

**IN RE LOS ALAMOS NATIONAL SECURITY, LLC AND THE
U.S. DEPARTMENT OF ENERGY**

NPDES Appeal No. 17-05

FINAL DECISION

Decided March 14, 2018

Syllabus

Concerned Citizens for Nuclear Safety (“Concerned Citizens”) filed an Informal Appeal with the Environmental Appeals Board (“Board”) under 40 C.F.R. § 124.5(b) seeking review of the U.S. Environmental Protection Agency Region 6’s (“Region”) denial of Concerned Citizens’ request to terminate as to one outfall – referred to as Outfall 051 – a National Pollutant Discharge Elimination System (“NPDES”) permit issued for operations at the Los Alamos National Laboratory in New Mexico (“Los Alamos Laboratory”).

The Region issued the permit in 2014 (“2014 Permit”) authorizing Los Alamos National Security, LLC and the U.S. Department of Energy to continue discharges from eleven sanitary and/or industrial outfalls at the Los Alamos Laboratory, including the discharge of treated wastewater from the Radioactive Liquid Waste Treatment Facility through Outfall 051. In its Informal Appeal, Concerned Citizens alleges that the Region erred in denying its subsequent request to terminate the 2014 Permit as to Outfall 051 because the Los Alamos Laboratory has not discharged liquid waste from that Outfall since 2010. Concerned Citizens asserts that permit termination is 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. In response, the Region argues that Concerned Citizens failed to establish a change in any condition justifying permit termination.

Held: The Region did not clearly err or abuse its discretion in denying Concerned Citizens’ request to terminate the 2014 Permit as to Outfall 051. When the Region issued the 2014 Permit, discharges from Outfall 051 had not occurred since 2010 and would only be necessary if certain equipment became unavailable due to maintenance, malfunction or capacity shortage. Under these circumstances, the record supports the Region’s determination that Concerned Citizens failed to establish a change in any condition after the Region issued the 2014 Permit justifying permit termination pursuant to 40 C.F.R. § 122.64(a)(4). The Board therefore denies the Informal Appeal.

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Ward:

I. STATEMENT OF THE CASE

Concerned Citizens for Nuclear Safety (“Concerned Citizens”) filed this Informal Appeal under 40 C.F.R. § 124.5(b) seeking review of the denial of its request to terminate as to one outfall – Outfall 051 – a National Pollutant Discharge Elimination System (“NPDES”) permit issued for operations at the Los Alamos National Laboratory (“Los Alamos Laboratory”). *See* Concerned Citizens for Nuclear Safety Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) (“Informal Appeal”) (Sept. 14, 2017); Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. NM0028355 (Aug. 12, 2014) (“2014 Permit”) (Administrative Record (“A.R.”) II).¹ The U.S. Environmental Protection Agency Region 6 (“Region”) issued the permit in 2014 authorizing Los Alamos National Security, LLC and the U.S. Department of Energy (“Permittees”) to continue discharges from eleven sanitary and/or industrial outfalls at the Los Alamos Laboratory, including discharges of treated wastewater from the Radioactive Liquid Waste Treatment Facility (“Treatment Facility”) through Outfall 051. *See* 2014 Permit Pt. I at 6. Concerned Citizens participated in the permitting process leading up to the issuance of the 2014 Permit.

¹ In responding to the Informal Appeal, the Region attached an index to the administrative record. *See* “Index to EPA Region 6 Administrative Record (A.R.)” (Oct. 18, 2017). The Region’s Index lists five documents, each identified with a Roman numeral (I-V). This decision will cite these documents using the Roman numeral assigned by the Region along with the title of the document. In addition, one of the documents in the administrative record provided by the Region, A.R. IV, is Concerned Citizens’ request to terminate with respect to Outfall 051 filed with the Regional Judicial Officer in June 2016 and then resubmitted to the Region 6 Acting Regional Administrator in March 2017 (discussed in section III.C. of this decision). *See* Letter from Lindsay A. Lovejoy, Jr., Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, Counsel for Concerned Citizens, to Samuel Coleman, P.E., Acting Administrator, U.S. EPA Region 6 (Mar. 9, 2017) (enclosing Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility) (June 17, 2016) (“Termination Request”). The Termination Request attaches multiple exhibits. This decision cites to these exhibits as “Ex. __ to Termination Request.”

In the current appeal, Concerned Citizens alleges that the Region erred in denying its subsequent request to terminate the 2014 Permit as to Outfall 051 because the Los Alamos Laboratory has not discharged liquid waste from that outfall since 2010. *See* Informal Appeal at 1. Concerned Citizens asserts that permit termination is appropriate under 40 C.F.R. § 122.64(a)(4), which provides that after a permit is issued, “[a] change in any condition” requiring a reduction or elimination of any discharge is cause for permit termination. *See id.* at 3-11. In response, the Region argues that Concerned Citizens failed to establish a change in any condition justifying permit termination. *See* EPA Response to Concerned Citizens for Nuclear Safety’s Informal Appeal of EPA’s Denial of Request to Terminate Permit Authorization (Oct. 18, 2017) (“Region’s Response”).

We conclude that the Region did not clearly err or abuse its discretion. The record supports the Region’s determination that Concerned Citizens failed to establish a change in a condition justifying permit termination after the Region issued the 2014 Permit. The Informal Appeal is therefore denied.

II. REGULATORY HISTORY

EPA’s consolidated permitting regulations provide detailed procedures for EPA’s issuance or renewal of permits under NPDES and other permit programs. Those regulations require EPA to issue a draft permit, seek public comment, hold a public hearing where there is significant public interest in the draft permit, and respond to significant comments received when a final permit decision is issued. *See* 40 C.F.R. §§ 124.6-.12, .17. The regulations specify the procedures and grounds for an appeal of a permit decision at 40 C.F.R. § 124.19. After EPA issues an NPDES permit, however, 40 C.F.R. § 124.5 allows “any interested person” to request termination under that regulation only for the reasons listed in 40 C.F.R. § 122.64. In particular, section 124.5 states, in part:

(a) Permits * * * may be modified, revoked and reissued, or terminated, either at the request of any interested person * * * or upon the [Region’s²] initiative. However, permits may *only* be

² The regulations use the term “Director” to describe the permitting authority. 40 C.F.R. § 124.2 (defining “Director”). The permitting authority here is EPA’s Regional Administrator for Region 6. The Board will therefore refer to the Region in places where the regulations use the term “Director.” *See id.* (“When there is no approved State * * * program, and there is an EPA administered program, ‘Director’ means the Regional Administrator.”).

*** terminated for the reasons specified in *** [40 C.F.R.] § 122.64 ***.

40 C.F.R. § 124.5 (emphasis added). And 40 C.F.R. § 122.64 in turn identifies four bases for “terminating a permit during its term:”

- (1) Noncompliance by the permittee with any condition of the permit;
- (2) The permittee’s failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee’s misrepresentation of any relevant facts at any time;
- (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or
- (4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

40 C.F.R. § 122.64(a).

Concerned Citizens’ Informal Appeal relies on the fourth basis for termination at 40 C.F.R. § 122.64(a)(4) – where there has been “[a] change in any condition” since permit issuance.

III. *FACTUAL HISTORY*

To best understand the issue raised by Concerned Citizens – that there has been “[a] change in any condition” after the Region issued the 2014 Permit – we describe in detail below the Treatment Facility, the process leading to issuance of the 2014 Permit, and Concerned Citizens’ subsequent termination request.

A. *The Los Alamos Laboratory*

The Los Alamos Laboratory is located on forty square miles in Los Alamos County in north-central New Mexico, approximately sixty miles north-northeast of Albuquerque. See Los Alamos National Laboratory NPDES Permit Re-Application, Permit No. NM0028355 at ¶ 3.0 (Feb. 2012) (“2012 Permit Re-Application”) (A.R. I) and attached 2012 NPDES Re-Application Outfall Fact Sheet for Outfall 051 (“2012 Re-Application Fact Sheet – Outfall 051”) (A.R. I.A.).

The Los Alamos Laboratory provides for “stockpile stewardship” and engages in “extensive basic research in physics, chemistry, metallurgy, mathematics, computers, earth sciences, and electronics.” 2012 Permit Re-Application at ¶ 3.1.

B. *The 2012 Permit Re-Application and the 2014 Permit*

In February 2012, the Los Alamos National Security, LLC and the U.S. Department of Energy submitted an application for renewal of the Los Alamos Laboratory’s then-existing NPDES permit, issued in August 2007, to authorize continued discharges from eleven outfalls, including discharges from the Treatment Facility to the Facility’s one Outfall, Outfall 051. *See* 2012 Permit Re-Application at ¶ 4.0 & Table 4.1. The Treatment Facility treats low-level and transuranic radioactive liquid waste from various locations at the Laboratory. 2012 Re-Application Fact Sheet – Outfall 051 at 1.

Prior to 2010, treated wastewater from the Treatment Facility was regularly discharged to Outfall 051. *See* 2012 Permit Re-Application at ¶ 2.0; 2012 Re-Application Fact Sheet – Outfall 051 at 1, 5. As the Permittees stated in their 2012 Re-Application, however, the Treatment Facility “ha[d] not discharged to Outfall 051 since November 2010” due to changes in facility operations prior to re-application, including the use of a mechanical evaporator. *See* 2012 Re-Application Fact Sheet – Outfall 051 at 5. The Permittees also identified the anticipated construction of two new solar evaporation tanks – referred to as “Zero Liquid Discharge” tanks – that would serve the same function as the mechanical evaporator of receiving treated effluent from the Treatment Facility. *See id.* at 5, 7. Permittees nevertheless requested re-permitting of Outfall 051, “so that the [Treatment Facility] can maintain the capability to discharge to the outfall *should* the Mechanical Evaporator and/or Zero Liquid Discharge * * * tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory’s] scope/mission.” *Id.* at 5 (emphasis added). Permittees further noted that “[a] grab sample [of the effluent] will be collected from Outfall 051 *when/if* the [Treatment Facility] discharges effluent through the [O]utfall.” *Id.* (emphasis added). *See also* Form 2C to the 2012 Permit Re-Application at 6-14 (same).

In June 2013, the Region issued a public notice of the draft permit seeking public comment. *See* NPDES Permit No. NM0028355 Response to Comments at 2 (Aug. 4, 2014) (“Response to Comments”) (A.R. III). The Region’s Fact Sheet accompanying the 2013 draft permit stated: “The effluent is evaporated through a mechanical evaporator and has no discharge since November 2010. [Los Alamos Laboratory] includes the outfall in the application *in case* the evaporator becomes

unavailable due to maintenance, malfunction, and/or capacity shortage.” NPDES Permit No. NM0028355, Fact Sheet for the Draft [NPDES] Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN to Termination Request) (emphasis added).

In their August 2013 comments on the draft permit, the Permittees reiterated that “the * * * [Treatment Facility has] not discharged [to Outfall 051] since November 2010 as a result of using the mechanical evaporator” and that it sought to re-permit the Outfall in the event that the mechanical evaporator or now constructed evaporation tanks (once permitted and in use) were not functioning: “Based on discharge records prior to November 2010, and with options of using the existing mechanical evaporator or new [Zero Liquid Discharge] evaporation tanks, [the Treatment Facility] would discharge to Outfall 051 only once or twice per week *if* evaporation is not an option.” Letter from Alison M. Dorries, Division Leader, Environmental Protection Division, Los Alamos National Security, LLC, and Gene E. Turner, Environmental Permitting Manager, Los Alamos Field Office, Department of Energy, to Diane Smith, U.S. EPA Region 6 Permit Processing Team, Enclosure 1 at 3 (Aug. 13, 2013) (emphasis added) (“Los Alamos Laboratory Comments on 2013 Draft Permit”) (Ex. OO to Termination Request).

Further, because Los Alamos Laboratory anticipated that future discharges to Outfall 051 – if they were to resume – were likely to be intermittent, its August 2013 comments requested modification of a provision in the draft permit’s continuous flow monitoring requirements for Outfall 051: “[The Treatment Facility] has not discharged since November 2010. *If* discharges to the Outfall 051 resume, it is estimated that [Treatment Facility] would only discharge intermittently * * *.” *Id.* at 7 (emphasis added).

Although Concerned Citizens apparently filed comments on other parts of the draft permit, no commenter objected to the 2014 Permit’s continued authorization of discharges through Outfall 051 during the comment period on the draft permit.³ *See generally* Response to Comments.

³ In its response to Concerned Citizens’ Informal Appeal, the Region represents that Concerned Citizens joined another organization, Communities for Clean Water, in submitting comments on the 2013 draft permit and that the Region responded to those comments. *See* Region’s Response at 14 (citing Response to Comments at 9-13). The Region states that these comments did not raise the issue of whether the permit should authorize discharges from Outfall 051. *Id.* In its Reply to the Region’s Response, Concerned Citizens indicates that the Region correctly characterized Concerned Citizens’

The Region issued its 2014 permit determination on August 12, 2014. In the Region's August 2014 Response to Comments on the draft permit, the Region agreed that continuous monitoring was not necessary because the Treatment Facility had not discharged to Outfall 051 since November 2010 and would only discharge intermittently even "if discharges resume." Response to Comments at 17. Consequently, although the 2014 Permit includes discharge parameters for Outfall 051, the Permit requires only that a one-time grab sample be taken "if a discharge occurs at Outfall 051." 2014 Pt. I.E. at 26 (emphasis added).

The deadline for filing a petition for review of the Region's 2014 Permit renewal decision with the Board was in September 2014. 40 C.F.R. § 124.19(a).⁴ Neither Concerned Citizens nor any other party filed a petition for review with the Board under 40 C.F.R. § 124.19 objecting to the inclusion of Outfall 051 in the 2014 Permit. However, Permittees filed a petition for review with the Board challenging the 2014 Permit's imposition of monitoring and sampling requirements for selenium at a different outfall (Outfall 03A048). At the request of the parties, the Board dismissed the petition after the Region removed the disputed permit provision. *See In re Los Alamos Nat'l Lab.*, NPDES Appeal No. 14-02 (EAB Apr. 27, 2015) (Order Dismissing Petition for Review).

C. *Concerned Citizens' 2015 Letter Challenging Issuance of 2014 Permit and 2016 Termination Request*

A little over a year later, in November 2015, new attorneys representing Concerned Citizens sent a letter to the Region questioning the need for the 2014 Permit. *See* Letter from Stacey Dwyer, Associate Director, U.S. EPA Region 6, NPDES Permits and TMDL Branch, to Lindsay A. Lovejoy, Jr., Attorney at Law, 3600 Cerrillos Rd., Santa Fe, NM (Dec. 18, 2015) ("Region's 2015 Response Letter") (Ex. UU to Termination Request) (referencing Concerned Citizens' Nov. 2015 letter). Concerned Citizens did not request termination of the 2014 Permit and instead asked for the Region's justification for issuance of the Permit in

participation during the public comment period. *See* Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) at 16 (Nov. 3, 2017).

⁴ Under 40 C.F.R. § 124.19(a), any person filing comments on the draft permit or participating in a public hearing on the draft permit may file a petition for review with the Board within thirty days after the Region serves notice of issuance of a permit. 40 C.F.R. § 124.19(a)(2)-(3).

the first instance. In particular, the letter stated that because the Treatment Facility has been designed to eliminate all discharges and there have been no discharges since 2010, there was no need for the Permit, and, pursuant to federal case law, the Region lacked jurisdiction under the Clean Water Act to have issued the 2014 Permit for Outfall 051. *Id.* at 1-2; *see also* Ex. 7 to Informal Appeal (attaching Concerned Citizens' Nov. 2015 letter).

In response, the Region stated that it had re-examined its permit file and determined that it would not alter its permit determination. Region's 2015 Response Letter. Although no discharges had occurred since 2010, the Region stated, in part, that: "[Los Alamos Laboratory] specifically sought permit coverage for Outfall 051 to protect against liability in case of a future discharge. In its application, [Los Alamos Laboratory] indicated that under certain circumstances, e.g.,] maintenance, malfunction, and/or capacity shortage, a discharge could occur and permit authorization would be needed." *Id.* at 1. The Region also disagreed that it lacked jurisdiction to issue a permit for potential discharges where, as here, the permittee requested coverage "for a possible future discharge." *Id.* at 2.

In June 2016, Concerned Citizens filed with the Regional Judicial Officer a request to terminate the 2014 Permit with respect to Outfall 051 pursuant to 40 C.F.R. §§ 124.5 and 122.64(a)(4).⁵ *See* Termination Request (June 17, 2016) (A.R. IV). As noted above, section 124.5 allows any person to request termination of an NPDES permit during its term based on: "(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW)." 40 C.F.R. § 122.64(a). In particular, Concerned Citizens stated that, since at least 1998, Los Alamos Laboratory had engaged in an effort to eliminate liquid discharges from the Treatment Facility to Outfall 051. *See* Termination Request at 3-11 (citing *Elimination of Liquid Discharge to the Environment from the TA-50 Radioactive Liquid Waste Treatment Facility*, David Moss, et. al., Los Alamos National Laboratory, at vi (June 1998) (Ex. A to Termination Request) (recommending a "phased transition toward zero liquid discharge" through Outfall 051). Concerned Citizens further noted that as a result of these efforts, the Treatment Facility had not discharged any wastes through Outfall 051 since November 2010. *Id.* at 10-11.

⁵ Concerned Citizens did not allege that 40 C.F.R. § 122.64(a)(1)-(3) served as a basis for termination.

Concerned Citizens also acknowledged that in the 2012 Permit Re-Application, Permittees had “expressly requested a permit [for Outfall 051] only for a possible discharge” and as a “fallback” for “use in possible contingencies.” *See Id.* at 9; *see also id.* at 10 (stating that 2012 Permit Re-Application sought leave to provide effluent characteristics for Outfall 051 only “*if discharges * * * are initiated* during the life of the new permit”), 11 (stating that the final permit refers to regulation of discharges from Outfall 051 “*if discharges resume*”) (emphasis in original). Nevertheless, because no discharges had occurred since 2010, Concerned Citizens asserted that Los Alamos Laboratory had no need for or intention of discharging through Outfall 051. *Id.* at 11. Given the continued lack of any discharges from Outfall 051, Concerned Citizens asserted that termination was justified under 40 C.F.R. § 122.64(a)(4). *See id.* at 17 (asserting that the permit must be terminated “due to lack of discharge”).

Concerned Citizens further argued that EPA lacked the authority under the Clean Water Act (“CWA”) to issue a permit for potential discharges that could occur sometime in the future. *Id.* at 12-15. Finally, Concerned Citizens suggested that Los Alamos Laboratory sought to maintain Outfall 051 as a permitted discharge for the Treatment Facility because coverage under the 2014 Permit allows Los Alamos Laboratory to obtain a Waste Water Treatment Unit exemption under another federal law, the Resource Conservation and Recovery Act (“RCRA”), and loss of the exemption would require Los Alamos Laboratory to meet additional RCRA requirements. *Id.* at 3-6 (citing RCRA § 1004(27), 42 U.S.C. § 6903(27); 40 C.F.R. §§ 260.10, 264.1(g)(6)).

On March 2, 2017, the Regional Judicial Officer dismissed Concerned Citizens’ termination request for lack of jurisdiction under 40 C.F.R. § 124.5, but stated that Concerned Citizens could proceed with the matter before the Regional Administrator. *See In re Concerned Citizens for Nuclear Safety (CCNS) Request to Terminate NPDES Permit #NM0028355 (Permit) for Los Alamos Nat’l Lab. Radioactive Liquid Waste Treatment Facility*, (RJO, Mar. 2, 2017) (referencing June 2016 Termination Request).⁶ Thereafter, on March 9, 2017, Concerned Citizens resubmitted its termination request to the Regional Administrator. *See*

⁶ Although the Regional Judicial Officer’s Order is not part of the administrative record identified by the Region, the Board takes official notice of it as a public document. *See, e.g., In re Donald Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004) (explaining that information in the public domain is subject to official notice by the Board); *In re City of Denison*, 4 E.A.D. 414, 419 n.8 (EAB 1992) (taking official notice of administrative order not part of proceeding before Board).

Letter from Lindsay A. Lovejoy, Jr., Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, Counsel for Concerned Citizens, to Samuel Coleman, P.E., Acting Administrator, U.S. EPA Region 6 (Mar. 9, 2017) (A.R. IV) (enclosing Request to Terminate NPDES Permit # NM0028355 as to Outfall 051 for the Radioactive Liquid Waste Treatment Facility (June 17, 2016)).

D. Region 6's Denial of Concerned Citizens' Termination Request

In August 2017, the Region denied Concerned Citizens' request pursuant to 40 C.F.R. § 124.5(b).⁷ The Region determined that Concerned Citizens' request to terminate the 2014 Permit as to Outfall 051 was not justified because Concerned Citizens failed to demonstrate that there had been “[a] change in any condition” after the 2014 Permit was issued justifying termination under 40 C.F.R. § 122.64(a)(4). *See* Letter from William K. Honker, Director, Water Division, U.S. EPA Region 6, to Lindsay A. Lovejoy, Jr., Attorney at Law, and Jonathan Block, Eric D. Jantz, Douglas Meiklejohn, and Jaimie Park, New Mexico Environmental Law Center, Counsel for Concerned Citizens (Aug. 16, 2017) (“Region 6 Letter”) (A.R. V). The Region also rejected Concerned Citizens' assertion that EPA lacked the authority under the CWA to issue the NPDES permit for potential discharges. *Id.* at 2. Finally, the Region concluded that “[w]hether or not issuance of NPDES permit coverage might trigger the RCRA [Waste Water Treatment Unit] regulatory exemption has no bearing on EPA's NPDES permitting decisions, which must be based on the requirements of the CWA and implementing regulations.” *Id.* at 3.

E. Informal Appeal to the Board

On September 14, 2017, Concerned Citizens timely filed an Informal Appeal with the Board under 40 C.F.R. § 124.5(b) seeking review of the Region's denial of Concerned Citizens' termination request.⁸ On September 21, 2017, the Board issued an Order for Additional Briefing requiring that the Region file a response to the Informal Appeal and requesting that the parties address certain issues in their replies. Thereafter, on September 25, 2017, the Board issued an order granting the parties' request to extend deadlines for the Region's and the

⁷ 40 C.F.R. § 124.5(b) states, in pertinent part, that “[i]f the [Region] decides that the [termination] request is not justified, he or she shall send the requester a brief written response giving a reason for the decision.”

⁸ Under 40 C.F.R. § 124.5(b), denials of requests for termination “may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts.”

Permittees' responses as well as Concerned Citizens' reply. The Permittees and the Region filed responses on October 16 and 18, 2017, respectively.⁹ Concerned Citizens filed a reply on November 3, 2017, and requested oral argument.¹⁰ On February 22, 2018, the Board heard oral argument in this case.¹¹ For the reasons stated below, the Board denies Concerned Citizens' Informal Appeal.¹²

III. STANDARD OF REVIEW

Unlike the procedures governing Board review of permit determinations under 40 C.F.R. § 124.19, the regulations governing informal appeals from the denial of a request to terminate a permit under 40 C.F.R. § 124.5 do not specify the Board's standard of review. Upon consideration, the Board will adopt for informal appeals the same standard used for appeals of permit determinations under 40 C.F.R. § 124.19. Specifically, a party seeking review under 40 C.F.R. § 124.5 must demonstrate that the Region's determination was based on either a finding of fact or conclusion of law that was clearly erroneous or was an abuse of discretion. *See* 40 C.F.R. § 124.19(a)(4)(i)(A)-(B).¹³ The issues that may arise in a proceeding

⁹ *See* Letter from Susan L. McMichael, Attorney, Office of Laboratory Counsel, Los Alamos National Laboratory, and Silas R. DeRoma, Field Office Counsel, U.S. Department of Energy, to Clerk of the Board, U.S. EPA Environmental Appeals Board, and enclosed Aff. of Michael Thomas Saladen, Environmental Manager at LANL (Oct. 12, 2017); EPA Response to Concerned Citizens for Nuclear Safety's Informal Appeal of EPA's Denial of Request to Terminate Permit Authorization (Oct. 18, 2017) ("Region's Response").

¹⁰ Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b).

¹¹ Concerned Citizens, the Region, and Permittees (Los Alamos National Security, LLC and the U.S. Department of Energy) all participated in oral argument. *See* EAB Hearing Transcript ("Tr.") (Feb. 22, 2018).

¹² Under 40 C.F.R. § 124.5(b), the "appeal shall be considered denied if the Environmental Appeals Board takes no action on the letter within 60 days after receiving it." The Board's September 21 and 25 orders constituted sufficient "action" necessary to keep this matter alive beyond the sixtieth day, allowing the Board to now address this Informal Appeal on the merits. *See In re Waste Techs. Indus.*, 5 E.A.D. 646, 655 n.13 (EAB 1995) (order for supplemental briefing is sufficient action for purposes of the sixty-day period specified in 40 C.F.R. § 124.5(b)).

¹³ This standard is in keeping with the Board's other review on the merits of an informal appeal under 40 C.F.R. § 124.5. *See, e.g., In re Waste Tech. Inds.*, 5 E.A.D. 646

under 40 C.F.R. § 124.5 are not necessarily different or less significant than the issues that arise in a proceeding under 40 C.F.R. § 124.19. Where, as here, the Board has decided to consider an informal appeal under 40 C.F.R. § 124.5, *see supra* note 12, the issues presented warrant Board consideration under the same standard of review as issues arising in proceedings under 40 C.F.R. § 124.19. Moreover, adopting this standard will serve administrative efficiency and will provide for consistency in addressing future appeals to the Board whether formal or informal. *Cf.* 40 C.F.R. § 124.19(n) (stating that the Board “may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal”).

IV. ANALYSIS

A. *The Region Did Not Clearly Err or Abuse its Discretion in Denying the Termination Request*

In this Informal Appeal, Concerned Citizens asserts that permit termination proceedings are appropriate for the reason specified in 40 C.F.R. § 122.64(a)(4) because “no discharges of water or pollutants are planned or expected for Outfall 051, and no such discharges have occurred since November 2010.” Informal Appeal at 3.

Under 40 C.F.R. § 122.64(a)(4), a cause for “terminating [an NPDES] permit during its term” includes: “[a] change in any condition that requires either a temporary or permanent reduction or elimination of any discharge * * * controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a)(4). As noted, the regulation states plainly that termination is an action that occurs “during [the permit’s] term.” *Id.* Therefore, “[a] change” for purposes of termination is one that occurs after permit issuance. *See also* 40 C.F.R. § 122.62(a)(1) (similarly requiring certain “changes” to have “occurred after permit issuance” to allow modification of a permit). And to read “[a] change” for purposes of termination some other way would effectively write the phrase “during its term” out of 40 C.F.R. § 122.64(a). The Informal Appeal, however, does not allege “[a] change in any condition” at Outfall 051 since issuance of the 2014 Permit. Indeed, in quoting the language of this provision, Concerned

(EAB 1995). Although the Board in *Waste Technologies* did not explicitly address the standard of review for informal appeals, the Board found that the permit issuer “committed no error” in its permit determination and adequately justified that determination. *Id.* at 662-63.

Citizens omits the reference to “[a] change in any condition.” *See* Informal Appeal at 3 (quoting only the portion of section 122.64(a)(4) referring to the “elimination of any discharge * * * controlled by the permit.”). Thus, on its face, the Informal Appeal fails to demonstrate that the Region clearly erred or abused its discretion in denying the request to terminate.

The record supports the Region’s determination that there has not been “[a] change in any condition” at Outfall 051 since issuance of the 2014 Permit. Although not explicitly stated, Concerned Citizens appears to suggest that the passage of additional time since issuance of the 2014 Permit by itself constitutes a sufficient basis for termination. *See id.* at 5. However, when Permittees applied for renewal of their permit, they advised the Region that discharges from Outfall 051 had not occurred “since November 2010” and would only be necessary “*should* the Mechanical Evaporator and/or Zero Liquid Discharge * * * tanks become unavailable due to maintenance, malfunction, and/or there is an increase in treatment capacity caused by changes in [the Laboratory’s] scope/mission.” 2012 Re-Application Fact Sheet at 5 (emphasis added).¹⁴ As the Region explained in the Fact Sheet accompanying the 2013 draft permit, “[Los Alamos Laboratory] includes [Outfall 051] in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage.” NPDES Permit No. NM0028355, Fact Sheet for the Draft [NPDES] Permit to Discharge to Waters of the United States at 12 (June 26, 2013) (Ex. NN to Termination Request) (emphasis added). And when the Region issued the 2014 Permit, it reiterated that discharges from Outfall 051 had not occurred “since November 2010,” imposing certain monitoring requirements only “if discharges resume.” Response to Comments at 17; *see also* 2014 Permit Part I.E. at 26 (requiring that Permittees take a one-time grab sample of effluent from Outfall 051 “*if* a discharge occurs”) (emphasis added). Thus, 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. Under these circumstances, the Informal Appeal fails to

¹⁴ *See also* 2012 Re-Application Fact Sheet, Form 2C at 6-14 (same). Form 2C of the 2012 Re-Application Fact Sheet states further that an effluent sample “will be collected from Outfall 051 *when/if* the [Treatment Facility] discharges effluent to Mortandad Canyon.” *Id.* (emphasis added). Further, in their comments on the 2013 draft permit, Permittees stated that “[*if*] discharges to the Outfall 051 resume, it is estimated that [Treatment Facility] would only discharge intermittently.” Los Alamos Laboratory Comments on 2013 Draft Permit at 7 (emphasis added).

demonstrate the Region clearly erred or abused its discretion in denying the termination request.

In its Reply, Concerned Citizens makes conclusory claims that there have in fact been “massive and obvious” changes to the Treatment Facility and its operation that, according to Concerned Citizens, justify termination of the 2014 Permit for Outfall 051 under 40 C.F.R. § 122.64(a)(4). Concerned Citizens for Nuclear Safety Reply Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) (“Concerned Citizens Reply”) (Nov. 3, 2017) at 7. However, these alleged changes – the use of a mechanical evaporator and the anticipated use of the Zero Liquid Discharge tanks designed to reduce or eliminate discharges from the Treatment Facility – were identified in the 2012 Permit Re-Application and the Region’s Fact Sheet for the 2013 draft permit prior to the 2014 Permit’s issuance. Thus, they do not reflect “[a] change in any condition” since issuance of the 2014 Permit warranting termination pursuant to 40 C.F.R. § 122.64(a)(4).¹⁵

And maintaining the integrity and finality of the permitting process for permittees and other stakeholders requires Concerned Citizens to show that there has been “[a] change in any condition” since issuance of the 2014 Permit. When EPA is deciding whether to issue or renew a permit, the public is given a full opportunity to participate in and challenge any aspect of the permit. EPA’s permitting regulations direct EPA to issue a draft permit, to seek public comment for no less than thirty days, to hold a public hearing where there is a significant degree of public interest in a draft permit, and to issue a response to significant comments received at the time the final permit is issued. 40 C.F.R. § 124.6 - .12, .17. The public in turn is required to raise “all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the comment period.” *Id.* § 124.13. And under section 124.19, a party may seek to challenge any condition of a final permit so long as it files a petition for review with the Board within thirty days of issuance. *See id.* § 124.19(a)(3), (4).

¹⁵ During oral argument, Concerned Citizens objected to any finding that its termination request was untimely because the issues raised in that request were not raised during the proceedings leading to issuance of the 2014 Permit. Tr. at 61-62. The Board’s decision, however, is not based on any finding that the termination request was untimely, but rather the Region’s finding that the request fails to demonstrate a basis for termination because there has been no “change of any condition” since permit issuance under 40 C.F.R. § 122.64(a)(4).

Once the permit is issued, however, the regulations at 40 C.F.R. § 122.64(a) and § 124.5 specify that EPA may only terminate a permit during its term for one of four listed reasons. Initially, EPA's permitting regulations applicable to state NPDES programs allowed the Agency to terminate a permit for cause, "including, but not limited to," "[a] change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge." *State Program Elements Necessary for Participation in the NPDES*, 37 Fed. Reg. 28,390, 28,397 (Dec. 22, 1972). EPA included identical language in promulgating regulations applicable to federal NPDES programs in 1973. *See National Pollution Discharge Elimination System*, 38 Fed. Reg. 13,528, 13,533 (May 22, 1973). In 1979, however, EPA revised the regulations to remove the phrase "including, but not limited to" so as to allow for termination "only in certain limited circumstances." *See National Pollution Discharge Elimination System; Revision of Regulations*, 44 Fed. Reg. 32,854, 32,868, 32,912 (June 7, 1979). In addition, the Agency agreed with commenters that the causes for permit modification should be listed separately from the "more 'severe' measure" of termination. *Id.* In 1980, when EPA issued consolidated regulations governing its permitting programs, it expressed the expectation that the bases for termination in 40 C.F.R. § 122.64(a) would not be read broadly. *See Consolidated Permit Regulations*, 45 Fed. Reg. 33,290, 33,316 (May 19, 1980). Further, although the proposed rule included "other good cause" as a ground for termination, EPA chose not to include this as a basis for termination in the 1980 consolidated regulations because it was too "vague and open ended." *Id.* at 33,317. The limited scope of 40 C.F.R. § 122.64(a) has remained unchanged for almost forty years now.

And the more abbreviated process EPA must follow before denying a request to terminate (as opposed to the process for issuing or renewing a permit) further supports the point that a request to terminate was not intended to be a basis to reopen the original permit decision. EPA does not need to issue a public notice or provide an opportunity for comment before denying a request to terminate. Instead, EPA need only "send the requester a brief written response giving a reason for the decision" not to terminate. 40 C.F.R. § 124.5(b); *see also id.* § 124.10(a)(2).

Notably, although much of the Informal Appeal focuses on Concerned Citizens' assertion that the Region erred in issuing the 2014 Permit in the first instance,¹⁶ it does not seek, nor could it seek, to challenge the 2014 Permit now.

¹⁶ *See, e.g.*, Informal Appeal at 2 (contesting the Region's "issuance of an NPDES permit" for possible discharges from Outfall 051), 2-3 (stating that the Region's position that it may "issue an NPDES permit" for possible discharges is "in error"), 5 (discussing

And it fails to demonstrate that the Region erred or abused its discretion in denying the request to terminate the 2014 Permit under 40 C.F.R. § 122.64(a)(4). Instead, Concerned Citizens may raise the issues it raises here, 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. *See also* Tr. at 40-41.¹⁷

B. Concerned Citizens' Contention That Permittees Never Disclosed that Discharges to Outfall 051 Might Not Occur is Untimely and Not Supported by the Record Here

In its Reply, Concerned Citizens argues further that it could not have contested the 2014 Permit at the time the Permit was issued, implying that Los Alamos Laboratory never disclosed the possibility that discharges to Outfall 051 might not occur. *See* Concerned Citizens Reply at 8. Specifically, Concerned Citizens now asserts that during the 2014 Permitting process, Los Alamos Laboratory expressed an intent to make use of Outfall 051. *Id.* (claiming that during the permitting process Los Alamos Laboratory represented that “discharges through Outfall 051 would be required”). From there, Concerned Citizens argues that it relied on Los Alamos Laboratory’s representations that it intended to discharge from Outfall 051 and thus could not have raised an earlier challenge to the 2014 Permit. *See id.* at 8-12.

However, Concerned Citizens did not make this argument before filing its Reply or otherwise claim that termination was appropriate under 40 C.F.R. § 122.64(a)(2) because of a “failure * * * to disclose” or “misrepresentation of any relevant facts” during the 2014 permitting process. And because this argument is raised for the first time in Concerned Citizens’ Reply, it is beyond the scope of the

EPA’s limited authority under the CWA to “*issue NPDES permits*” for potential discharges), and 7-8 (challenging the Region’s position that it can “*issue an NPDES permit*” at the request of the owner or operator) (emphasis added).

¹⁷ Because the Region did not clearly err or abuse its discretion in finding that there has been no “change in any condition,” the Board does not address the Region’s further argument that any such change must be of a condition “that requires *** elimination of any discharge *** (for example, plant closure or termination of discharge by connection to a POTW).” 40 C.F.R. § 122.64(a)(4); *see* Region’s Response at 6-7.

Informal Appeal and is therefore untimely. *Cf. In re Russell City Energy Ctr. LLC*, 15 E.A.D. 1, 53 (EAB 2010) (declining to consider new issues raised for the first time in a reply brief); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) (new issues raised in reply briefs are equivalent to late-filed appeals and are thus untimely).

Even had Concerned Citizens timely raised this argument, however, the argument is contradicted by the record here. Although Permittees acknowledged during the application process that the use of the mechanical evaporator had resulted in no discharges from Outfall 051 since 2010, Permittees nevertheless sought a permit for continued discharges under certain circumstances. As discussed above, the permitting record for the 2014 Permit made clear that discharges from Outfall 051 would only be necessary if the mechanical evaporator or Zero Liquid Discharge tanks become unavailable due to malfunction, maintenance, or capacity shortage. Indeed, the permitting record refers to Outfall 051 requirements in multiple places as applying only “if” discharges resume. Thus, contrary to Concerned Citizens’ assertion, the record alerted the public to the fact that discharges might not occur at all.

This argument is also at odds with Concerned Citizens’ own prior statements. As early as November 2015, Concerned Citizens raised concerns about the 2014 Permit demonstrating its understanding that Permittees had sought and the Region had issued the 2014 Permit covering Outfall 051, even though it was known that there had been no discharges since 2010. *See* Region’s 2015 Response Letter (Ex. UU to Termination Request) (referencing Concerned Citizens’ Nov. 2015 letter). Further, in its termination request, Concerned Citizens acknowledged that the Permittees had stated that there had been no discharges to Outfall 051 since 2010 and had expressly requested a permit for Outfall 051 “only for a possible discharge,” and as a “fallback” for use in possible contingencies. *See* Termination Request at 9; *see also id.* at 10 (stating that 2012 Permit Re-Application sought leave to provide effluent characteristics for Outfall 051 only “*if discharges * * * are initiated* during the life of the new permit”), 11 (stating that the final permit refers to regulation of discharges from Outfall 051 “*if discharges resume*”) (emphasis in original). In short, there is no merit in Concerned Citizens’ argument that the Permittees never disclosed the possibility that discharges from Outfall 051 might not occur at all, as Concerned Citizens’ own submissions demonstrate.¹⁸

¹⁸ In a post-argument brief, Concerned Citizens now contends that it could not have known during the comment period on the draft permit that the Zero Liquid Discharge tanks had been constructed, and on that basis, claims termination is appropriate. *See* Concerned

V. CONCLUSION

For the reasons stated above, the Board concludes that Concerned Citizens has not established that the Region clearly erred or abused its discretion in denying Concerned Citizens' request to terminate the 2014 Permit for Outfall 051. Concerned Citizens' Informal Appeal is therefore denied.¹⁹

So ordered.

Citizens for Nuclear Safety Post-Argument Submission Pursuant to 40 C.F.R. §§ 124.2 and 124.5(b) at 7 (Feb. 27, 2018). The Board did not grant the parties leave to file post-argument briefs but instead only directed the filing of publicly-available information regarding the status of the State permitting process for the Zero Liquid Discharge tanks, Tr. at 67-68, and this argument raised for the first time in a post-argument brief is untimely. In any event, regardless of when the Zero Liquid Discharge tanks were constructed, the permitting record – and specifically the 2012 Permit Re-Application and the Region's Fact Sheet for the 2013 draft permit – alerted the public that with either the mechanical evaporator or the Zero Liquid Discharge tanks, discharges might not occur at all.

¹⁹ Because we conclude that the Region did not clearly err or abuse its discretion in denying the termination request, we do not need to address Concerned Citizens' argument that EPA lacked authority under the CWA to issue a permit for potential discharges.