



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

ORDER REQUESTING CLARIFICATION FROM U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 6

The Environmental Appeals Board ("Board") has determined that clarification from U.S. Environmental Protection Agency Region 6 ("Region") would assist the Board's consideration of this appeal. Accordingly, the Board orders that the Region provide the following clarifications with respect to the administrative record and the response to comments at the time the final permit was issued. See generally 40 C.F.R. §§ 124.17-18.

- 1. The Region's Response Brief in this matter, in a footnote, states that the Region "considered all discharges from Outfall 051 in its final decision, including 2021 and 2022 discharges" that occurred between April 2021 and January 2022, but that the Region "inadvertently omitted" the 2021 and 2022 discharges in its Response to Comments document. U.S. EPA Region 6 Response to Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and Veterans for Peace Chapter #63's Petition for Review 4, n.5 (July 7, 2022) ("Region Resp. Br."). The Response Brief further states that the Region "included in the administrative record all discharge monitoring reports received prior to the 2022 Permit reissuance on March 30, 2022." Id. In setting forth the

2021 and 2022 data summary in its Response Brief, the Region cites to a Discharge Monitoring Report (DMR) summary document dated **July 5, 2022**. *Id.* at 4. The Region’s Certified Administrative Record Index includes a link to that summary document. *Id.* attach. 16 at 13; Region 6, U.S. EPA, *DMR Summary* (July 5, 2022) (A.R. H.6). The July 5, 2022 date on the DMR summary document post-dates the public comment period on the draft permit that ended on February 28, 2021, and post-dates the issuance of the Response to Comments document and final permit decision on March 30, 2022.¹ *See* Region 6, U.S. EPA, *NPDES Permit No. NM0028355 Response to Comments* 53 (March 24, 2022) (A.R. H.5) (“Resp. to Cmts.”). The Board orders the Region to:

- a. Provide any citation(s) to the Certified Administrative Record, or other documentation that existed at the time of final permit issuance, that demonstrates whether the Region added (i) the discharge monitoring reports, (ii) a summary of the 2021 and 2022 discharge data, or (iii) both, to the administrative record, and when the document(s) were added to the administrative record that existed at the time the final permit decision was issued. *See* 40 C.F.R. § 124.18.

¹ The original comment period on the draft permit was scheduled to close on January 28, 2020, but the deadline was extended to March 31, 2020. Region 6, U.S. EPA, *Authorization to Discharge to Waters of the United States, NPDES Permit No. NM0028355*, at 2 (undated) (A.R. A.5). The Region reopened the public comment period from January 30, 2021 to February 28, 2021. Region 6, U.S. EPA, *NPDES Permit No. NM0028355 Response to Comments* 40, 53 (March 24, 2022) (A.R. H.5). EPA also granted Petitioners an extension on the re-opened comment period, allowing them to submit comments by March 29, 2021. *Id.* at 53. The 2021 and 2022 discharge data post-date this extended deadline of March 29, 2021. The Board notes that there appears to be some inconsistency in the record as to when the public comment period began. The Region’s Response Brief states that the public comment period began on November 28, 2019 (Thanksgiving), but in support the Region cites to a public notice that indicates that the public comment period began on November 30, 2019 (a Saturday). Region Resp. Br. at 2; *see* Region Resp. Br. attach. 10 at 2.

- b. Provide any citation(s) to the Certified Administrative Record, or other documentation that existed at the time of final permit issuance, demonstrating that the Region considered the 2021 and 2022 discharge data in making its final permit decision on March 30, 2022. 40 C.F.R. § 124.18(c) (“The record *shall* be complete on the date the final permit is issued.” (emphasis added)); *see also id.* § 124.18(a) (providing that the permit issuer “*shall* base final permit decisions under § 124.15 on the administrative record defined in this section” (emphasis added))).
 - c. Provide any citation(s) to the Certified Administrative Record, or other documentation that existed at the time of final permit issuance, indicating whether the Region provided notice and an opportunity for the public to comment on the 2021 and 2022 discharge data. *See generally id.* § 124.10.
 2. Provide any citation(s) to the Certified Administrative Record, or other documentation that existed at the time of final permit issuance, indicating where in the record the public received notice of the location of the administrative record required by 40 C.F.R. § 124.9, the times at which the record would be open for public inspection, and a statement that all data submitted by the applicant was available as part of the administrative record. *See id.* § 124.10(d)(1)(vi).
 3. Provide any citation(s) to the Certified Administrative Record, or other existing documentation, demonstrating when and how the Region provided notice of the final permit decision to the permit applicant and persons who submitted written comments or requested such notice. The permitting regulations provide that, “[a]fter the close of the public comment period under § 124.10 on a draft permit, the Regional Administrator

shall issue a final permit decision * * *. The Regional Administrator shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision.” *Id.* § 124.15(a).


The Region’s response to this Order must be filed and served on or before **Thursday, September 1, 2022.**

This appeal, including all pending motions, is held in abeyance until the Region files its response to this Order.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: August 24, 2022

By: 

Aaron P. Avila
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Requesting Clarification from U.S. Environmental Protection Agency Region 6* 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:

By Email:

For: Concerned Citizens for Nuclear Safety, et al.

Joni Arends
Concerned Citizens for Nuclear Safety
P.O. Box 31147
Santa Fe, NM 87594-1147
jarends@nuclearactive.org
Tel. (505) 986-1973

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
lindsay@lindsaylovejoy.com
Tel. (505) 983-1800

For: Triad National Security, L.L.C.

James Banks
Misty Howell
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
james.banks@hoganlovells.com
misty.howell@hoganlovells.com
Tel. (202) 637-5802

Cristina (Cris) A. Mulcahy
Maxine M. McReynolds
Office of General Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, NM 87545-0001
mulcahy@lanl.gov
mcreynolds@lanl.gov
Tel. (505) 667-3766

For: EPA Region 6

Jay Przyborski
U.S. EPA Region 6
1201 Elm Street, Suite 500
Dallas, TX 75270
przyborski.jay@epa.gov
Tel. (214) 665-6605

For: U.S. Department of Energy, National Nuclear Security Administration

Silas R. DeRoma
Stephen Jochem
U.S. DOE NNSA, Los Alamos Site Office
3747 W. Jemez Rd.
Los Alamos, NM 87544
silas.deroma@nnsa.doe.gov
stephen.jochem@nnsa.doe.gov
Tel. 505-667-4668

Dated: Aug 24, 2022

Emilio Cortes

Emilio Cortes
Clerk of the Board