EXHIBIT 12

Notice, Issuance of Environmental Appeals Board Order (January 4, 2023)

RECEIVED Pamela Jones
By Water Quality Control Commission at 10:03 am, Jan 04, 2023

STATE OF NEW MEXICO
BEFORE THE
WATER QUALITY CONTROL COMMISSION

PETITION FOR REVIEW OF THE DECISION OF THE NEW MEXICO ENVIRONMENT DEPARTMENT ISSUING GROUND WATER DISCHARGE PERMIT No. DP-1132	))))	WQCC No. 22-21

NOTICE OF ISSUANCE OF
ENVIRONMENTAL APPEALS BOARD ORDER

This Notice of the Issuance of the Environmental Protection Agency Environmental Appeals Board Remand Order, dated December 28, 2022, is submitted on behalf of Petitioners, Concerned Citizens for Nuclear Safety ("CCNS") and Honor Our Pueblo Existence ("HOPE").

Petitioners note that this Commission's Order on Motion to Stay Proceedings Pending Resolution of Related Adjudication, dated August 30, 2022, directs that the within proceeding, No. 22-21, be "stayed pending resolution in the related adjudicatory proceeding," citing the appeal proceeding before the EPA Environmental Appeals Board, which is resolved by the attached Remand Order.

Respectfully submitted,

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December 31, 2022

Certificate of Service

I hereby certify that on December 31, 2022, a true and correct copy of the foregoing *Notice of Issuance of Environmental Appeals Board Order* was served on counsel for the Parties to the Water Quality Control Commission proceedings by email. A copy can be sent via U.S. mail first class, postage prepaid, upon request.

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FILED
Dec 28, 2022
Clerk, Environmental Appeals Board
INITIALS CC

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, within fifteen (15) days of the issuance of this opinion, of any typographical or other formal errors, in order that corrections may be made before publication.

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

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

[Decided December 28, 2022]

REMAND ORDER

Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake, and Mary Kay Lynch.

IN RE U.S. DEPARTMENT OF ENERGY AND TRIAD NATIONAL SECURITY, L.L.C.

NPDES Appeal No. 22-01

REMAND ORDER

Decided December 28, 2022

Syllabus

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 in March 2022 pursuant to the Clean Water Act ("CWA"). The 2022 Permit authorizes certain discharges from the Los Alamos National Laboratory, including discharges of treated wastewater from the Radioactive Liquid Waste Treatment Facility through what is referred to as Outfall 051.

Petitioners challenge the Region's permitting decision with regard to Outfall 051, arguing, among other things, that the Region lacks authority to permit Outfall 051 under the CWA.

Held: The Board remands 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. The Region first reveals in a footnote in its Response Brief before the Board that it relied on Outfall 051 discharge data from 2021, which post-dates the comment period, in making its final permitting decision. Thus, neither Petitioners nor the public at large had an adequate opportunity to comment on that data during the permitting process or to address that data in a petition for review filed with the Board.

Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake, and Mary Kay Lynch.

Opinion of the Board by Judge Avila:

I. *STATEMENT OF THE CASE*

In March 2022, the U.S. Environmental Protection Agency ("EPA") Region 6 ("Region") issued a National Pollutant Discharge Elimination System ("NPDES") permit to the U.S. Department of Energy, National Nuclear Security Administration and Triad National Security L.L.C. ("Permittees"), pursuant to the Clean Water Act ("CWA" or "Act"), authorizing certain discharges from the Los Alamos National Laboratory ("Laboratory" or "LANL"). The 2022 Permit replaces the Laboratory's 2014 NPDES permit. The 2022 Permit authorizes the Laboratory to discharge from eleven outfalls, including discharges of treated wastewater from the Radioactive Liquid Waste Treatment Facility ("Treatment Facility" or "RLWTF") through what is referred to as Outfall 051.

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 the Region's 2022 permitting decision. Petitioners challenge the Region's permitting decision with regard to Outfall 051, arguing, among other things, that the Region lacks authority to permit Outfall 051 under the CWA because "Congress did not include in the CWA any authority to issue a permit for a discharge that 'could occur,' nor for a 'potential' or a 'capability' to discharge [and that the] CWA regulates only an outfall that actually discharges or proposes to discharge." Petition for Review at 37-43, 50 (May 9, 2022) ("Pet."). (Petitioners also argue that five other outfalls do not come within the Region's permitting authority for similar reasons. *Id.* at 33-35, 50 & n.52.). Petitioners maintain that the Treatment Facility manages hazardous waste and that the Resource Conservation and Recovery Act ("RCRA") "directs that such a facility must have a hazardous waste permit." *Id.* at 54 (citing 42 U.S.C. § 6925). Further, Petitioners assert that the Region exceeded its authority in issuing an NPDES permit for Outfall 051 and that, by doing so, "created a supposed conflict with RCRA regulation, invoking the [RCRA Wastewater Treatment Unit] WWTU exemption, and denying RCRA any effect." *Id.* at 55-56. According to Petitioners, this eligibility for exemption from RCRA regulation creates an increased risk of release or mismanagement of radioactive and hazardous waste from the Treatment Facility and means that the Treatment Facility is not subject to "specific protective RCRA requirements." *Id.* at 14, 20.

For the reasons explained below, we remand 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. As discussed below, the Region first reveals in a footnote in its Response Brief

before the Board that it relied on Outfall 051 discharge data from 2021, all of which post-dates the comment period, in making its final permitting decision. Thus, neither Petitioners nor the public at large had an adequate opportunity to comment on that data during the permitting process or to address that data in a petition for review filed with the Board.[1]

II. *PRINCIPLES GOVERNING BOARD REVIEW*

Section 124.19 of title 40 of the Code of Federal Regulations governs Board review of NPDES permitting decisions. In any appeal from a permitting decision issued under part 124, petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). "[A] petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." *Id.* § 124.19(a)(4)(i).

The Board has discretion to grant or deny review of a permit decision. *Id.* § 124.19; *see In re Avenal Power Ctr., L.L.C.*, 15 E.A.D. 384, 394-95 (EAB 2011) (citing Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)), *vacated & remanded on other grounds sub nom. Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014). Ordinarily, the Board will deny a petition for review and thus not remand the permit unless the underlying permit decision is based on a clearly erroneous finding of fact or conclusion of law, or an exercise of discretion that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a)(4)(i). In considering whether to grant or deny a petition for review, the Board is guided by the preamble to the regulations authorizing appeal under part 124, in which the Agency stated that the Board's power to grant review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. at 33,412.

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised "considered judgment." *E.g.*, *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997). The permit issuer must articulate

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[1] Because our remand is based on the data regarding Outfall 051 identified for the first time in the Region's Response Brief, EPA Region 6's Response to Petition for Review 4 (July 7, 2022) ("Region Resp. Br."), we need not and do not discuss in this decision the other outfalls Petitioners address.

with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion. *E.g.*, *Ash Grove*, 7 E.A.D. at 417. As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998), *pet. for review denied sub. nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

III. *LEGAL FRAMEWORK*

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). To help achieve this objective, the Act prohibits the discharge of pollutants into waters of the United States unless authorized by a permit or other specified provision of the Act. *See* CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342.

A. *National Pollutant Discharge Elimination System Permitting Program*

The NPDES permitting program is the Act's primary means of authorizing discharges into waters of the United States. *See* CWA § 402, 33 U.S.C. § 1342. A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). Federal regulations implementing the NPDES program are set forth in part at 40 C.F.R. parts 122, 125, and 131.

Under 40 C.F.R. § 122.21, a person who "discharges or proposes to discharge" pollutants has a "duty to apply" for an NPDES permit prior to the date on which the discharge will commence. *See* 40 C.F.R. § 122.21(a), (c). Permitting authorities may issue an NPDES permit for discharge of a pollutant "upon condition that such discharge will meet" all applicable CWA requirements. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1).

B. *Public Participation Requirements under 40 C.F.R. Part 124*

EPA procedures for "issuing, modifying, revoking and reissuing, or terminating all * * * NPDES 'permits'" are set forth in 40 C.F.R. part 124. 40 C.F.R. § 124.1(a). Those regulations include requirements and procedures for public participation in the permitting process. The regulations require, among other things, that the public have notice of, and an opportunity to comment on, a draft

permit decision, *id.* § 124.10(a)(1)(ii), (b)(1), that the permitting authority briefly describe and respond to all significant comments raised during the public comment period in a response to comments document that is issued at the time the final permit decision is issued, *id.* § 124.17(a), (a)(2), and that the final permit decision be based on the administrative record for the final permit as defined in 40 C.F.R. § 124.18, *id.* § 124.18(a). As the Board has emphasized on several occasions, the response to comments document "provides the Agency's final rationale for its decision." *In re ConocoPhillips Co.*, 13 E.A.D. 768, 780 (EAB 2008) (quoting *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 533 (EAB 2006)).

IV. *FACTUAL AND PROCEDURAL SUMMARY*

A. *Background and Prior NPDES Permitting History*

The Los Alamos National Laboratory ("Laboratory" or "LANL") is a multidisciplinary laboratory located in Los Alamos County, New Mexico. *See* Triad Nat'l Sec., L.L.C., *Los Alamos National Laboratory 2019 NPDES Permit Re-Application*, at 1-2 (March 2019) (A.R. A.1) ("2019 Permit Re-Application"). "The Laboratory's central mission is to reduce nuclear danger through evaluation and stockpile stewardship," and the Laboratory has "[e]xtensive basic research programs in physics, chemistry, metallurgy, mathematics and computers, earth sciences, and electronics." *Id.* at 2. The Laboratory has eleven outfalls, including Outfall 051, that have been subject to NPDES permits over the years. *See* Region 6, U.S. EPA, *NPDES Permit No. NM0028355 Fact Sheet*, at 4-7 (Feb. 26, 2020) (A.R. A.7) ("Fact Sheet").

In August 2014, the Region issued a new NPDES permit for the Laboratory, replacing the prior permit that had been in effect.[2] Region 6, U.S. EPA, *NPDES Permit No. NM0028355 Final Permit Decision for Permit Modification*, at 1 (March 2015) (A.R. A.13) ("2014 Permit"). Like the prior NPDES permits, the 2014 Permit authorized the Laboratory to discharge from the Radioactive Liquid Waste Treatment Facility ("RLWTF" or "Treatment Facility") through Outfall 051 to Mortandad Canyon. *See* 2014 Permit pt. I, at 7-9.

The record reflects that, for many years, the Laboratory pursued eliminating discharges from Outfall 051. In 1998, the Laboratory's "outfall 051 elimination working group" issued a report, noting that "[i]t may no longer be in the best

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[2] The 2014 Permit was superseded in part by a permit modification, irrelevant to our discussion here, issued in March 2015.

interests of Los Alamos National Laboratory (LANL) to continue using this outfall," and identifying "[i]ncentives for eliminating outfall 051, regulatory and technical issues involved, and recommended steps to accomplish this goal." Moss et al., *Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility*, at v (Aug. 7, 1998) (A.R. C.2.A). The 1998 report ultimately recommended that the Laboratory "design and construct an evaporative process that will reuse or evaporate treated radioactive liquid waste and result in zero liquid discharge to the environment." *Id.* at vii.

By February 2012, the Treatment Facility had adopted such a process, and "ha[d] not discharged to Outfall 051 since November 2010" due to changes in facility operations, including the use of mechanical evaporators. *See* Los Alamos Nat'l Lab'y, *2012 NPDES Permit Re-Application Outfall Fact Sheet – Outfall 051*, at 1, 5 (Feb. 2012) (A.R. A.14). But the 2012 permit renewal application still included Outfall 051. *Id.* at 5. According to the Permittees' 2012 Outfall 051 Fact Sheet, Outfall 051 was included so the Treatment Facility could maintain the capability to discharge if the evaporators became unavailable due to maintenance or malfunction, or in the event of an increase in treatment capacity. *Id.*

While Concerned Citizens participated in the 2014 permitting process, it did not appeal the 2014 permit decision under 40 C.F.R. § 124.19. *See In re Los Alamos Nat'l Sec., L.L.C.*, 17 E.A.D. 586, 587, 592 (EAB 2018), *pet. for rev. dismissed for lack of juris. sub nom. Concerned Citizens for Nuclear Safety, Inc. v. EPA*, No. 18-9542 (10th Cir. Apr. 23, 2020), *cert. denied*, 141 S. Ct. 1464 (Mar. 1, 2021). But in March 2017, Concerned Citizens requested that the Regional Administrator terminate the 2014 Permit as to Outfall 051 because Concerned Citizens maintained that the Laboratory had not discharged liquid waste from Outfall 051 since 2010. *Id.* at 588; *see also id.* at 593-94. The Regional Administrator denied the request, and Concerned Citizens informally appealed that denial to the Board under 40 C.F.R. § 124.5(b) in September 2017 ("2017 Appeal"). *Id.* at 587-88 (citing Concerned Citizens for Nuclear Safety Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) ("Informal Appeal")).

In the 2017 Appeal, Concerned Citizens asserted that the permit should be terminated because "no discharges of water or pollutants are planned or expected for Outfall 051, and no such discharges have occurred since November 2010." *Id.* at 597 (quoting the Informal Appeal at 3). Concerned Citizens asserted that permit termination was "appropriate under 40 C.F.R. § 122.64(a)(4), which provides that after an NPDES permit is issued, '[a] change in any condition' requiring a reduction or elimination of any discharge is cause for permit termination." *Id.* at 588. The Board noted that when the Region issued the 2014 Permit, discharges from Outfall

051 had not occurred since 2010 and would only be necessary in certain circumstances. *Id.* at 602. The Board concluded that the record supported the Region's determination that Concerned Citizens had not established a change in condition warranting termination of the permit pursuant to 40 C.F.R. § 122.64(a)(4), and Concerned Citizens had failed to establish that the Region clearly erred or abused its discretion. *Id.* at 598-99. The Board explained that "the passage of additional time without a discharge from Outfall 051 since issuance of the 2014 Permit was expected, was made known during the permit proceeding, and does not amount to a change in any condition justifying termination." *Id.* at 598. The Board did not reach the issue of whether EPA had authority to issue an NPDES permit for potential discharges, *id.* at 603 n.19, and noted that "Concerned Citizens may raise the issues it raises [in the 2017 Appeal], or any other issue it chooses, in any future permit renewal process for the Los Alamos Laboratory when the 2014 Permit expires in September 2019, and file a petition for review with the Board from any future permit at that time under 40 C.F.R. § 124.19," *id.* at 601.

B. *2019 Draft Permit Application and Issuance*

In March 2019, Permittees submitted an application to renew their NPDES permit. *See generally*, 2019 Permit Re-Application. The record reflects that there were no discharges from Outfall 051 between November 2010 and the submission of the permit re-application in March 2019. *See* Fact Sheet at 15; *see also* Los Alamos Nat'l Lab'y, *NPDES Permit No. NM0028355 Notice of Planned Change for the Radioactive Liquid Waste Treatment Facility (RLWTF) Outfall 051* attach. 1, at 8 (Feb. 25, 2021) (A.R. F.3) ("Notice of Planned Change"). Notwithstanding the lack of discharges from Outfall 051 for the nine years preceding submission of Permittees' application, the Permittees' Fact Sheet submitted with their application estimated an average discharge of 20,000 gallons per day at a frequency of four days a week for twelve months of the year for Outfall 051. Triad Nat'l Sec., L.L.C., *Industrial and Sanitary Outfalls 2019 NPDES Permit Re-Application Outfall 051 Fact Sheet*, at 7 tbl.4 (March 2019) (A.R. A.2) ("Outfall 051 Fact Sheet"). The Permittees' Fact Sheet also indicated that a Notice of Change would be submitted to reflect "[f]uture improvements to the treatment processes at the RLWTF [Treatment Facility] includ[ing] the startup of newly constructed main low-level waste treatment facility" with an "estimated operational start date in 2023." *Id.* at 7. The Fact Sheet further stated that "[t]he startup of the new facility is not expected to impact the outfall location, flowrates, and discharge frequency provided in Table 4" of the Fact Sheet. *Id.*

In November 2019, the Region issued a draft permit for the Laboratory, provided a sixty-day comment period, and held a public hearing.[3] *See* Region 6, U.S. EPA, *Public Notice of Authorization to Discharge to Waters of the United States, NPDES Permit No. NM0028355* (Nov. 30, 2019) (A.R. A.5); *see also* Region 6, U.S. EPA, *Draft NPDES Permit No. NM00028355* (Nov. 30, 2019) (A.R. A.8-A.11) ("2019 Draft Permit"). The Region provided several extensions to that initial comment period on the 2019 Draft Permit, and the comment period closed on November 2, 2020. Region 6, U.S. EPA, *Reopening of Public Comment Period Authorization to Discharge to Waters of the United States, NPDES Permit No. NM0028355*, at 1 (Jan. 30, 2021) (A.R. E.2) ("Notice Reopening Comment Period").

The Region issued a Fact Sheet to accompany the 2019 Draft Permit, which included the Permittees' estimated flow rates and frequency of discharge for Outfall 051 (20,000 gallons a day, four days a week). Fact Sheet at 7; *see also* Outfall 051 Fact Sheet at 7 tbl.4 (estimating Outfall 051's average discharge at 20,000 gallons a day, four days a week, twelve months a year). The Region's Fact Sheet for the 2019 Draft Permit indicated that Outfall 051's effluent is "evaporated through a mechanical evaporator and ha[d] no discharge since November 2010" until a one-day discharge in June 2019. *Id.* at 7, 15. Petitioners[4] acknowledged this June 2019 discharge in their initial comments on the 2019 Draft Permit, noting that the "present RLWTF [Treatment Facility] is designed and operated as a 'zero liquid discharge' facility and has not discharged any liquid since November 2010, except for a single one-day discharge of 80,798 liters [21,345 gallons] of treated effluent on June 18, 2019." Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and New Mexico Acequia Ass'n, *Comments on Proposed Renewal of*

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[3] The initial public comment period for the 2019 Draft Permit opened on November 30, 2019, and closed on January 28, 2020. Region 6, U.S. EPA, *Public Notice of Authorization to Discharge to Waters of the United States, NPDES Permit No. NM0028355*, at 2 (Nov. 30, 2019) (A.R. A.5). The public hearing was held on January 15, 2020. *Transcript, Public Meeting Re Proposed Changes to the LANL Industrial Wastewater Permit (NPDES Permit No. NM0028355)* (Jan. 15, 2020) (A.R. B.2).

[4] Petitioners in the instant matter include Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace. The original and supplemental comments on the 2019 Draft Permit were submitted on behalf of Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and New Mexico Acequia Association. For ease of reference, we refer to these as "Petitioners' Comments" and "Petitioners' Supplemental Comments" even though the group composition has changed.

NPDES Permit # NM0028355, at 4 (Oct. 15, 2020) (A.R. C.2) ("Pet'rs Original Cmts."). Petitioners submitted extensive comments regarding the Region's authority to permit a non-discharging outfall and maintained that "the CWA is not intended to authorize the permitting of a facility whose discharge has been terminated—such as the RLWTF [Treatment Facility]." *Id.* at 29. Petitioners further stated that the Region had "expand[ed] the application of the CWA beyond its clear limits" and "expressly ignor[ed] RCRA." *Id.*

1. *2021 Reopening of the Public Comment Period*

In November 2020, Permittees requested that the Region reopen the public comment period on the 2019 Draft Permit. E-mail from Jennifer Griffin, NPDES Program Lead, Los Alamos Nat'l Lab'y, to Isaac Chen & Brent Larsen, U.S. EPA Region 6 (Nov. 12, 2020, 15:33 MST) (A.R. E.1). In support of their request, Permittees stated that comments submitted during the public comment period "identify and address a number of important technical and regulatory concerns" and "there are a number of technical inaccuracies and questions that can be addressed as needed for the Agency to review as needed to issue a final permit." *Id.* The Region granted the request, specifying that the reopened comment period would be limited to the following issues:

> 1. Legal and factual issues pertaining to EPA's jurisdiction to issue an NPDES permit for Outfall 051.
>
> 2. Legal and factual issues pertaining to the applicability of the wastewater treatment unit exemption for the RLWTF [radioactive liquids waste treatment facility].
>
> 3. Factual issues concerning historical discharges from all outfalls covered by the permit application.
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> 4. Derivation of the flow estimates for Outfall 051 or other outfalls that were provided in the renewal application.
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> 5. Misc. factual issues (i.e., past permit application information vs. current; current discharges; permitting of outfalls that may discharge or discharge infrequently).

Notice Reopening Comment Period at 2.

The reopened comment period began on January 30, 2021, and ended on February 28, 2021. *Id.* (The Region granted Petitioners an extension, allowing them to submit comments on the issues identified in the Notice Reopening the

Comment Period by March 29, 2021.). Region 6, U.S. EPA, *NPDES Permit No. NM0028355 Response to Comments*, at 53 (March 24, 2022) (A.R. H.5) ("Resp. to Cmts."). Permittees and Petitioners submitted supplemental comments responding to the issues identified in the reopening notice. Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and New Mexico Acequia Ass'n, *Supplemental Comments on Proposed Renewal of NPDES Permit # NM0028355* (Mar. 29, 2021) (A.R. F.4) ("Pet'rs Sup. Cmts."); *see also* U.S. Dep't of Energy Nat'l Nuclear Sec. Admin., and Triad Nat'l Sec., L.L.C., *Supplemental Comments, Information, and Response Regarding Non-Governmental Organizations (NGO) Comments on the Draft 2019 National Pollutant Discharge Elimination System (NPDES) Permit No. NM0028355 for Los Alamos National Laboratory* (Feb. 25, 2021) (A.R. F.1) ("Permittees Sup. Cmts."). Permittees' supplemental comments maintained that Petitioners' original comments were mistaken in asserting that there had only been one discharge from Outfall 051 since November 2010, and that instead, there had been three such discharges: on June 18, 2019; March 10, 2020; and August 18, 2020. Permittees Sup. Cmts. attach. 1, at 17. Permittees stated that these discharges were documented in Discharge Monitoring Reports ("DMRs") submitted to EPA. *Id.* Permittees also stated that the discharges in March and August 2020 were "especially noteworthy" and examples of Outfall 051 being used as a "back-up or supplemental alternative when circumstances require," including when the evaporation equipment is unavailable, when the solar evaporation tanks are not in service, and when influent volumes necessitate use. *Id.* at 17-18. Further, Permittees noted that the Laboratory "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." *Id.* at 18-19. Permittees included an affidavit from Stuart A. McKernan, a Facility Operations Director at the Laboratory, with their supplemental comments. *Id.* at 30-31. The Facility Operations Director's affidavit stated that Outfall 051 would not only be used as a back-up but would also be used "routinely in conjunction with the MES [Mechanical Evaporator System] to support the Laboratory's operational priorities, such as when influent to the RLWTF [Treatment Facility] makes such use advisable, and to confirm operability." *Id.* at 30.

Permittees also submitted a "Notice of Planned Change" with their supplemental comments, which included a Revised Fact Sheet for Outfall 051. *See* Notice of Planned Change attach. 1. The Permittees' Revised Fact Sheet provided red-line/strikeout edits to the previous Outfall 051 Fact Sheet, including a revised estimate for Outfall 051's discharge rate of approximately 16,000 gallons per day, "calculated based upon discharges in June 2019, March 2020, and August 2020."

Compare Notice of Planned Change attach. 1, at 7 tbl.4 *with* Outfall 051 Fact Sheet at 7 tbl.4 (estimating Outfall 051's discharge rate at 20,000 gallons per day). The Permittees' Revised Fact Sheet's estimated frequency of discharge remained at four days a week for twelve months a year. Notice of Planned Change attach. 1, at 7 tbl.4. The cover letter accompanying the Notice of Planned Change stated that the changes to the Treatment Facility and use of Outfall 051 "**will not** increase the quantity of pollutants in the effluent or volume discharged to the outfall." Notice of Planned Change at 1-2 (emphasis in original); *see also id.* attach. 1, at 7 (stating "[t]he startup of the new facility is not expected to impact the outfall location, flowrates, and discharge frequency provided in Table 4" of the Fact Sheet).

In their supplemental comments, Petitioners responded to the 16,000 gallons per day revised discharge estimate, noting that the estimate was "derived from a discharge made in 2020." Pet'rs Sup. Cmts. at 3. Petitioners maintained that the revised estimate "do[es] not represent a quantity that DOE [Permittee] plans or proposes to discharge in the future." *Id.* Petitioners also stated that while the Permittees indicated that they plan to operate Outfall 051 "in an 'integral' manner" with the evaporation equipment, they contended that this statement "does not amount to a plan or proposal actually to discharge via the outfall in the future." *Id.*

2. *Response to Comments Document and 2022 Final Permit*

In March 2022, the Region issued its Response to Comments document and its final permitting decision. Region 6, U.S. EPA, *Triad National Security, L.L.C. and U.S. Department of Energy, NPDES Permit No. NM0028355* (March 30, 2022) (A.R.H.1-H.4) ("2022 Final Permit"); Resp. to Cmts at 1. With respect to Outfall 051, the 2022 Permit describes the discharge type as "intermittent," and does not include parameters for the "monthly average" or "daily maximum" flow discharge limitations other than reporting requirements. 2022 Final Permit pt. I, at 7. The 2014 Permit had the same description and lack of parameters for flow discharge limitations for Outfall 051. 2014 Permit pt. I, at 7.

During the public comment period, Petitioners objected to including Outfall 051 in the NPDES permit and maintained that the "[g]overning law precludes a permit for non-discharging outfalls." Resp. to Cmts. at 10; *see also* Pet'rs Original Cmts. at 24 (arguing 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"). The Region responded that the CWA allows the "EPA to issue 'a permit for the discharge of any pollutant[,]' * * * draws no distinction between actual and potential discharges[,] and does not limit EPA's authority on that basis." Resp. to Cmts. at 10 (quoting 33 U.S.C. § 1342(a)(1)). The Region further noted that "to comply with the [CWA], 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." *Id.* The Region stated that the Laboratory "sought permit coverage * * * because the facilities have discharged or have the potential to discharge." *Id.* at 11. The Region maintained that "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 [sic] the discharge may be infrequent and/or irregular." *Id.*

In response to Petitioners' objection to the continued NPDES permitting of Outfall 051, the Region also referenced the three days of discharge between 2019 and 2020, and then quoted Permittees' statement in their supplemental comments that discharges from Outfall 051 are expected to be more routine and frequent in the future. The Region stated:

> 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."

E.g., Resp. to Cmts. at 11; *see also id.* at 32, 33-34, 35, 36, 38, 55, 57, 59, 60-61 (repeating the same discussion of the 2019 and 2020 discharge data verbatim).

Following the Region's issuance of the 2022 Permit, Petitioners filed their Petition for Review with the Board challenging that permitting decision.

V. *ANALYSIS*

A. *Overview*

For the reasons discussed below, a remand to the Region in this matter is necessary because the public, including Petitioners, lacked an adequate opportunity

to comment on critical Outfall 051 discharge data that the Region relied upon in making its final permitting decision, or to address the Region's reliance on that data in a petition filed with the Board. For the first time in a footnote in its Response Brief, the Region admits that it "considered" certain data that post-dates the close of the public comment period and that the Region "inadvertently omitted" that data from its Response to Comments document, EPA Region 6's Response to Petition for Review 4 n.5 (July 7, 2022) ("Region Resp. Br."), which is the document that "provides the Agency's final rationale for its decision," *In re ConocoPhillips Co.*, 13 E.A.D. 768, 780 (EAB 2008) (quoting *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 533 (EAB 2006)).

B. *The Region Failed to Provide the Public with Adequate Notice and Opportunity to Comment with Respect to the 2021 Discharge Data or to Address the Region's Reliance on That Data in a Petition with the Board, Warranting a Remand*

The Region relied on discharge data that post-dates the public comment period on the 2019 Draft Permit and did not include, or discuss, that discharge data in its Response to Comments document as part of its final rationale for its permitting decision. The Region's Fact Sheet that accompanied the 2019 Draft Permit for public comment represented that Outfall 051 had not discharged since November 2010, except for a one-day discharge in June 2019. Fact Sheet at 15. In its March 2022 Response to Comments document, the Region identified three days of discharge from Outfall 051 that occurred in June 2019, March 2020, and August 2020, all of which occurred prior to the conclusion of the public comment period. *E.g.*, Resp. to Cmts. at 11. As noted above, the Region specifically reopened the public comment period to address, among other things, "[f]actual issues concerning historical discharges from all outfalls covered by the permit application." Notice Reopening Comment Period at 2. This reopened public comment period extended from January through February 2021, and then Petitioners received an additional 30 days until March 2021 to submit comments. *Id.*; Resp. to Cmts. at 53.

Petitioners addressed the three days of discharges from Outfall 051 in 2019 and 2020 in their original and supplemental public comments. *See* Pet'rs Original Cmts. at 4 (noting that Outfall 051 had not discharged any liquid since November 2010, aside from one single-day discharge in June 2019); Pet'rs Sup. Cmts. at 3 (arguing that the latest discharge estimates Permittees provided are "derived from a discharge made in 2020 [and] do not represent a quantity that DOE [Permittee] plans or proposes to discharge in the future [because the Permittee'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"). Petitioners again addressed those three days of discharge in their Petition for Review. Pet.

at 31-32 (attributing the discharges in 2020 to the mechanical evaporator being serviced and characterizing the June 2019 discharge as a single exception, termed an "operational readiness discharge"); *see also id.* at 37 n.42 (noting that the purpose of the June 2019 discharge "was said to be operational readiness" but that "[t]he actual purpose has never fully been explained").

The Region, however, relied on other Outfall 051 discharge data in making its 2022 final permitting decision. The Region relied on Outfall 051 discharge data from April 2021, May 2021, June 2021, July 2021, August 2021, September 2021, October 2021, November 2021, and January 2022. It was not until the Region's Response Brief in this matter that the Region first disclosed, in a footnote, that the Region had "inadvertently omitted [the] 2021 and 2022 discharges" from its Response to Comments document and that "EPA considered all discharges from Outfall 051 in its final decision, includ[ing the] 2021 and 2022 discharges that occurred prior to permit issuance." Region Resp. Br. at 4 n.5. In response to the Board's order requesting clarification of various issues, the Region revised this statement, stating "that only the 2021 discharges, and not the 2022 discharges, were considered in issuing the 2022 Permit." *See* Response to Order Requesting Clarification at 6 (Sept. 1, 2022) ("Clarification Resp.").[5] Given that the Region's reliance on the 2021 data in its final permitting decision did not come to light until the Region filed its Response Brief in this matter, the public had no opportunity to comment on the 2021 discharge data or to address it in any petition filed with the Board. Under these circumstances, a remand is warranted for the Region to provide the public with an opportunity to comment on the 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.

We have routinely remanded where a permitting authority has introduced data or rationales for the first time on appeal. For example, in *In re Pio Pico Energy Ctr.*, the permit issuer did not include or discuss in its response to comments document or fact sheet certain emissions data in the administrative record relevant to the permit condition at issue. 16 E.A.D. 56, 132 (EAB 2013). Instead, the permit issuer made a "cursory" reference to the data in a footnote in its response to the petitions for review, stating that such data was "generally consistent" with the

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[5] 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).

permit issuer's conclusions. *Id.* We held that the permit issuer's "post-hoc analysis comes too late; the analysis should have been part of the record available for public comments before the [permit issuer] determined the final [permit condition]." *Id.* We also observed that the Region's post-hoc summary lacked a "detailed explanation of all the data and its significance" to the permit issuer's permitting decision. *Id.* at 132-33. And "more importantly," neither the permit issuer's fact sheet nor the response to comments document provided such an explanation. *Id.* at 133. Thus, the record did not reflect the permit issuer's considered judgment in determining this permit condition, and the permit was remanded. *Id.* at 134, 150; *see also In re Hawaii Elec. Light Co.*, 8 E.A.D. 66, 101-02 (EAB 1998) (refusing to consider "new data" offered to confirm the permit issuer's analysis because it was "not in the record and available during the public comment period" and had "not been subject to public scrutiny and comment as contemplated by the statute and regulations").

The Board has repeatedly emphasized that the response to comments document plays an integral role in the public's ability to participate in and effectively challenge permitting decisions. "[T]he response to comments document is an appropriate vehicle for the Region to provide its rationale for a final permitting decision. Indeed, that is precisely the purpose of the response to comments document." *In re City and Cty. of San Francisco*, 18 E.A.D. 322, 369 n.38 (EAB 2020) (citation omitted) (citing *In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 125, 186 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied* 139 S. Ct. 1240 (Feb. 19, 2019)), *appeal docketed*, No. 21-70282 (9th Cir. Feb. 9, 2021); *see also, e.g.*, *ConocoPhillips*, 13 E.A.D. at 780 (noting that "the response to comments document provides the Agency's final rationale for its decision" (quoting *Dominion*, 12 E.A.D. at 533)). The response to comments document should contain a permit issuer's final rationale for its decisions, because this "ensures that interested parties have an opportunity to adequately prepare a petition for review." *In re Springfield Water and Sewer Comm'n*, 18 E.A.D. 430, 491 (EAB 2021) (quoting *In re City of Marlborough*, 12 E.A.D. 235, 245 (EAB 2005), *quoted in In re Indeck-Elwood, L.L.C.*, 13 E.A.D. 126, 147 (EAB 2006)). Additionally, a permitting authority's explanation that appears for the first time in the response to comments document can be challenged on appeal even if the issue was not raised in a public comment. *E.g.*, *In re Tucson Elec. Power*, 17 E.A.D. 675, 692 n.9 (EAB 2018). That is because "[t]he purpose of the response to comments and any supplementation of the administrative record at that time is to ensure that interested parties have full notice of the basis for final permit decisions and can address any concerns regarding the final permit in an appeal to the Board * * *." *Ash Grove*, 7 E.A.D. at 431.

Here, the Response to Comments document does not contain "the Agency's final rationale for its decision." *Dominion*, 12 E.A.D. at 533. The Region did not include in the Response to Comments document data that it relied on in making its permitting decision and now acknowledges that this data should have been included. *See* Region Resp. Br. at 4 n.5. As in *Pio Pico*, the Region's post-hoc reliance on the 2021 discharge data in its Response Brief reflects a lack of considered judgment by the Region in making its permitting decision. 16 E.A.D. at 132-34.

Moreover, the 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. And the rationale for the permitting decision with respect to Outfall 051 appears to have shifted from the Response to Comments to the Region's briefs before the Board. That is, despite the fact that the 2021 discharge data existed when the Region prepared its 2022 Response to Comments document, the Region did not mention it and instead referenced three discharges over the past decade and simply reiterated the permittees' representation that things would change *in the future*. *E.g.*, Resp. to Cmts. at 11. Yet, in its submissions before the Board, the Region's rationale appears to shift to focus on a rationale that the facility "actively discharge[s]," Region Resp. Br. at 4, and that the 2021 data is merely "confirmatory." Clarification Resp. at 7.

For example, the Region's Response Brief states that the Petition "contains many false and misleading statements that would lead the Board to believe Outfall 051 does not actively discharge and will never discharge in the future," and counters that "Outfall 051 actively discharges treated radioactive liquid waste from the Radioactive Liquid Waste Treatment Facility ("RLWTF") through Outfall 051 into Mortandad Canyon." Region Resp. Br. at 4. The Region then cites to the 2021 discharge data, noting that DMRs "reflect numerous discharges from Outfall 051." *Id.* Petitioners stated in their supplemental comments that the Permittees' statement about Outfall 051's "integral" role in operations "clearly does not amount to a plan or proposal actually to discharge via the outfall in the future." Pet'rs Sup. Cmts. at 3. The Region, in its Response to Comments document, repeated the Permittees' comments about this envisioned "integral" role and included arguments about why the Region has the authority to permit potential discharges. *E.g.*, Resp. to Cmts. at 11; *see also* Permittees Sup. Cmts. attach. 1, at 18-19. The Region's Response to Comments document does not ground the Region's rationale for its permitting decision in Outfall 051 actively discharging, and instead merely notes three discharges over the span of a decade, *see* Fact Sheet at 15. *E.g.*, Resp. to Cmts. at 11. The Region has not argued here that the 2021 discharges reflect Permittees' envisioned "integral" role for Outfall 051 in the future, *see* Permittees Sup. Cmts.

attach. 1, at 18, and even if it had, a brief before the Board is not where that point should be made. That point should have been made in the Region's Response to Comments document. The 2021 discharge data existed at the time the Region drafted its 2022 Response to Comments document, so if that was the import of the 2021 discharge data, the Region should have said so in the Response to Comments document rather than simply reiterating Permittees' comments that Outfall 051 will be "an integral component" of the Permittee's operations "in the future." Resp. to Cmts. at 11. A permit issuer "must articulate with reasonable clarity the reasons for [its] conclusions and the significance of the crucial facts in reaching those conclusions," *Ash Grove*, 7 E.A.D. at 417 (alteration in original) (quoting *In re Carolina Power & Light Co.*, 1 E.A.D. 448, 451 (Act'g Adm'r 1978)), but here the record is unclear as to the import of the 2021 discharge data in the Region's final permit decision.

The Region's presentation of new data in its Response Brief here and its shifting articulation of the rationale for the permitting decision with respect to Outfall 051 from the Response to Comments to its briefs before the Board indicates a lack of considered judgment in the Region's permitting decision. As discussed above, the Region's rationale for its permitting decision is unclear, and remand is warranted if we "can not [sic] determine with sufficient certainty the basis for the Region's determination." *In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997) (noting that the Region gave a different reason for permit condition in its response to comments and its response brief); *see also In re Beckman Prod. Servs.*, 8 E.A.D. 302, 313 (EAB 1999) (remanding for the Region to clarify basis for permit requirement because Region's response brief had "abandoned the rationale articulated in the Response to Comments" and the Board therefore could not "determine with sufficient certainty the actual basis for the Region's determination"). At the very least, if the Region had explained that it was relying on the 2021 discharge data in its Response to Comments document, a petitioner could have addressed that data in a petition for review filed with the Board—as the Petitioners here addressed the 2019 and 2020 discharge data in their petition. *See* Pet. at 31-32, 37 n.42. The Region failed to "ensure that interested parties ha[d] full notice of the basis for final permit decisions and c[ould] address any concerns regarding the final permit in an appeal to the Board." *Ash Grove*, 7 E.A.D. at 431. The Region's failure prevented Petitioners from having the opportunity to "question the rationale for or to challenge the validity of this new material" in their petition. *In re Gen. Elec. Co.*, 18 E.A.D. 575, 609 (EAB 2022), *appeal docketed*, No. 22-1398 (1st Cir. May 19, 2022) (citing *In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407, 418 (EAB 2007)).

The Region and Permittees seem to contend that, because the 2021 discharge data was in the administrative record, was publicly available, and the public was generally aware that the Region was relying on DMR reports, the public was on notice and should have addressed the 2021 discharge data in a petition filed with the Board. *See* Clarification Resp. at 2, 5 (noting that "DMRs submitted by NPDES permitted facilities are available to the public on an EPA website," that "Petitioners' comments include references to DMRs," and that the Region's Response to Comments "specifically referenced the ongoing requirement to continue submitting DMRs"); *see also* Permit Applicants' Response to Petition for Review 12 (July 1, 2022) ("Permittees Resp. Br.") ("Region 6 included in the administrative record a summary of DMRs for the five years preceding permit issuance. These records have been available to the public for some time.").[6] We do not disagree with the Region's contention that the Region properly included the 2021 discharge data in the administrative record. *See* Clarification Resp. at 2-5. We also recognize that a permit issuer may add new materials to the record in documenting its response to matters raised during the public comment period. *See* 40 C.F.R. § 124.17(b) ("If new points are raised or new material is supplied during the public comment period, EPA may document its response to those matters by adding new materials to the administrative record."). The problem here, however, is that the Region's Response to Comments document only discusses the 2019 and 2020 discharge data. *E.g.*, Resp. to Cmts. at 11. The Region "inadvertently omitted" the 2021 discharge data for Outfall 051 from its Response to Comments document. Region Resp. Br. at 4 n.5. Thus, as discussed above, the record is unclear as to the import of the 2021 discharge data in the Region's final permitting decision and the public had no opportunity to comment on it or address it in a petition to the Board.

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[6] Permittees request that the Board take official notice of the "public documents cited in th[eir] Response." Permittee Resp. Br. at 13 n.38; *see also* Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace Reply Brief 24 (July 25, 2022) ("Reply") (stating that the Laboratory "requests that its records of these asserted discharges should be subject to official notice"). As far as the DMR Summary document is concerned, that document is already included in the administrative record, *see* Clarification Resp. at 2, so it is unclear why we would need to take official notice of it. Moreover, taking official notice of the DMR Summary document (much like the Region's inclusion of the DMR Summary document in the administrative record) does not remedy the public's lack of opportunity to comment on the 2021 discharge data or the public's inability to address the Region's reliance on that data in a petition before the Board.

The Region's Response to Comments document only mentioned a subset of the data the Region actually relied upon in making its final permitting decision.[7] And "the response to comments document provides the Agency's final rationale for its decision." *Dominion*, 12 E.A.D. at 533. The public therefore reasonably understood that it was the 2019 and 2020 discharge data on which the Region relied to make its permitting decision, not a host of other data that did not exist during the public comment period—the 2021 discharge data. Given those circumstances, we do not agree with the Region's and Permittees' apparent argument that it was the public's responsibility here to comb the administrative record and all publicly available reports to discern the Region's actual rationale for its permitting decision and what discharge data the Region was actually relying on in making that decision. To so find in the circumstances presented here would be contrary to the letter and spirit of the notice and comment regulations.

The Region also seems to suggest that there was no need for the public to have the opportunity to comment on the 2021 discharge data because the Region considers "DMRs submitted after the close of the public comment period for the draft 2022 Permit as confirmatory" and that the "confirmatory nature of the DMRs is reflected by the authorization of Outfall 051 * * * in both the draft and final versions of the 2022 Permit." Clarification Resp. at 7. It is not entirely clear what the Region means when it says that 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'" that the Region noted in its

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[7] Aside from the Response to Comments document, we note that Permittees' statements in the administrative record about future discharges from Outfall 051 are confusing. For example, Permittees represented that their flow estimates for Outfall 051 were based on "data from the discharges to Outfall 051 in June 2019, March 2020, and August 2020," discharges that Permittees characterized as Outfall 051 being used as a "back-up or supplemental alternative when circumstances require," Notice of Planned Change at 1, Permittees Sup. Cmts. attach. 1, at 18. Permittees also stated that changes to the Treatment Facility and use of Outfall 051 "**will not** increase the quantity of pollutants in the effluent or volume discharged to the outfall," Notice of Planned Change at 1-2 (emphasis in original), even though "discharges from the outfall are expected to be more routine and frequent in the future," Permittees Sup. Cmts. attach. 1, at 18-19.

Response to Comments document. *E.g.*, Resp. to Cmts. at 11.[8] 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." Permittees Sup. Cmts. attach. 1, at 18. Yet the Region now characterizes the 2021 discharge data as a product of Outfall 051 "actively discharg[ing]," Region Resp. Br. at 4, 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," Permittees Sup. Cmts. attach. 1, at 18; Region Resp. Br. at 4.[9]

The fundamental problem is that it was not until the Region's Response Brief here that it became clear that the Region relied on the 2021 discharge data in making its permitting decision, and the public lacked the opportunity to comment on this data. The nature and significance of the 2021 Outfall 051 discharge data, including whether it is "confirmatory," are substantive issues that should have first been addressed and debated through the public comment process and for the

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[8] To the extent the Region is suggesting that the 2021 discharge data was "confirmatory" and therefore the Region's failure to identify that it was relying on the 2021 discharge data until its Response Brief filed with the Board is excusable, we disagree. Even as to information that is "generally consistent" with the Region's permitting decision, where such information is first discussed in the permit issuer's response brief with the Board, we have held that such a "post-hoc analysis comes too late; the analysis should have been part of the record available for public comments before the Region determined the final [permitting condition]." *Pio Pico*, 16 E.A.D. at 132. We have also remanded permitting decisions to ensure that permit issuers "rigorously adhere" to the procedural requirements that facilitate public participation and input in permitting, even where we have recognized that remanding those proceedings might not result in any alteration of the final permitting decisions. *In re Russell City Energy Ctr.*, 14 E.A.D. 159, 174, 175-76 (EAB 2008); *e.g.*, *In re Weber*, 11 E.A.D. 241, 246 (EAB 2003); *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 557 (EAB 1999). And we have done so in cases in which the petitioner has not alleged any prejudice from the permitting authority's failure to adhere to public participation requirements. *E.g.*, *Rockgen*, 8 E.A.D. at 557.

[9] Petitioners have a different take on the 2021 discharge data. *See* Reply at 27. Whether Petitioners' take on the 2021 discharge data is correct has no bearing on our disposition here. The point is that there are different ways of characterizing the nature and significance of the 2021 Outfall 051 discharge data and the debate as to that characterization and significance should not occur before the Board in the first instance.

permitting authority to address in its Response to Comments document, not for the first time in briefing before the Board. These are not issues for the Board to analyze and address in the first instance without the benefit of the public comment process, including technical issues involving the Treatment Facility's operations, such as whether Outfall 051 is still serving as a "back-up or supplemental alternative when circumstances require," or "as an integral component of [the Laboratory's] operations." Permittees Sup. Cmts. attach. 1, at 18; *see In re West Bay Expl. Co.*, 17 E.A.D. 204, 222 (EAB 2016) ("[T]he Board should generally not be asked to resolve technical issues in the first instance."); *In re West Bay Expl. Co.*, UIC Appeal No. 14-66, at 12 (EAB Sept. 22, 2014) (Order Denying Review) ("The Board's role is not to make initial scientific findings but to review the Region's decisions to determine if the Region has based its conclusions on clearly erroneous conclusions of fact or law."); *see also Gen. Elec.*, 18 E.A.D. at 618 ("The Board's role is not to evaluate scientific arguments in the first instance. Instead, the Board's role is to review whether the Region's permitting decision is based on clearly erroneous conclusions of fact or law.").

VI. *CONCLUSION*

For the reasons discussed above, we remand to the Region to provide the public with an opportunity to comment on the 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.[10]

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[10] Anyone dissatisfied with the Region's decision on remand must file a petition seeking Board review in order to exhaust administrative remedies under 40 C.F.R. § 124.19(*l*). All pending motions are denied as moot.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Remand Order* in the matter of U.S. Department of Energy and Triad National Security, L.L.C., NPDES Appeal No. 22-01, were sent to the following persons in the manner indicated:

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Dated: Dec 28, 2022

Emilio Cortes

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