Condition #1: Related to PCBs:**

- (a) The U.S Department of Energy National Security Administration and Triad National Security, LLC (collectively “DOE/Triad”) have discharge monitoring data (using EPA Method 1668) for Outfall 051 from sampling performed in June 2019 and March 2020 (see Attachment 1). Analytical data is not available for the other outfalls; however, the 2019 Permit Re-Application Form 2Cs for these outfalls indicated that PCBs were “Believed Absent” based upon the composition of the water discharged. Table 1 below provides the basis for reasonable potential at each outfall.
- (b) Where reasonable potential exists (“Yes”), DOE/Triad shall monitor for Total PCBs in effluent from Outfalls 001, 13S, and 03A027 once per year (see Table 1).
- (c) The ten (10) outfalls identified in Table 1 discharge to PCB-impaired surface waters; however, water quality data are only available for a sub-set of the outfalls. Therefore, where reasonable potential may exist (“Unknown”), DOE/Triad shall confirm that PCBs are absent from the discharges by sampling for Total PCBs in effluent from Outfalls 03A048, 03A113, 03A160, 03A181, 03A199, and 03A022 once during the first year of coverage, or when the facility next discharges if no discharge occurs during the first year (Table 1).
- (d) Samples shall be analyzed by an accredited lab for Total PCBs in accordance with EPA Method 1668C or later revisions. Method and analysis shall be sufficiently sensitive to evaluate the data against the New Mexico water quality standards (Total PCB < 0.00064 ug/L).
- (e) If data from the confirmation sampling indicate that reasonable potential exists (RP = “Yes”) at one or more of the outfalls identified in Table 1, then DOE/Triad shall monitor for Total PCBs once per year at the outfall(s) for the remainder of the permit term. If data indicate “No” RP, then no additional monitoring is required.

**Table 1. Summary of Reasonable Potential (RP) Information for PCBs at NPDES Outfalls**

<b>Outfall ID</b>	<b>Long-Term Average (ug/L)<sup>a</sup></b>	<b>RP Y/N</b>	<b>Basis of RP Determination</b>	<b>Total PCB Maximum Discharge Limitation (ug/L)<sup>b</sup></b>	<b>Monitoring Requirements</b>	<b>Monitoring Frequency</b>
001	0.002654	Yes	<ul style="list-style-type: none"> <li>• DMR Monitoring Data using EPA 1668</li> <li>• “Believed Present”</li> </ul>	0.00064	24-hour composite	1/Year
13S	ND	Yes	<ul style="list-style-type: none"> <li>• “Believed Present”</li> </ul>	0.00064	24-hour composite	1/Year
03A027	0.001335	Yes	<ul style="list-style-type: none"> <li>• DMR Monitoring Data using EPA 1668</li> <li>• “Believed Present”</li> </ul>	0.00064	Grab sample	1/Year

Outfall ID	Long-Term Average (ug/L) <sup>a</sup>	RP Y/N	Basis of RP Determination	Total PCB Maximum Discharge Limitation (ug/L) <sup>b</sup>	Monitoring Requirements	Monitoring Frequency
051	0.000000	No	<ul style="list-style-type: none"> <li>DMR Monitoring Data using EPA 1668</li> <li>“Believed Present”</li> </ul>	N/A	None – data indicate no RP	N/A
03A048	ND	UNK	<ul style="list-style-type: none"> <li>No data</li> <li>Composition of the discharge is potable water and water treatment chemicals that do not contain PCBs</li> <li>“Believed Absent”</li> <li>Impaired</li> </ul>	0.00064	“Believed Absent” confirmation sample required for impairment.	1/permit term <sup>c</sup>
03A113	ND	UNK		0.00064	“Believed Absent” confirmation sample required for impairment.	1/permit term <sup>c</sup>
03A160	ND	UNK		0.00064	“Believed Absent” confirmation sample required for impairment.	1/permit term <sup>c</sup>
03A181	ND	UNK		0.00064	“Believed Absent” confirmation sample required for impairment.	1/permit term <sup>c</sup>
03A199	ND	UNK		0.00064	“Believed Absent” confirmation sample required for impairment.	1/permit term <sup>c</sup>
03A022	ND	UNK		<ul style="list-style-type: none"> <li>No data</li> <li>Composition of the discharge is potable water and water treatment chemicals that do not contain PCBs, and stormwater from a roof</li> <li>“Believed Absent”</li> <li>Impaired</li> </ul>	0.00064	“Believed Absent” confirmation sample required for impairment.

a. Long-Term Average based upon monitoring data collected at the outfall during the current permit term and analyzed using EPA Method 1668.

b. NMWQS = 0.00064 ug/L

c. If data indicate that reasonable potential exists, then TRIAD/DOE shall monitor for Total PCBs once per year for the remainder of the permit

Outfall ID	Long-Term Average (ug/L) <sup>a</sup>	RP Y/N	Basis of RP Determination	Total PCB Maximum Discharge Limitation (ug/L) <sup>b</sup>	Monitoring Requirements	Monitoring Frequency
term. If data indicate no RP, then no additional monitoring is required. NMWQS = New Mexico Water Quality Standard; ND = no data; UNK = Unknown; RP = Reasonable Potential						

EPA Response: Monitoring requirements for PCBs are added to the final permit in order to comply with conditions of certification as required by 40 CFR §124.55(a)(2).

Condition #2: Based on NMED's review of the Reasonable Potential (RP) spreadsheets public noticed with the draft permit and data submitted to EPA by the Permittees, it appears that limitations for Thallium are necessary at several outfalls. Monitoring requirements shall exist in the final permit at outfalls where there is an impairment in the receiving waterbody, regardless of whether RP exists.

Outfall	Added Limits/Monitoring	Monitoring Frequency
001	Limit for thallium; monitoring for temperature – compliance schedule ok.	1/year
13S	Limit for thallium; monitoring for gross alpha.	1/year
03A027	No additional limits or monitoring.	N/A
03A048	No RP for limits but monitoring for all impairments: gross alpha; cyanide; total mercury; total selenium.	1/year
03A113	No additional limits or monitoring.	1/year
03A160	No additional limits or monitoring.	1/year
03A181	RP must be determined for copper. Add limits and/or monitoring requirements based on RP determination.	1/year if RP determined
03A199	Add limit for thallium.	1/year
03A022	Retain monitoring requirements for copper.	1/year
05A055	No additional limits or monitoring.	N/A
051	Add limit for thallium.	1/year

EPA Response: EPA has added limits and monitoring requirements to the final permit in order to comply with conditions of certification as required by 40 CFR § 124.55(a)(2). The Permittee submitted two sets of effluent data in their permit renewal Application package. Additionally, the permittee submitted updated data during the comment period since there was equipment changes and discharges that occurred during the one-year comment period. EPA re-ran RP with the updated set of data and added some limits/monitoring requirements.

Updated Limits/Monitoring on each outfall are as follows:

Outfall No	Added Limits/Monitoring
001	Limit for thallium, compliance schedule for temperature.
13S	Limit for thallium; monitoring for gross alpha.
03A027	No additional limits or monitoring.

<b><u>Outfall No</u></b>	<b><u>Added Limits/Monitoring</u></b>
03A048	Monitoring for impairments: gross alpha; cyanide; mercury; selenium. Limit for chromium VI since RP was detected.
03A113	Limit for chromium VI since RP was detected.
03A160	RP was re-ran. Limit for thallium. Monitoring for impairment: gross alpha. Chromium VI was deleted since no RP was detected. No RP detected for mercury, selenium and cyanide nor impaired.
03A181	RP was re-ran. No RP detected for copper. Monitoring for impairments: copper; gross alpha. Chromium VI was deleted since no RP was detected.
03A199	Limit for thallium. Removed zinc and copper limit as no RP was detected. Monitoring for impairment: copper.
03A022	Monitoring for impairments: copper; gross alpha; mercury.
05A055	No additional limits or monitoring.
051	Limit for thallium, corrected limit for copper.

### **Comments from New Mexico Environment Department**

Comment #1: There appears to be a typo in Footnote 5 for Outfall 001. NMED proposes revision to delete last sentence "6T3 Temperature of 20°C (68°F) shall not be exceeded for six or more consecutive hours in a 24-hour period on more than three consecutive days. ~~Daily maximum temperature shall be determined by 6T3 temperature record when 6T3 temperature.~~"

EPA Response: EPA concurs and deleted the typo.

Comment #2: Please ensure that all the notices of change submitted by LANL since the 2019 NPDES Permit Re-Application was submitted on March 26, 2019, are incorporated.

- Revision 3 to Outfall 03A048 fact sheet to add a Chlorine monitoring system, submitted July 14, 2020 (EPC-DO: 20-222)
- Revision 3 to the Outfall 001 Flow Diagram which addresses improvements made to reduce the temperature of effluent discharged to the outfall as follows:
  - Piping modification to allow for effluent stored in the Reuse Tank to be routed (as needed) to the power plant cooling tower prior to discharge.
  - Piping modification to allow for blowdown associated with the Strategic Computing Complex (SCC) Cooling Towers to be routed to the Reuse Tank where (as needed) it can either be recycled to SERF or routed to the power plant cooling tower prior to discharge.

This change will not increase the volume or impact the effluent quality (i.e., no new chemicals) other than to reduce the temperature. This change was submitted as a notice of change on July 16, 2020 (EPC-DO: 20-221).

- Renovation of the power plant. This change was submitted as a notice of change on November 26, 2019 (EPC-DO: 19-430). This will increase the volumes at Outfall 001 as indicated below and were incorporated into the antidegradation calculations.

**Table 5**  
**Potential New Future Flow Rates and Frequencies for Discharges to Outfall 001**

Potential Future Source	Frequency		Flow Rates and Volumes				
	Days/Week	Months	Average (MGD)	Maximum (MGD)	Average Volume (GPD)	Maximum Volume (GPD)	Duration (days)
SCC Cooling Towers <sup>a, b</sup>	7.0	12	0.074	0.201	74,436	201,056	365
<u>Power Plant Co-Generation Renovation</u>	<u>7.0</u>	<u>12</u>	<u>0.170</u>	<u>0.220</u>	<u>169,920</u>	<u>220,320</u>	<u>365</u>
<u>TA-55-006-Cooling-Towers<sup>c</sup></u>	<u>7.0</u>	<u>12</u>	<u>0.009</u>	<u>0.032</u>	<u>9,365</u>	<u>31,986</u>	<u>365</u>
<b>Future Outfall 001 <u>Total</u><sup>c</sup></b>	7.0	12	<b>0.311</b>	<b>0.751</b>	<b>310,595</b>	<b>752,463</b>	365

a. See the permit section provided for Outfall 03A027 for a schematic showing this change.  
 b. Cooling tower blowdown calculated for the operation of 15 towers.  
 b-c. Total volume estimate for four source facilities: SWWS Effluent; SERF Effluent; SCC Cooling Towers; and Power Plant Co-Generation Renovation. All four facilities are hydraulically connected and eventually discharge water to Outfall 001 regardless of flow path.

- Startup of 5 additional Cooling Towers at the SCC. This modification was included as a future change in the 2019 NPDES Permit Application submitted March 26, 2019 (see EPC-DO: 19-106).

EPA Response: Comment noted for the record. Above noted process modifications are reflected in the descriptions of outfalls in the final permit. RP screenings for these two outfalls reflect new flow information.

Comment #3: NMED suggests that the downstream user Pueblo of San Ildefonso be included in the reporting requirements as found in Part I.C Reporting of Monitoring Results, Part II.B 24-hour Oral Reporting, and for any noncompliance which may endanger public health of the environment. The contact information for Pueblo of San Ildefonso is:

Raymond Martinez,  
 Director of Environment and Cultural Preservation  
 02 Tunyo Po  
 Santa Fe, NM87506  
[rmartinez@sanipueblo.org](mailto:rmartinez@sanipueblo.org)  
 505-455-4127

EPA Response: EPA will add the downstream Pueblo of San Ildefonso Tribe to be included in the 24-hour oral reporting requirements.

**Comments Received at Public Hearing on January 15, 2020**

Comment #1: James Bearzi, Glorieta Geoscience, an environmental and water resources consulting firm for the Buckman Direct Diversion Board, the governing body for the Buckman Direct Diversion. The Buckman Direct Diversion is on the Rio Grande, approximately three miles downstream of Otowi Bridge, near the location of the confluence of Los Alamos Canyon and the Rio Grande. The board is, therefore,



understandably concerned about runoff Los Alamos Canyon and its tributaries. NPDES Permit No. NM0028355 covers 11 outfalls or locations of discharge of industrial pollutants to waters of the U.S., in this case, the Rio Grande. One of those outfalls, known as T-53 03A048, discharges treated cooling water that originates at TA-53 to a tributary of Los Alamos Canyon and is, therefore, of particular interest to the board. Our comments concern two areas. One is how EPA determined the effluent limits and the constituents that would be subject to them in the permit, and then the second area is those limits themselves. We have found certain discrepancies between the fact sheet and the permit that need to be clarified before a final permit is issued. We also have noted that the approach for determining reasonable potential appears to change throughout the fact sheet from the beginning to the end depending on the findings as one goes through the fact sheet. We would appreciate EPA clarifying how they calculated reasonable potential, particularly as it relates to consistency between the approach used between outfalls and among constituents for each outfall. The current permit for this outfall has effluent limitations for TRA, Total Arsenic, Dissolved Copper, Total Mercury, and Dissolved Mercury. EPA proposes to delete limitations and monitoring requirements from the final permit based on its analysis. The current permit also has monitoring requirements for gross alpha and chromium (VI). EPA proposes to remove those monitoring requirements also, subject to their analysis. Because of the confusion that I've already alluded to, the Board is concerned that these proposed changes to the permit may not sufficiently protect the BDD, and we urge EPA to retain the more stringent monitoring and effluent limitations in the existing permit.

EPA Response: EPA regulations at § 122.44(d)(1)(i) state, "Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard, including [s]tate narrative criteria for water quality." Whether a specific pollutant would be limited or not is based on whether the loading of that pollutant demonstrates reasonable potential (RP) or not. If the combined loading of the discharge and the loading of the upstream receiving waterbody will cause the downstream water to exceed the applicable water quality, that specific pollutant has demonstrated "RP" and effluent limitations would be established for that pollutant. The limitation is the value for that discharge not to cause exceedance of water quality standard during the low flow condition. Therefore, effluent limitations are conservative in protection of receiving waters. EPA performed RP for all pollutants reported in the Application Form 2C. RP Calculation spread sheet for outfalls are available at EPA Final NPDES website <https://www.epa.gov/nm/los-alamos-national-laboratory-lanl-industrial-wastewater-permit-final-npdes-permit-no-nm0028355>.

Please see Condition of Certification #2, this final permit has corrected all the incongruencies found in the draft permit. If an outfall discharge contains the pollutant of concern but demonstrates no RP, monitoring only will be established in the final permit. If the pollutant of concern was not detected or EPA determines the discharge is unlikely to contain the pollutant of concern, EPA determines that no monitoring is required. If TMDLs for these impaired waterbodies are approved in the future, EPA will establish effluent limitations accordingly. Please see Response to Triad Comment #3.

Comment #2: Joni Arends, with Concerned Citizens for Nuclear Safety. Thanked EPA for the extension of the comment period and will be submitting written comments.

EPA Response: Comment noted for the record.

**Comments Received from extended Public Notice Comment Period Years 2019 - 2020****Comments Received from Concerned Citizens for Nuclear Safety (CCNS), Honor our Pueblo Existence (HOPE), and New Mexico Acequia Association (NMAA)**

Comment #1: a) Renewal of the Permit #NM0028355 should not include Outfall 051 since LANL operates the Radioactive Liquid Waste Treatment Facility (RLWTF) at Technical Area 50 within the LANL site. The RLWTF treats low-level and transuranic radioactive and hazardous liquid waste. Such wastes contain hazardous constituents and come within the definition of solid and hazardous waste under RCRA. LANL has consistently scheduled Outfall 051 to remain in the NPDES permit. Despite the modifications to achieve zero liquid discharge, LANL has sought to maintain the RCRA exemption for the RLWTF.

b) Other unused outfall should not be included in a permit renewal. Other outfalls are included in the permit renewal application, even though DOE and Triad do not now discharge from them nor propose to discharge from them. Outfalls 13S, 03A027, 03A113, 03A160, 05A055 are not used for the discharge of pollutants, and they are outside the scope of NPDES permitting.

c) Governing law precludes a permit for non-discharging outfalls. Whether to issue a NPDES permit that includes Outfall 051 and other unused outfalls is governed by CWA, RCRA and regulations issued by EPA under these laws. The CWA forbids the discharge of pollutants into the waters of the United States. RCRA authorizes EPA to issue regulations requiring each person owning or operating an existing facility or planning to construct a new facility to have a permit issued pursuant to this section. RCRA is enforced in New Mexico through the HWA, which NMED is authorized to enforce pursuant to EPA authorization. There is no dispute that the RLWTF managed hazardous waste, and RCRA directs that a facility managing hazardous waste must have a hazardous waste permit. Should RCRA be applicable to the RLWTF, which regulates discharges, be deemed applicable to the non-discharging RLWTF, to render it exempt from RCRA regulation? In 2017 EPA Region 6 resolved the conflict by expanding the application of the CWA beyond its clear limits ignoring RCRA. EPA Region 6 in 2015 and again in 2017 strived to create a conflict with RCRA, without any explanation or justification, to break through the jurisdictional limits of the CWA holding that because a discharge “could occur” the CWA somehow requires a permit for Outfall 051. EPA may not “pick and choose” the federal law that it will apply; rather, it must, in interpreting two statutes. Instead, EPA expressly disregarded RCRA, stating flatly that RCRA, and hazardous waste regulation are “outside the scope of our decision and have no bearing on EPA’s NPDES permitting decisions” The CWA permit for Outfall 051 and other non-discharging outfalls has no legal basis and should be denied.

(Note: the list of Exhibits A – BBB, submitted with this comment, is available at <https://www.epa.gov/nm/los-alamos-national-laboratory-lanl-industrial-wastewater-permit-final-npdes-permit-no-nm0028355>).

EPA Response: Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that

are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA's ability under the CWA to issue permits to cover potential discharges serves the Act's goal of protecting the Nation's waters. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA's issuance of permit coverage for these facilities is in accordance with EPA's statutory authority and the CWA's stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from at least one of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be "an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future."

DMRs also show discharges from other the other facilities. The Strategic Computing Complex (SCC) discharges monthly from Outfall 001. Los Alamos Neutron Science Complex (LANSCE) discharges monthly from Outfall 03A048. The National High Magnetic Field Laboratory discharged in May 2018 from Outfall 03A160. DMRs show regular discharges from Outfall 03A113 since 2019.

The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL's compliance with RCRA is outside the scope of this NPDES permitting action.

### **Comments from Triad National Security, LLC (Triad)**

Comment #1: Part I.A Pages 1, 2, 4, 5, 16, 17 and Fact Sheet Page 15. Congener Method 1668 for PCBs is not an approved EPA Method listed in 40 CFR 136. Triad and DOE support the use of the PCB congener method for reporting purposes only but not for compliance purposes. The EPA issued a proposal (FR Vol. 75, No. 222, November 18, 2010) to incorporate the method into 40 CFR Part 136 and accepted comments addressing the validity of the method. The EPA received comments from 35 respondents: only five supported inclusion into Part 136. On May 18, 2012, EPA withdrew the proposed incorporation of the method (FR Vol. 77 No. 97, May 18, 2012). The Los Alamos National Laboratory (LANL) is the only facility in New Mexico where use of the Congener Method 1668 is required to determine compliance with an NPDES permit limit. The proposal to use Method 1668 for monitoring and reporting only is consistent with other New Mexico NPDES permits. Triad and DOE request the removal of the Congener Method 1668 for determining effluent permit compliance from the draft permit. Triad and DOE request that Congener Method 1668 analysis be changed to EPA approved method Aroclor Method 8082 analysis for PCB effluent limit monitoring and reporting at NPDES

Outfall 001.

EPA Response: To use Method 1668C Revision for PCBs monitoring and compliance was required by the State 401 Condition of Certification. Since the Method 1668C is not a 40 CFR 136 approved method, the New Mexico Environment Department (NMED) has re-certify the condition to require Method 1668C to be used for compliance purposes.

Comment #2: Part I.A., Page 1, 16, and 22. The following bullets summarize the evolution of the 6T3 requirement in the LANL NPDES permit:

- In 2005, the Water Quality Control Commission (WQCC) adopted the Upper Sandia Canyon Assessment Unit (AU) as a classified water of the State with the designated use of cold-water aquatic life and the segment-specific temperature criteria of 24°C. The decision to adopt the segment-specific temperature criteria was based on the 2002 U.S. Fish and Wildlife Service (USFWS 2002) study that included continuous temperature recording within the Upper Sandia Canyon AU during the summer of 1997. The study concluded that a cold-water aquatic life designated use, defined by a site-specific maximum temperature of 24°C was appropriate. NMED SWQB prepared a UAA (NMED 2007) detailing the attainable aquatic life uses for the new Segment and submitted it to EPA for approval. EPA approved Segment 20.6.4.126 NMAC in September of 2007.
- In 2010, as part of a revision of the New Mexico Water Quality Standards, the WQCC discontinued site-specific temperature listings when they did not differ from the cold water temperature criteria contained in 20.6.4.900.H NMAC. The Upper Sandia Canyon AU site-specific maximum temperature standard of 24°C was eliminated and replaced with the general cold water temperature criteria contained in 20.6.4.900.H NMAC. This criterion specifies a maximum temperature of 24°C, but includes the criterion that a temperature of 20°C not be exceeded for six or more consecutive hours in a 24-hour period on more than three consecutive days (6T3).
- The 6T3 criteria was added to the NPDES Permit for Outfall 001 that became effective on October 1, 2014, and became applicable on September 30, 2019 as part of a compliance schedule.

Elevated air temperatures continue to heat the receiving water in Upper Sandia Canyon causing it to be naturally warmer than the 6T3 standard during the months of June through August. Triad and DOE in cooperation with the NMED have collected data to document this issue. Triad and DOE have initiated the regulatory rule making process to demonstrate that the application of the 6T3 cold-water temperature criteria from NMAC 20.6.4.900.H is not attainable in Upper Sandia Canyon. Analytical data have been provided to EPA and NMED in the Semi-Annual Report (Ref. EPC-DO-20-062). Additionally, on February 10, 2020, Triad and DOE submitted a Work Plan for developing a Use Attainability Analysis (UAA) for 6T3 in Sandia Canyon to the NMED (Ref. EPC-DO-20-040). NMED has indicated it will take approximately 30-60 days to review and approve the Work Plan. Upon NMED approval, Triad and DOE will develop the UAA for public comment. While this rule making effort is pending, Triad and DOE request that EPA provide Triad and DOE additional time (i.e. compliance schedule) to meet the 6T3 requirement.

EPA Response: After consulting with NMED, a 3-year Compliance Schedule is approved in the final permit.

Comment #3: Part I.A and Section VI CWA 303(d) Impaired Water. The draft permit inconsistently

assigns monitoring requirements and/or permit limits to outfalls that discharge to impaired waters. Specifically, it is inconsistent for those pollutants that were not detected and/or for which the RP Analysis was negative. The outfalls, discharge locations, and impairments are provided below:

- Outfall 001: Sandia Canyon [NMAC 20.4.6.126] impaired for Temperature, Total Recoverable Aluminum, Dissolved Copper, PCB, and Adjusted Gross Alpha.
- Outfall 03A027: Sandia Canyon [NMAC 20.4.6.126] impaired for Temperature, Total Recoverable Aluminum, Dissolved Copper, PCB, and Adjusted Gross Alpha.
- Outfall 03A199: Sandia Canyon [NMAC 20.4.6.126] impaired for Temperature, Total Recoverable Aluminum, Dissolved Copper, PCB, and Adjusted Gross Alpha.
- Outfall 03A022: Mortandad Canyon [NMAC 20.6.4.128] impaired for Dissolved Copper, PCBs, Adjusted Gross Alpha, and Total Mercury.
- Outfall 051: Mortandad Canyon [NMAC 20.6.4.128] impaired for Dissolved Copper, PCBs, Adjusted Gross Alpha, and Total Mercury.
- Outfall 03A181: Mortandad Canyon [NMAC 20.6.4.128] impaired for Dissolved Copper, PCBs, Adjusted Gross Alpha, and Total Mercury.
- Outfall 13S: Canada del Buey [NMAC 20.6.4.128] impaired for PCBs and Adjusted Gross Alpha.
- Outfall 05A055: Canon de Valle [NMAC 20.6.4.128] impaired for Adjusted Gross Alpha.
- Outfall 03A048: Los Alamos Canyon [NMAC 20.6.4.128] impaired for PCBs, Total Recoverable Cyanide, Total Recoverable Selenium, Adjusted Gross Alpha, and Total Mercury.
- Outfall 03A113: Sandia Canyon [NMAC 20.6.4.128] impaired for PCBs, Total Recoverable Aluminum, Adjusted Gross Alpha, and Total Mercury.
- Outfall 160: Ten Site Canyon [NMAC 20.6.4.128] impaired for PCBs and Adjusted Gross Alpha.

Please amend the inconsistencies in Part I.A as follows:

- Delete permit limits at those outfalls where the pollutant was not detected and the RP Analysis was negative.
- Reduce to permit monitoring “report only” at those outfalls where the pollutant was detected and the RP Analysis was negative. Recommend a frequency of 1/year.

Please revise Section VI to reflect all applicable impaired waters and the methodology/approached used to assign permit requirements based upon discharges to them.

EPA Response: In the draft permit, EPA conducted RP for each outfall and established effluent limitations from forms 2C and Fact Sheet information provided by the permittee in 2019. Since the comment period lasted a year, new equipment’s were installed and new data became available for multiple outfalls during the year 2020, the permittee submitted updated information that EPA used to re-run RP. NMED has requested that EPA requires monitoring of pollutants which caused impairment at outfalls where those were detected in the effluent (Condition #2). *Monitoring requirements shall exist in the final permit at outfalls where there is an impairment in the receiving waterbody, regardless of whether RP exists.* EPA proposes monitoring only requirement of 1/Year (except for temperature, 1/quarter) for those pollutants because effluent data have demonstrated no RP. If an outfall discharge contains the pollutant of concern but demonstrates no RP, monitoring only will be established in the final permit. If the pollutant of concern was not detected or EPA determines the discharge is unlikely to contain the pollutant of concern, EPA determines that no monitoring is required. If TMDLs for these

impaired waterbodies are approved in the future, EPA will establish effluent limitations accordingly.

Comment #4: Part III.D.4. Triad requests a waiver from the requirement to use NetDMR to submit Discharge Monitoring Report (DMR) results due to the complications associated with reporting for multiple outfalls; the inability of NetDMR to record WET test results and retests; and the inability to of NetDMR to report 6T3 exceedances for temperature at Outfall 001. If the EPA grants the waiver, Triad proposes to continue to submit paper DMRs on EPA No. 3320-1.

If the EPA decides not to grant the waiver, then Triad requests the requirement to implement NetDMR be amended to allow for implementation under a compliance schedule. This will allow Triad to work with NetDMR to create the custom parameters, store codes, and limits that will be required to implement the NetDMR system at LANL. A compliance schedule would also provide Triad time to develop modifications to the Electronic Information Management System at LANL so that it can auto populate the DMR reports without errors or inconsistencies.

EPA Response: Discharge Monitoring Report (DMR) results shall be electronically reported to EPA per 40 CFR 127.16. To obtain a waiver, the permittee may contact EPA Region 6 Enforcement Division for waiver request in accordance with the provision set in the Proposed Permit Part III.D.4. If paper reporting is granted temporarily, the permittee shall submit the original DMR signed and certified as required and all other reports required by Part III.D. to the EPA and copies to NMED as required.

Comment #5: Fact Sheet pg. 8, Part B, 5<sup>th</sup> paragraph. There was combination of ELG and BPJ used on this permit and the paragraph as written conflicts with the information stated for each outfall.

Please revise the paragraph as follows:

“Following are the summary of the Technology Based Effluent limitations included in the administratively continued permit and EPA proposes to retain them in the permit:”

EPA Response: Comment noted for the record.

Comment #6: Fact Sheet pg. 12, Item C4, 1<sup>st</sup> paragraph. Please revise the last sentence as follows: “The initial screening results show that the following discharges have RP to exceed the WQS for the designated uses in 20.6.4.126 and 20.6.4.128:”

EPA Response: Comment noted for the record.

Comment #7: Part II.B. Please revise the list of pollutants for which 24-hour oral reporting is required to reflect only those that have a permit limit. Those that have monitoring “report only” requirements should be deleted and include the following:

- Adjusted Gross Alpha
- Chromium VI (see comments on Outfall 03A160)

EPA Response: Comment noted. EPA has included the list of pollutants to reflect only those that have a permit limit.

Comment #8: Part II, Section F. Please add the following test methods for radiological analysis. These methods are not currently listed in 40 CFR 136.3:

- EPA 900/SW846 9310 – Gross Alpha and Gross Beta
- EPA 900\_CALC – Adjusted Gross Alpha

- EPA 903.1 – Radium 226
- EPA 904 – Radium 228
- EPA 905 – Strontium 90
- EPA 906 - Tritium

HASL 300 – Isotopic Radiological Data (e.g., Am-241, Pu238, Pu239, Pu240,U234, U238)

EPA Response: The analytical methods for radiological analyses are added to the final permit.

Comment #9: Part I.A and Part II, Section H. Please revise the WET test sampling requirements for Outfall 051 and 05A055 for the following reasons:

- Outfall 051 and 05A055 are discharged from a mixed tank in batches. The samples cannot be collected as a 3-hour composite sample. They are collected as a grab sample from the recirculation line as the tank is discharged to the outfall. The tank is mixed and the grab sample is representative of the contents.
- A sample to provide fresh effluent for the 24-hour renewal step of the WET test cannot be collected on a separate day because effluent is discharged to the outfall as a batch operation instead of a continuous flow.

[See Comment Nos. 58, 66, 91)

EPA Response: EPA changed Part I, Outfall 051 and 05A055 to grabs. The permittee may collect the required 2 samples during the duration of the batch discharge.

Comment #10: Part I.A, Page 1, Outfall 001. Please revise the outfall description to be consistent with the 2019 Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018), Supplemental Information Package 1 (Ref. EPC-DO-19-299), and Notices of Change (Ref. Enclosure 6):

"During the period beginning the effective date of the permit and lasting through the expiration date of the permit (unless otherwise noted) the permittee is authorized to discharge cooling tower blowdown, boiler blowdown, demineralizer backwash, RO reject and once through cooling water from the Power Plant; treated sanitary effluent from the Sanitary Wastewater System (SWWS) Facility; recycled sanitary effluent from the Sanitary Effluent Reclamation Facility (SERF), and treated cooling tower blowdown from the Strategic Computing Complex (SCC) to Sandia Canyon in Segment Number 20.6.4.126 of the Rio Grande Basin. The discharge from this outfall creates a perennial portion of Sandia Canyon that is effluent dominated."

EPA Response: Comment noted for the record, and change made accordingly to correctly reflect Outfall 001 description.

Comment #11: Part I.A, Page 1, Outfall 001. Please delete the requirement to monitor for Total Recoverable Aluminum at Outfall 001. Total Recoverable Aluminum was not detected in the effluent (Ref. ESHQSS-19-018) and the RP Analysis was negative.

[See Comment No. 3]

EPA Response: See Response to Comment No. 3. Total Recoverable Aluminum monitoring only is required at this discharge since it was detected at the effluent with a concentration of 19.3 ug/L. RP

Analysis was negative, no limits are required at this time. If an outfall discharge contains a pollutant of concern for an impairment listing in the receiving waterbody but demonstrates no RP, monitoring only is established in the final permit.

Comment #12: Part I.A, Page 1, Outfall 001. A PCB sample was collected from Outfall 001 in May 2019 and analyzed using the Congener Method as required by the permit. The result from that sample was 0 ug/L for Total PCBs as reported in the September 2019 Discharge Monitoring Report (Ref. EPC-DO-19-394). Please change the permit requirement for PCBs at Outfall 001 to monitoring and “report only”. If the PCB limit is continued in the permit, then revise the analytical method to include the Aroclor Method 8082 for monitoring and reporting consistent with 40 CFR 136.

[See Comment No. 1]

EPA Response: PCB has been added as required by the Condition of Certification #1 above.

Comment #13: Part I.A, Page 2 and FS page 18, Outfall 001. Please correct the fact sheet to match the draft permit Part I.A. The Fact Sheet states that 7-day chronic test required for *Pimephales promelas* will be performed at a frequency of 1/year. The draft permit Part I.A says the frequency is 1/5-years

EPA Response: The frequency in the fact sheet was correct. The final permit will reflect the frequency of 1/year consistent with NMIP Table 11: WET testing requirements.

Comment #14: FS, page 4, Outfall 001. Please revise the outfall description to be consistent with the 2019 Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018), Supplemental Information Package 1 (Ref. EPC-DO-19-299), and Notices of Change (Ref. Enclosure 6).

[See Comment No. 11]

EPA Response: Comment noted for the record. Also see response to comment #3.

Comment #15: FS, page 4, 3<sup>rd</sup> sentence. Please revise to be consistent with the 2019 Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018), Supplemental Information Package 1 (Ref. EPC-DO-19-299), and Notices of Change (Ref. Enclosure 6) as follows:

"Disinfected water from the SWWS facility is pumped to the Reuse Tank and is dechlorinated ....."

EPA Response: Comment noted for the record. Also see response to comment #3.

Comment #16: FS, page 5, Outfall 001. Please revise the long-term average flow rate/volume used in the text and RP analysis to be consistent with the Notice of Change submitted to the EPA on November 27, 2019 (Ref. Enclosure 6). The revised long term average flow rate/volume is:  
Long Term Average: 310,595 GPD (365 days/year) [Ref. Enclosure 6]

EPA Response: Comment noted for the record. Also see response to comment #3.

Comment #17: FS, page 5, Outfall 001. Please revise the bullets to be consistent with the Notice of Change submitted to the EPA on November 27, 2019 (Ref. Enclosure 6) as follows:



- The SCC is currently adding 5 more cooling towers to its cooling system. These towers will utilize the existing water treatment system and makeup water supply and will increase the long-term average discharge volume to Outfall 001.

A Power Plant renovation will resume co-generation power/steam operations and this will increase the long-term average volume of water discharge to Outfall 001. The renovation will include the discharge of reverse osmosis concentrate, demineralizer regeneration, steam condensate blowdown, boiler blowdown, and cooling tower blowdown to Outfall 001 either directly or indirectly after it has been treated at the SWWS facility.

EPA Response: Comment noted for the record. Also see response to comment #3.

Comment #18: FS, page 11, Outfall 001. Revise volume/flow rate in the text and RP analysis to be consistent with Notice of Change submitted to the EPA on November 27, 2019 (Ref. Enclosure 6). Long Term Average: 310,595 GPD (365 days/year) [Ref. Enclosure 6]

EPA Response: Comment noted for the record. Also see response to comment #3.

Comment #19: Section VI, CWA 303(d) Impaired Water. Outfall 001 discharges to Sandia Canyon [NMAC 20.4.6.126], which is impaired for Temperature, Total Recoverable Aluminum, Dissolved Copper, PCB, and Adjusted Gross Alpha. Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 001 due to impaired waters.

[See Comment No. 3]

EPA Response: See Response to Comment No. 3.

Comment #20: RP Analysis, page 3, Outfall 001. The Permit Re-Application Form 2C (Ref. ESHQSS-19-018) provided a Total Chromium value of <3 ug/L. This value was below the MDL of 3 ug/L and the EPA MQL of 10 ug/L. Please correct the RP Analysis to indicate that Dissolved Chromium (including Cr III and Cr VI) were not detected in the effluent.

EPA Response: Comment noted for the record. See Response to Comment No. 3. RP analysis did not show RP for chromium in any form in Outfall 001.

Comment #21: RP Analysis, page 2/3. The RP Analysis did not provide a calculation for dissolved copper and it is unclear what the source of the number used for dissolved copper is. The long-term average for dissolved copper from the DMR summary provided with the 2019 Permit Re-Application is 3.7 ug/L (Ref. ESHQSS-19-018). The calculated value using the spreadsheet and the Total Copper concentration of 5.45 ug/L that was provided on the Permit Re-Application Form 2C (Ref. ESHQSS-19-018) is 2.429667405 ug/L. Both of these values are different than the concentration used in the RP Analysis (2.945 ug/L). Please clarify and/or correct.

EPA Response: EPA re-ran RP using the Total Copper concentration of 5.45 ug/l that was provided on the Form 2C and a limit has been established in the final permit.

Comment #22: Part I.A, page 4, Outfall 13S. Please revise the description to be consistent with the 2019 Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299) as follows:

“During the period beginning the effective date of the permit and lasting through the expiration date of the permit (unless otherwise noted), the permittee is authorized to discharge treated sanitary wastewater effluent from the Sanitary Wastewater System (SWWS) Facility to Canada del Buey in Segment Number 20.6.4.128 of the Rio Grande Basin. The discharge may also be routed to Outfall 001 in Sandia Canyon in Segment Number 20.6.4.126 of the Rio Grande Basin to support reuse/recycle.

Such discharges shall be limited and monitored by the permittee as specified below: (Monitoring and reporting are not required at 13S if the effluent is reused/recycle or discharged to Outfall 001).”

EPA Response: Comment noted for the record, and change made accordingly to correctly reflect Outfall 13S description.

Comment #23: Part I.A, page 5, footnote 3, Outfall 13S. Please clarify footnote 3 to be consistent with the 2019 Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299) as follows:

“If the wastewater is discharged directly to Outfall 001, as effluent from the SERF facility to Outfall 001, or as reused/recycled blowdown from the SCC Cooling towers to Outfall 001 or 03A027, it shall comply with effluent limitations and monitoring requirements for PCBs as established for Outfall 13S.”

EPA Response: Comment noted for the record. EPA accepts and adopts the footnote for clarifying purposes.

Comment #24: Part I.A, page 5, footnote 4, Outfall 13S. Please clarify footnote 4 as follows:

“The limit is based on the human health-organism only” based water quality standard.

EPA Response: Comment noted for the record. Footnote changed to: Limit is required by NMED CWA 401 Condition of Certification.

Comment #25: FS, Section V.C, Outfalls 13S and 001. Please clarify that this facility’s discharges qualify as Minor (sanitary waste discharge with flow over 0.1 MGD but less than 1.0 MGD) and replace Part IV Instructions to Permittees Major – Sewage Sludge Requirements with Part IV Instructions to Permittees Minor – Sewage Sludge Requirements.

EPA Response: The combined sanitary wastewater from 13S and 001 is 0.5 MGD, falling into the minor discharge category. Part IV Instructions to Permittees Minor – Sewage Sludge Requirements is incorporated into the final permit.

Comment #26: Part IV currently provides instructions for a Major – Sewage Sludge Requirements. The SWWS facility associated with Outfall 13S and 001 is a Minor. Please correct Part IV to provide the Minor – Sewage Sludge Requirements.

EPA Response: Please see response to comment #25 above.

Comment #27: Section VI, CWA 303(d) Impaired Water. Outfall 13S discharges to Canada del Buey [NMAC 20.4.6.128], which is impaired for PCBs and Adjusted Gross Alpha. Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 13S due to impaired waters.

[See Comment No. 3]

EPA Response: Please see Response to Condition of Certification No. 1 & 2.

Comment #28: Part I.A, page 16, Outfall 03A027. Please revise the description to be consistent with the Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299) as follows:

“During the period beginning the effective date of the permit and lasting through the expiration date of the permit (unless otherwise noted), the permittee is authorized to discharge cooling tower blowdown to Sandia Canyon, in Segment number 20.6.4.126 of the Rio Grande Basin.”

EPA Response: Comment noted for the record, and change made accordingly to correctly reflect Outfall 03A027 description.

Comment #29: Part I.A, page 17, footnote 2, Outfall 03A027. Effluent from Outfall 13S is not rerouted directly to Outfall 03A027. Suggest revising the footnote to say the following: "Effluent limitations and monitoring requirements only apply when SWWS effluent treated at the SERF; used as makeup water in the SCC Cooling Towers; and discharged as blowdown to Outfall 03A027."

EPA Response: Change made accordingly.

Comment #30: Part I.A, page 17, footnote 5, Outfall 03A027. Outfall 03A027 does not have a continuous 6T3 recorder for temperature.

EPA Response: Change made accordingly. An instantaneous grab sample is required to record temperature.

Comment #31: FS, page 5, Outfall 03A027. Please revise the following sentence: "If discharges occur, the potential average flow rate is 0.051 MGD and the daily maximum flow is 0.105 MGD. Outfall 03A027 did not discharge from September 2016 through May 2019, so older monitoring data was submitted."

The sentence should say, "Outfall 03A027 effluent is currently routed to Outfall 001 and has not discharged since September 2016. If discharges occur, the potential average flow rate is 0.051 MGD and the daily maximum flow is 0.105 MGD. An operational sample was collected from the cooling tower blowdown to provide data for the permit application and this data was used in the RP analysis."

EPA Response: Comment noted for the record. See also Response to Comment #3.

Comment #32: FS, page 5, 3<sup>rd</sup> paragraph, 3<sup>rd</sup> sentence, Outfall 03A027. Please revise the description for Outfall 03A027 as follows:

“Blowdown from the SCC Cooling Towers may be routed to Outfall 03A027, Outfall 001, SERF or the SWWS as needed to allow for water recycling, construction, and or maintenance activities.”

EPA Response: Comment noted for the record.

Comment #33: Section VI, CWA 303(d), Impaired Water. Outfall 03A027 discharges to Sandia Canyon [NMAC 20.4.6.126], which is impaired for Temperature, Total Recoverable Aluminum, Dissolved Copper, PCB, and Adjusted Gross Alpha. Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 03A027 due to impaired waters.

[See Comment No. 3]

EPA Response: See Response to Condition of Certification No. 1 & 2 and Response to Comment No. 3.

Comment #34: RP Analysis, page 1, Outfall 03A027. The average temperature used in the RP Analysis (23 °C) does not match the Permit Re-Application Form 2C. Please revise to 22.8°C.

EPA Response: Comment noted for the record. EPA re-ran RP with revised temperature of 22.8°C. No change on the final permit is necessary.

Comment #35: RP Analysis, page 2, Outfall 03A027. The RP Analysis did not provide a calculation for dissolved copper. The Permit Re-Application Form 2C indicated a detected concentration of total copper in the effluent of 16.3 ug/L. Based on the RP calculation the dissolved concentration should be 7.2667 ug/L. Please correct.

EPA Response: Dissolved copper value was calculated based on dissolved copper data provided in Outfall 03A027 Fact Sheet. RP was re-done using data from Form 2C of 16.3 ug/L Total Copper and RP exists for Total Copper and limit is maintained in the final permit.

Comment #36: RP Analysis, page 3, Outfall 03A027. The RP Analysis currently uses a dissolved copper concentration of 13.57 ug/L. The dissolved copper concentration should be 7.2667 ug/L based upon the total copper concentration of 16.3 ug/L provided on the Permit Application Form 2C. Please correct or clarify why different data was used

EPA Response: Please see Response to Comment #35 above.

Comment #37: RP Analysis, page 4, Outfall 03A027. The Permit Re-Application Form 2C for Outfall 03A027 (ESHQSS-19-018) indicates that bromoform, chlorodibromomethane, chloroform, and dichlorobromomethane were not detected above the MDL and the EPA MQL. Please delete the effluent data that was used in the RP Analysis for these potential pollutants.

EPA Response: Comment noted for the record. RP analysis was re-done without these pollutants. No RP was detected.

Comment #38: Part I.A, page 22, Outfall 03A199. Please delete "and other wastewater" from the description to be consistent with the 2019 Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299). This outfall discharges only treated cooling tower blowdown to the outfall.

EPA Response: Change made accordingly to correctly reflect Outfall 03A199 description.

Comment #39: Part I.A, page 22, Outfall 03A199. Please clarify why the draft permit includes a requirement to monitor Temperature (1/Quarter) at Outfall 03A199. This outfall converges with Sandia Canyon downstream of Outfall 001 and 03A027. [Related to Comment No.2]

EPA Response: Outfall 03A199: Sandia Canyon [NMAC 20.4.6.126] is impaired for Temperature. See comment #3. See Condition of Certification #2, which says: *Monitoring requirements shall exist in the final permit at outfalls where there is an impairment in the receiving waterbody, regardless of whether RP exists.*

Comment #40: Part I.A, page 22, Outfall 03A199. Please delete the requirement to monitor for Total Recoverable Aluminum at Outfall 03A199. Total Recoverable Aluminum was not detected in the effluent (Ref. ESHQSS-19-018) and the RP Analysis was negative.  
[See Comment No. 3]

EPA Response: See Condition of Certification No. 2 and Response to Comment No. 3. Monitoring requirements for total recoverable aluminum is due to impair of receiving water and was detected (19.3 ug/L in effluent).

Comment #41: Part I.A, page 22, Outfall 03A199. Please delete the permit limit for copper. The RP Analysis does not indicate RP for copper at Outfall 03A199.  
[See Comment No. 3]

EPA Response: See Condition of Certification No. 2 and Response to Comment No. 3. Limit for copper has been deleted in the final permit as no RP existed, but a monitoring requirement is established due to impairment of receiving water.

Comment #42: Part I.A, page 22, Outfall 03A199. Please delete the permit limit for zinc. The RP Analysis does not indicate RP for zinc at Outfall 03A199.  
[See Comment No. 3]

EPA Response: See Response to Comment No. 3. Limit for zinc has been deleted in the final permit as no RP existed.

Comment #43: Part I.A, page 23, footnote 4, Outfall 03A199. Outfall 03A199 does not have a continuous 6T3 recorder for temperature.

EPA Response: Comment noted for the record. Temperature will be collected as instantaneous grab sample.

Comment #44: \*Commenter skipped this number. No Response needed. \*

Comment #45: FS, page 11, Outfall 03A199. Please revise the following sentence so that it references 20.6.4.126 instead of 20.6.4.128: "However, because the discharge at Outfall 03A199 is to a storm water drain prior to reaching Sandia Canyon, an additional RP was conducted against WQS for 20.6.4.126 waterbody."

EPA Response: Comment noted for the record. No change required in the final permit.

Comment #46: FS, page 14, 1<sup>st</sup> paragraph, Outfall 03A199. Please revise the last 2 sentences of this paragraph as follows: "EPA proposes to establish copper and zinc limits at Outfall 03A199. In addition, the EPA proposes to establish monitoring requirements and limits for copper, zinc, and PCBs at Outfall 03A027 if effluent is discharged to the outfall. Currently, Outfall 03A027 does not discharge because its effluent is routed to Outfall 001."

EPA Response: Comment noted for the record.

Comment #47: FS, page 14, 4<sup>th</sup> paragraph, Outfall 03A199. Please delete the 4<sup>th</sup> paragraph. The 2019 Permit Re-Application Form 2C [Ref. ESHQSS-19-018] for Outfall 03A199 indicates that selenium and cyanide were not detected above the MDL and the EPA MQL. The RP Analysis was also negative for selenium and cyanide.

EPA Response: Comment noted for the record. See Response to Comment No. 3.

Comment #48: Section VI, CWA 303(d) Impaired Water. Outfall 03A199 discharges to Sandia Canyon [NMAC 20.4.6.126], which is impaired for Temperature, Total Recoverable Aluminum, Dissolved Copper, PCB, and Adjusted Gross Alpha. Please revise the permit requirements in Section I.A and Section VI to reflect methodology/approach used to assign permit requirements to Outfall 03A199 due to impaired waters.  
[See Comment No. 3]

EPA Response: See Condition of Certification No. 2 and Response to Comment No. 3.

Comment #49: RP Analysis, Page 1, Outfall 03A199. Please revise the stream segment to 20.6.4.126. [Ref. ESHQSS-19-018]

EPA Response: EPA re-ran RP with the correct stream segment 20.6.4.126. No changes resulted from the new RP analyses.

Comment #50: RP Analysis, Page 1, Outfall 03A199. Please correct the RP Analysis. The notes next to TSS, Hardness and long-term flow indicate the data is for Outfall 001. The data is actually for Outfall 03A199.

EPA Response: EPA re-ran the RP with the correct data for Outfall 03A199. No changes resulted from the new RP analyses.

Comment #51: RP Analysis, Page 2, Outfall 03A199. The RP Analysis did not calculate a concentration for dissolved copper. The 2019 Permit Re-Application Form 2C (Ref. ESHQSS-19-018) indicated a detected concentration of total copper in the effluent of 3.15 ug/L. Based on the RP calculation the dissolved concentration should be 1.45999395 ug/L. Please correct.

EPA Response: Please see Condition of Certification No. 2 and Response to Comment No. 3. EPA re-ran RP with revised concentration for dissolved copper. No RP existed for the pollutant, nevertheless monitoring will be required for total copper as per Condition of Certification No. 2.

Comment #52: The RP Analysis currently uses a dissolved copper concentration of 1.845 ug/L. The dissolved copper concentration should be 1.459 ug/L based upon the total copper concentration of 3.15 ug/L provided on the Permit Application Form 2C. Please correct.

EPA Response: See Response to Comment No. 51 above.

Comment #53: RP Analysis, Page 3, Outfall 03A199. The RP analysis includes an effluent concentration for phenol of 3.36 ug/L. The 2019 Permit Application Form 2C indicates that phenol was less than the MDL and the EPA MQL. Please correct the RP Analysis.

EPA Response: See Response to Comment No. 3. EPA re-ran RP without phenol concentration as it was less than the MDL and EPA MQL.

Comment #54: RP Analysis, General. The table provided on Page 12 of the fact sheet includes data for RP analysis at the outfall point of discharge and when it converges with the existing stream generated by Outfall 001/03A027. The RP calculation at the convergence was not provided for review.

EPA Response: For development of the final permit EPA used updated data to re-run RP for the Outfall and not the convergence. RP limits on the final permit are based on the re-run RP and Condition of Certification No. 2. Monitoring for Copper is included since the discharge reaches the waterbody that is listed by the NMED with an impairment for Copper.

Comment #55: Please revise the Outfall 051 description to be consistent with the 2019 Permit Re-Application (Ref. ESHQSS-19-018) and Supplemental Package 2 (Ref. EPC-DO-19-301) as follows: "During the period beginning the effective date of the permit and last through the expiration date of the permit (unless otherwise noted), the permittee is authorized to discharged treated effluent from the Radioactive Liquid Waste Treatment Facility (RLWTF) to Mortandad Canyon in Segment number 20.6.4.128 of the Rio Grande Basin."

EPA Response: Change made accordingly to correctly reflect Outfall 051 description.

Comment #56: Part I.A, Page 6. The Copper limit (5 ug/L) provided for Outfall 051 is the calculated limit using a hardness of 50 mg/L for Chronic Aquatic Life. Outfall 051 discharges to Mortandad Canyon (NMAC 20.6.4.128). NMAC 20.6.4.128 has a designated use of limited aquatic life, therefore, the chronic aquatic life criteria does not apply (NMAC 20.6.4.900.H.7). Please revise the permit limit to the calculated Acute Aquatic Life limit of 7 ug/L (applicable under NMAC 20.6.4.900.7), which is the calculated limit at 50 mg/L hardness.

EPA Response: EPA re-ran RP for Outfall 051 using acute aquatic life criteria. RP for Copper still exists based on acute aquatic life criteria and a limit is included in final permit.

Comment #57: Part I.A, Page 7, Outfall 051. Please revise the WET test sampling requirements for Outfall 051 for the following reasons:

- Outfall 051 is discharged from a mixed tank in batches. The samples cannot be collected as a 3-hour composite sample. It can be collected as a grab sample from the recirculation line as the

tank is discharged to the outfall. The tank is mixed and the grab sample is representative of the contents.

- A sample to provide fresh effluent for the 24-hour renewal step of the WET test cannot be collected on a separate day because effluent is discharged to the outfall as a batch operation instead of a continuous flow.

[See Comment No. 9]

EPA Response: Comment noted for the record. See Response to Comment No. 9.

Comment #58: FS, Page 7, Outfall 051. Please delete the following sentence:

"The facility has a mechanical evaporation system and Outfall 051 has not discharged since 2014 (Note: Discharges to the outfall were performed on June 18, 2019, March 10, 2020, and August 18, 2020)." The sentence is no longer applicable.

EPA Response: Comment noted for the record. See Response to Comment No. 3.

Comment #59: FS, Page 9, Outfall 051. The technology based effluent limits discussed on page 5 of the fact sheet include Total Chromium and Total lead, however, the limits were not added to the Part I.A requirements. The RP analysis for chromium and lead indicate that there is no reasonable potential for these metals in the effluent. Please provide a footnote to this section indicating that the negative RP is the justification for NOT assigning an effluent limit to the permit.

EPA Response: Comment Noted for the record. New RP analysis also was negative for chromium and lead.

Comment #60: FS, Page 9. The draft permit Part I.A, fact sheet, and RP analysis utilize three different hardness values for Outfall 051.

- Part I.A – 50 mg/L hardness limit
- Fact Sheet Table on Page 12 - is 17.3 mg/L
- RP Analysis - 77.4 mg/L (from June 19, 2019 Effluent Discharge).

Please clarify how hardness was used to determine the permit monitoring and/or limits provided in Part I.

EPA Response: EPA re-ran RP using updated data from Enclosures 1 and 2 provided with the permittees comments (hardness 83.8 mg/L). Updated limits are established in the final NPDES permit.

Comment #61: FS, Page 12, Outfall 051. LANL has performed additional analysis that includes data for Thallium at an MDL below the EPA MQL. An operational sample collected from RLWTF effluent on December 17, 2019 indicated that Thallium was not detected at a lower MDL of 0.051 ug/L. This MDL is lower than the EPA MQL of 0.5 ug/L. Please do not add a monitoring requirement for Thallium for Outfall 051. [See Enclosure 2]

EPA Response: Please see Condition of Certification #2. Effluent limitation for thallium is condition for certification and must be included for this permit. (40 CFR §124.55(a)(2)).

Comment #62: FS, Page 12, Outfall 051. LANL performed additional analysis that includes data for Mercury at an MDL below the EPA MQL. The operational sample collected from the effluent on December 17, 2019 shows a value of 0.0021 ug/L Mercury with a revised MDL of 0.0003 ug/L. Please clarify. [See Enclosure 2]



EPA Response: EPA re-ran RP using updated data from permittee. No limits are established for Mercury. See Response to Comment No. 3.

Comment #63: FS, Page 14, last paragraph. Please delete the first sentence "The effluent is evaporated through a mechanical evaporator and has not discharge since November 2010." Outfall 051 received a discharges on June 18, 2019; March 10, 2020; and August 18, 2020.

EPA Response: Comment noted for the record. See Response to Comment No. 3.

Comment #64: FS, Page 15, Outfall 051. It appears that the limits provided in Part I.A were not adjusted to reflect the revised analytical results from June 2019. The permit requires a minimum hardness of 50 mg/L. The calculated Acute Aquatic Life limit at that hardness is 7.0 mg/L (NMAC 20.6.4.900.J.1. The RP Analysis used the hardness (77.4 mg/L) from Supplemental Data Package 2 (Ref. EPC-DO-19-301). The calculated Acute Aquatic Life limit at the RP Analysis hardness is 10.6 mg/L. Please clarify what data was used to determine the copper limit provided Part I.A.

EPA Response: Hardness of 83.8 mg/L was used for RP analysis. Please see Response No. 60 above.

Comment #65: FS, Page 18, Outfall 051. Please revise the following requirement:

"Since the flow from this outfall is intermittent, a 3-hour composite rather than a 24-hour composite sample is established because the discharge is intermittent. The term "3-hour composite sample" means a sample consisting of a minimum of one (1) aliquot of effluent collected at a one-hour interval over a period of up to 3-hour discharge."

The revision is appropriate due to the following reasons:

- Outfall 051 is discharged from a mixed tank in batches. The samples cannot be collected as a 3-hour composite sample. It can be collected as a grab sample from the recirculation line as the tank is discharged to the outfall. The tank is mixed and the grab sample is representative of the contents. A sample to provide fresh effluent for the 24-hour renewal step of the WET test cannot be collected on a separate day because effluent is discharged to the outfall as a batch operation instead of a continuous flow.

[See Comment No. 9]

EPA Response: Comment noted for the record. Please see Response to Comment No. 9.

Comment #66: RP Analysis, Page 3, Outfall 051. Please revise the RP analysis to include the dissolved Manganese result provided in Supplemental Package 2 submitted on August 19, 2019 (Ref. EPA-DO-19-301).

EPA Response: Comment noted for the record. EPA re-ran RP with a dissolved manganese result of 21.4 ug/L provided by the permittee. No RP existed for the pollutant. No manganese limit or monitoring is required in the final permit for Outfall 051.

Comment #67: RP Analysis, Page 4, Outfall 051. Please update the RP Analysis with the Low MDL Mercury and Thallium results provided above and in the attached analytical reports.

[See Comment No. 60 and 61]

EPA Response: Comment noted for the record. EPA re-ran RP and included limit for thallium, which was also required as a Condition of Certification No. 2.

Comment #68: RP Analysis, Page 4, Outfall 051. The effluent concentration data provided for Total and Dissolved Molybdenum was not updated to the data provided in Supplemental Package 2 submitted on August 19, 2019 (Ref. EPA-DO-19-301). Supplemental package 2 provides the analytical data collected from the discharge to Outfall 051 that was performed on June 18, 2019. Please revise.

EPA Response: Comment noted for the record. EPA re-ran RP using updated Total Molybdenum of 0.2 ug/L concentration. No changes in the final permit are required.

Comment #69: Fact Sheet, Section VI, CWA 303(d) Impaired Water. Outfall 051 discharges to Mortandad Canyon [NMAC 20.6.4.128] impaired for Dissolved Copper, PCBs, Adjusted Gross Alpha, and Total Mercury. Please revise the permit requirements in Section I.A and Fact Sheet Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 051 due to impaired waters.

[See Comment No. 3]

EPA Response: Comment noted for the record. See Response to Comment No. 3.

Comment #70: Part I.A, Page 12, Outfall 03A181. Please revise the description to be consistent with the Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299) as follows:

“During the period beginning the effective date of the permit and lasting through the expiration date of the permit (unless otherwise noted), the permittee is authorized to discharge treated cooling tower blowdown to Mortandad Canyon, in Segment number 20.6.4.128.”

EPA Response: Change made accordingly to correctly reflect Outfall 03A181 description.

Comment #71: FS, Page 6, 3<sup>rd</sup> Paragraph, Outfall 03A181. Please delete the last two sentences. The project to route the cooling tower blowdown to the Reuse tank has been cancelled.

EPA Response: Comment noted for the record. See also Response to Comment No. 3.

Comment #72: Section VI, CWA 303(d) Impaired Water. Outfall 03A181 discharges to Mortandad Canyon [NMAC 20.6.4.128] impaired for Dissolved Copper, PCBs, Adjusted Gross Alpha, and Total Mercury. Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 03A181 due to impaired waters. [See Comment No. 3]

EPA Response: See Response to Comment No. 3.

Comment #73: Part I.A, Page 12, Outfall 03A181. LANL has performed additional analysis that includes data for a dissolved Chromium VI. The result indicated that Chromium VI was not detected below the MDL of 3 ug/L. Please delete the requirement to monitor for Chromium VI at Outfall 03A181. [See Enclosure 3]

EPA Response: See Condition of Certification No. 2 and Response to Comment No. 3. EPA re-ran RP with updated data from Enclosure #3 and Outfall 03A181 RP for Chromium VI was negative and no limit or monitoring is required in the final permit.

Comment #74: Part I.A, Page 18, Outfall 03A048. Please delete "and other wastewater" from the description to be consistent with the Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299). This outfall only discharges treated cooling tower blowdown to the outfall.

EPA Response: Change made accordingly to correctly reflect Outfall 03A048 description.

Comment #75: Part I.A, Page 14 and FS, Page 14 & 20, Outfall 03A048. There is an inconsistency regarding when the requirement to monitor for "impaired water" contaminates is applied to each outfall. The impairments were not added to Part I.A for Outfall 03A048 but were added to Outfall 03A113 regardless of whether the RP Analysis was negative. Please clarify.  
[See Comment No. 3]

EPA Response: See Condition of Certification No. 2 and Response to Comment No. 3.

Comment #76: Section IV, CWA 303(d) Impaired Water. Outfall 03A048 discharges to Los Alamos Canyon [NMAC 20.6.4.128] impaired for PCBs, Total Recoverable Cyanide, Total Recoverable Selenium, Adjusted Gross Alpha, and Total Mercury. Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 03A048 due to impaired waters.  
[See Comment No. 3]

EPA Response: See Response to Comment No. 3.

Comment #77: Part I.A, Page 14, Outfall 03A113. Please delete "and other wastewater" from the description to be consistent with the Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299). This outfall only discharges treated cooling tower blowdown that can be isolated for sampling at the outfall prior to comingling with storm water.

EPA Response: Change made accordingly to correctly reflect Outfall 03A113 description.

Comment #78: Part I.A, Page 14, Outfall 03A113. The description does not include the discharge of storm water. This is inconsistent with Page 5 of the Fact sheet. Please revise the description to include stormwater.

EPA Response: Comment noted for the record. EPA revised the description of Outfall 03A113 and added "and stormwater" to the final permit.

Comment #79: FS, Page 14 and 20, Outfall 03A113. There is a conflict between Part I.A, Page 14, and Page 20 regarding the inclusion of Total Recoverable Aluminum, Total Mercury, and Adjusted Gross Alpha. The fact sheet indicates that Total Recoverable Aluminum and Adjusted Gross Alpha are proposed to be removed from the permit for this outfall. This appears to be inconsistent with Section VI on Page 20, which indicates that Total Recoverable Aluminum, mercury, and Adjusted Gross Alpha are

included due to impaired waters. If there is no reasonable potential and the waste stream is not variable (i.e., single routine source) does the requirement to sample and report due to impaired waters need to be included? Please clarify or remove the requirement to sample and report.

[See Comment No. 3]

EPA Response: See Condition of Certification No. 2 and Response to Comment No. 3. If an outfall discharge contains impairments pollutants of concern but demonstrates no RP, monitoring only will be established in the final permit.

Comment #80: Section VI, CWA 303(d) Impaired Water. Outfall 03A113 discharges to Sandia Canyon [NMAC 20.6.4.128] impaired for PCBs, Total Recoverable Aluminum, Adjusted Gross Alpha, and Total Mercury. Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 03A113 due to impaired waters.

[See Comment No. 3]

EPA Response: See Response to Comment No. 3.

Comment #81: RP Analysis. The RP Analysis indicates that there is RP for Copper at this outfall. Is there a reason it was not included in the Part I.A for Outfall 03A113?

[See Comment No. 3]

EPA Response: The file named 2019Outfall03A113NewData.xlsx shows no RP for Copper but does show RP for Chromium VI which is right above Copper. The final permit retains the proposed limit for Chromium VI, but based on the RP analysis no limit for Copper is required.

Comment #82: Part I.A, Page 10, Outfall 03A022. Please revise the outfall description to be more consistent the Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299) as follows:

“During the period beginning the effective date of the permit and lasting through the expiration date of the permit (unless otherwise noted), the permittee is authorized to discharge storm water from roof drains, once through cooling water, and once-through cooling water from emergency use only to Mortandad Canyon, in segment number 20.6.4.128 of the Rio Grande Basin. (Cooling tower blowdown is not authorized for discharge at this outfall.)”

EPA Response: Change made accordingly to correctly reflect Outfall 03A022 description.

Comment #83: FS, Page 9, Outfall 03A022. Please delete the ELGs for a Type Outfall 04A from the draft permit. The Outfall 04A022 has been renamed 03A022 and there are no longer any 04A outfalls at LANL.

EPA Response: Comment noted for the record.

Comment #84: FS, Page 14, 6<sup>th</sup> paragraph, Outfall 03A022. This paragraph states, “...WQ based effluent limitations and monitoring requirements (total recoverable aluminum, dissolved copper, and gross alpha, except for TRC as described above) in the current permit are proposed to be removed from these outfalls.” Part I.A retains the requirement to monitor for copper. Please clarify.

EPA Response: See Condition of Certification No. 2 and Response to Comment No. 3.

Comment #85: Section VI, CWA 303(d) Impaired Water. Outfall 03A022 discharges to Mortandad Canyon [NMAC 20.6.4.128] impaired for Dissolved Copper, PCBs, Adjusted Gross Alpha, and Total Mercury. Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 03A022 due to impaired waters. [See Comment No. 3]

EPA Response: See Conditions of Certification No. 1 & 2 and Response to Comment No. 3.

Comment #86: Part I.A, Page 20, Outfall 03A160. Please delete "and other wastewater" from the description to be consistent with the Permit Re-Application Fact Sheet (Ref. ESHQSS-19-018) and Supplemental Information Package 1 (Ref. EPC-DO-19-299). This outfall only discharges treated cooling tower blowdown to the outfall (Ref. ESHQSS-19-018).

EPA Response: Change made accordingly to correctly reflect Outfall 03A160 description.

Comment #87: Part I.A, Page 20 and RP Analysis, Outfall 03A160. The data provided for the NPDES Permit application was old data from blowdown operations to the outfall prior to routing it to SWWS and prior to the installation and startup of the new wastewater treatment system outlined in a Notice of Change provided in Supplemental Information Package No. 3 (Ref. EPC-DO-19-302). New data from the cooling tower blowdown was provided for the Waste Stream Profile (WSP) to the SWWS Facility. The following bullets provide new data for three potential pollutants:

- These results showed a ND for Se using the SW846 Method at an MDL of 2.0 ug/L. This is below the EPA MQL of 5 ug/L. Please consider removing the requirements for Selenium from the permit.
- These results showed an ND for Cyanide using the EPA Method at an MDL of 1.67 ug/L. This is below the EPA MQL of 10 ug/L. Please consider removing the requirements for Cyanide from the permit.
- These results showed a lower Total Chromium concentration 6.15 ug/L using the SW 846 Method. The EPA MQL for Total Chromium is 10 ug/L. Please consider removing the requirements for Chromium VI from the permit.

Please revise the RP analysis and permit limits/requirements based upon the data provided in the bullets above. [See Enclosure 4]

EPA Response: See Response to Condition of Certification No. 2 and Response to Comment No. 3. EPA re-ran the RP and removed the limit for Chromium VI and added limit for Total Thallium in the final permit.

Comment #88: FS, Page 6, Outfall 03A160. Please delete the last sentence. The notice of change for the water treatment system was submitted to the EPA on June 12, 2019 and was provided in Supplemental Package No. 3 (Ref. EPC-DO-19-302).

EPA Response: Comment noted for the record.

Comment #89: Section VI, CWA 303(d) Impaired Water. Outfall 03A160 discharges to Ten Site Canyon [NMAC 20.6.4.128] impaired for PCBs and Adjusted Gross Alpha.

Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 03A160 due to impaired waters.

[See Comment No. 3]

EPA Response: See Conditions of Certification No. 1 & 2 and Response to Comment No. 3.

Comment #90: Part I.A, Page 9, Outfall 05A055. Please revise the WET test sampling requirements for 05A055 for the following reasons:

- Outfall 05A055 is discharged from a mixed tank in batches. The sample cannot be collected as a 3-hour composite sample. It can be collected as a grab sample from the recirculation line as the tank is discharged to the outfall. The tank is mixed and the grab sample is representative of the contents.

[See Comment No. 9]

EPA Response: See Response to Comment No. 9.

Comment #91: FS, Page 7, 1<sup>st</sup> paragraph, Outfall 05A055. Please revise the first line to the following: "...tanks, and facilities at TA-9, TA-11, and TA-16. The average...." A waste stream profile for water from TA-11 was approved after the permit application was submitted to the EPA.

EPA Response: Comment noted for the record.

Comment #92: FS, Page 7, 1<sup>st</sup> Paragraph, Outfall 05A055. Please clarify the last sentence to indicate that the operational sampling data was used in the RP analysis as follows: "Operational samples were submitted for analytical testing and those results were used in the RP Analysis."

EPA Response: Comment noted for the record.

Comment #93: FS, Page 15, 2<sup>nd</sup> Paragraph, Outfall 05A055. Please revise this paragraph to the following:

"There has been no discharge from the High Explosive Wastewater Treatment Facility (HEWTF) at Outfall 05A055 since November 2007. Normal operations since November 2007 have discharged effluent to an electric evaporator. The applicant intends to continue to operate the HEWTF using the evaporator except under abnormal conditions (i.e., maintenance or malfunction of the evaporator) or to ensure operability of the discharge equipment. There is RP for....."

The HEWTF did not resume discharges to Outfall 05A055 in the fall of 2019.

EPA Response: Comment noted for the record.

Comment #94: Section VI, CWA 303(d) Impaired Water. Outfall 05A055 discharges to Canon de Valle [NAMC 20.6.4.128] impaired for Adjusted Gross Alpha. Please revise the permit requirements in Section I.A and Section VI to reflect the methodology/approach used to assign permit requirements to Outfall 05A055 due to impaired waters.

[See Comment No. 3]

EPA Response: See Response to Comment No. 3.

Comment #95: RP Analysis, Outfall 051. Additional analysis has been performed for Outfall 051 using samples that were collected from three RLWTF effluent discharges (June 2019, March 2020, and August 2020) that occurred after the 2019 Permit Reapplication was submitted. Enclosure 5 provides the analytical data. Please revise the RP analysis to include this analytical data.

EPA Response: Comment noted for the record. See Condition of Certification No. 2 and Response to Comment No. 3. EPA re-ran RP with updated data collected during the comment period.

Comment #96: FS & RP Analysis, Outfall 001. There have been two Notice of Planned Change submitted for Outfall 001 since the Draft permit was issued in November 2019. Please see Enclosure 6 for the details and revise the fact sheet and RP analysis.

EPA Response: Comment noted for the record. RP analysis was re-run, no changes are necessary to final permit limits for Outfall 001.

Comment #97: FS, Outfall 03A048. There has been one Notice of Planned Change submitted for Outfall 03A048 since the Draft permit was issued in November 2019. Please see Enclosure 7 for the details and revise the fact sheet.

EPA Response: Comment noted for the record.

### **Comments from John E. Wilks, III, Veterans for Peace Chapter 63**

Comment #1: Veterans For Peace, Chapter #63, strongly object to the flagrant attempt by the Los Alamos National Laboratory to circumvent the Resource Conservation and Recovery Act (RCRA) by listing on its application five (05) facilities that not have a discharge and therefore are not eligible for inclusion on the Clean Water Act regulation. The five entities inappropriately listed clearly fall into the purview of the RCRA.

The Clean Water Act addresses entities that involve “discharge or any pollutant, or combination or pollutants.” The five entities that we are urging you to remove from any permit you issue, do not discharge and therefore are inappropriate for inclusion. Kindly, delete from the Clean Water Act permit those five facilities that involve handling, treating, and storing hazardous wastes, rather than discharges within the jurisdiction of the Clean Water Act. The entities for which I request deletion are, as follows:

Radioactive Liquid Waste Treatment Facility (RLWTF);  
Strategic Computing Complex;  
Los Alamos Neutron Science Complex, or LANSCE, facility;  
National High Magnetic Field Laboratory; and  
High Explosive Wastewater Treatment Facility.

Thank you for your consideration of this request.

EPA Response: Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program.

Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA's ability under the CWA to issue permits to cover potential discharges serves the Act's goal of protecting the Nation's waters. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA's issuance of permit coverage for these facilities is in accordance with EPA's statutory authority and the CWA's stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be "an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future."

DMRs also show discharges from other the other facilities. The Strategic Computing Complex (SCC) discharges monthly from Outfall 001. Los Alamos Neutron Science Complex (LANSCE) discharges monthly from Outfall 03A048. The National High Magnetic Field Laboratory discharged in May 2018 from Outfall 03A160

The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL's compliance with RCRA is outside the scope of this NPDES permitting action.

### **Comment from Basia Miller, Ph.D, CCNS Board Member**

Comment #1: Clean Water Act permit. I object to EPA issuing a permit for facilities that handle, treat and store hazardous waste, but do not discharge. This is just a way for LANL to get around the more stringent RCRA hazardous waste laws and regulations which should be regulating these facilities. It is against the regulations and totally illegitimate to exempt such LANL facilities from RCRA. That LANL continues to apply for Clean Water Act permits for these facilities only shows that the Lab is **not** a good neighbor to the surrounding communities, as it is seeking to weasel out—yet again—from its environmental responsibilities. LANL has a long history of just this kind of irresponsible, illegal and reckless behavior as year after year they do everything possible to avoid their responsibilities toward the communities that surround them—whether it is to limit their EJSCREEN radii essentially to Los Alamos County—possibly the richest county in the country—while ignoring the majority/minority makeup of



poorer, local pueblos and the Espanola Valley and beyond—an area that LANL has already contaminated with their past discharges; or venting tritium gas with no care or even study of effects on the same local population because it's the cheapest way for the Lab to check off one of the boxes on their contract; or shipping waste to WIPP that, through total incompetence and greed, has become explosive, with no care at all for safety. LANL has not improved their safety culture at all despite numerous demands from affected communities, government oversight entities, and state and local agencies. If EPA is truly in the business of protecting the environment, letting LANL continue to avoid proper regulation is not the way to go. EPA should require proper permit applications that meet the regulations instead of rubber stamping these illegal permits. Therefore I object to EPA issuing a permit for those LANL facilities that have not discharged, such as the

- Radioactive Liquid Waste Treatment Facility (RLWTF),
- Strategic Computing Complex;
- Los Alamos Neutron Science Complex, or LANSCE, facility;
- National High Magnetic Field Laboratory; and
- High Explosive Wastewater Treatment Facility.

Please delete those facilities that are in the business of handling, treating, and storing hazardous waste but do not discharge, from the Clean Water Act permit so that they can be properly regulated by the more stringent RCRA regulations, and LANL can show that they actually understand what safety means and that they are willing to operate the Lab in a safe manner.

EPA Response: EPA considered communities that may be affected by this discharge during the public notice period. For example, EPA: offered Tribal Consultation to Tribes adjacent to LANL, extended the comment period for one year, translated Public Notice document to Spanish and offered a Public Meeting and Hearing to the community.

Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA’s ability under the CWA to issue permits to cover potential discharges serves the Act’s goal of protecting the Nation’s waters. “The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated.” *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA’s issuance of permit coverage for these facilities is in accordance with EPA’s statutory authority and the CWA’s stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent

discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be “an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future.”

DMRs also show discharges from other the other facilities. The Strategic Computing Complex (SCC) discharges monthly from Outfall 001. Los Alamos Neutron Science Complex (LANSCE) discharges monthly from Outfall 03A048. The National High Magnetic Field Laboratory discharged in May 2018 from Outfall 03A160

The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL’s compliance with RCRA is outside the scope of this NPDES permitting action.

#### **Comment from Rev. Jean Siegfried Darling, Minister Emerita, Peoples Church of Chicago**

Comment #1: I object to Los Alamos National Laboratory (LANL) asking the Environmental Protection Agency (EPA) to issue a Clean Water Act permit for industrial facilities that have not discharged wastewater to the environment for years, if not decades. Clean Water Act permits may be granted only for “the discharge of any pollutant, or combination of pollutants.” Some LANL facilities have no discharge from a “point source,” also known as an outfall. These facilities should no longer be on the permit. I object to EPA issuing a permit for facilities that handle, treat and store hazardous waste, but do not discharge. Such Clean Water Act permitting confers an exemption from more stringent Resource Conservation and Recovery Act (RCRA) hazardous waste laws and regulations. The only reason to issue a Clean Water Act permit is to illegitimately exempt LANL facilities from RCRA.

I object to EPA issuing a permit for those LANL facilities that have not discharged, such as the

- Radioactive Liquid Waste Treatment Facility (RLWTF),
- Strategic Computing Complex;
- Los Alamos Neutron Science Complex, or LANSCE, facility;
- National High Magnetic Field Laboratory; and
- High Explosive Wastewater Treatment Facility.

Please delete from the Clean Water Act permit those facilities that are in the business of handling, treating, and storing hazardous waste, but do not discharge. Open the door to their proper and more stringent regulation under RCRA.

EPA Response: Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in

place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA's ability under the CWA to issue permits to cover potential discharges serves the Act's goal of protecting the Nation's waters. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA's issuance of permit coverage for these facilities is in accordance with EPA's statutory authority and the CWA's stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be "an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future."

DMRs also show discharges from other the other facilities. The Strategic Computing Complex (SCC) discharges monthly from Outfall 001. Los Alamos Neutron Science Complex (LANSCE) discharges monthly from Outfall 03A048. The National High Magnetic Field Laboratory discharged in May 2018 from Outfall 03A160

The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL's compliance with RCRA is outside the scope of this NPDES permitting action.

### **Comment from James Eagle**

Comment #1: I object to Los Alamos National Laboratory (LANL) asking the Environmental Protection Agency (EPA) to issue a Clean Water Act permit for industrial facilities that have not discharged wastewater to the environment for years, if not decades. Clean Water Act permits may be granted only for "the discharge of any pollutant, or combination of pollutants." Some LANL facilities have no discharge from a "point source," also known as an outfall. These facilities should no longer be on the permit. I object to EPA issuing a permit for facilities that handle, treat and store hazardous waste, but do not discharge. Such Clean Water Act permitting confers an exemption from more stringent Resource Conservation and Recovery Act (RCRA) hazardous waste laws and regulations. The only reason to issue a Clean Water Act permit is to illegitimately exempt LANL facilities from RCRA.

I object to EPA issuing a permit for those LANL facilities that have not discharged, such as the

- Radioactive Liquid Waste Treatment Facility (RLWTF),

- Strategic Computing Complex;
- Los Alamos Neutron Science Complex, or LANSCE, facility;
- National High Magnetic Field Laboratory; and
- High Explosive Wastewater Treatment Facility.

Please delete from the Clean Water Act permit those facilities that are in the business of handling, treating, and storing hazardous waste, but do not discharge. Open the door to their proper and more stringent regulation under RCRA.

EPA Response: Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA’s ability under the CWA to issue permits to cover potential discharges serves the Act’s goal of protecting the Nation’s waters. “The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated.” *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA’s issuance of permit coverage for these facilities is in accordance with EPA’s statutory authority and the CWA’s stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be “an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future.”

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The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL’s compliance with RCRA is outside the scope of this NPDES permitting action.

**Comment from Maj-Britt Eagle**

Comment #1: As the wife of a US Nuclear Submarine officer for 47 years, and the mother of two, as well as a League of Women Voter member of the nuclear waste disposal study group, I've acquired some knowledge of the effects of radiation release into the Earth ecosystem, on life broader than only human, and urge you to shut down any attempt to (1) release tritium into the atmosphere, and (2) allow the discharge of radioactive water into our surroundings here in Los Alamos and Santa Fe, New Mexico.

Further reasoning on the water discharge and permit are below:

Safety bases for both National Nuclear Security Administration and Environmental Management facilities at Los Alamos National Laboratory do not consistently or appropriately consider a potential energetic chemical reaction involving transuranic waste.

- Hazard analyses lack systematic evaluations of the chemical compatibility of transuranic waste streams. These analyses are needed to fully identify potential chemical reaction hazards associated with waste constituents.
- Accident analyses are not bounding, assume inappropriate initial conditions, and do not defensibly establish the quantity of radioactive material that may be released due to an energetic chemical reaction. As such, additional credited safety controls may be necessary to protect workers and the public.

Some facilities store transuranic waste without any engineered controls beyond the waste container. The radiological release events that occurred at the Waste Isolation Pilot Plant and Idaho National Laboratory have demonstrated the importance of incorporating multiple layers of protection to reduce the consequences of an accident.

EPA Response: Comment noted for the record. LANL's compliance with RCRA, regulation of waste management and air emissions are outside the scope of this NPDES permitting action.

**Comments from David McCoy:**

Citizen Action New Mexico is opposed to the continued issuance of an NPDES permit under the Clean Water Act from at least the following five facilities at Los Alamos National Laboratory:

1. **The Radioactive Liquid Waste Treatment Facility.** This key facility, located across the street from the Plutonium Facility, treats liquid radioactive and hazardous waste contaminated by the fabrication of plutonium pits, or the triggers, for nuclear weapons. In 1963, discharges began through Outfall 051 into a tributary of Mortandad Canyon. In the late 1990's LANL instituted a "zero liquid discharge" plan to eliminate the discharge.
2. **The Strategic Computing Complex** (no discharge between September 2016 and to at least May 2019);
3. **The Los Alamos Neutron Science Complex**, or LANSCE, (facility cooling towers are no longer in use);
4. **The National High Magnetic Field Laboratory** (treated water being "discharged" to the Sanitary Wastewater System (SWWS) Plant); and

5. **The High Explosive Wastewater Treatment Facility** (since November 2007 an electric evaporator(s) has been in use).

All of these facilities should be regulated under the Resource Conservation and Recovery Act (RCRA) and the areas adjacent to these non-discharge facilities should be required to clean up the contaminated soil from past operations.

It is high time for the EPA to discontinue the fiction that these discharge permits should be issued where there is no discharge. EPA should not accommodate a lesser standard of protection for public health and environmental safety than could be obtained under RCRA. The continued issuance of such permits in the absence of discharge is contrary to law.

EPA Response: Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA’s ability under the CWA to issue permits to cover potential discharges serves the Act’s goal of protecting the Nation’s waters. “The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated.” *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

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The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL's compliance with RCRA is outside the scope of this NPDES permitting action.

**Comments Received on the limited re-opening comment period on January 30, 2021****Comments from Triad National Security, LLC (Triad) EPC-DO-21-057****I. Citizen Organizations Have Misconstrued the Applicable Law**

The citizen organizations' Comments offer mistaken interpretations of the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the relationship between the two statutes, as they have in the past before the EPA Environmental Appeals Board and several federal courts. First, they erroneously assert that EPA lacks authority under the CWA to issue a discharge permit for outfalls that have not been utilized recently and/or continuously in the past and have not been described as meeting immediate future needs. Second, they mistakenly contend that the wastewater treatment unit (WWTU) exemption under RCRA applies only when the unit has been issued a discharge permit under the CWA. They string together these two misconceptions in order to construct an erroneous conclusion that EPA must deny LANL's application for a CWA permit, which will lead to a duty for the State of New Mexico to commence the permitting process for the RLWTF under RCRA. The discussion below addresses each point in turn.

**A. EPA Has Clear Authority Under the CWA to Issue the Permit.**

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

The citizen organizations nonetheless appear to contend that there must be an imminent future discharge in order that EPA would have such authority. They maintain that "the CWA contains no authority to issue a permit for a discharge that 'could occur,' nor for a 'potential' or a 'capability' to discharge." Comments at 24. They assert that the LANL intention to discharge "in event of unavailability of evaporation equipment" falls into these categories for which EPA is powerless to issue a permit. Nothing in the statute or EPA's longstanding practice supports this contention.

The citizen organizations' contention boils down to an argument that the applicant must show it has an unconditional intention to discharge in the near future, regardless of circumstances, or at least has demonstrated that a discharge is likely, before EPA would have authority to grant the application. *Id.* We demonstrate below in Section II.A.1 that LANL satisfies even this extreme and erroneous test. But the statute does not mention such a limit on EPA's authority, and for



good reason. Permit applicants who envision even the possibility of a discharge in unusual or rare circumstances are in fact meeting their responsibility to avoid unpermitted, and unlawful, discharges by ensuring they have permit authorization to cover such possibilities. It would be bizarre, to say the least, if Congress had imposed on EPA an obligation to assess the likelihood that circumstances would arise necessitating a discharge, and to issue a permit only when satisfied that the probabilities were sufficiently large. In the context of such a requirement, EPA could hardly justify enforcing the statute's prohibition on unpermitted discharges if it had previously deemed such discharges to be too remote to justify issuing a permit. The statutory scheme makes no provision for such a scenario.

The citizen organizations apparently reach their remarkable position by misapplying the holdings in two decisions from the Second and Fifth Circuits. Comments, 25-28. Those decisions have nothing to do with whether EPA has authority to issue a requested permit under the CWA.

In the first decision, industry petitioners challenged a provision in EPA's programmatic regulation governing Concentrated Animal Feeding Operations (CAFOs) that had required CAFO owners and operators to apply for a CWA discharge permit if there was a "potential to discharge" from their operations. *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005). EPA had termed this requirement a "duty to apply," and said the duty was based on a presumption that every CAFO has the potential to discharge. See Comments at 25, n. 42. Thus, the "duty to apply" was an EPA command requiring that all CAFOs must submit themselves to regulation that would control and constrain their means of operating their businesses. The "duty to apply" was itself an enforceable requirement, punishable by civil and criminal penalties independent of whether there had been any discharge of pollutants from the CAFOs. The Second Circuit concluded that the CWA conferred no authority on EPA to compel the filing of a permit application in the absence of an actual discharge. Because a mere potential to discharge lacks all of the elements triggering the statute's prohibition against unpermitted discharges (actual addition of pollutants to navigable waters from a point source), the court said there was "no statutory obligation of point sources to seek or obtain a [CWA] permit in the first instance." *Waterkeeper Alliance*, 399 F.3d at 505. Thus, there could be "no duty to apply" based on a mere potential to discharge, but the court never addressed whether EPA could issue a permit in response to a voluntary permit application. The court did not address that question because no petitioner had raised it.

Despite this context and with no regard for the limits of the case or controversy before the court, the citizen organizations focus on a single sentence in the Second Circuit's decision, calling it a "categorical ruling": the court said "the Clean Water Act gives EPA jurisdiction to regulate and control only actual discharges—not potential discharges, and certainly not point sources themselves." *Id.* See Comments at 25-26. The citizen organizations work to utilize the court's language – "jurisdiction to regulate and control" – in support of their theory that EPA's permit issuance authority depends on the high likelihood of a discharge. The citizen organizations' reliance on this passage misuses the court's language and should be disregarded.

First, because no party had brought a challenge to EPA's authority to issue permits (as opposed to its authority to compel submission of permit applications), the court had no occasion to address it, and interpreting the court's language to cover EPA's permit-issuance authority, as the citizen organizations endeavor to do, renders the court's passage mere dictum. *Monod v. Futura, Inc.*, 415 F.2d 1170, 1173 (10th Cir. 1969) ("Because this issue was not properly before that court the conclusion is mere dicta and must be read as such.") *Tokoph v. United States*, 774F.3d 1300, 1303 (10th Cir. 2014) ("[D]icta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.") (quoting *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1328 n.3 (10th Cir. 2009)). Reading a court's language so as to reduce it to dicta can hardly be seen as a plausible interpretation.

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

In the second decision, industry petitioners had challenged EPA's attempt to draft around the limitation that had been imposed by the Second Circuit. *National Pork Producers Council v. U.S. Environmental Protection Agency*, 635 F.3d 738(5th Cir. 2011). Instead of regulating a CAFO with the "potential to discharge," EPA revised the CAFO regulation to enforce its "duty to apply" where a CAFO "proposes to discharge," and EPA defined that phrase as being a CAFO "designed, constructed, operated, and maintained in a manner such that the CAFO will discharge...." *Id.*, 635 F.3d 738, 750. The Fifth Circuit rejected this attempt. As with the Second Circuit's decision in *Waterkeeper*, the Fifth Circuit in *National Pork* addressed only the EPA's authority to compel permit applications in the absence of actual discharges, not the Agency's quite different authority to issue a CWA permit in response to a voluntary application.

Other prominent features of the statute also underscore that EPA has jurisdiction to issue permits where discharges might or might not occur depending on external circumstances and irrespective of the applicant's aspirations or plans. EPA can exercise its jurisdiction whenever a person applies for a permit in order to remain in compliance with the law if circumstances make a discharge necessary. Nowhere is this authority better illustrated than in the storm water permitting provisions of the Act.

Storm water permitting represents a central feature of the Section 402 NPDES program. The statutory authority to permit future, episodic discharges of storm water has existed in the CWA

since passage of the landmark 1972 Federal Water Pollution Control Act Amendments, which later became known as the CWA. Pub. L. No. 92-500, 86 Stat. 816 (1972). The 1972 legislation established the Section 301 prohibition on unpermitted pollutant discharges and the Section 402 NPDES permit program. *Id.* at 844, 880. The same, original statutory commands and definitions that provide EPA's authority to permit discharges from LANL's Outfall 051 also provide the basis for permitting episodic storm water discharges.

In 1987, Congress enacted amendments to the CWA that required EPA to undertake rulemaking and implement comprehensive permitting for these pollutant sources. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987). While the 1987 amendments breathed new life into EPA's storm water permitting program, they did not augment the original statutory authority to deal with these future, episodic discharges. The amendments added subsection 402(p), which directs EPA to issue permits that will authorize future storm water discharges from municipal and industrial point sources in the event that precipitation, together with other circumstances at a facility, necessitate a discharge. Pub. L. No. 100-4, 101 Stat. 7, 69- 70 (1987) (codified as amended at 33 U.S.C. § 1342(p)(2)(B)—(D)).

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

Because the large number of industrial facilities requiring NPDES storm water authorizations could easily overwhelm State and federal permitting agencies, EPA has issued and periodically updates a Multi-Sector General Permit ("MSGP") and associated guidance documents to provide permit coverage for industrial dischargers. Final 2015 MSGP Documents, U.S. EPA, <https://www.epa.gov/npdes/final-2015-msgp-documents>. The MSGP provides that dischargers must employ control measures to "divert, infiltrate, reuse, contain, or otherwise reduce stormwater runoff to minimize pollutants" in their discharges. U.S. EPA, *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity* 18, § 2.1.2.6 (2015). These measures must be specified in the facility's Storm Water Pollution Prevention Plan ("SWPPP"). *Id.* at 33, § 5.2.4. And they must be described in detail in the discharger's permit application. See 40C.F.R. § 122.26(c).

Detention basins are a typical and widely used example of control measures that capture sediment and other pollutants washed by precipitation runoff from the facility property. Detention basins are designed to impound storm water for a time sufficient for the pollutants to

settle out and leave the storm water clean enough to be discharged by pumping the cleaner water near the basin's surface into receiving waters (thus, also creating capacity to contain runoff from the next storm). 3 Michael L. Clar, Billy J. Barfield & Thomas P. O'Connor, *Stormwater Best Management Practice Design Guide: Basin Best Management Practices* § 222 (2004). Detention basins are designed to control precipitation events of a certain size—e.g., the 25-year storm or the 50-year storm. *Id.* at § 2-2. In other words, if a future precipitation event does not exceed the “design storm,” the control measure will be sufficient to promote settling of pollutants, and will result in a discharge that meets water quality objectives.

Thus, the CWA authorizes EPA to issue permits authorizing future discharges—both expected discharges based upon approved design criteria (emptying the basin following a smaller storm), and unexpected discharges that were neither planned for nor intended (overflow from a storm larger than the basin’s design basis). Unexpected discharges can occur due to a number of factors beyond the discharger's control, but EPA is not required to deny a permit application because it believes the circumstances that would result in a discharge may be remote.

For storm water permitting, the relevant circumstances include extreme swings between periods of normal-to-heavy precipitation and periods of drought. It is not uncommon for extended periods of time to pass without any discharge pursuant to the discharge authorization granted by a storm water permit. See generally *Drought Monitoring*, National Weather Service, <https://www.weather.gov/ilm/drought>. Extreme and prolonged drought conditions can leave geographic areas with no precipitation for years, especially in the arid Western and Southwestern regions of the United States. *Id.* If prolonged periods devoid of discharges were to provide a basis for denying applications for renewal of NPDES permits, EPA's Section 402(p) permitting program would be in shambles. Unanticipated storms do occur, and when they do, there will be discharges.

For some years, LANL has occupied a similar situation here. It has designed the evaporation equipment to handle the currently expected volume of wastewater.

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. LANL has made this perfectly clear in its submissions, as the citizen organizations acknowledge. Like the storm water discharger in an arid region, the operating plan has been that LANL might not discharge via Outfall 051 for extended periods, but LANL has consistently sought a permit that specifically authorizes the use of Outfall 051 in anticipation of circumstances that will make a discharge necessary -- a permit that will make that discharge lawful.

In sum, the CWA does not withhold authorization for EPA to permit future discharges in circumstances that, while they may be rare, have been anticipated and stated in the permit application. The citizen organizations' contrary interpretation of the statute should be rejected.

Furthermore, as explained below in Section II.A.1, 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 simultaneously for short or longer-term periods of time.

**B. The RLWTF is Exempt From RCRA Permitting Regardless of Whether EPA issues the Permit for Outfall 051.**

The citizen organizations also misunderstand the applicable legal requirements in arguing that EPA should not renew the CWA permit because EPA's issuance of the permit gives effect to the WWTU exemption from RCRA permitting. Comments at 4, 23-24. They point to 40 CFR § 264.1(g)(6), which exempts the tanks and associated ancillary equipment at the RLWTF from the substantive RCRA standards. But they never mention 40 CFR § 270.1(c)(2)(v), which provides that owners and operators of wastewater treatment units "are not required to obtain a RCRA permit." Both section 264 and section 270 contribute to the WWTU exemption, one for substantive RCRA requirements, and one for RCRA permitting. Both provisions point to section 260.10 for the definition of a "wastewater treatment unit." The key element of that definition is that such a unit must be "subject to regulation under either section 402 or 307(b)" of the Clean Water Act. 40 CFR § 260.10.

EPA has a long standing and consistent interpretation of what is meant by this definition in its regulation. Nearly 30 years ago, EPA's Office of Solid Waste and Emergency Response (OSWER) issued an official directive addressing the issue. Exemption from Permitting Requirements for Waste Water Treatment Units, OSWER 9522.1992(01), 1992 WL 754630 (January 16, 1992) (ATTACHMENT A). OSWER emphasized that:

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

Id. at 1. Explaining further, OSWER made clear that "subject to regulation under Section 402" of the CWA covers facilities "which are permitted, were ever permitted, or should have been permitted under NPDES." Id.

OSWER went further, moreover, in explaining the exemption's applicability to so-called "zero discharge" facilities:

With regard to the question of a "zero discharge" facility, EPA would like to clarify the difference between a facility that produces no treated wastewater as a direct result of Clean Water Act requirements and units that are not required to obtain an NPDES permit because they do not discharge treated effluent. In the first case, the facility would have had a surface water discharge at one time, but has since eliminated the discharge as a result of, or by exceeding, NPDES or pretreatment requirements. Such facility would qualify for the waste water treatment unit exemption under RCRA. In the second case, the facility never had a surface water discharge, and therefore was never subject to NPDES permitting or Clean Water Act requirements. The RCRA exemption is not available in these cases.

Id. at 2.

The Agency's directive settles the question of whether the RLWTF is exempt from RCRA permitting under 40 CFR §§ 270.1 and 260.10. Because LANL has held an NPDES permit for Outfall 051 in the past, and clearly was required to do so, the directive concludes that the exemption applies. And if, as the citizen organizations erroneously maintain, the RLWTF has "eliminated" its discharge by employing treatment technology (evaporation equipment) that meets or exceeds NPDES requirements, then the directive deems it a "zero discharge" facility, and it likewise is entitled to the exemption.

As the citizen organizations point out, in the past LANL also had erroneously assumed that continuous renewal of the NPDES permit for Outfall 051 was necessary in order for the WWTU exemption to apply. Comments at 5-7. LANL was mistaken then, just as the citizen organizations are mistaken now.

EPA Response: Triad's comments are largely in response to comments submitted by other commenters, which EPA has responded to elsewhere in these responses to comments. Triad's comments are noted for the record.

## **II. The Citizen Organizations' Comments are Replete with Material Errors**

Finally, the discussion below addresses a number of factual errors and misconceptions in the citizen organizations' Comments that bear on LANL's use of other outfalls, LANL's flow estimates for Outfall 051, and statements lifted from prior LANL submissions to EPA.

### **A. Facts Concerning Discharges From LANL Outfalls.**

The citizen organizations' Comments contain numerous factual errors in describing discharges from various LANL outfalls. Those errors are corrected in the discussion below.

1. Outfall 051. The Comments state that, since 2010, LANL has made only a single discharge, on June 18, 2019, from Outfall 051. See, e.g., Comments at 4, 18. That is incorrect. LANL has discharged from Outfall 051 on June 18, 2019, March 10, 2020, and August 18, 2020. These

discharges are documented in Discharge Monitoring Reports (DMRs) submitted to EPA. The citizen organizations' error may be due to their misplaced reliance on quarterly reports submitted to the New Mexico Environment Department (NMED) Ground Water Quality Bureau, which does not have jurisdiction over discharges to surface waters, rather than the DMRs LANL has submitted to EPA, which does.

The discharges in March and August of 2020 are especially noteworthy. As the citizen organizations acknowledge, LANL has made it clear that Outfall 051 is needed, and will be used, when necessary because the evaporation equipment is unavailable or when increased treatment needs arise that would not be handled in the most efficient manner by utilizing the evaporation equipment alone. Comments at 12. Since the solar evaporation tanks are not in service, the key equipment is the mechanical evaporator. On March 10, 2020, LANL discharged via Outfall 051 because influent volumes made that advisable even though the mechanical evaporator was in service. On August 18, 2020, LANL utilized Outfall 051 because the mechanical evaporator was down for maintenance, including maintenance on the burners. Thus, Outfall 051 is being used precisely as LANL has said it would be – as a back-up or supplemental alternative when circumstances require. Had Outfall 051 not been permitted to discharge on those dates, LANL would have encountered a choice of either violating the CWA or curtailing operations at one of DOE's most important laboratories.

The citizen organizations are plainly wrong in their repeated assertion that such events are "highly unlikely," see Comments at 20. Discharges from Outfall 051 are not merely events that "could occur." See Comments at 15. These discharges have occurred in the recent past, and they will occur as required by operations in the future, within the limits allowed by the permit.

In this regard, we note that LANL has recently adjusted its wastewater treatment operational plan so as to utilize Outfall 051 as an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future. As explained in the Affidavit of Stuart A. McKernan, Facility Operations Director at LANL (ATTACHMENT B), with the evaporation tanks not in service, there will be occasions on which influent to the RLWTF will be significant enough that LANL will choose to use both the mechanical evaporator and Outfall 051 simultaneously. Outfall 051 thus provides both operational flexibility and back-up capability.

2. Outfall 13S. The Comments assert that "Outfall 13S did not discharge between October 2014 and September 2018 and analytical results were taken from operational flows." This statement misrepresents the information provided in the 2019 NPDES Permit Re-Application. Outfall 13S is associated with the LANL sanitary wastewater system (SWWS) treatment facility. This facility and Outfall 13S are located at a lower elevation than all of the other outfalls at LANL, and the 2019 Permit NPDES Permit Re-Application clearly states that treated effluent from the SWWS can be discharged to Outfall 13S or pumped to the Power Plant Reuse Tank (located at a higher elevation). Treated SWWS effluent that is pumped to the Power Plant Reuse Tank is either discharged to Outfall 001 or treated for reuse at the Sanitary Effluent Reclamation Facility (SERF). Outfall 13S is

routinely maintained, has an automatic flow meter, automatic sampler, and is fully capable of receiving SWWS treated effluent based upon demand, volume, and availability of equipment to pump, store, discharge, and/or treat using facilities and equipment located at an elevation that is much higher than SWWS. The outfall provides operational flexibility for maintenance, repair, and replacement of equipment (i.e., pumps, SERF, Reuse Tank, Outfall 001) and serves as a critical backup should LANL be unable to pump to a higher elevation due to equipment failure or an increase in treated effluent volume. The analytical data provided on the 2019 NPDES Permit Re-Application Form 2C were from recently collected representative samples of the SWWS effluent before it was pumped to the Power Plant Reuse Tank or SWWS de-chlorination for discharge to Outfall 13S. The samples were collected on September 19-20, 2018 and February 22, 2019 (13S Fact Sheet Section 5.1).

3. Outfall 03A027. The Comments assert that “Outfall 03A027 did not discharge from September 2016 to at least May 2019, so older monitoring data was submitted.” Comments at 20, (quoting from 03A027 LANL Fact Sheet). This statement misrepresents the information provided in the 2019 NPDES Permit Re- Application. Outfall 03A027 is located approximately 30 feet downstream from Outfall 001 and continues to be capable of receiving SCC Cooling Tower blowdown discharges. In September 2016, the valving on the blowdown line was modified to allow discharge to Outfall 03A027, Outfall 001, the Reuse Tank at the Power Plant for recycle at SERF, or the SWWS treatment plant (03A160 Fact Sheet Section 2.2 and Attachment B) based upon demand, volume, and outfall/equipment availability. The 2019 NPDES Permit Re-Application Form 2C included analytical data from DMR submittals and representative samples collected on August 29, 2018 and February 4, 2019 from a sample port on the SCC Cooling Tower blowdown line (03A160 Fact Sheet Section 5.1).

4. Outfall 03A113. The Comments assert that LANL does not discharge or propose to discharge from Outfall 03A113. Comments at 20-21. This conclusion apparently was derived from a statement in the Fact Sheet explaining that the cooling towers served by this outfall are not currently in use. Id. at 21. The Comments misrepresent the information provided in the 2019 NPDES Permit Re-Application. Outfall 03A113 receives stormwater and cooling tower blowdown from TA-53-293 and TA-53-952 (Fact Sheet Attachment B). The TA-53-952 cooling tower discharges routinely to the outfall as shown in Fact Sheet Attachment D and the various Discharge Monitoring Reports Submitted for the current permit term of October 2014 - Present. The outfall discharged 529,234 gallons in 2017, 436,400 gallons in 2018, 198,530 gallons in 2019, and 154,390 gallons as of October 30, 2020. Cooling Tower TA-53-293 is in operational standby and is currently not discharging to the outfall, but the permit application proposes this as a future discharge source to the outfall.

5. Outfall 03A160. The Comments erroneously assert that LANL does not propose to discharge from this outfall. Id. at 20-21. The statement from the Fact Sheet quoted by the citizen organizations plainly states that LANL intends to discharge from this outfall if an operational upset prevents the discharge of cooling water to the SWWS. The cooling tower blowdown discharged to Outfall



03A160 was routed to SWWS in May of 2018 to support the recycling of water through the SERF facility and to allow the NHMFL to construct a water treatment system and perform rehabilitation of the cooling system (i.e., replace heat exchangers, tank cleaning, tank integrity testing). The 2019 NPDES Permit Re-Application proposed discharges to that outfall based upon historical data and the use of the outfall as an operational backup. The proposed water treatment system mentioned in the permit and the cooling system rehabilitation were completed in the summer of 2020. A representative sample of the cooling tower blowdown was recently collected, and those supplemental data were provided as an attachment to the Triad Comments on the Draft Industrial and Sanitary Wastewater NPDES Permit No. NM0028355 published for public comment on November 30, 2019.

6. Outfall 05A055. The Comments assert that Outfall 05A055 did not discharge between October 2014 and September 2018; that it has not discharged since November 2007, and that the analytical results were taken from operational flows. These statements misrepresent the information provided in the 2019 NPDES Permit Re-Application. Outfall 05A055 is associated with the High Explosives Waste Water Treatment Facility (HEWTF) and is located in a remote part of LANL. The 2019 NPDES Permit Re-Application clearly states “The treatment process is designed to circulate the wastewater through the process multiple times prior to storage in the post treatment tanks and discharge to either electric evaporators or to Outfall 05A055” (05A055 Fact Sheet Section 2.2.). Outfall 05A055 is fully capable of receiving treated HEWTF effluent based upon demand, volume, and availability of evaporation equipment. The outfall provides operational flexibility for maintenance, repair and replacement of equipment (i.e., evaporator), and serves as a critical backup should LANL be unable to evaporate effluent. There will be occasions when the volume of effluent or equipment availability (i.e., evaporator) will require discharge to Outfall 05A055. This is demonstrated in the discharge monitoring reports submitted to the EPA for previous discharges to the outfall. The 2019 NPDES Permit Re-Application Form 2C included analytical data from representative samples of the effluent that were collected on September 26, 2018 and January 24, 2019 (05A055 Fact Sheet Section 5.1).

#### B. Renewal Application Flow Estimates.

The citizen organizations’ Comments assert that LANL’s estimates of average and maximum flow rates at Outfall 051 “are inaccurate and are misstatements, since discharges from Outfall 051 ended in 2010 (with a single exception, termed an operational readiness discharge).” Comments at 18. As demonstrated by the discussion above, the premise of this assertion – that discharges from Outfall 051 ended in 2010 – is incorrect. The flow-rate estimates are correct; the 2019 NPDES Permit Re-Application provided volumes and frequencies on Form 2C Section II.C that were estimated based upon the total capacity of the two treated effluent tanks (20,000 gallons) at the RLWTF and a proposed operational scenario where one or both of those tanks discharged four days a week and 12 months a year. The proposed discharge volume, therefore, was an estimated average volume of 20,000 gallons/day or an estimated maximum volume of 40,000 gallons/day.

### C. Misplaced Reliance on Documents Associated With Prior Permits.

The citizen organizations' Comments make extensive references to snippets of language from LANL submissions and associated documents dating back decades, and they emphasize the fact that LANL requested that some of its prior submissions be considered part of the 2019 re-application due to the complex nature of the NPDES Permit Re-Application and potential need for supplemental information. Comments at 19. In seeking to ensure that all available data are accessible to EPA, LANL obviously did not intend for the Agency to rely on outdated or inaccurate information where more recent data are available. Information submitted in connection with the 2019 Re-Application supersedes the data provided in previous applications to the extent there is conflict and/or overlap.

EPA Response: Triad's comments are largely in response to comments submitted by other commenters, which EPA has responded to elsewhere in these responses to comments. Triad's comments are noted for the record.

### **Comments from Triad National Security, LLC (Triad) EPC-DO-21-058**

The purpose of this letter is to notify the EPA of the petition and supplemental filing for review of the State 401 Certification of NPDES Permit No. NM0028355 by the U.S. Department of Energy National Nuclear Security Administration (DOE/NNSA) and Triad National Security, LLC (Triad) ("Permittees"). The petition and supplemental challenge Conditions 1 and 2 of the 401 State Certification. The Permittees requested the New Mexico Environment Department to withdraw these conditions on the basis that they are outside the scope of allowable state imposed conditions under the federal Clean Water Act and EPA's regulation of the Section 401 certification process. In addition, for the reasons stated in the Supplement and incorporated herein, the Permittees request that the EPA not include Condition 1 in the final NPDES permit.

1. Condition 1 requires Triad/DOE to (a) "monitor and report [18] PFAS in effluent once during the first year of coverage, or when the facility next discharges if no discharge occurs during the first year;" (b) analyze samples "for all 18 PFAS analytes using EPA Method 537.1 (EPA 2018);" and (c) if PFOA or PFOS "are detected above the New Mexico screening level, additional monitoring and reporting shall occur annually." Condition 1 also recommends that Triad/DOE "take corrective action and identify ways to minimize, reduce, and eliminate PFAS from the industrial activity through product substitution and/or additional best management practices and operational control." As explained below, none of the 18 PFAS analytes are identified as toxic pollutants in the state surface water quality standards and the requirements in Condition 1 are not necessary to ensure compliance with applicable surface water quality standards under the federal Clean Water Act and the New Mexico Water Quality Act, and therefore exceed the limited scope of the New Mexico Environment Department's ("NMED") authority under federal and state law. First, neither the Toxic Release Inventory's ("TRI") list of reportable chemicals or EPA's Toxic Substances and Disease Registry support the imposition of surface water discharge compliance requirements. Second, NMED does not address the applicable technical criteria to support the 401 Certification's requirements for the 18 PFAS analytes to protect surface waters standards.

The process in the WQCC regulations requires NMED to undergo a process to determine whether the 18 PFAS analytes meet the criteria for toxicity for surface water protection. See 20.6.4.7 and 20.6.4.13(f) NMAC. Third, even if PFAS could be regulated as proposed, NMED first must determine the amount of PFAS in surface waters that are toxic, given the location of the discharge and other factors, and then determine whether the discharge of PFAS has a "reasonable potential" to cause or contribute to an exceedance of that amount. Finally, the analytical methods that Condition 1 mandates, Methods 537 and 537.1, are not approved by EPA under 40 CFR Part 136, and therefore, cannot be used for 401 certifications or compliance determination.

2. Condition 2, in part, sets an effluent limit for Polychlorinated Biphenyls ("PCBs") for Outfall 051 and mandates that monitoring and reporting of PCBs from all of the outfalls be performed in accordance with Method 1668C. As explained below, effluent limits for Polychlorinated Biphenyls ("PCBs") for Outfall 051 are not necessary to assure compliance with applicable requirements of federal and state law because (a) EPA did not determine that there is a reasonable potential to exceed applicable water quality standards for PCBs at Outfall 051, and therefore, there is no basis for requiring an effluent limitation for the discharge; and (b) NMED's justification for the condition does not demonstrate that discharges from Outfall 051 have a reasonable potential to cause or contribute to an exceedance of applicable water quality standards. Additionally, the analytical method mandated by Condition 2, Method 1668C, is not approved for PCBs under 40 CFR Part 136, and therefore, cannot be used for 401 certifications or compliance determinations.

EPA Response: The Final Stipulated Orders for the LANL challenges to the LANL industrial outfalls IP (NPDES NM0028355) were signed by all parties on December 30, 2021. A modified Conditions of Certification was received by EPA on January 31, 2022. Conditions of Certifications are added to the final permit in order to comply with 40 CFR § 124.55(a)(2).

### **Comments from Triad National Security, LLC (Triad) EPC-DO-20-075**

The National Pollutant Discharge Elimination System (NPDES) Permit No. NM0028355 for the Nuclear Security Administration (NNSA) and Triad National Security, LLC (Triad) requires the permittee(s) to notify the U. S. Environmental Protection Agency (EPA) of any physical alterations or additions to a permitted facility that could significantly change the nature or increase the quantity of pollutants discharged (see Part III.D.1.a.Report Requirements).

This notice of planned change provides information regarding the following changes at the RLWTF:

1. Updated Table 4 of the Fact Sheet for Outfall 051 with flow rates and volumes based upon actual data from the discharges to Outfall 051 in June 2019, March 2020, and August 2020 previously provided with the Triad comments on October 26, 2020. Attachment 1 provides a red line of the Fact Sheet. This change will not increase the quantity of pollutants in the effluent or the volume discharged to the outfall.

2. Updated Section 5.0 of the Fact Sheet for Outfall 051 to include the analytical data from the discharges to Outfall 051 in June 2019, March 2020, and August 2020 previously provided with the Triad comments on October 26, 2020. Attachment 1 provides a red line of the Fact Sheet. This change will not increase the quantity of pollutants in the effluent or the volume discharged to the outfall.
3. Updated Table 3 of the Fact Sheet for Outfall 051 to add four new chemicals to the treatment process at the RLWTF. The chemicals include sodium bicarbonate, calcium carbonate, magnesium chloride, and calcium chloride will be added each effluent tank prior to its discharge to Outfall 051. The addition of these chemicals will raise the pH, alkalinity, and hardness to improve effluent quality prior to discharge. Attachment 1 provides a red line of the Fact Sheet. Attachment 2 provides Safety Data Sheets (SOS) for each chemical. This change will not increase the quantity of pollutants in effluent or the volume discharged to the outfall.
4. Updated Table 3 of the Fact Sheet for Outfall 051 to add sodium hypochlorite to the treatment process at the RLWTF. Sodium hypochlorite will be used to clean and/or disinfect the reverse osmosis unit(s). Attachment 1 provides a red line of the Fact Sheet. Attachment 2 provides Safety Data Sheets (SOS). This change will not increase the quantity of pollutants in effluent or the volume discharged to the outfall.
5. Piping modification to improve the effluent discharge line to Outfall 051. The modification will remove the flexible hose effluent line that currently connects to the outfall discharge line and replace it with hard pipe routed through an underground trench box to the outfall discharge line. Attachment 3 provides drawings that show the existing flexible hose and the new piping and trench box. This change will not increase the quantity of pollutants in the effluent or the volume discharged to the outfall.

The NNSA/DOE and Triad respectfully submit the contents of this notice of change in accordance with the existing NPDES Permit NM0028355 and request that the information be included in the record in accordance with the provisions identified in the Public Notice: Los Alamos National Laboratory (LANL) Limited Reopening of the Public Comment Period for NPDES Permit No. NM0028355.

EPA Response: Comments noted for the record. EPA has considered these updates and/or modifications while the finalization of this permit.

**Comments Received from Concerned Citizens for Nuclear Safety (CCNS), Honor our Pueblo Existence (HOPE), and New Mexico Acequia Association (NMAA) – February 23, 2021**

The Environmental Protection Agency (“EPA”) public notice reopening the comment period states:

On November 12, 2020, Triad, which is the operator of the LANL facility, and was only privy to the content of public comments after the comment period closed, requested that EPA reopen the comment period to allow submittal of additional information on the Record to address information provided in the comments believed by Triad to be incomplete, misleading, or technical[ly] inaccurate that would help EPA in responding to those comments and make a final permit decision.

CCNS, H.O.P.E. and NMAA note that the “new” information referenced in our October 15, 2020 Comments of Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and New Mexico Acequia Association on Proposed Renewal of NPDES Permit # NM0028355 is not “incomplete, misleading, or technical[ly] inaccurate.” Our new information is based on Department of Energy and Triad National Security, LLC (and its predecessor) documents.

EPA appears to have adopted an approach that authorizes interested parties to address submissions by other such parties. To permit such responses to be submitted equitably, we respectfully request EPA grant the public a three (3) week period of time to respond to the materials to be submitted by Triad. We request that the three (3) week comment period commencing when a public notice is released to the mailing list and when the Triad comments, and all comments submitted by others, are posted to the “Review associated documents” webpage at <https://www.epa.gov/nm/los-alamos-national-laboratory-lanl-limited-reopeningpublic-comment-period-mpdes-permit-no-0>

We note that the current comment period ends on Sunday, February 28, 2021. Generally, when comment periods end on a Sunday, the comments are due the next day, or on Monday, March 1, 2021.

EPA Response: EPA granted CCNS et al. a comment period extension of four weeks instead of the three-week extension requested by the commenters. The comment period was extended from February 28, 2021, until March 29, 2021. EPA confirms that when a comment period ends on a Sunday, EPA accepts the comments on the following business day.

**Comments received by Robert Hake, Innocent Victim of Nuclear Technology:**

Hello Evelyn, thank you for the opportunity to comment on the proposed release of poison from Los Alamos Labs. Please register my objections to any release or discharge of any ionic waste from the Los Alamos Labs for any reason whatsoever.

It would be more appropriate to take that stuff to Washington D.C. and bury it under the White House and the Pentagon. Those monuments are being made into lies by such tactics as the legal ploys being used to get rid of the risk and bad karma it represents. The government and official paid lackeys do not have the right to ruin the lands and lives of citizens of the world, that includes all life. We the People ..... remember that document?



Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA’s ability under the CWA to issue permits to cover potential discharges serves the Act’s goal of protecting the Nation’s waters. “The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated.” *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA’s issuance of permit coverage for these facilities is in accordance with EPA’s statutory authority and the CWA’s stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be “an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future.”

DMRs also show discharges from other the other facilities. The Strategic Computing Complex (SCC) discharges monthly from Outfall 001. Los Alamos Neutron Science Complex (LANSCE) discharges monthly from Outfall 03A048. The National High Magnetic Field Laboratory discharged in May 2018 from Outfall 03A160

The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL’s compliance with RCRA is outside the scope of this NPDES permitting action.

#### **Comments received by Castille Aguilar, YUCCA Leadership:**

My name is Castille Aguilar, and I am a leader from YUCCA (Youth United for Climate Crisis Action); we are a youth led and primarily BIPOC organization that focuses on social and climate justice here in Northern NM. We support the New Mexico Environment Department’s recommendation that all Los Alamos National Laboratory (LANL) discharge sites covered by the permit be sampled for PFASs. We

object to LANL asking the Environmental Protection Agency (EPA) to issue a Clean Water Act permit for industrial facilities that have not discharged wastewater to the environment for years, if not decades.

Clean Water Act permits may be granted only for “the discharge of any pollutant, or combination of pollutants.” Some LANL facilities have no discharge from a “point source,” also known as an outfall. These facilities should no longer be on the permit.

We object to EPA issuing a permit for facilities that handle, treat and store hazardous waste, but do not discharge. Such permitting confers an exemption from more stringent Resource Conservation and Recovery Act (RCRA) hazardous waste laws and regulations. The only reason to issue a Clean Water Act permit is to illegitimately exempt LANL facilities from RCRA.

We object to EPA issuing a permit for those LANL facilities that have not discharged, such as the

- Radioactive Liquid Waste Treatment Facility (RLWTF),
- Strategic Computing Complex;
- Los Alamos Neutron Science Complex, or LANSCE, facility;
- National High Magnetic Field Laboratory; and
- High Explosive Wastewater Treatment Facility.

Please delete from the Clean Water Act permit those facilities that are in the business of handling, treating, and storing hazardous waste, but do not discharge. Open the door to their proper and more stringent regulation under RCRA. We need to make sure that our communities that bare the brunt of environmental racism and toxic dumping are not being further harmed by these issues; we need to stop turning a blind eye when industries and facilities are polluting our air, water, and land.

Thank you for your careful consideration of my comments.

EPA Response: Comment noted on the PFAS monitoring. PFAS monitoring was deleted from the Conditions of Certification when the final stipulated orders were signed by NMED and LANL on December 30, 2021.

Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA’s ability under the CWA to issue permits to cover potential discharges serves the Act’s



goal of protecting the Nation's waters. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA's issuance of permit coverage for these facilities is in accordance with EPA's statutory authority and the CWA's stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be "an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future."

DMRs also show discharges from other the other facilities. The Strategic Computing Complex (SCC) discharges monthly from Outfall 001. Los Alamos Neutron Science Complex (LANSCE) discharges monthly from Outfall 03A048. The National High Magnetic Field Laboratory discharged in May 2018 from Outfall 03A160

The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL's compliance with RCRA is outside the scope of this NPDES permitting action.

#### **Comments received by John E. Wilks, Veterans for Peace:**

This public comment is timely electronically filed prior to the March 3rd deadline to file under the reopened Comment Period. Our organization filed a comment November 1, 2020, prior to the discovery of new information surfaced by the non-governmental entities Honor Our Pueblo Existence and the New Mexico Acequia Association.

The Environmental Committee of Veterans For Peace, Chapter #63 (Albuquerque), urges your office to reject the application for a water discharge permit filed by Triad National Security, LLC, (Triad) on behalf of the Los Alamos National Laboratory (LANL), as five or more entities listed on the application are not eligible permittees.

The application under consideration lists five of six ineligible entities:

- ~ Radioactive Liquid Waste Treatment Facility (RLWTF) aka Outfall 051,
- ~ Strategic Computing Complex,
- ~ Los Alamos Neutron Science Complex, or LANSCE, facility,
- ~ National High Magnetic Field Laboratory, and
- ~ High Explosive Wastewater Treatment Facility.

The Clean Water Act provides for permits to be issued *only* for “the discharge of any pollutant, or combination of pollutants.” The five entities listed above do not discharge, rather they handle, treat, and store hazardous waste. Issuing a permit to these ineligible entities would create an exemption from the more stringent requirements found in the Resource Conservation and Recovery Act (RCRA). By filing the pending application, the applicant is attempting to skirt the DOE’s more stringent regulations concerning hazardous waste.

The Los Alamos National Laboratory is subject to multi-jurisdictional, dual oversight. For matter of wastes generated at the site, the Departments of Interior and Energy have joint responsibility. Also, for non-radioactive wastes, the New Mexico Environmental Department has a licensing role in the oversight at LANL. We believe that Triad hopes to persuade the EPA to provide an expedient avenue for Triad to avoid the more stringent regulations and statutes that address certain radioactive wastes. In our view, Triad is attempting to avoid DOE guidelines and requirements.

We urge your office to reject the permit, require a new permit application to be filed prior LANL’s discharge of any additional waste water, and to investigate and identify the point source of the elevated levels of PFAS recently detected by New Mexico’s Environment Department in the canyons below the Pajarito Plateau.

EPA Response: Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA’s ability under the CWA to issue permits to cover potential discharges serves the Act’s goal of protecting the Nation’s waters. “The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated.” *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA’s issuance of permit coverage for these facilities is in accordance with EPA’s statutory authority and the CWA’s stated goal, even if the potential for

discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be “an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future.”

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The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL’s compliance with RCRA is outside the scope of this NPDES permitting action.

#### **Comments received by Basia Miller, PhD:**

I support the New Mexico Environment Department recommendation that all Los Alamos National Laboratory (LANL) discharge sites covered by the permit are sampled for PFASs and PCBs at the most protective standards possible. This is a responsible and community-respecting position.

However, I object to LANL asking the Environmental Protection Agency (EPA) to issue a Clean Water Act permit for industrial facilities that have not discharged treated wastewater to the environment for years, even decades. Clean Water Act permits may be granted only for “the discharge of any pollutant, or combination of pollutants.” These LANL facilities should no longer be covered by the permit.

Likewise, I object to EPA issuing a permit to LANL for facilities that handle, treat and store hazardous waste, but do not discharge. Such permitting confers an exemption from more protective hazardous waste laws and regulations. The only reason to issue a Clean Water Act permit is to illegitimately exempt LANL facilities from hazardous waste laws and regulations and to deny the public the opportunity for a public hearing for the newly constructed low-level radioactive liquid waste treatment facility.

I object to EPA issuing a permit for those LANL facilities that do not discharge at present, including:

- Radioactive Liquid Waste Treatment Facility (RLWTF),
- Strategic Computing Complex;

- Los Alamos Neutron Science Complex, or LANSCE, facility;
- National High Magnetic Field Laboratory; and
- High Explosive Wastewater Treatment Facility.

Please delete these facilities from the Clean Water Act permit. They are in the business of handling, treating, and storing hazardous waste but do not discharge. Open the door to their proper and more stringent regulation under RCRA and the opportunity for a public hearing about the newly constructed low-level radioactive liquid waste treatment facility.

Thank you for your careful consideration of my comments.

Sincerely, Basia Miller, Ph.D 2848 Vereda de Pueblo, Santa Fe, NM 87507

EPA Response: Comment noted on the PFAS and PCB's monitoring. PFAS monitoring was deleted from the Conditions of Certification when the final stipulated orders were signed by NMED and LANL on December 30, 2021. PCB monitoring and limits are added as specified on Conditions #2 from NMED.

Section 402(a)(1) of the CWA allows EPA to issue "a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA's authority on that basis. Further, EPA's authority to issue permits for potential or future discharges is evident in the structure of the CWA's NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of discharge. EPA's ability under the CWA to issue permits to cover potential discharges serves the Act's goal of protecting the Nation's waters. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA's issuance of permit coverage for these facilities is in accordance with EPA's statutory authority and the CWA's stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be "an integral component of its operations,

rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future.”

DMRs also show discharges from other the other facilities. The Strategic Computing Complex (SCC) discharges monthly from Outfall 001. Los Alamos Neutron Science Complex (LANSCE) discharges monthly from Outfall 03A048. The National High Magnetic Field Laboratory discharged in May 2018 from Outfall 03A160

The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL’s compliance with RCRA is outside the scope of this NPDES permitting action.

### **Comments received by CCNS, HOPE and NMAA (Citizens):**

These supplemental comments on the proposed renewal of National Pollutant Discharge Elimination System (“NPDES”) Permit No. NM0028355 are filed on behalf of Concerned Citizens for Nuclear Safety (“CCNS”), Honor Our Pueblo Existence (“H.O.P.E.”), and the New Mexico Acequia Association (“NMAA”) (collectively, “Citizens”).

1. The Department of Energy (“DOE”) has filed supplemental arguments (Feb. 25, 2021) (“Supp.”) in pursuit of renewal of an NPDES permit for Outfall 2 051 at the Radioactive Liquid Waste Treatment Facility (“RLWTF”). These materials state DOE’s current intentions as to the operation of that facility.
2. As is detailed in Citizens’ Comments (Oct. 15, 2020), DOE adopted a “zero liquid discharge” program at the RLWTF in 1998 and carried out that program by installing mechanical evaporator equipment in about 2010 and constructing solar evaporation “tanks” in 2012. The tanks are still undergoing permitting. Despite the successful program to eliminate discharges, DOE seeks a renewed Clean Water Act, 33 U.S.C. § 1251 et seq. (“CWA”), permit under the NPDES, 33 U.S.C. § 1342.
3. The NPDES statute authorizes EPA to issue a permit for a “discharge,” and DOE is correct that the statutory and regulatory references to discharges are “forward-looking.” (Supp. 3). As to its intentions, DOE has stated that it seeks a permit for the RLWTF’s Outfall 051 for the purpose of discharging if the evaporation equipment is out of service or the quantity of wastewater is such that additional disposal methods, beyond the evaporation units, are required. DOE states:

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.

(Supp. 13. See also Supp. 3, 8; Citizen Comments, ¶¶ 37-41). In its supplemental comments, DOE adds only that it plans to operate Outfall 051 in an “integral” manner (Supp. 13, “integral role,”

18, “integral component”) with the evaporation equipment. DOE does not explain this statement, but it clearly does not amount to a plan or proposal actually to discharge via the outfall in the future. DOE offers no commitment to use the outfall at any particular time or for discharge of any particular amount of wastewater or pollutants.

4. In a Notice of Planned Change (Feb. 25, 2021), filed with the supplemental comments, DOE substitutes new data concerning the volume of possible discharges from Outfall 051 for the “estimates” previously provided. The previous “estimates” expressed only the quantity of discharges that is theoretically possible—not planned or proposed. The latest figures, derived from a discharge made in 2020, do not represent a quantity that DOE plans or proposes to discharge in the future. DOE’s position remains that it wishes to discharge via Outfall 051 only if the evaporation equipment is unavailable or its needs to discharge wastewater change. In proceedings held by the State of New Mexico, testimony from two expert witnesses has established that the occurrence of such circumstances is “highly unlikely.” (Ex. AAA to Citizens’ Comments).
5. The Clean Water Act authorizes EPA only to issue a NPDES permit for a “discharge.” 33 U.S.C. § 1342(a). DOE argues that its stated intention to discharge only if certain conditions occur—i.e., when and if evaporation equipment is unavailable or additional capacity is needed, if ever—is sufficient to support a NPDES permit. DOE also contends that, if it obtains a NPDES permit for Outfall 051, it would then be entitled to the Wastewater treatment unit exemption, 42 U.S.C. § 6903(27); 40 C.F.R. § 260.10 (Tank system, Wastewater treatment unit); § 264.1(g)(6), from hazardous waste regulation under the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 et seq. (“RCRA”), for the entire RLWTF. DOE is in error on both issues.
6. DOE’s argument is presented entirely without reference to the applicable statute and regulations, which control here. Under the CWA, EPA’s only authority to grant a NPDES permit is § 1342, which authorizes EPA to issue a permit only for the “discharge of any pollutant, or combination of pollutants.” 33 U.S.C. § 1342(a). Numerous decisions have established that the statutory element of a “discharge” is clear under *Chevron 1*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), analysis and is not met by anything less. Where there is no discharge, EPA has no authority to issue a permit. Recent cases are *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005), and *National Pork Producers Council v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011). In unambiguous language, *Waterkeeper* states that the CWA requires a discharge to support an NPDES permit:

Congress left little room for doubt about the meaning of the term “discharge of any pollutant.” The Act expressly defines the term to mean “(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. § 1362(12). Thus, in the absence of an actual addition of

any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

Waterkeeper, 399 F.3d at 504-05. The Second Circuit emphasized that its decision was based on Chevron 1 analysis:

For all these reasons, we believe that the Clean Water Act, on its face, prevents the EPA from imposing, upon CAFOs [concentrated animal feeding operations], the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (where Congress has “directly spoken to the precise question at issue” and “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). *Id.* 506 (footnote omitted).

7. DOE asserts that Waterkeeper holds only that EPA may not require an NPDES application from a non-discharging entity. (Supp. 5). However, the decision is emphatic that a person who has only an asserted “potential” to discharge—as DOE claims the RLWTF does—is not subject to the CWA:

The CAFO Rule violates this statutory scheme. It imposes obligations on all CAFOs regardless of whether or not they have, in fact, added any pollutants to the navigable waters, i.e., discharged any pollutants. After all, the Rule demands that every CAFO owner or operator either apply for a permit - and comply with the effluent limitations contained in the permit - or affirmatively demonstrate that no permit is needed because there is "no potential to discharge." See 40 C.F.R. §§ 122.23(d) and (f). In the EPA's view, such demands are appropriate because all CAFOs have the potential to discharge pollutants. See Preamble to the Final Rule at 7202 ("The 'duty to apply' provision is based on the presumption that every CAFO has a potential to discharge."). While we appreciate the policy considerations underlying the EPA's approach in the CAFO Rule, however, we are without authority to permit it because it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only actual discharges - not potential discharges, and certainly not point sources themselves. See *National Resources Defense Council v. EPA*, 273 U.S. App. D.C. 180, 859 F.2d 156, 170 (D.C. Cir. 1988) (noting that "the [Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants"). To the extent that policy considerations do warrant changing the statutory scheme, "such considerations address themselves to Congress, not to the courts." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234, 129 L. Ed.2d 182, 114 S. Ct. 2223 (1994) (citation omitted).

Waterkeeper, 399 F.3d at 505.

8. In *National Pork*, the Fifth Circuit concurred with the Second Circuit's reasoning and decision:

The Second Circuit's decision is clear: without a discharge, the EPA has no authority and there can be no duty to apply for a permit.

\* \* \*

Because the issues presented in *Waterkeeper* are similar to the issues presented here, we find the Second Circuit's analysis to be instructive and persuasive. Accordingly, we decline to uphold the EPA's requirement that CAFOs that propose to discharge apply for an NPDES permit.

*National Pork*, 635 F.3d at 750. In *Waterkeeper* and *National Pork* EPA did not seek certiorari to challenge the court of appeals rulings and instead withdrew the contested regulations. EPA, Revised Regulation in Response to *Waterkeeper* Decision, 71 Fed. Reg. 37744 (June 30, 2006); EPA, Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44494 (July 30, 2012). EPA stated publicly that a non-discharging facility is outside its regulatory reach:

The EPA accepts 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, 4496.

9. DOE contends that *Waterkeeper* and *National Pork* “had nothing to do with EPA’s authority to issue CWA permits, but focused instead on EPA’s lack of authority to require persons to apply for permits in the absence of actual pollutant discharges—as if the questions were unrelated. Obviously, they are not unrelated, as those cases expressly state. Both decisions hold that EPA cannot lawfully issue a CWA permit for a so-called “potential” discharge, and therefore EPA cannot demand a permit application for a “potential” discharge.
10. These court of appeals decisions follow the *Chevron 1* principle that, if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Chevron*, 467 U.S. at 843 n.9. See also *INS v. Cardoza- Fonseca*, 480 U.S. 421, 447 (1987).
11. The Supreme Court has elaborated concerning the clear language of 33 U.S.C. § 1342(a):

The triggering statutory term here is not the word ‘discharge’ alone, but ‘discharge of a pollutant,’ a phrase made narrower by its specific definition requiring an ‘addition’ of a pollutant to the water. § 1362(12).



*S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 381- 82 (2006).

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982), accordingly holds that to require NPDES permits, five elements must be present (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.

*National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (D.C. Cir. 1988), restates the same principles. *Id.* at 583. As the Tenth Circuit has stated:

The CWA sets forth guidelines for the NPDES permits for the discharge of pollutants in Section 402, 33 U.S.C. § 1342. To establish a violation of these sections, a plaintiff must prove that the defendant (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit.

*Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1141-1142 (10th Cir. 2005). Further, *In re Lowell Vos*, 2009 EPA ALJ Lexis 8 (2009), states that “EPA agrees that it cannot require one to obtain an NPDES permit on the basis of a mere potential to discharge.” *Id.* at \*63.

12. In addition, the CWA requires permits issued by EPA<sup>1</sup> to be subject to these terms:

(1) To issue permits which--

\*           \*           \*

(C) can be terminated or modified for cause including, but not limited to, the following:

\*           \*           \*

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge . . .

33 U.S.C. § 1342(b)(1). Thus, under the CWA, in the event that there is no discharge, the permit is subject to termination.

13. Regulatory exclusions from the requirement of a permit for a discharge cannot stand. See, e.g., *National Cotton Council v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009) (regulatory exclusion for pesticides applied in accordance with Federal Insecticide, Fungicide, and Rodenticide Act held in conflict with CWA); *Northwest Environmental Advocates v. U.S. EPA*, 537 F.3d 1006 (9th Cir. 2008) (exclusion for ship discharges held in conflict with CWA); *Northern Plains Research Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003) (exemption for disposal of produced water held preempted by CWA); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2001) (EPA lacks authority to exempt point source from permit requirement); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (exclusions for silvicultural, various animal feeding operations, and other operations held unauthorized).

<sup>1</sup>The quoted language refers to authorized state programs. Under § 1342(a)(3), EPA’s federal program must contain the same requirements.

14. The reviewing court in each case held the CWA unambiguous and, therefore, its analysis invoked Chevron 1: “The Clean Water Act is not ambiguous. Further, it is a fundamental precept of this Court that we interpret unambiguous expressions of Congressional will as written.” *National Cotton Council*, 553 F.3d at 929. “The text of the statute clearly covers the discharge at issue here.” *Northwest Environmental Advocates*, 553 F.3d at 1021. “The reasons for our conclusion are apparent from the statute’s terms.” *Northern Plains Research Council*, 325 F.3d at 1160. “The Forest Service’s argument fails because the statute is clear and unambiguous.” *League of Wilderness Defenders*, 309 F.3d at 1185. “The wording of the statute, legislative history, and precedents are clear. . . . We find a plain Congressional intent to require permits in any situation of pollution from point sources.” *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d at 1377, 1383.
15. If the CWA had left any room for doubt, Chevron 2 analysis shows that DOE’s argument is not a “permissible” reading of the statute. Where statutory language is ambiguous, the Court may “turn to the relevant regulatory definition in understanding the statutory meaning of [the] term.” *Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201, 1209 (10th Cir. 2015). In *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), the court pointed out that the responsible agency’s regulations offer important guidance as to the meaning of ambiguous terms, and, if reasonable, may be considered controlling:
- [C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principles of deference to administrative interpretations . . . consistently followed . . . whenever decision as to the meaning or reach of a statute [] involves reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation [] depends upon more than ordinary knowledge respecting the matters subjected to agency regulations.
- Seneca-Cayuga Tribe*, 327 F.3d at 1036. Thus, deference to an agency’s regulations rests upon “the notion that the ‘rule-making process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny.’” *Id.* at 1036. Finding the regulation a reasonable construction, the Court stated that “we therefore accord it ‘controlling weight’.” *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 718-19 (quoting *Chevron*, 467 U.S. at 842-44); see also *Seneca-Cayuga Tribe*, *supra*, at 1040, 1043.
16. Here, EPA’s regulations offer a clarifying construction. EPA is authorized to “prescribe such regulations as are necessary to carry out the functions under this Act.” 33 U.S.C. § 1361(a). Under 40 C.F.R. § 122.21, a person who “discharges or proposes to discharge” a pollutant has a “duty to apply”—thus, a statutory requirement—to obtain an NPDES permit. To “propose” is to purpose, plan or intend. *Webster’s New World Dictionary*, 2d ed. Other regulatory language makes plain that a proposed discharge is one that is actually planned and thereafter carried out.

See 40 C.F.R. § 122.21(c). Thus, one who proposes to discharge actually intends to do so; the proposal is not a hypothetical prospect, nor speculation about the possibility of a future discharge in prospective conditions; such would fall outside “the bounds of reasonable interpretation,” *Arlington v. FCC*, 569 U.S. 290, 296 (2013), because it would reduce what Congress enacted as a clear limit upon permit issuance to an unverifiable and meaningless product of the imagination.

17. For such reasons the additional five outfalls that DOE seeks to include in a CWA permit, but which do not currently discharge nor propose to discharge, cannot lawfully be permitted under 33 U.S.C. § 1342. The CWA does not regulate an outfall that serves only as a backup or potential discharge point, for use if certain conditions are met. The CWA regulates only an outfall that actually discharges or proposes to discharge.<sup>2</sup>

<sup>2</sup>Thus, the listed discharge points do not come within 33 U.S.C. § 1342(a)(1) or 40 C.F.R. § 122.21(a)(1):

1. Outfall 13S: The supplemental comments state that this outfall “is fully capable of receiving SWWS (Sanitary Wastewater Treatment System) treated effluent based upon demand, volume, and availability of equipment to pump, store, discharge, and/or treat using facilities and equipment located at an elevation that is much higher than SWWS.” (Supp. 19 – 20). However, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall. The October 28, 2020 DOE submittal to EPA, titled “NPDES Permit No. NM0028355 Monthly Discharge Monitoring Reports (DMRs) for September 2020, Quarterly DMRs for July 2020 – September 2020, Yearly DMRs for October 2019 – September 2020, and Term DMRs for October 2014 – September 2020,” states “No Discharge October 2014 – September 2020,” “No discharge to Cañada del Buey,” and “No Discharge to Outfall During Monitoring Period.” EPC-DO: 20-346, LA-UR 20-28634.
2. Outfall 03A027: This outfall is said to be “capable of receiving SCC Cooling Tower blowdown discharges.” (Supp. 20). Again, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall. DOE also reported [No Data Indicator Code] NODI=C, meaning there was no discharge from the outfall. The monthly and quarterly DMRs report “The Outfall Pipe capped on 9/9/2016. No Discharge During Monitoring Period.” The yearly DMR states, “No Discharge to Outfall 027 this monitoring period.” *Id.*
3. Outfall 03A113: The supplemental comments state that the outfall discharged certain amounts in 2017 through 2020, but adds: “Cooling Tower TA-53-293 is in operational standby and is no longer discharging to the outfall, but the permit application proposes this as a future discharge source to the outfall.” (Supp. 21 – 22). Once again, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall.
4. Outfall 03A160: The supplemental comments state: “The 2019 NPDES Permit Re-Application proposed discharges to that outfall based upon historical data and the use of the outfall as an operational backup.” (Supp. 22). Thus, no discharge is claimed to be ongoing or proposed. 40

C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall. DOE reported, “No Discharge During Monitoring Period,” on the monthly, quarterly and yearly DMRs. Id.

5. Outfall 05A055: DOE states in its supplemental comments: “The outfall provides operational flexibility for maintenance, repair, and replacement of equipment (i.e., evaporator), and serves as a critical backup should LANL be unable to evaporate effluent.” (Supp. 23). Thus, no discharge is claimed to be ongoing or proposed. 40 C.F.R. § 122.21(a). There is no legal basis for a permit for this outfall. DOE reported, “No Discharge During Monitoring Period,” on the monthly, quarterly and yearly DMRs. Id.

18. DOE also urges that the statutory limits enforced in *Waterkeeper* and *National Pork* must be ignored if the permit applicant requested the permit. (Supp. 5). DOE contends that *Waterkeeper* and *National Pork* say nothing about issuance of a NPDES permit to a person who “voluntarily” requests one. (Supp. 5 – 6). That issue was not presented in those cases, because there a NPDES permit was not desired for its exemptive powers; here, it is.

19. But the CWA does not authorize a permit that is “requested” as distinguished from a permit for a “discharge.” The statutory limitation to a discharge is a jurisdictional requirement. *Waterkeeper*, 399 F.3d at 505. If DOE’s theory is correct—that EPA may issue a NPDES permit to an entity that does not discharge nor propose to discharge, so long as the person requests a permit—then there would be no limitation on EPA’s power to issue a permit. (Supp. 5-6). Such a situation would violate the principle that Congress may not delegate legislative authority:

[I]n *Mistretta v. United States*, 488 U.S. 361 (1989), we revisited the nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could “ascertain whether the will of Congress has been obeyed,” no delegation of legislative authority trenching on the principle of separation of powers has occurred. Id., at 379, quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944). See *American Power & Light Co. v. SEC*, supra, at 105 (It is “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations”).

*Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-19 (1989). Here, Congress delegated to EPA the authority to issue a permit only for a “discharge,” not for a possible future discharge that is not planned or expected but only imagined, and certainly not for a person who simply requests a permit for its own convenience. If Congress had authorized EPA to issue a permit on request, a serious question of unconstitutional delegation of authority without standards or policy direction would be presented.

20. Moreover, the concept of a “voluntary” request for a permit cannot stand scrutiny. All permits are requested “voluntarily” in response to an applicant’s needs and the prevailing legal provisions. To seek indicia of “voluntariness” in order to uphold an unauthorized permit is a

fool's errand and would only encourage the fabrication of permitting history. Once the NPDES permit process begins, the regulatory structure is entirely mandatory. See, e.g., 40 C.F.R. § 122.21(f), (g). The idea that EPA can disregard the statutory limits when an entity "requests" a sought-after permit not only would nullify the CWA's jurisdictional limits but also would introduce profound mischief, e.g., by authorizing EPA to hand out unnecessary CWA permits to non-discharging entities, which permits would carry an exemption from hazardous waste regulation. This malign concept has no source in the law Congress enacted.

21. DOE asserts that the possible need for an immediate discharge supports issuance of a permit "just in case" of an emergency. (Supp. 4). This argument simply ignores the statutory limitation that requires a "discharge." Moreover, here such a need is imaginary. When the RLWTF was reconstructed for zero-liquid-discharge, indoor storage tanks sufficient to hold 300,000 gallons of effluent were installed. RLWTF Closure Plan, DP-1132 (July 2016) at 15 (AR0001597) and Appendix A, Table 7 at 50 (AR0001632). Even if both evaporation systems were somehow inoperative, the RLWTF has storage capacity in the solar evaporation tanks sufficient to hold more than seven months of output. Petition to EAB, Ex. 1 (AR0000198) (solar evaporation tank capacity is 754,036 gallons); see also Petition to EAB, Ex. 2 (AR0000204) (in 2009 RLWTF discharged 4,401,900 liters or 1,162,859 gallons). Talk of an emergency that compels a sudden discharge is simply a fantasy.
22. Moreover, EPA in construing the CWA must consider the impact of its permitting action upon RCRA coverage. DOE argues (Supp. 16) that a CWA permit for Outfall 051 will confer upon the RLWTF an exemption from RCRA regulation under the Wastewater treatment unit exemption. Such is DOE's evident motive in seeking a permit; thus, DOE seeks to set up a conflict between CWA and RCRA regulation. But EPA is charged with application of both CWA and RCRA. 33 U.S.C. § 1251(d); 42 U.S.C. § 6921. EPA has no authority to "pick and choose" the federal law that it will apply and, instead, must seek to give effect to both. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). EPA must consider the impact of a CWA permit on RCRA enforcement. DOE asks EPA to adopt an incorrect construction of the CWA requirement of a "discharge" that renders both statutes ineffective: The CWA permit would regulate nothing, because there is no discharge, but, by DOE's reading, it would block the RCRA process, thwarting RCRA's preventive purposes. To the contrary, where the CWA has no role to play, EPA should not uselessly expand the supposed jurisdiction of the CWA to bar RCRA from protecting human health and the environment.
23. Citizens do not agree that the Wastewater treatment unit exemption properly should apply to the RLWTF, as DOE contends (Supp. 16), even if a CWA permit were issued for Outfall 051. At present, substantially all of the wastewater from the RLWTF is disposed of by evaporation. The evaporation equipment— both the existing mechanical evaporator and the constructed, but not yet operational, solar evaporation tanks—is entirely unregulated, and it would not be regulated in the renewal permit. In contrast, under RCRA, all such equipment would be regulated under a

permit. Moreover, contrary to DOE's argument, EPA has issued its opinion letter, discussed below, stating that a facility like the RLWTF is not an exempt Wastewater treatment unit.

24. Specifically, a "Wastewater treatment unit" is defined in 40 C.F.R. § 260.10:

Wastewater treatment unit means a device which:

- (1) Is part of a wastewater treatment facility that is subject to regulation under either section 402 or 307(b) of the Clean Water Act; and
- (2) Receives and treats or stores an influent wastewater that is a hazardous waste as defined in § 261.3 of this chapter, . . . and
- (3) Meets the definition of tank or tank system in § 260.10 of this chapter.

EPA explained in issuing the rule in 1988 that the exemption applies to a tank system that is part of a facility that is subject to CWA Section 302 regulation, but does not apply when the tank system is also used for a different purpose:

[A]ny hazardous waste tank system that is used to store or treat the wastewater that is managed at an on-site wastewater treatment facility with a National Pollution Discharge Elimination System (NPDES) permit . . . is exempt from the RCRA regulations.

\* \* \*

EPA intends that this exemption apply to any tank system that manages hazardous wastewater and is dedicated for use with an on-site wastewater treatment facility. However, if a tank system, in addition to being used in conjunction with an on-site wastewater treatment facility, is used on a routine or occasional basis to store or treat a hazardous wastewater prior to shipment off-site for treatment, storage, or disposal, it is not covered by this exemption.

53 Fed. Reg. 34079, 34080 (Sept. 2, 1988).

25. In 1998, EPA issued an Agency opinion letter concerning a tank system that was used for wastewater treatment in certain months, and used for other purposes for the remainder of the year—just as the RLWTF is used to dispose of wastewater by evaporation, in addition to potentially using the CWA-permitted outfall. EPA stated that the Wastewater treatment unit exemption does not apply to such a tank system:

You ask what EPA meant by the language "dedicated" [for use with an on-site wastewater treatment facility] and offer two possible interpretations. One interpretation, you suggest, is that the WWTU must be dedicated solely for wastewater treatment at all times. A second interpretation, you suggest, is an "alternating use" scenario in which a WWTU may operate as a WWTU for a portion of the year, dedicated for wastewater treatment for that period of time in use, and then operate as an accumulation tank for a different part of the year. The Agency confirms the first interpretation, described above. That is, in order to satisfy the WWTU exemption, a tank must be dedicated solely for on-site wastewater treatment at all times and for no other purpose. EPA believes that the preamble language is clear on this

point. EPA did not intend the WWTU exemption to apply in situations involving “dual use” of a tank (when a tank is concurrently used for wastewater treatment and for another purpose). Nor did EPA intend for the exemption to apply in situations, such as the one your letter describes, involving “alternating use” of the tank.

Letter, E.A. Cosworth, OSW, to Susan Pendleton, ERM New England, Inc., RO 14262.

Reflecting this interpretation, section 4.6 of the current Hazardous Waste Act (“HWA”) permit for LANL states that the Wastewater treatment unit exemption shall apply to the RLWTF only if all wastewater is discharged through the NPDES-regulated Outfall 051 or as authorized by that NPDES permit:

The Permittees shall discharge all treated wastewater from the TA-50 Radioactive Liquid Waste Treatment Facility (RLWTF) through the outfall permitted under Section 402 of the federal Clean Water Act, or as otherwise authorized by the terms of an applicable Clean Water Act permit that regulates the treatment and use of wastewater. If the Permittees intentionally discharge through a location other than the permitted outfall or as otherwise authorized, they will fail to comply with this requirement, and as a consequence the wastewater treatment unit exemption under 40 CFR § 264.1(g)(6) will no longer apply to the RLWTF. <https://www.env.nm.gov/hazardous-waste/lanl-permit/>

Since most of the RLWTF’s wastewater is disposed of not through Outfall 051 nor pursuant to the NPDES permit, but by evaporation, the exemption does not apply.

26. DOE tells the Agency that the RLWTF is entitled to the Wastewater treatment unit exemption based upon a 1992 EPA opinion letter by S.K Lowrance to T.W. Cervino. (Supp. 15-16). The letter claims exemption of “facilities which are permitted, were ever permitted, or should have been permitted under NPDES,” and DOE asserts that such wording means that the RLWTF, which now has a NPDES permit for Outfall 051, is entitled to an exemption, because it was permitted—i.e., “ever.” So stating, DOE seeks to stretch the Agency’s statements to meet the RLWTF. Certainly, the RLWTF has historically been permitted. But neither the CWA nor its regulations authorize a perpetual permit. In 1998 LANL adopted the “zero-liquid-discharge” program, and the facility was changed and rebuilt; evaporation equipment was installed, and discharges effectively stopped. The fact that a facility was once permitted under the NPDES but was then changed to eliminate discharges, and so is not the same facility, does not support a new NPDES permit.
27. DOE elaborates upon its theory that EPA’s stormwater regulation program somehow proves that EPA may issue a NPDES permit for a non-discharging facility. DOE states that the stormwater program regulates “episodic” discharges. (Supp. 8 – 9). “Episodic” discharges occur at intervals, and the intervals may be unpredictable. But the point is: there will be actual stormwater discharges in the future, because there will be precipitation, although the weather dictates the timing. The stormwater program addresses the discharges attributable to such precipitation,

which are significant. EPA in 1990 offered an assessment of the nature of the stormwater problem:

The Assessment concluded that pollution from diffuse sources, such as runoff from agricultural, urban areas, construction sites, land disposal and resource extraction, is cited by the States as the leading cause of water quality impairment. These sources appear to be increasingly important contributors of use impairment as discharges of industrial process wastewaters and municipal sewage plants come under increased control and as intensified data collection efforts provide additional information.

EPA, NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, Background and Water Quality Concerns (Nov. 16, 1990). The stormwater program clearly deals with massive discharges of contaminated waters. A very different question is presented by the current permit proposal: Whether a permit may issue where there is no discharge and no plan to discharge at all. The stormwater program offers no guidance on that question.

## CONCLUSION

It is not for EPA to break through the jurisdictional limits of the CWA to issue a permit that blocks the application of federal hazardous waste laws to a facility that admittedly treats and stores hazardous waste, and is required under RCRA to adhere to stringent regulations in the handling of such dangerous substances. The CWA permit for outfalls that have no plan to discharge has no legal basis and should be denied.

Respectfully submitted,

EPA Response: This comment is largely in response to comments submitted by other commenters, which EPA has responded to elsewhere in these responses to comments.

EPA considered communities that may be affected by this discharge during the public notice period. For example, EPA: offered Tribal Consultation to Tribes adjacent to LANL, extended the comment period for one year, translated Public Notice document to Spanish and offered a Public Meeting and Hearing to the community.

Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must issue permits for discharges that are not yet actual. In addition, the CWA imposes stiff penalties for discharging without a permit. See CWA § 309, 33 U.S.C. § 1319. This encourages facilities to obtain permits even if there is only a remote chance of



discharge. EPA's ability under the CWA to issue permits to cover potential discharges serves the Act's goal of protecting the Nation's waters. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

LANL sought permit coverage for the five facilities referenced in this comment because the facilities have discharged or have the potential to discharge. EPA's issuance of permit coverage for these facilities is in accordance with EPA's statutory authority and the CWA's stated goal, even if the potential for discharge from these facilities is remote/and or the discharge may be infrequent and/or irregular.

In Discharge Monitoring Reports (DMRs), LANL reported to EPA that there have been recent discharges from several of these facilities. On June 18, 2019, LANL discharged wastewater from the Radioactive Liquid Waste Treatment Facility (RLWTF) through Outfall 051. LANL informed EPA that it did so because its solar evaporators were unavailable. LANL discharged from Outfall 051 on March 18, 2020, and informed EPA that it did so due to influent volumes. LANL again discharged from Outfall 051 on August 18, 2020, and informed EPA that it did so because the mechanical evaporator was down for maintenance. In public comments on this permit modification, captured below, LANL notes a change to facility operations such that Outfall 051 will be "an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future."

DMRs also show discharges from other the other facilities. The Strategic Computing Complex (SCC) discharges monthly from Outfall 001. Los Alamos Neutron Science Complex (LANSCE) discharges monthly from Outfall 03A048. The National High Magnetic Field Laboratory discharged in May 2018 from Outfall 03A160

EPA's authority to issue NPDES permit authorization at the request of an applicant for a potential future discharge is not precluded under federal court holdings in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5<sup>th</sup> Cir. 2011) ("*National Pork Producers*") and *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) ("*Waterkeeper*"). 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 486. Likewise, in *National Pork Producers*, the Fifth Circuit found that EPA could not mandate permit applications in cases where there was no actual discharge. The agency could require discharging CAFOs to obtain NPDES permits. *National Pork Producers* at 755-756.

Both *National Pork Producers* and *Waterkeeper* place the burden on the CAFO owner and/or operator to determine whether to seek permit authorization or to risk liability in case of a discharge. Neither case addresses EPA's authority to issue a permit to a facility operator voluntarily *requesting* authorization for a recognized possible or potential discharge. If a facility voluntarily seeks permit authorization for a possible or potential discharge of pollutants, CWA section 402(a) provides authority for EPA to issue a permit authorizing that possible or potential future discharge. In this instance, the permittees specifically sought permit authorization for discharges that may occur, albeit infrequently or irregularly.

The 2003 CAFO rule required all CAFOs to apply for a permit unless they had received a determination by the permitting agency that the facility had "no potential to discharge." This "duty to apply" provision was based on the presumption that every CAFO has a potential to discharge and therefore must seek coverage under an NPDES permit. 68 FR 7176 at 7202 (February 12, 2003).

The Commentor also expressed concern that LANL is attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage for these five (5) facilities. LANL's compliance with RCRA is outside the scope of this NPDES permitting action. The commenter cites EPA guidance, RO 14262, which addresses the availability of the wastewater treatment exemption at 40 CFR 264.1(g)(6) for "dual use" tanks. EPA has received no information indicating any "dual use" tank (meaning a tank used for both treatment and some other purpose such as accumulation) discharges to Outfall 051.

## **Comments Received on Discharge Data for Outfalls 051, 13S, 05A055, 03A160, 03A027, and 03A113 from 2021-2022 Publicly Noticed on February 25, 2023**

### **Introduction**

On May 9, 2022, Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace (“Petitioners”) filed a petition for review with the Environmental Appeals Board (“Board”) challenging a National Pollutant Discharge Elimination System (“NPDES”) permit decision by the U.S. Environmental Protection Agency Region 6 (“Region”). The Region issued the NPDES permit to the U.S. Department of Energy, National Nuclear Security Administration and Triad National Security L.L.C (“Permittees”) in March 2022 pursuant to the Clean Water Act (“CWA”). The 2022 Permit authorizes certain discharges from the Los Alamos National Laboratory (“LANL”), including discharges of treated wastewater from the Radioactive Liquid Waste Treatment Facility through what is referred to as Outfall 051.

Petitioners challenged the Region’s permitting decision as to six of the permitted outfalls, including Outfall 051, arguing, among other things, that the Region lacks authority under the CWA to issue permits for discharges that have not occurred or are not certain to occur in the future.

On December 28, 2022, the Board remanded the 2022 Permit to the Region, finding that EPA first revealed in a footnote in its Response Brief that it relied on Outfall 051 discharge data from 2021 and that neither Petitioners nor the public had an adequate opportunity to comment on that data during the permitting process or to address that data in a petition for review before the Board. In addition, the Board viewed the Region’s mention of the 2021 Outfall 051 data for the first time in its Response Brief as part of the Region’s “shifting articulation of the rationale for the permitting decision with respect to Outfall 051.” Remand Order, pg. 17. The Board stated that “[t]he nature and import of the 2021 discharge data, upon which the Region states in its Response Brief it relied, is not clear and is now in dispute.” Remand Order, p. 16.

The Board explained:

“It is not entirely clear what the Region means when it says the 2021 discharge data is ‘confirmatory.’ We are not sure if the Region means that the 2021 discharge data is ‘confirmatory’ of Outfall 051 being used as a backup, when there were three discharges over about a decade that are discussed in the Response to Comments document. Or it could be that the Region means that the 2021 discharge data is confirmatory of “the change to facility operations such that Outfall 051 will be an integral component of its operations, rather than solely as a backup, and discharges from the outfall are expected to be more routine and frequent in the future. The parties’ characterization of the data underscores the lack of clarity of the 2021 discharge data’s import. As to the earlier 2019 and 2020 discharges discussed in the Response to Comments document, even the Permittees admit that these discharges were examples of Outfall 051 being used as a ‘back-up or supplemental alternative when circumstances require.’ Yet the Region now characterizes the 2021 discharge data as a product of Outfall 051 ‘actively discharging,’

suggesting that the data is different in character than the three isolated discharges in 2019 and 2020 when Outfall 051 was being used as a backup.” Remand Order, pp. 19-20.

The Board remanded the Permit to the Region to provide the public with an opportunity to comment on the Outfall 051 2021 discharge data, to consider any comments received, and to revise its Response to Comments document and take further action, as appropriate, in reissuing its permit decision.

In response to the Board’s Remand Order, on February 25, 2023, the Region provided public notice and opportunity to comment on the 2021 Outfall 051 data. In addition, to provide the public with an opportunity to review and comment on any additional discharge data that the Region might rely on in reissuing the Permit in response to the Remand, the Region provided public notice and opportunity for comment on 2022 Outfall 051 discharge data, as well as 2021-2022 discharge data for the additional five Outfalls that were the subject of the Petitioners’ petition for review of the 2022 Permit, i.e., Outfalls 13S, 05A055, 03A160, 03A027, and 03A113. The 30-day public comment period was set to run from February 25, 2023, until March 27, 2023. On March 7, 2023, the Region re-published some of the data because of a duplication error and extended the comment period until April 7, 2023. The Region received comments from the Permittees and, collectively, Concerned Citizens for Nuclear Safety, Honor our Pueblo Existence and Veterans for Peace Chapter 63. The Region’s responses to the comments received are set out below and are included as a supplement to the Region’s March 24, 2022, Response to Comments document for reissuance of this Permit in accordance with the Remand Order.

## COMMENTS FROM LANL & TRIAD (PERMITTEES)

Received April 5, 2023

### 1. There Are Anomalies in the Discharge Data EPA Provided in its Public Notice

Region 6 included in its Public Notice summary Discharge Monitoring Reports (DMR) data for each of the six outfalls for which the Laboratory seeks Permit reissuance and which are subject to Petitioner’s challenge at the Environmental Appeals Board (EAB). The published DMR data contains anomalies, as enumerated in Table 1, by outfall, which should be corrected in the record. Additionally, Permittees have attached herein, as **Attachment A**, a copy of the corrected DMR summary sheets that Region 6 provided with its Public Notice. Corrections appear in red font.

**Table 1: Anomalies between the EPA DMR Data Reports and DMRs submitted to EPA by Permittees**

No.	Document:	Page:	Comment:
1	DMR Data for Outfall 13S	NA	No comments.
2	DMR Data for Outfall 03A027	NA	No comments.
3	DMR Data for Outfall 03A160	NA	No comments.
4	DMR Data for Outfall 05A055	NA	No comments.

No.	Document:	Page:	Comment:
5	DMR Data for Outfall 03A113	Page 3 of 5	pH Data for November 2021: The minimum pH provided in the report does not match the value submitted in the hard copy DMR. It should be "7.1".
6	DMR Data for Outfall 03A113	Page 3 of 5	pH Data for December 2021: The minimum pH provided in the report does not match the value submitted in the hard copy DMR. It should be "6.7".
7	DMR Data for Outfall 03A113	Page 3 of 5	Flow Data for March 2022: The Daily Maximum provided in the report does not match the value submitted in the hard copy DMR. It should be "0.016080".
8	DMR Data for Outfall 051	Page 6 of 12	TSS Data for May 2021: The Monthly Average provided in the report does not match the value submitted in the hard copy DMR. It should be "< 0.57."
9	DMR Data for Outfall 051	Page 7 of 12	Chromium Data for August 2021: The Monthly Average provided in the report does not match the value submitted in the hard copy DMR. It should be "< 0.003."
10	DMR Data for Outfall 051	Page 8 of 12	Copper Data for August 2021: The Daily Max provided in the report does not match the value submitted in the hard copy DMR. It should be "0.00069."
11	DMR Data for Outfall 051	Page 8 of 12	Copper Data for September: The monthly Average and Daily Max values provided in the report do not match the values submitted in the hard copy DMR. The DMR did not include the "<" symbols.
12	DMR Data for Outfall 051	Page 8 of 12	Copper Data for March 2022: The Monthly Average provided in the report does not match the value submitted in the hard copy DMR. The DMR did not include the "<" symbol.
13	DMR Data for Outfall 051	Page 9 of 12	Lead Data for May 2021: The Monthly Average and Daily Max provided in the report do not match the values submitted in the hard copy DMR. The values should both be "< 0.0005."
14	DMR Data for Outfall 051	Page 9 of 12	Zinc Data for January 2022: The Daily Max provided in the report does not match the value submitted in the hard copy DMR. The value should be "< 0.0033."
15	DMR Data for Outfall 051	Page 9 of 12	Zinc Data for July 2022: The Monthly Average and Daily Max provided do not match the values submitted in the hard copy DMR. The values should be "< 0.00775" and "0.0122" respectively.
16	DMR Data for Outfall 051	Page 10 of 12	Radium 226/228 Data for August 2021: The Monthly Average and Daily Max provided in the report do not match the values submitted in the hard copy DMR. The values should be "0.571" and "0.982" respectively.

No.	Document:	Page:	Comment:
17	DMR Data for Outfall 051	Page 10 of 12	Flow Data for August 2021: The Monthly Average and Daily Max provided in the report do not match the values submitted in the hard copy DMR. The values should be “0.014519” and “0.017388”

### EPA RESPONSE TO COMMENT #1:

The EPA has verified the paper DMRs submitted by the Permittees for years 2021-2022 and noted some typographical errors made by EPA staff when transcribing results into the Integrated Compliance Information System (“ICIS”). All typographical errors were corrected on or about April 12, 2023, to reflect the correct results in the ICIS system. The EPA found all of the transcription errors to be minor in nature and none of them affected the Permittees’ compliance status in ICIS. Important to note that all the parameters on which typographical errors were found had limits and both the incorrect and the corrected ICIS results show the Permittees to be in full compliance with the Permit.

Further, the errors had no effect on EPA’s permitting decision. As further explained in responses below, in proceedings before the Board on the Petition for Review, the EPA considered the import of the 2021 DMR data from Outfall 051 to be the fact that it evidences actual discharges from an Outfall that Petitioners argued EPA has no authority to permit because the Outfall does not discharge. The import of the data for EPA was not related to the particulars, e.g., the amounts, of the pollutants discharged. Likewise, the import to the EPA of the additional 2022 data for Outfall 051 and for the 2021-2022 data for the other five outfalls, is that it is evidence of actual discharges from at least some of these Outfalls. Though a showing of actual discharges is not required for issuance of permit authorization, the history of actual discharges from Outfall 051 is directly responsive to public comments made during the previous comment periods. To the extent the data was considered by the EPA in determining appropriate permit limitations or requirements for these outfalls, the transcription errors were too minor to make a difference. For these reasons, the typographical errors raise no new questions concerning the permit. See 40 CFR 124.14.

Please find below the EPA’s response for each “anomaly” noted by the Permittees’.

**Table 1: EPA Response for each Comment**

No.	Document:	Page:	Permittees Comment:	EPA Response:
1	DMR Data for Outfall 13S	NA	No comments.	Noted for the Record.
2	DMR Data for Outfall 03A027	NA	No comments.	Noted for the Record.
3	DMR Data for Outfall 03A160	NA	No comments.	Noted for the Record.
4	DMR Data for Outfall 05A055	NA	No comments.	Noted for the Record.
5	DMR Data for Outfall 03A113	Page 3 of 5	pH Data for November 2021: The minimum pH provided in the report does not match the value submitted in the hard copy DMR. It should be “7.1”.	Typographical Error. A value of 7.4 was entered but the correct value is 7.1 s.u. Correction was made in ICIS.

No.	Document:	Page:	Permittees Comment:	EPA Response:
6	DMR Data for Outfall 03A113	Page 3 of 5	pH Data for December 2021: The minimum pH provided in the report does not match the value submitted in the hard copy DMR. It should be "6.7".	Typographical Error. A value of 8.7 was entered but the correct value is 6.7 s.u. Correction was made in ICIS.
7	DMR Data for Outfall 03A113	Page 3 of 5	Flow Data for March 2022: The Daily Maximum provided in the report does not match the value submitted in the hard copy DMR. It should be "0.016080".	Typographical Error. A value of 0.016088 was entered but the correct value is 0.016080 MGD. Correction was made in ICIS.
8	DMR Data for Outfall 051	Page 6 of 12	TSS Data for May 2021: The Monthly Average provided in the report does not match the value submitted in the hard copy DMR. It should be "< 0.57."	Typographical Error. A value of 0.57 was entered but the correct value is <0.57 mg/L. Correction was made in ICIS.
9	DMR Data for Outfall 051	Page 7 of 12	Chromium Data for August 2021: The Monthly Average provided in the report does not match the value submitted in the hard copy DMR. It should be "< 0.003."	Typographical Error. A value of <0.036 was entered but the correct value is <0.003 mg/L. Correction was made in ICIS.
10	DMR Data for Outfall 051	Page 8 of 12	Copper Data for August 2021: The Daily Max provided in the report does not match the value submitted in the hard copy DMR. It should be "0.00069."	Typographical Error. A value of 0.00089 was entered but the correct value is 0.00069 ug/L. Correction was made in ICIS.
11	DMR Data for Outfall 051	Page 8 of 12	Copper Data for September: The monthly Average and Daily Max values provided in the report do not match the values submitted in the hard copy DMR. The DMR did not include the "<" symbols.	Typographical Errors. Values of <0.000762 and <0.000778 were entered but the correct values are 0.000762 ug/L, and 0.000778 ug/L. Corrections were made in ICIS.
12	DMR Data for Outfall 051	Page 8 of 12	Copper Data for March 2022: The Monthly Average provided in the report does not match the value submitted in the hard copy DMR. The DMR did not include the "<" symbol.	Typographical Error. A value of <0.00114 was entered but the correct value is 0.00114 ug/L. Correction was made in ICIS.
13	DMR Data for Outfall 051	Page 9 of 12	Lead Data for May 2021: The Monthly Average and Daily Max provided in the report do not match the values submitted	Typographical Errors. Values of <0.005 were entered but the correct values are <0.0005

No.	Document:	Page:	Permittees Comment:	EPA Response:
			in the hard copy DMR. The values should both be “< 0.0005.”	mg/L. Corrections were made in ICIS.
14	DMR Data for Outfall 051	Page 9 of 12	Zinc Data for January 2022: The Daily Max provided in the report does not match the value submitted in the hard copy DMR. The value should be “< 0.0033.”	Typographical Error. A value of <0.003 was entered but the correct value is <0.0033 ug/L. Correction was made in ICIS.
15	DMR Data for Outfall 051	Page 9 of 12	Zinc Data for July 2022: The Monthly Average and Daily Max provided do not match the values submitted in the hard copy DMR. The values should be “< 0.00775” and “0.0122” respectively.	Typographical Errors. Values of <0.0075 and <0.0122 were entered but the correct values are <0.00775 ug/L and 0.0122 ug/L. Corrections were made in ICIS.
16	DMR Data for Outfall 051	Page 10 of 12	Radium 226/228 Data for August 2021: The Monthly Average and Daily Max provided in the report do not match the values submitted in the hard copy DMR. The values should be “0.571” and “0.982” respectively.	Typographical Errors. Values of 0.191 and 0.191 were entered but the correct values are 0.571 pC/L and 0.982 pc/L. Corrections were made in ICIS.
17	DMR Data for Outfall 051	Page 10 of 12	Flow Data for August 2021: The Monthly Average and Daily Max provided in the report do not match the values submitted in the hard copy DMR. The values should be “0.014519” and “0.017388”	Typographical Errors. Values of 0.571 and 0.982 were entered but the correct values are 0.014519 MGD and 0.017388 MGD. Corrections were made in ICIS.

Note that the Permittees were submitting paper DMRs to the EPA through August 2022. Subsequently, the Permittees have been submitting DMR results electronically in NetDMR as required by 40 CFR 127.16, thus avoiding the sort of typographical errors resulting from transcription that occurred in this instance.

## 2. The Data Demonstrates There are Numerous Discharges From Outfall 051

As Region 6 stated in the Public Notice, DMR data published with the Public Notice are “confirmatory” of earlier discharge information already in the record for the Permit. The DMR data demonstrates that actual discharges are occurring from the Laboratory on an ongoing basis, including in 2021 and 2022, and including from the RLWTF through Outfall 051. *See* Public Notice, available at <https://www.epa.gov/nm/los-alamos-national-laboratory-wastewater-industrial-extension-comment-period-npdes-permit-no> (last visited Mar. 8, 2023). The Public Notice sets forth DMR Summaries providing monthly average and daily maximum values for discharges in 2021 and 2022.

Page 12 of the DMR Summary for Outfall 051 displays the values for discharge flow in million gallons per day (MGD) for Outfall 051. *See* Public Notice, DMR Data for Outfall 051 for NM0028355.pdf,



available at <https://www.epa.gov/nm/los-alamos-national-laboratory-wastewater-industrial-extension-comment-period-npdes-permit-no> (last visited Mar. 14, 2023). The data are provided as *average* monthly and daily maximum values. Because these values, while instructive, are not intended to provide the level of detail that is available from the DMRs previously submitted to the Agency in 2021 and 2022, the Permittees hereby submit *daily* flow values for each discharge event that occurred via Outfall 051 in 2021 and 2022. *See* Attachment B. Discharge flow occurred at Outfall 051 on a total of 29 days in 2021 and 2022. *See id.*

These data further demonstrate that actual discharges are occurring via Outfall 051. Likewise, the data confirms the conclusions that the Region drew from earlier data in the administrative record for the Permit. *See id.*; *see also* Public Notice. The monthly average and daily maximum flow data set forth in the Public Notice support the same conclusion.

### **EPA RESPONSE TO COMMENT #2:**

DMR Summary for Outfall 051 displays the values for discharge flow in million gallons per day (MGD) for Outfall 051. Per Permit requirements the results shall be submitted as average monthly and daily maximum values each month. While the EPA doesn't require permittees to submit daily flow values, the Permittees have submitted daily flow values. The EPA has cross-referenced those values with the DMR results and confirmed the permittees' reported daily flow values are in line with the average monthly and daily maximum value reported in their paper DMRs. The Outfall 051 discharged a total of sixteen (16) months, which included twenty-nine (29) days, in the 2021-2022 timeframe.

Note that in EPA's September 1, 2022, Response to the EAB's Request for Clarification, EPA clarified it relied upon data showing discharges from Outfall 051 in April, May, June, July, August, September, October, and November of 2021. Then, in their Remand Order, the EAB stated,

"Although the Region states that it relied on the 2021 discharge data (specifically the April, May, June, July, August, September, October, and November flow data), we note that the DMR summary report the Region links to in its Corrected Certified Administrative Record Index states that discharge flow data was "Not Received" for October 2021. *See* Region 6, U.S. EPA, DMR Summary, Permit NM0028355, at 45 (Mar. 8, 2022) (A.R. H.6)."

Note that missing flow data for October 2021 has since been entered into the DMR tracking system. Flows for October 2021 were: 0.017435 MGD both for the Monthly Average and Daily Maximum, another confirmation that discharges are occurring from Outfall 051.

### **3. Permittees' 2021 and 2022 Discharge Data for Outfall 051 is Consistent with and Supports Permittees' Form 2C Estimates Regarding Flow Rates and Volume of Discharges for Outfall 051**

In March 2019, as EPA requires for NPDES permit renewals, Permittees included with its Permit reapplication copies of the EPA's Form 2C "Instructions - Application for Permit to Discharge Wastewater[,] Existing Manufacturing, Commercial, Mining and Silviculture Operations" (Form 2C Instructions) for each outfall for which it sought renewed NPDES permit coverage, including Outfall 051. *See* 40 C.F.R. §122.21(a)(2)(D); *see also* Form 2C Instructions, at Part V-B.

Form 2C Instructions require that an applicant use either actual discharge data or estimate both the flow rate and volume of discharges at a given outfall, and to include these calculations in the relevant portions of its Form 2C for the respective outfall(s). *See* Form 2C Instructions, at pg. 2C-1 (Item II-C) (“Fill in every applicable column in this item [Form 2C] for each source of intermittent or seasonal discharges. Base your answers on actual data whenever available; otherwise provide your best estimate”) (emphasis). Calculations regarding flow rates and volumes of discharge are also included in an applicant’s NPDES renewal application Fact Sheet and then used in EPA’s calculation for reasonable potential.

Permittees included discharge flow rates and volumes for Outfall 051 in their Form 2C and Permit Application Fact Sheet, as required. *See* 40 C.F.R. §122.21(a)(2)(D); *see also* Form 2C Instructions, at Part V-B. Permittees’ estimated discharge flow rates and volumes at Outfall 051, identified in their Form 2C and Fact Sheet were estimated based upon the express language in the Form 2C Instructions. Specifically, Permittees estimated their discharge flow rates and volumes as directed in Form 2C, Items II-B and II-C (Page 2C-1), as follows:

- Item II-B: List all sources of wastewater to each outfall. Operations may be described in general terms (*for example*, “dye-making reactor” or “distillation tower”). You may estimate the flow contributed by each source if no data are available. For stormwater discharges you may estimate the average flow, but you must indicate the rainfall event upon which the estimate is based and the method of estimation. For each treatment unit, indicate its size, flow rate, and retention time, and describe the ultimate disposal of any solid or liquid wastes not discharged. Treatment units should be listed in order and you should select the proper code from Table 2c-1 to fill in column 3-b for each treatment unit. Insert “XX” into column 3-b if no code corresponds to a treatment unit you list. If you are applying for a permit for a privately owned treatment works, you must also identify all of your contributors in an attached listing.
- Item II-C: A discharge is intermittent unless it occurs without interruption during the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities. A discharge is seasonal if it occurs only during certain parts of the year. Fill in every applicable column in this item for each source of intermittent or seasonal discharges. Base your answers on actual data whenever available; otherwise, provide your best estimate. Report the highest daily value for flow rate and total volume in the “Maximum Daily” columns (*columns 4-a-2 and 4-b-2*). Report the average of all daily values measured during days when discharge occurred within the last year in the “Long Term Average” columns (*columns 4-a-1 and 4-b-1*). *See* EPA Instructions, at pg. 2C-1 (Item II- B-II-C).

Over the years, the RLWTF, which was originally constructed in 1963, has undergone various upgrades, which has included the addition of two 20,000-gallon effluent tanks (*i.e.*, for a *total* of 40,000 gallons of potential effluent) that can be discharged to Outfall 051 during batch discharges. The 2019 NPDES permit limit flow rates and volumes were estimated based upon the volume of these two tanks (20,000 gallons x 2) and the standard single 4-day, 10-hr shift operating schedule of the RLWTF as shown in Table 2.

**Table 2 Discharge Rates and Frequencies for Outfall 051**

Source <sup>a</sup>	Frequency		Flow Rates and Volumes				
	Days/Week	Months	Average (MGD)	Maximum (MGD)	Average Volume (GPD)	Maximum Volume (GPD)	Duration (days)
Radioactive Liquid Waste Treatment Facility	4	12	0.020	0.040	20,000	39,840	208

a. Estimated based on the operating parameters of the Effluent Storage Tanks.  
GPD = gallons per day; MGD = million gallons per day

The flow rate/volumes listed in Table 2 are design basis volumes intended to provide an upper boundary for the daily average (that is, 1-20,000 gallon effluent tank) and daily maximum (that is, 2-20,000 gallon effluent tanks for a total volume of 40,000 gallons) discharge flow rate/volume to Outfall 051. EPA utilized the flow rate/volumes listed in Table 2 to estimate an upper boundary for potential pollutants evaluated in the reasonable potential analysis and loading calculations. The *actual* discharge flow rates/volumes for 2021 and 2022, are as follows:

**Table 3: Outfall 051 Flow Rate/Volume Data 2021 - 2022**

Location ID	Date	Flow (Daily) MGD	Flow (Daily) GPD
NPDES Outfall 051051	4/27/2021	0.018629	18629
NPDES Outfall 051051	4/29/2021	0.017579	17579
NPDES Outfall 051051	5/18/2021	0.015926	15926
NPDES Outfall 051051	6/22/2021	0.017392	17392
NPDES Outfall 051051	7/20/2021	0.014827	14827
NPDES Outfall 051051	7/28/2021	0.017543	17543
NPDES Outfall 051051	8/10/2021	0.006248	6248
NPDES Outfall 051051	8/24/2021	0.017109	17109
NPDES Outfall 051051	8/26/2021	0.017388	17388
NPDES Outfall 051051	8/31/2021	0.017331	17331
NPDES Outfall 051051	9/14/2021	0.016865	16865
NPDES Outfall 051051	9/21/2021	0.017221	17221
NPDES Outfall 051051	10/26/2021	0.017435	17435
NPDES Outfall 051051	11/9/2021	0.017374	17374
NPDES Outfall 051051	11/29/2021	0.007062	7062
NPDES Outfall 051051	01/11/2022	0.016726	16726
NPDES Outfall 051051	01/13/2022	0.007596	7596
NPDES Outfall 051051	03/02/2022	0.017389	17389
NPDES Outfall 051051	07/06/2022	0.017056	17056
NPDES Outfall 051051	07/14/2022	0.016798	16798
NPDES Outfall 051051	08/11/2022	0.015461	15461
NPDES Outfall 051051	08/18/2022	0.017090	17090
NPDES Outfall 051051	08/30/2022	0.016499	16499
NPDES Outfall 051051	09/08/2022	0.015286	15286
NPDES Outfall 051051	09/20/2022	0.016522	16522
NPDES Outfall 051051	10/19/2022	0.016492	16492

Location ID	Date	Flow (Daily) MGPD	Flow (Daily) GPD
NPDES Outfall 051051	11/08/2022	0.014859	14859
NPDES Outfall 051051	12/08/2022	0.016416	16416
NPDES Outfall 051051	12/15/2022	0.016366	16366
<b>Long Term Average</b>			15,741
<b>Daily Max</b>			18,629

As the 2021 and 2022 data contained in Table 3 demonstrate, the average and daily maximum discharge volumes (15,741 gallons and 18,629 gallons, respectively) are less than the estimated flow rates/volumes identified in Form 2C of the Permit Renewal Application. Accordingly, Table 3 demonstrates that Permittees’ Renewal Application adequately estimated bounding flow rates/volumes. Additionally, the estimated flow rates/volumes provided a more conservative estimate for potential pollutant concentrations and loading (*i.e.*, is more protective of water quality), as shown in the following example:

**Loading Calculation Using Estimated Average from 2019 Permit Application:**

14 Mg                    1 L            2.20E-06 lb            20000 gal            = 2.33 Lbs  
                                  L            0.264172 gal                                    1 mg                                    day                                    Day

**Loading Calculation Using Average Discharge Data from 2019 – 2021:**

14 Mg                    1 L            2.20E-06 lb            15,763 gal            = 1.84 Lbs  
                                  L            0.264172 gal                                    1 mg                                    day                                    Day

Moreover, Table 3 demonstrates that Permittees not only accurately estimated the numbers in their Form 2C, but also had multiple *actual* discharges from Outfall 051 in 2021 and 2022. The accuracy of Permittee’s Form 2C is evidenced by both its conformance to the EPA’s Instructions on as much—as enumerated above—and by the *actual* 2021 and 2022 discharge data from Outfall 051.

**EPA RESPONSE TO COMMENT #3:**

EPA regulations at 40 CFR 122.21 establish permit application requirements for applicants seeking coverage under individual permits. During the permit draft process in 2019, the EPA used the permit application Form 2C for Outfall 051 to draft permit requirements into the NPDES Permit No. NM0028344. In their application, LANL used estimated values for flow per the Form 2C requirements and instructions. EPA can confirm that in 2021 and 2022, the flow estimated values used in their permit application were consistent with the sixteen (16) months of discharges in 2021-2022, including twenty-nine (29) days that Outfall 051 actually discharged.

**4. Permittees Supporting 2021 and 2022 Data and Comments on Outfalls 13S, 03A027, 03A113, 03A160, and 05A055 for 2021 and 2022**

Permittees include, as **Attachment C**, the complete DMRs for Outfalls 13S, 03A027, 03A113, 03A160, and 05A055. Furthermore, provided below are additional comments for outfalls 13S, 03A027 03A113, 03A160, and 05A055.

**A. Outfall 13S**

Outfall 13S is associated with the LANL sanitary wastewater system (SWWS) treatment facility. The SWWS and Outfall 13S are located at a lower elevation than all of the other outfalls at LANL, and the 2019 Permit Reapplication clearly states that treated effluent from the SWWS can be discharged to Outfall 13S by gravity feed, should other options for discharge or reuse, such as the Power Plant Reuse Tank—located at a higher elevation than Outfall 13S—be unavailable to accept flows. Outfall 13S is routinely maintained, has an automatic flow meter, automatic sampler, and is fully capable of receiving SWWS treated effluent based upon demand, volume, and availability of equipment to pump, store, discharge, and/or treat using facilities and equipment located at an elevation that is much higher than SWWS. The outfall provides operational flexibility for maintenance, repair, and replacement of equipment (*i.e.*, pumps), Sanitary Effluent Reuse Facility (SERF), Power Plant Reuse Tank, and Outfall 001. Outfall 13S serves as a critical component of LANL’s operational footprint.

### **B. Outfall 03A027**

The Laboratory uses Outfall 03A027 to discharge cooling tower blowdown in support of the Strategic Computing Complex (SCC). The effluent is comprised of potable water and/or recycled SWWS effluent from the SERF that is treated by the cooling tower water treatment system. The blowdown discharged from 03A027 can be routed to either Outfall 03A027, Outfall 001, or the SWWS, depending on a multitude of factors and because flexibility is needed for operations at SCC, a mission critical facility to LANL. Moreover, when possible, LANL attempts to recirculate and recycle water, as much as possible at the SCC, a facility that can use a substantial amount of water, due to the decades-long and historic drought conditions in New Mexico. *See* NOAA, Current Drought Monitor Conditions for New Mexico (1895-Current), available at: <https://www.drought.gov/states/new-mexico> (last visited Mar. 13, 2023); *see also* NOAA, Climate Program Office, “The Period from 2000-2021 was the driest since the year 800 in the Southwest [including New Mexico],” available at <https://cpo.noaa.gov/News/ArtMID/7875/ArticleID/2488/The-period-from-2000-2021-was-the-driest-since-the-year-800-in-the-Southwest#:~:text=The%20study%20reveals%20that%202000,during%20the%20lat e%2D1500s%20megadrought> (last visited Mar. 13, 2023). Thus, influent loading, operational status of other equipment, and the ability to reuse/recycle water dictate the need to use Outfall 03A027.

### **C. Outfall 03A113**

The Laboratory has utilized Outfall 03A113 in the past and will continue to utilize Outfall 03A113 into the future. Outfall 03A113 discharges treated cooling water. Permittees’ Supplemental Comments stated: “The TA-53-952 cooling tower discharges routinely to the outfall as shown in Fact Sheet Attachment D and the various [DMRs] . . . . The outfall discharged 529,234 gallons in 2017, 436,400 gallons in 2018, 198,530 gallons in 2019, and 154,390 gallons as of October 30, 2020. *See* February 25, 2021, Permittees’ Supplemental Comments (Supplemental Comments), at pgs. 5-6. Cooling Tower TA-53-293 is in operational standby and is currently not discharging to the outfall, but the permit application proposes and intends the Cooling Tower as an additional (in addition to TA-53-952) future discharge source to Outfall 03A113. The DMR Summary in the Administrative Record for the Permit, as well as those DMRs included as Attachment C confirm the factual record regarding Outfall 00A113 discharges.

### **D. Outfall 03A160**

The Laboratory has utilized Outfall 03A160 in the past, most recently through April 2018, and will continue to do so in the future. Outfall 03A160 discharges cooling tower blowdown. In May 2018, Permittees rerouted discharges from Outfall 03A160 to SWWS to support water reuse and recycling

during historic drought conditions in New Mexico; to allow the National High Magnetic Field Laboratory (NHMFL) to construct a water treatment system; and to rehabilitate an aging cooling system at the NHMFL. NHMFL completed construction of its water treatment system and rehabilitation of an aged cooling tower in the summer of 2020.

#### **E. Outfall 05A055**

LANL has previously utilized Outfall 05A055, which is associated with its High Explosives Wastewater Treatment Facility (HEWTF) and will continue to utilize Outfall 05A055 into the future. As Permittees described in their Supplemental Comments:

Outfall 05A055 is fully capable of receiving treated HEWTF effluent based upon demand, volume, and availability of evaporation equipment. The outfall provides operational flexibility for maintenance, repair and replacement of equipment (i.e., evaporator). Supplemental Comments, at pg. 23.

As LANL's mission continues to change and evolve, maintaining flexibility at the HEWTF is critical and such flexibility necessitates the ability to discharge from Outfall 05A055 as needed.

#### **EPA RESPONSE #4:**

- 4A – Comment noted for the Record. Let the Record show that EPA publicly noticed Outfall 13S DMRs from 2021-2022.
- 4B – Comment noted for the Record. Let the Record show that EPA publicly noticed Outfall 03A027 from 2021-2022.
- 4C - Comment noted for the Record. Let the Record show that EPA publicly noticed Outfall 03A113 from 2021-2022.
- 4D - Comment noted for the Record. Let the Record show that EPA publicly noticed Outfall 03A160 from 2021-2022.
- 4E - Comment noted for the Record. Let the Record show that EPA publicly noticed Outfall 05A005 from 2021-2022.

#### **5. Conclusion**

Based upon the record before it, EPA Region 6 properly reissued the Laboratory's NPDES Permit in May 2022 to authorize 11 outfalls for discharge based on operational need. Moreover, the 2021 and 2022 discharge data for which EPA now seeks additional comment pursuant to the Public Notice confirms that the May 2022 issuance was proper.

#### **EPA RESPONSE #5:**

Comment noted for the Record.

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### **COMMENTS FROM CONCERNED CITIZENS FOR NUCLEAR SAFETY, HONOR OUR PUEBLO EXISTENCE AND VETERANS FOR PEACE Chapter 63**

**Received on April 7, 2023**

**6. The EAB has remanded this matter to Region 6 with instructions:**

- a. To invite the public to comment on Outfall 051 discharge data for 2021,
- b. To consider comments received, and
- c. To revise the Response to Comments and take further action as appropriate in issuing the permit decision.

**EAB Order, December 28, 2022.**

**EPA RESPONSE TO COMMENT #6:**

- a. EPA complied with the EAB remand order and provided public notice and opportunity to comment on 2021 discharge data for Outfall 051, in addition to the other five (5) Outfalls that were originally challenged for years 2021 & 2022 and 2022 data for Outfall 051. The EPA publicly noticed the discharge data on February 25, 2023, via our mailing list and also published all Public Notice materials on the [www.epa.gov/publicnotices](http://www.epa.gov/publicnotices) webpage for a 30-day comment period. On March 1<sup>st</sup>, 2023, the permittees informed EPA that some of the data reported in the DMRs had issues with duplication of dates reported. EPA corrected the duplication issue and re-published all DMRs again and extended the comment period for 11-days until April 7, 2023.
- b. In making a final permit decision/issuance, EPA considered all the comments received from the Permittees on April 5, 2023, and from CCNS et al. received on April 7, 2023. No other comments were received.
- c. EPA has reviewed all the comments received and made a final permit decision to re-issue NPDES Permit No. NM0028355 including authorization for Outfall 051 and the other five (5) Outfalls challenged in Permit Appeal No. 22-01.

**7. Briefly, in 2021 Applicants Department of Energy National Nuclear Security Administration ("DOE/NNSA") and Triad National Security LLP ("Triad") (collectively, "Applicants") stated that discharges from the Radioactive Liquid Waste Treatment Facility ("RLWTF") would be made via Outfall 051 when evaporation equipment is unavailable or when treatment demands exceed normal levels. See Applicants' Supp. Comments at 3, 8, 13 (Feb. 25, 2021).**

**EPA RESPONSE TO COMMENT #7:**

EPA notes that this comment by CCNS provides background and summarizes information provided by the Permittee indicating the intent to discharge from Outfall 051. Comment is noted for the record.

**8. The time for public comments on the proposed NPDES permit, with extensions, ended on March 29, 2021. Frequent discharges of waste water from the RLWTF began in April, 2021, i.e., immediately after the end of the public comment period. The data from 2021 were not available for comment during the original public comment period.**

**EPA RESPONSE TO COMMENT #8:**

The original comment period for the draft permit ended in November 2020 after several extensions. The EPA re-opened the comment period on a limited basis in February 2021 and extended the comment period until it formally ended in March 2021. Discharge data from 2021 was not originally published for

public comment in 2021, since the Public Notice was limited to certain aspects of the original comment period. See also Response to Comment #6.a.

This comment provides and characterizes background information and is noted for the record.

**9. The present question is how such 2021 discharge data should be interpreted by Region 6, which is responsible for the initial permit decision.**

**EPA RESPONSE TO COMMENT #9:**

This comment appears to summarize and interpret legal issues and/or instructions from the EAB. The comment is noted for the record. EPA directly addresses the relevance of 2021 discharge in responses provided below.

**10. As background, in 1998 the heads of the Environmental Safety and Health ("ESH") and the Environmental Management ("EM") Divisions at LANL jointly adopted the goal of zero liquid discharge from the RLWTF:**

**We agree that the Laboratory should set a goal of zero discharge of radioactive liquid effluent to the environment. To reach this ambitious goal. ESH and EM Divisions will jointly initiate the Radioactive Liquid Waste Zero Discharge Project.**

**AR 01239, July 10, 1998.**

**EPA RESPONSE TO COMMENT #10:**

As noted by CCNS, this comment provides and offers opinions regarding background information. Comment is noted for the record.

**11. The zero-liquid-discharge program went forward, and by 2010, with the installation of a Mechanical Evaporation System ("MES"), Los Alamos National Laboratory ("LANL" or the "Lab") achieved the goal of ending liquid discharges from the RLWTF. The RLWTF did not discharge liquid for about ten years. Discharges were made in 2019 and 2020, principally when evaporation equipment was unavailable due to maintenance. (Region 6 Response brief at 4 note 5 (July 7, 2022)). These discharges have been termed "backup" use of the Outfall 051 and did not represent normal operation.**

**EPA RESPONSE TO COMMENT #11:**

As noted by CCNS, this comment provides and characterizes background information. Comment is noted for the record.

**12. From approximately 2010, when the MES was installed, whether to use Outfall 051 or the MES to dispose of waste water at the RLWTF has been essentially a matter of Applicants' choice. Clearly, the facility could operate on a zero-liquid-discharge basis for an indefinite period. Given the choice, presumably based upon economic, safety, and legal considerations, Applicants operated the RLWTF normally on a zero-liquid-discharge basis.**

**EPA RESPONSE TO COMMENT #12:**



The comment characterizes previous statements made by permittees and asserts opinions on facility operations and capabilities. The comment does not directly address discharge data that is the subject of this public comment opportunity.

The comment is outside the scope of the public notice action, which was limited to the discharge data from 2021 & 2022 from Outfall 051 and other five (5) Outfalls that were originally challenged with the EAB.

To the extent the comment concerns the impact or relevance of permittees' basis for discharge on EPA's permitting authority. EPA directly addresses this issue in responses below.

**13. From 2012 onward, Applicants stated that they would rely on Outfall 051 to dispose of waste water in event of unavailability of evaporation equipment due to maintenance or malfunction or, possibly, increased treatment capacity needs. In their renewal application in 2012, Applicants requested a Clean Water Act, 33 U.S.C. § 1342(a) ("CWA"), permit for Outfall 051 for the stated purpose of maintaining the capability to discharge in case the evaporators became unavailable due to maintenance or malfunction or in case of an increase in treatment capacity. (AR 000033, at 5 of 9). This is the "backup" function. The 2014 CWA permit was issued based on this backup role.**

**EPA RESPONSE TO COMMENT #13:**

This comment summarizes and characterizes background information. Comment is noted for the record.

**14. Applicants are now motivated to obtain a renewal CWA permit; they claim that such a permit might support a Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"), exemption for the RLWTF under the Waste Water Treatment Unit, 40 C.F.R. § 264.1(g)(6) ("WWTU") provision.**

**EPA RESPONSE TO COMMENT #14:**

This comment characterizes permittees' motivations for seeking permit renewal. Comment is outside the scope of the public notice action, which was limited to the discharge data from 2021 & 2022 from Outfall 051 and other five (5) Outfalls that were originally challenged with Permit Appeal No. 22-01.

**15. It is the job of Region 6 to determine whether a new CWA permit should be issued, and to explain its decision with reasonable clarity based on the administrative record.**

**EPA RESPONSE TO COMMENT #15:**

Comment is noted for the record.

**16. Under 40 C.F.R. § 122.21, a person who "discharges or proposes to discharge" CWA pollutants may and must apply for a CWA permit.**

**EPA RESPONSE TO COMMENT #16:**

EPA concurs and the comment is noted for the Record.

**17. In 2019 Applicants applied to renew the CWA permit. Applicants' February 25, 2021 Supplemental Comments envision changes in discharge operations. Applicants stated that Outfall 051 would be "an integral component of its operations, rather than solely as a backup." (Supp.**

**Comments, Att. 1). However, the new operating protocols did not contain a statement that Applicants plan or propose to discharge any particular quantity in the future.**

**EPA RESPONSE TO COMMENT #17:**

Comment provides and characterizes background information. Comment is noted for the record.

**18. There were no discharges from Outfall 051 in 2012-19. After the public comment period ended in March of 2021, Applicants began making significant discharges from Outfall 051 for the remainder of 2021. (See Region 6 Response to Order for Clarification, DMR Summary, March 8, 2022, at 45 of 114).**

**EPA RESPONSE TO COMMENT #18:**

DMRs reflect that permittees discharged from Outfall 051 in June 2019.

Per the DMRs submitted by the Permittees to EPA, Outfall 051 discharged at least eight (8) times from April – December 2021.

In their Remand Order, the EAB noted the following:

“Although the Region states that it relied on the 2021 discharge data (specifically the April, May, June, July, August, September, October, and November flow data), we note that the DMR summary report the Region links to in its Corrected Certified Administrative Record Index states that discharge flow data was “Not Received” for October 2021. See Region 6, U.S. EPA, DMR Summary, Permit NM0028355, at 45 (Mar. 8, 2022) (A.R. H.6).”

Note that missing flow data for October 2021 has since been entered into the DMR tracking system. Flows for October 2021 were: 0.017435 MGD both for the Monthly Average and Daily Maximum.

**19. On this Record, the Region issued a permit, explaining in its Response to Comments (March 24, 2022) at 10 that it was authorized to issue a permit for a possible or "potential" discharge.**

**EPA RESPONSE TO COMMENT #19:**

EPA concurs.

**20. The appeal now stands in an awkward posture. Region 6' s appellate brief acknowledges the series of 2021 discharges and some in 2022 (Region 6 Response brief at 4 note 5) (July 7, 2022), but it insistently argues that EPA may issue a permit for a "potential" or "possible" discharge. (*Id.* 12-21). Applicants, on the other hand, argue that EPA need not rely upon a "possible" discharge, because Outfall 051 now discharges regularly. (Applicants' Response brief at 10-14).**

**EPA RESPONSE TO COMMENT #20:**

This comment appears to summarize and argue the merits of previous statements made by EPA in NPDES Appeal No. 22-01. Therefore, the comment is outside the scope of the public notice action, which was limited to the discharge data from 2021 & 2022 from Outfall 051 and other five (5) Outfalls that were originally challenged in Permit Appeal No. 22-01.

Though the comment does not address the publicly noticed 2021 and 2022 discharge data from Outfall 051, note that the responses below address EPA's authority to issue permits for possible or potential discharges.

**21. The "possible" discharge theory is disputed, to say the least. *National Pork Producers Council v. US. Environmental Protection Agency*, 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. US. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005). A reviewing Board or court could hardly hold that a permit issued for a "possible discharge" reflects "considered judgment," *In re General Electric Co.*, 18 E.A.D. 575,608 (EPA E.A.B. 2022), and, at the same time, reason "post hoc" that Region 6's permit may rest, not upon a "possible discharge," but on actual discharges, past or proposed. (Applicants' Response brief at 14).**

#### **EPA RESPONSE TO COMMENT #21:**

This comment appears to summarize and argue the merits of previous statements made by EPA in NPDES Appeal No. 22-01. Therefore, the comment is outside the scope of the public notice action, which was limited to the discharge data from 2021 and 2022 from Outfall 051 and the other five (5) Outfalls that were originally challenged in Permit Appeal No. 22-01.

Though the comment does not address the publicly noticed 2021 and 2022 discharge data from Outfall 051. Note that the responses below address EPA's authority to issue permits for possible discharges.

**22. The EAB has remanded for public comment on the 2021 discharges (an opportunity not previously available), also inviting the Region to explain in revisions to its Response to Comments what significance it attributes to the 2021 discharges. (EAB Order, Dec. 28, 2022).**

#### **EPA RESPONSE TO COMMENT #22:**

Comment characterizes instruction from the EAB Remand Order for NPDES Appeal No. 22-01. Comment noted for the record.

**23. In the EAB, Region 6 stated that it viewed discharges in 2021 as "confirmatory" evidence. (Region 6 Response brief at 4 note 5 (July 7, 2022) (See also Region 6 Clarification Response, at 7, Sept. 1, 2022). One may ask: what was confirmed? It was known that Outfall 051 is capable of discharging. It had also been established that the RLWTF could operate indefinitely without discharging. The idea that Outfall 051 would be an "integral component" of Applicants' operations is so vague that it is not clear how it could be confirmed or, if so, how that would be significant.**

#### **EPA RESPONSE TO COMMENT #23:**

Regarding the comment that the "RLWTF could operate indefinitely without discharging", this comment expresses opinions regarding permittees' operational capabilities and does not directly address 2021-2022 discharge data that is the subject of this public comment opportunity. To the extent this statement may be a comment upon EPA's authority to grant NPDES permit authorization, EPA directly addresses this theory below.

The EPA considered the import of the 2021 DMR data from Outfall 051 to be the fact that it evidences actual discharges from an Outfall that Petitioners argued EPA has no authority to permit because the

Outfall does not discharge. The import of the data for EPA was not related to the particulars, e.g., the amounts, of the pollutants discharged, nor as to whether Outfall 051 serves as a backup outfall or an “integral component” of facility operations. The import to the EPA of the additional 2022 data for Outfall 051 and for the 2021-2022 data for the other five outfalls, is that it is evidence of actual discharges from at least some of these Outfalls. Though actual discharges are not required for permit authorization, the history of actual discharges from Outfall 051 is directly responsive to public comments made during the 2020 comment periods, which included inaccurate assertions that Outfall 051 was non-discharging and should therefore be denied permit authorization.

40 CFR 122.21(a) provides that “(a)ny person who discharges or proposes to discharge pollutants...must submit a complete application” in accordance with applicable regulations. By submitting a complete application, permittees propose to discharge. The permit application materials and the permit applicant’s comments submitted during the public comment period in 2020 constitute a request for authorization from Outfall 051, and other outfalls, which are indeed capable of discharging. Actual discharges in 2021 and 2022 are not necessary to support EPA’s decision to grant permit authorization; however, the discharges *confirm* the possibility of discharge and that there was no lack of a plan or proposal to discharge.

**24. But it was clear that the use of Outfall 051 to discharge waste water, given the installation of evaporation equipment, was, and is, largely a matter of the Lab's choice. And for ten years the Applicants chose to evaporate waste water. It is reasonable to infer that in normal operation, Applicants would choose to use the evaporation equipment to dispose of waste water, in preference to a discharge.**

**EPA RESPONSE TO COMMENT #24:**

This comment characterizes permittees’ basis for discharge. Therefore, the comment is outside the scope of the public notice action, which was limited to the discharge data from 2021 & 2022 from Outfall 051 and other five (5) Outfalls that were originally challenged Permit Appeal No. 22-01.

To the extent that the comment is intended to relate to EPA’s authority to grant NPDES permit authorization, EPA directly addresses this issue in responses below.

**25. Thus, until April 2021, Applicants had operated Outfall 051 on the basis that (a) evaporation would be used regularly, except when discharge was needed because of the unavailability of the MES and SET evaporation systems and any increases in treatment capacity demands, and, most recently, (b) Outfall 051 would be "an integral component of its operations, rather than solely as a backup." The latter plan still "does not represent a quantity that DOE plans or proposes to discharge in the future," nor "amount to a plan or proposal actually to discharge via the outfall in the future." (Petitioners' Supplemental comments at 3) (March 29, 2021).**

**EPA RESPONSE TO COMMENT #25:**

The comment summarizes and characterizes background information on facility operations and submits legal theories related to permittees’ eligibility for NPDES permit coverages. To the extent that the comment is intended to relate to EPA’s authority to grant NPDES permit authorization, or to other requirements for permit authorization, EPA directly addresses this issue in responses below.

**26. The data also show that, from April 2021, Applicants departed sharply from the previous operating protocol. After the public comment period ended, the practice became one of frequent discharges. Notably, Applicants have offered no explanation for their change to frequent use of Outfall 051.**

**EPA RESPONSE TO COMMENT #26:**

Section 402(a)(1) of the CWA allows EPA to issue “a permit for the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). The CWA draws no distinction between actual and potential discharges and does not limit EPA’s authority on that basis. Further, EPA’s authority to issue permits for potential or future discharges is evident in the structure of the CWA’s NPDES permitting program. Under the CWA, it is generally illegal to discharge without a permit. See CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1313 (a) and 1342 (a). Therefore, to comply with the Act, facilities must have a permit in place before they discharge, which necessarily means that EPA must at times issue permits for discharges that are not yet actual.

Additionally, neither Section 402(a)(1) nor the NPDES permitting regulations at 40 C.F.R. 122 require permit applicants to provide the type of justification for discharge that the commenter finds lacking. Section 402(a)(1) provides that EPA may issue a permit for discharge following public comment, so long as applicable requirements of the Clean Water Act are met. Commenters seem to imply that because permittees have, over time, offered different rationales for discharge, EPA may not grant NPDES permit authorization. However, commenters do not cite to any requirement of the Clean Water Act or applicable regulations to support this claim.

The permit application materials and the permit applicant’s comments submitted during the public comment periods constitute a request for authorization from an Outfall 051, and other outfalls, which are indeed capable of discharging. Discharges in 2021 and 2022 are not necessary to support EPA’s decision to grant permit authorization; however, the discharges *confirm* the capability of discharge and that there was no lack of a plan or proposal to discharge.

EPA’s regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite any requirement of 40 CFR 122.21 or any other applicable regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants changing the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Neither do the comments identify any requirement of the NPDES permitting regulations that would cause the loss of permit authorization due to an increased number of permitted discharges. Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

**27. Applicants have not asserted any set of circumstances, other than unavailability of evaporation equipment or a change in treatment demands, that might require a discharge through Outfall 051 for disposal, in lieu of the MES. The output of the RLWTF could be evaporated, not discharged. It is a matter of choice by the Applicants.**

**EPA RESPONSE TO COMMENT #27:**

This comment appears to characterize permittees' operational decision-making. Commenters do not cite to any requirement that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Commenters do not provide any citation showing that NPDES regulations require the permittees to exhaust the option to evaporate before discharge is permissible.

The comment does not appear to directly respond to the 2021 and 2022 DMRs that are the subject of this opportunity for public comment.

**28. Moreover, Applicants enthusiastically urge the post-March 2021 discharges as key evidence supporting issuance of a CWA permit: "Region 6 knew full well that the Laboratory has in fact utilized the outfall and had made clear its intention to continue to utilize the outfall into the future." (Applicants' Response brief, July 1, 2022, at 14). Applicants offer these discharges as support, in a "forward-looking" inquiry (Applicants' Supp. Comments, Feb. 25, 2021, at 3), for a finding that Applicants propose to discharge waste water regularly from Outfall 051.**

**EPA RESPONSE TO #28:**

This comment appears to summarize and characterize statements made by permittees but does not directly respond to the 2021-2022 data that is the subject of this opportunity for comment. Comment is noted for the record.

**29. Given the suddenness of the post-comment period change in operation, its fundamental nature, its occurrence immediately after public comment ended, its continuation since that change, and the argument by Applicants that the discharges support the issuance of a permit, Region 6 should conclude that Applicants have discharged from the outfall in an effort to influence the outcome of this proceeding.**

**EPA RESPONSE TO COMMENT #29:**

This comment characterizes statements made by permittees and offers conclusions and theories regarding permittees' operations and motivations for discharge. The comment does not directly respond to the 2021-2022 data that is the subject of this opportunity for comment.

The comment also does not cite any requirement of the applicable statute or regulations that EPA or the permittee fail to meet.

Note that 40 CFR 122.22(a) and (d) require all permit applicants to certify that permit application materials are true, accurate, and complete.

Comment is noted for the record.

**30. Where previously the Applicants had stated that they would discharge when evaporation equipment was unavailable or treatment demands exceeded normal levels, they have now broken with that pattern without any explanation in terms of equipment availability or treatment capacity or any other factor rooted in technical or practical needs. There can be no conclusion but that Applicants have changed their operating protocol in an effort to influence the Region's permit decision.**

**EPA RESPONSE TO COMMENT #30:**

This comment summarizes and characterizes permittees' statements and operations and offers conclusions as to permittees' motivations for discharge. The comment does not cite any requirement of the applicable statute or regulations that EPA or the permittee fail to meet.

EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite any requirement of 40 CFR 122.21 or any other applicable regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Neither do the comments identify any requirement of the NPDES permitting regulations that would cause the loss of permit authorization due to an increase of permitted discharges. Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

As noted in Response #3 above, EPA regulations at 40 CFR 122.21 establish permit application requirements for applicants seeking coverage under individual permits. During the permit draft process in 2019, the EPA used the permit application Form 2C for Outfall 051 to draft permit requirements into the NPDES Permit No. NM0028344. In their application, LANL used estimated values for flow per the Form 2C requirements and instructions. EPA can confirm that in 2021 and 2022, the flow estimated values used in their permit application were consistent with the sixteen (16) months of discharges in 2021-2022, including twenty-nine (29) days that Outfall 051 actually discharged.

**31. Applicants filed comments in the original comment period (as extended) on February 25, 2021. Notably, these comments contained *no reference* to a forthcoming major change in discharge practices. Applicants then told EPA:**

**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.**

**Supplemental Comments, Feb. 25, 2021, at 13. Applicants suggested that some changes in this protocol were "envisioned," but they were still based on operational efficiency, *i.e.*, waste water volume:**

**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 simultaneously for short or longer-term periods of time.**

***Id.* 13-14.**

**EPA RESPONSE #31:**

The comment does not address discharge data from 2021 & 2022 from Outfall 051 and other five (5) Outfalls, which are the subject of this opportunity for comment.

This comment summarizes and characterizes permittees' statements and operations and offers conclusions as to permittees' motivations for discharge. The comment does not cite any requirement of the applicable statute or regulations that EPA or the permittee fail to meet.

EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite any requirement of 40 CFR 122.21 or any other applicable regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Neither do the comments identify any requirement of the NPDES permitting regulations that would cause the loss of permit authorization due to an increased number of permitted discharges. Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

**32. A month later Applicants started their new program of discharges. They have offered no explanation, and certainly no innocent explanation, for the sudden increase in discharges. Footnote Page 10: Concerning the Outfall 051 discharge data for 2021-2022, shown in the DMR Summary, 3/3/23 10:27 AM, p. 4 of 12 and p. 10 of 12, one cannot tell whether the flow is to Outfall 051, to the MES, or potentially to the SET. For transparency, EPA should require the Permittees to report the discharge volumes to the Outfall, the MES, and the SET on the DMRs separately.**

**Concerning Outfalls 13SA, 05A055, 03A160, 03A027 and 03A13 in 2021- 2022, shown in the DMR Summary, 3/3/23 10:27 AM, please note that there are no reported discharges from Outfalls 13SA,05A055, 03A027 and 03A160. For some sites, there have been no discharges for years. For example, 05A055 (High Explosives Waste Treatment Facility), has never reported a discharge. EPA should delete these outfalls from the permit.**

#### **EPA RESPONSE TO COMMENT #32:**

Regarding the basis for discharge from Outfall 051, the applicable regulations do not set standards or restrictions on the rationales for discharge, and the comment does not identify any such requirements.

For discharges that occurred from Outfall 051, Permittees submit monthly Discharge Monitoring Reports to EPA with discharge volumes reporting the discharge volume as Monthly Average and Daily Maximum. For wastewater sent to the MES or the SET, volume monitoring requirements for groundwater discharges are already covered under and reported in accordance with an NMED Groundwater Discharge Permit – DP-1132. The public can access information on data associated with DP-1132, including analytical and flow data, from the Los Alamos National Laboratory Electronic Public Reading Room (<https://epr.lanl.gov/>) under the Groundwater Category, publication year of choice and NMED as the Regulatory Agency. Flow data for MES, SET, and NPDES Outfall 051 are available in a single table in quarterly monitoring reports at this site. Discharge data could also be obtained by submitting a request to the New Mexico Environment Department, Ground Water Quality Bureau. A request may be made at the Department's website: <https://www.env.nm.gov/public-record-request/>. In addition, data are available at [www.intellusnm.com](http://www.intellusnm.com) as of August 2023. IntellusNM is a database containing permitting compliance data which is available to the public through collaborative



efforts between the Department of Energy NNSA Field Office, Department of Energy Environmental Management Los Alamos Field Office, and the New Mexico Environment Department. No changes are made to the final permit. The discharges from Outfall 051 regulated by the NPDES permit are required to be reported on Discharge Monitoring Reports as required by 40 CFR 122.41(l)(4). Wastewater sent to the MES or SET are not discharged to a water of the United States and are not regulated under the authority of the NPDES permit.

Concerning Outfalls 13S, 05A055, 03A160, 03A027 and 03A133 in 2021- 2022, **see the Response above to Comment No. 26.** 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.

EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite any requirement of 40 CFR 122.21 or any other applicable regulation that the application fails to satisfy.

**33. In 1998 the staffs of the EM and ESH divisions in the Applicants' management wholeheartedly supported the policy of zero-liquid-discharge, and for nearly ten years the facility operated successfully under that regime. Costly facility modifications were carried out to enable zero-liquid- discharge operations. In 2010 Permittees equipped the RLWTF with the MES. In 2012 the Permittees constructed the Solar Evaporation Tanks ("SET") to evaporate waste water with solar power. The zero-liquid-discharge program has never been stopped or abandoned. One may infer from this history that in the future, litigation issues aside, zero-liquid- discharge would be the practice.**

#### **EPA RESPONSE TO COMMENT #33:**

The comment does not address discharge data from 2021 & 2022 from Outfall 051 and the other five (5) Outfalls, which are the subject of this opportunity for comment.

This comment summarizes and characterizes permittees' statements and operations and offers conclusions as to permittees' motivations for discharge. The comment does not cite any requirement of the applicable statute or regulations that EPA or the permittee fail to meet.

**34. In this situation, the Region cannot know what the discharge plan or proposal actually is for the future. As a result, if Region 6 should decide, nevertheless, to issue a permit that includes Outfall 051, the Region would not be able to explain its action based on any legitimate justification.**

**EPA RESPONSE TO COMMENT #34:**

EPA's decision to issue an NPDES Permit including Outfall 051 is consistent with CWA 402(a)(1) and was based on a complete NPDES application requesting authorization for discharges submitted by the Permittees.

As noted in Response #3 above, EPA regulations at 40 CFR 122.21 establish permit application requirements for applicants seeking coverage under individual permits. During the permit draft process in 2019, the EPA used the permit application Form 2C for Outfall 051 to draft permit requirements into the NPDES Permit No. NM0028344. In their application, LANL used estimated values for flow per the Form 2C requirements and instructions. EPA can confirm that in 2021 and 2022, the flow estimated values used in their permit application were consistent with the sixteen (16) months of discharges in 2021-2022, including twenty-nine (29) days that Outfall 051 actually discharged.

Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III.D of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

**35. *InDOCv. New York*, 139 S.Ct. 2551 (2019), the Supreme Court held that the proffered explanation for including a citizenship question in the decennial census could not be accepted in light of contrary evidence suggesting that the stated explanation was pretextual.**

**EPA RESPONSE TO COMMENT #35:**

See Response #36, below.

**36. Here there is not just an inadequate explanation; there is none at all. If Region 6 were to accept Applicants' present practice of discharging as establishing (as Applicants claim) that Outfall 051 will discharge regularly, the Region would be relying on evidence that is, in light of history, essentially performative, *i.e.*, created to establish a litigation point. When Applicants' actions are not satisfactorily explained, Region 6 may not accept them as support for the agency's decision.**

**EPA RESPONSE TO COMMENT #36:**

EPA's decision to issue an NPDES Permit including Outfall 051 is consistent with CWA 402(a)(1) and was based on a complete NPDES application requesting authorization for discharges submitted by the Permittees.

EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite to any requirement of 40 CFR 122.21 or any other applicable regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

**37. As in *DOC*, "the evidence tells a story that does not match the explanation the [Region is asked to give] for its decision." 139 S.Ct. at 2575. Rather, the proffered rationale "seems to have been contrived." (Id.). "We are presented, in other words, with a [proposed] explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." (Id.). Against the history of zero-liquid- discharge, the Region must bear in mind that**

**The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.**

*DOC v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Consequently,

**Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.**

(at 2576).

#### **EPA RESPONSE TO COMMENT #37:**

This comment does not address discharge data from Outfall 051 or the other five outfalls that are the subject of this opportunity to comment.

EPA's decision to issue an NPDES Permit including Outfall 051 is consistent with CWA 402(a)(1) and was based on a complete NPDES application requesting authorization for discharges submitted by the Permittees.

EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite requirements of 40 CFR 122.21 or any other regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

**38. In *Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers v. FRA*, 988 F.3d 1170 (9th Cir.2021), the Ninth Circuit noted the reasoning of the Supreme Court in *DOC v. New York*:**

**In *New York*, the Court set forth four steps for reviewing whether an agency's stated reasons for taking action are pretextual. "First, in order to permit meaningful judicial review, an agency must disclose the basis of its action." 139 S. Ct. at 2573 "Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Id.* "Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Id.* Fourth, the Court "recognized a narrow**

**exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers'" where there is "a strong showing of bad faith or improper behavior.'" *Id.* at 2573-74.**

*Transp. Div.*, 988 F.3d 1178-79.

#### **EPA RESPONSE TO COMMENT #38:**

Comment is outside the scope of the public notice action, which was limited to the discharge data from 2021 & 2022 from Outfall 051 and other five (5) Outfalls that were originally challenged in Permit Appeal No. 22-01.

**39. Should the Region determine to renew the NPDES permit, it would need to state the role of the 2021 discharges in its reasoning. "Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action." *Transp. Div.*, 988 F.3d at 1179.**

#### **EPA RESPONSE TO COMMENT 39:**

EPA's bases for decisionmaking are found throughout this Response to Comments.

Specifically, the EPA considered the import of the 2021 DMR data from Outfall 051 to be the fact that it evidences actual discharges from an Outfall that Petitioners argued EPA has no authority to permit because the Outfall does not discharge. The import of the data for EPA was not related to the particulars, e.g., the amounts, of the pollutants discharged, nor as to whether Outfall 051 serves as a backup outfall or an "integral component" of facility operations. The import to the EPA of the additional 2022 data for Outfall 051 and for the 2021-2022 data for the other five outfalls, is that it is evidence of actual discharges from at least some of these Outfalls. Though actual discharges are not required for permit authorization, the history of actual discharges from Outfall 051 is directly responsive to public comments made during the 2020 comment periods, which included inaccurate assertions that Outfall 051 is non-discharging and should therefore be denied permit authorization.

The permit application materials and the permit applicant's comments submitted during the public comment period in 2020 constitute a request for authorization from Outfall 051, and other outfalls, which are indeed capable of discharging. Actual discharges in 2021 and 2022 are not necessary to support EPA's decision to grant permit authorization; however, the discharges *confirm* the possibility of discharge and that there was no lack of a plan or proposal to discharge.

**40. Yet before this renewal proceeding, Applicants chose to evaporate waste water and had scarcely discharged any such water since 2010. No credible explanation is offered for the sudden change to regular discharges. And, since the change occurred exactly when it might have forestalled any comment on the new practice, and cannot be explained by any of the factors previously said to determine whether waste water would be discharged (such as the unavailability of evaporation equipment or an abnormal treatment demand), the recent discharges must be viewed as calculated to influence the Region's decision, and Applicants' explanation, projecting future discharges, must be considered pretextual.**

#### **EPA RESPONSE TO COMMENT #40:**

This comment does not address discharge data from Outfall 051 or the other five outfalls that are the subject of this opportunity to comment.

EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite requirements of 40 CFR 122.21 or any other applicable regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

**41. It is understood that an agency's ruling may not be set aside when the agency entertained legitimate reasons, but also unstated reasons, for its action. The presence of legitimate reasons must be doubted here, where the Region's previous rationale was to license a "potential" discharge, in disregard of the CWA requirement of a "discharge."**

**EPA RESPONSE TO COMMENT #41:**

This comment asserts the absence of legitimate reasons for permit authorization and does not address discharge data from Outfall 051 or the other five outfalls that are the subject of this opportunity to comment.

EPA's decision to issue an NPDES Permit including Outfall 051 is consistent with CWA 402(a)(1) and was based on a complete NPDES application requesting authorization for discharges submitted by the Permittees. The bases for EPA's decisionmaking is found throughout this Response to Comments.

**42. The Region's duty to consider whether Applicants seek here to obtain a permit, against all available facts, is supported by the circumstance that the Applicants are driven to obtain a RCRA exemption (See Applicants' Supp. Comments, February 25, 2021, at 14) and that the change in discharge protocols was a surprise occurrence, timed immediately after the comment period closed.**

**EPA RESPONSE TO COMMENT #42:**

EPA's decision to issue an NPDES Permit including Outfall 051 is consistent with CWA 402(a)(1) and was based on a complete NPDES application requesting authorization for discharges submitted by the Permittees.

The comment asserts theories regarding permittees' motivations to obtain an NPDES permit. EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite any requirement of 40 CFR 122.21 or any other regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The applicable NPDES rules do not set standards or restrictions on the rationales for discharge.

The comment appears to express concern that permittees are attempting to circumvent the requirements of the Resource Conservation and Recovery Act (RCRA) by seeking NPDES coverage. LANL's compliance with RCRA is outside the scope of this NPDES permitting action.

**43. The Region must bear in mind the standards of judicial review of its actions:**

**In reviewing petitioners' claim that the FRA failed to comply with the APA, we look to "whether the [FRA] examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made." *New York*, 139 S. Ct. at 2569.**

***Transp. Div.*, 988 F. 3d at 1182. The record here directs the Region to the conclusion that there is no factfinding on the current Record which could support renewal. The history of discharges is contrived. No other facts support a NPDES permit.**

**EPA RESPONSE TO COMMENT #43:**

Comment includes statements outside the scope of the public notice action, which is limited to the discharge data from 2021 & 2022 from Outfall 051 and other five (5) Outfalls that were originally challenged in Permit Appeal No. 22-01.

EPA's decision to issue an NPDES permit is consistent with CWA 402(a)(1) and was based on a complete NPDES application requesting authorization for discharges submitted by the Permittees. The bases for EPA's decisionmaking are found throughout this Response to Comments.

**44. The original plan-to discharge when evaporation is unavailable or treatment capacity requires it-has been abandoned. The more recent plan-to integrate the outfall with the facility-is next to meaningless. To the extent Applicants articulate a plan to discharge, it has no credibility. There is no possible interpretation that supports renewal of the permit. And if no permit is required, none may be issued.**

**EPA RESPONSE TO COMMENT #44:**

This comment does not address discharge data from Outfall 051 or the other five outfalls that are the subject of this opportunity to comment.

EPA's regulations at 40 CFR 122.21 set forth requirements for NPDES permit applications. This comment does not cite any requirement of 40 CFR 122.21 or any other applicable regulation that the application fails to satisfy. Likewise, EPA has not found in its regulations any prohibition from permit applicants amending the basis of their request for NPDES permit authorization, nor any requirement for applicants to justify the necessity of operational changes. Note that 40 C.F.R. 122.41(l) requires permittees to give notice to the director of Planned Changes including those that would significantly change the nature or increase the quantity of the *pollutants discharged*. This requirement was included in Part III of the Permit. The rules do not set standards or restrictions on the rationales for discharge.

EPA's decision to issue an NPDES permit is consistent with CWA 402(a)(1) and was based on a complete NPDES application requesting authorization for discharges submitted by the Permittees. The bases for EPA's decisionmaking are found throughout this Response to Comments.

**45. Conclusion: Region 6 should deny the requested renewal of the discharge permit for Outfall 051.**

**EPA RESPONSE TO COMMENT #45:**

EPA has reviewed all the comments received and made a final permit decision to re-issue NPDES Permit No. NM0028355 including authorization for Outfall 051 and the other five (5) Outfalls challenged in Permit Appeal No. 22-01. Comment is noted for the record.