

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

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

RESPONSE TO ORDER REQUESTING CLARIFICATION

On August 24, 2022, the Environmental Appeals Board (“Board”) ordered the United States Environmental Protection Agency, Region 6 (“EPA”) to provide clarifications with respect to the administrative record and the Response to Comments at the time Permit No. NM0028355 (“the 2022 Permit”) was issued.

EPA’s Response Brief, filed July 7, 2022, includes a footnote stating that EPA inadvertently omitted 2021 and 2022 discharges from Outfall 051 in the Response to Comments. 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) (“Response Brief”). EPA explained that while these discharges were not noted in the Response to Comments, EPA considered them and, accordingly, included in the administrative record all discharge monitoring reports (“DMRs”) received prior to permit issuance. The Response Brief included as Attachment B a Discharge Monitoring Report Summary dated July 5, 2022, with search parameters of 2017 through February 2022. *See* Administrative Record Number (“A.R.”)

H.6. In the Response Brief, EPA cited to this summary to show discharge history, including discharge from Outfall 051 in January 2022. Response Brief 4-5.

EPA respectfully submits this response with clarifications (“Clarification”).

1. Regarding 2021 and 2022 discharges referenced in EPA’s Response Brief and captured in a July 5, 2022, report, the Board ordered EPA as follows:

- 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.”**

EPA Clarification: DMRs submitted by NPDES permitted facilities are available to the public on an EPA website. In addition to their general public availability, EPA submits with this Clarification documentation demonstrating that EPA added 2021 DMRs to the administrative record on or about March 8, 2022. 2022 DMRs are addressed in a later section of this Clarification.

Background information on the public comment periods and the delay of a final decision on the permit application may assist in understanding the timeframes associated with DMRs and the administrative record.

The initial public comment period for the draft 2022 Permit commenced on November 30, 2019.¹ EPA then commenced a second public comment period on January 30, 2021, which was limited in scope to a defined list of issues, including “[l]egal and factual issues pertaining to EPA’s jurisdiction to issue an NPDES permit for Outfall 051[.]” “current discharges[.]” and “permitting of outfalls that may discharge or discharge infrequently[.]” Attachment 4 at 3.

Before the second public comment period, the permittees petitioned the New Mexico Environmental Department for review of the Clean Water Act § 401 state water quality

¹ The Board’s Order Requesting Clarification notes a discrepancy between the Response Brief and the Public Notice regarding the first day of the initial comment period. Upon review of the record, EPA confirms November 30, 2019, was the first day of the comment period.

certification (“401 Certification”). EPA delayed final determination on the 2022 Permit while the 401 Certification was pending to ensure consistency between the final certification and the permit. The New Mexico Environmental Department issued a modified 401 Certification on January 31, 2022, and EPA then moved forward with final issuance of the 2022 Permit. *See* A.R. G.1.

Throughout the public comment periods and 401 Certification challenge, while EPA waited to make a final decision on the 2022 Permit, the permittees continued to submit monthly DMRs to EPA, as required by the permit in effect at the time and subsequently required by the 2022 Permit. *See* A.R. A.13 at 27 of Part I and A.R. H.1 at 26 of Part I. These reports, which are due no later than the 28th day of the month following each reporting period, are an expected part of standard operating procedures for any facility with a National Pollutant Discharge Elimination System (“NPDES”) permit, and the EPA Permit Writer’s Manual instructs permit writers to consider DMRs when reviewing applications for permit reissuance. *Id. See generally* A.R. I.2 at 3-1 and 4-17.

Permittees submit DMRs by electronically uploading them to the Integrated Compliance Information System (“ICIS”) database, and authorized EPA personnel may access the data at icis.epa.gov. The ICIS database allows EPA personnel to search data within specified date ranges. If the ICIS user exports data, the resulting report includes a time stamp. The time stamp created when the report was produced is unrelated to the date range parameters used to generate the report.

DMR data uploaded to ICIS is available to the public for three years at echo.epa.gov (“ECHO”).

In response to the Board's Request for Clarification, EPA performed a document search for time-stamped files that would indicate EPA's addition of those reports to the administrative record. EPA's document search confirms that EPA downloaded a DMR summary from the ICIS website on March 8, 2022. *See* Attachment 1. EPA has included a declaration by the EPA permit writer stating that to the best of his knowledge and belief, he added this document to the electronic folder designated for storage of the administrative record and uploaded a copy of the document to the EPA website designated for the 2022 Permit: <https://www.epa.gov/nm/los-alamos-national-laboratory-lanl-industrial-wastewater-permit-final-npdes-permit-no-nm0028355>. *See* Attachment 2.

Review of this March 8, 2022, report shows the search parameters included all 2017-2021 discharges, but did not include 2022. Therefore, EPA records clearly reflect addition of the 2021 discharge data to the administrative record prior to permit issuance.

Even if EPA had not manually added DMRs to the administrative record, 40 C.F.R. § 124.18(e) provides that materials which are generally available and which are included in the administrative record under the standards of 40 C.F.R. § 124.18 ("Administrative record for final permit when EPA is the permitting authority") or 40 C.F.R. § 124.17 ("Response to Comments") "need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments." 40 C.F.R. § 124.18(e). In EPA's Response to Comments for the 2022 Permit, EPA included at least eleven references to monthly DMRs to show recent and ongoing discharges, including those from Outfall 051, as a basis for permit issuance. In the context of those DMRs, EPA noted permittees' statements that future discharges from Outfall 051 are expected. EPA also referenced the general requirement for electronic submission of DMRs at 40 C.F.R. § 127.16 in EPA's

response to the permittees' request for waiver of the requirement to electronically submit DMRs. See A.R. H.5 , p. 14.

Petitioners' comments include references to DMRs in support of their position that no discharges are ongoing or proposed from specified outfalls. A.R. H.5 at 67-68. EPA responded to this and many similar comments with references to recent DMRs, noting permittees expected more discharges in the future.

In the Response to Comments, EPA specifically referenced the ongoing requirement to continue submitting DMRs. Also, both Permittees' and Petitioners' cited DMRs to support their comments regarding *potential* to discharge, and EPA responded to those comments with specific references to DMRs. *See e.g.*, A.R. H.5 at 11. For these reasons and because DMRs are generally available, EPA was not required to manually add DMRs to the administrative record, as provided by 40 C.F.R. § 124.18(e).

Even so, as noted above, EPA exported 2021 DMR data to the electronic folder used for the administrative record and then uploaded the data to the publicly available website on or about March 8, 2022.

- 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))."**

EPA Clarification: EPA records attached to this Clarification and described above demonstrate consideration of the 2021 discharge data. EPA did not consider January and February 2022 DMRs and, with this Clarification, corrects the Response Brief.

As described above, in response to the Board's Request for Clarification, EPA performed a document search for time-stamped files created prior to permit reissuance. In addition, EPA discussed the results of this search with appropriate staff and included as an attachment to this Clarification a declaration attesting to EPA's management of the relevant DMRs. A time-stamped export of discharge data and subsequent addition of the data to the public website clearly indicates EPA considered the information. *See* Attachments 1 and 2.

EPA exported a DMR summary for 2017-2021 on March 8, 2022, and uploaded it to the public website designated for the 2022 Permit. *Id.* The permit writer's declaration included with this Clarification attests to these facts and to the fact that this time-stamped document has been stored in his electronic folder designated for review of the application for permit reissuance of Permit No. NM0028355. *Id.*

After reviewing available time-stamped DMR summaries and discussing these documents, EPA submits that only the 2021 discharges, and not the 2022 discharges, were considered in issuing the 2022 Permit. With this Clarification, EPA corrects the assertion made in EPA's Response Brief that 2022 discharges were considered. *See* Response Brief 4, n.5.

The DMR summary included in the certified index to the administrative record should have included all data prior to 2022 but should not have included January and February of 2022. *See* A.R. H.6. Accordingly, EPA submits with this Clarification a corrected version of the certified index to the administrative record. *See* Attachment 7. This version of the certified index to the administrative record is identical to the one filed on July 7, 2022, except that the parameters for the DMR summary identified as A.R. H.6 are limited to 2017-2021 and do not include 2022.

- 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.”

EPA Clarification: EPA did not reopen the public comment period for 2021 and 2022 discharge data.

As noted above, EPA is correcting the record with regard to consideration of discharges in 2022. EPA only considered discharges prior to 2022.

EPA did not reopen the public comment period for consideration of DMRs submitted in 2021 or 2022. DMRs are expected monthly and are available to the public as described above. EPA considers DMRs submitted after the close of the public comment period for the draft 2022 Permit as confirmatory and were accordingly included in the administrative record as part of the supporting file under 40 C.F.R. § 124.18(b)(6).

The confirmatory nature of the DMRs is reflected by the authorization of Outfall 051 and other outfalls in both the draft and final versions of the 2022 Permit.

- 2. The Board’s Request for Clarification further orders EPA as follows: “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).”**

EPA Clarification: In addition to public notices found in the administrative record, EPA submits with this Clarification copies of electronic notices published on EPA’s public notice website stating the availability of the administrative record.

In addition to the public notices included in the administrative record (A.R. B.1 and A.R. E.2), EPA published notice of opportunity for public participation on the EPA website: www.epa.gov/publicnotices. In response to the Board’s request for clarification, EPA is attaching portable document format (“PDF”) versions of the archived electronic public notices, which are no longer published on the website.

Attachment 3 to this Clarification shows the public notice originally published on EPA's public notice website on November 30, 2019. That public notice included the following language regarding access to the administrative record:

Further information regarding the administrative record may be requested from the EPA contact above or viewed at the above address between 8 a.m. and 4:30 p.m., Monday through Friday. It is recommended that you write or call to the contact above for an appointment, so the record (s) will be available at your convenience.

Attachment 3 at 4

Attachment 4 to this Clarification shows the public notice published on EPA's public notice website on January 30, 2021.² This notice states that because of COVID-19, access to the Region 6 building was limited. The third page of the attached PDF version of the archived webpage shows large, boldfaced, underlined text, "**Review associated documents[.]**" This text was hyperlinked to the public website where EPA houses supporting files for the 2022 Permit: <https://www.epa.gov/nm/los-alamos-national-laboratory-lanl-industrial-wastewater-permit-final-mpdes-permit-no-nm0028355>. Attachment 4 at 4.

- 3. The Board's Request for Clarification further orders EPA as follows: "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)."**

EPA Clarification: EPA submits with this Clarification a copy of the electronic mail notifying permittees and interested parties of the final permit decision.

² Each of the archived webpages includes a field with the word "Unpublished[.]" This reflects that each of the webpages is not *currently* published on the active EPA website and does not indicate the webpage was *never* published.

On March 30, 2022, EPA provided notice via electronic mail of the final permit decision to the permit applicant and individuals who submitted comments or requested such notice. In addition to notice of the permit decision, the message directs recipients to the public website designated for the 2022 Permit. A copy of that email is attached to this Clarification. *See* Attachment 6.

The email included the following attachments:

Cover Letter	Attachment 5 to Clarification
Part I of Permit	A.R. H.1
Part II of Permit	A.R. H.2
Part II Appendix A	Attachment 8 to Clarification
Part III of Permit	A.R. H.3
Part IV of Permit	A.R. H.4
Response to Comments	A.R. H.5
Public Hearing Transcript	A.R. B.2

The cover letter and a PDF version of the email are included with this Clarification as Attachments 5 and 6.

Dated: September 1, 2022

Respectfully submitted,

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