

**IN RE WABASH CARBON SERVICES, LLC**

UIC Appeal No. 24-01

***ORDER REMANDING IN PART AND  
DENYING REVIEW IN PART***

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Decided March 3, 2025

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## Syllabus

Four farmers petitioned the Environmental Appeals Board for review of two Underground Injection Control permits issued by Region 5 of the U.S. Environmental Protection Agency pursuant to the Safe Drinking Water Act. The permits include a 10-year post-injection site care (“PISC”) timeframe rather than the regulatory default 50-year PISC timeframe. Petitioners claim that the Region’s permit decisions violate the Safe Drinking Water Act, the National Environmental Policy Act, and the Administrative Procedure Act.

Held: The Board remands the permit decisions in part and denies review in part. The Board remands the permit decisions to the Region with respect to the PISC timeframe because the record does not reflect the Region’s independent review and analysis of the alternative 10-year PISC timeframe, or the basis for the Region’s conclusion that a 10-year timeframe was appropriate given the applicable regulatory requirements. The Board denies review of the National Environmental Policy Act and the Administrative Procedure Act claims.

Under the circumstances of this case, the Board is not requiring, and will not accept, an appeal to the Board on the final permit decision following remand in this case.

***Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake,  
and Ammie Roseman-Orr.***

***Opinion of the Board by Judge Roseman-Orr:***

## I. STATEMENT OF THE CASE

Andrew Lenderman, Ben Lenderman, Floyd Lenderman, and Jessie Lenderman (“Petitioners”) petitioned the Environmental Appeals Board (“EAB” or “Board”) for review of two Underground Injection Control (“UIC”) permit decisions the U.S. Environmental Protection Agency Region 5 issued pursuant to the Safe Drinking Water Act (“SDWA”). The permits authorize Wabash Carbon Services, LLC (“Wabash”) to inject carbon dioxide (“CO<sub>2</sub>”) into two UIC Class VI injection wells in Indiana, one in Vermillion County and the other in Vigo County.

The petition challenges the UIC permit decisions on various grounds, raising arguments under the SDWA, the National Environmental Policy Act (“NEPA”), and the Administrative Procedure Act (“APA”). The primary issue addressed in this decision concerns the Region’s approval under the UIC regulations of a 10-year post-injection site care (“PISC”) timeframe, rather than the regulatory default PISC timeframe of 50 years. For the reasons explained below, the Board remands the permit decisions in part and denies review in part.

## II. LEGAL FRAMEWORK

Congress established the UIC program pursuant to the SDWA and required EPA to promulgate regulations for UIC programs to protect underground sources of drinking water. SDWA § 1421, 42 U.S.C. § 300h. EPA has promulgated such regulations, including minimum requirements for UIC permits based on the type, or “class,” of well. *See generally* 40 C.F.R. pts. 144-148. Class VI well regulations govern the permitting of underground injection and geologic sequestration of CO<sub>2</sub>, to ensure both protection of underground sources of drinking water (“USDWs”) and consistency in permitting of geologic sequestration operations across the country. Federal Requirements Under the UIC Program for CO<sub>2</sub> Geologic Sequestration Wells, 75 Fed. Reg. 77,230 (Dec. 10, 2010). EPA based the Class VI well regulations on the pre-existing UIC regulatory framework, with modifications to address the unique nature of CO<sub>2</sub> injection for geologic sequestration. *Id.* at 77,233. The regulations set minimum criteria for permitting Class VI wells including, among other things, criteria for geologic site characterization, determining the area of review, establishing financial responsibility, and—critical to this appeal—development of a PISC and site closure plan. *See id.* at 77,230, 77,233; *see generally* 40 C.F.R. pt. 146, subpt. H.

A PISC and site closure plan must include a series of monitoring requirements that apply to CO<sub>2</sub> injection wells beginning when injection ceases and ending with site closure. *See* 40 C.F.R. § 146.93. The plan must also include the duration of the PISC timeframe. 40 C.F.R. § 146.93(a)(2). The regulations set a

default PISC timeframe of 50 years but provide a pathway for permit applicants to propose an alternative timeframe during the permitting process.<sup>1</sup> 40 C.F.R. § 146.93(b), (c). As EPA explained in the preamble to the Class VI regulations, the 50-year default timeframe was based on “a review of research studies, industry reports, and existing environmental programs.” 75 Fed. Reg. at 77,266-77,267; *see also* 40 C.F.R. § 146.93(b)(1) (noting that owner or operator must “continue to conduct monitoring in the Director-approved post-injection site care and site closure plan for *at least* 50 years or for the duration of the [approved] alternative timeframe”) (emphasis added). In promulgating the Class VI regulations, EPA considered whether a PISC timeframe shorter than 50 years would be appropriate when issuing a permit. EPA ultimately retained the 50-year timeframe as the default but set forth very specific considerations for granting an alternative PISC timeframe. *See* 75 Fed. Reg. at 77,267 (considering public comments calling for shorter PISC timeframe but instead retaining default 50-year timeframe with flexibility for permitting authority to approve an alternative timeframe consistent with § 146.93(c)).

Under the regulations, if a permit applicant chooses to propose an alternative PISC timeframe to the permitting authority, the applicant must meet the requirements set forth in 40 C.F.R. § 146.93(c).<sup>2</sup> The permitting authority, here the Region, may approve a PISC timeframe other than the 50-year default if the permit applicant “can demonstrate during the permitting process that an alternative post-injection site care timeframe is appropriate and ensures non-endangerment of USDWs.” 40 C.F.R. § 146.93(c). The regulations further provide that the permit applicant’s demonstration “must be based on significant, site-specific data and information,” “must contain substantial evidence that the geologic sequestration project will no longer pose a risk of endangerment to USDWs at the end of the proposed alternative [PISC] timeframe,” and “must include consideration and documentation” of the factors identified in 40 C.F.R. § 146.93(c)(1). *Id.*

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<sup>1</sup> The UIC regulations require the “owner or operator” of a UIC well to obtain an appropriate permit. 40 C.F.R. § 146.81. In this decision, “permit applicant” means the “owner or operator” of the proposed geologic sequestration project.

<sup>2</sup> The UIC regulations use the term “Director” to describe the permitting authority. 40 C.F.R. § 146.3. The permitting authority for the Wabash permits is EPA Region 5. For clarity, all references to the “permitting authority,” “permit issuer,” or the Region mean the “Director” as defined under the UIC regulations.

The eleven factors in 40 C.F.R. § 146.93(c)(1) that the permit applicant must consider and document in its demonstration supporting an alternative PISC timeframe include: (1) “[t]he results of computational modeling performed pursuant to the delineation of the area of review \* \* \*”; (2) “[t]he predicted timeframe for pressure decline within the injection zone \* \* \*”; (3) “[t]he predicted rate of carbon dioxide plume migration within the injection zone, and the predicted timeframe for the cessation of migration”; (4) “[a] description of the site-specific processes that will result in carbon dioxide trapping including immobilization by capillary trapping, dissolution, and mineralization at the site”; (5) “[t]he predicted rate of carbon dioxide trapping in the immobile capillary phase, dissolved phase, and/or mineral phase”; (6) “[t]he results of laboratory analyses, research studies, and/or field or site-specific studies to verify” the information in factors 4 and 5; (7) “[a] characterization of the confining zone(s) including a demonstration that it is free of transmissive faults, fractures \* \* \* and of appropriate thickness, permeability and integrity to impede fluid \* \* \* movement”; (8) “[t]he presence of potential conduits for fluid movement including planned injection wells and project monitoring wells associated with the proposed geologic sequestration project or any other projects in proximity to the predicted/modeled, final extent of the carbon dioxide plume and area of elevated pressure”; (9) “[a] description of the well construction and an assessment of the quality of plugs of all abandoned wells within the area of review”; (10) “[t]he distance between the injection zone and the nearest USDWs \* \* \*”; and (11) and any other site-specific factors required by the permitting authority. 40 C.F.R. § 146.93(c)(1)(i)-(xi).

Any alternative timeframe approved by the permitting authority is then reflected in the PISC and site closure plan and incorporated into the final Class VI permit. An owner or operator may modify the PISC and site closure plan at any time after the permit is issued and resubmit it for permitting authority approval. *Id.* § 146.93(a)(4). The regulations also provide that a site cannot be closed until the permit applicant demonstrates that “no additional monitoring is needed to ensure that the geologic sequestration project does not pose an endangerment to USDWs” and the permitting authority approves that demonstration. *Id.* § 146.93(b)(3).

### III. *FACTUAL AND PROCEDURAL HISTORY*

Wabash applied for two Class VI UIC permits to inject CO<sub>2</sub> into two geologic sequestration wells. Wabash Carbon Services, *Permit Application Documents for WVCCS#1 and WVCCS#2* (Apr. 28, 2021) (A.R. 1). Once the wells are constructed, the affiliated Wabash Valley Resources hydrogen production and power generation facility would transport CO<sub>2</sub> to either of the two well locations, where the CO<sub>2</sub> would then be injected deep underground into underlying geological

formations. See Region 5, U.S. EPA, *Public Comments Sought on Class VI UIC Injection Well Carbon Storage Draft Permits*, at 3 (July 7, 2023) (A.R. 42) (“Fact Sheet”).

The materials supporting the application for the permits included, among other things, documentation of the area of review, a financial assurance demonstration, a geological summary, and a PISC and site closure plan.<sup>3</sup> See Wabash Carbon Services, *Area of Review and Corrective Action Plan 40 CFR 146.84(b) Wabash CCS Project*, at 30 (Apr. 10, 2021) (A.R. 3) (“Orig. AoR”); Wabash Carbon Services, *Original Financial Assurance Demonstration* (Apr. 28, 2021) (A.R. 7); Wabash Carbon Services, *Class VI Permit Application Narrative 40 CFR 146.82(a) Wabash CCS Project* (Apr. 28, 2021) (A.R. 2) (“Orig. PGS”); Wabash Carbon Services, *Post-Injection Site Care and Site Closure Plan 40 CFR 146.93(a) Wabash CCS Project*, at 10 (Sept. 14, 2020) (A.R. 5) (“Orig. PISC”). Wabash’s proposed PISC and site closure plan included a discussion of the factors in 40 C.F.R. § 143.93(c), which Wabash is required to consider and document before an alternative PISC timeframe can be approved. Orig. PISC at 10-29. Among other things, Wabash explained that its model simulated the flow of water and CO<sub>2</sub> for the twelve-year injection period plus an additional 50 years post injection, for a total of 62 years of simulated data. Orig. AoR at 21. In its Area of Review document, Wabash described the modeling it conducted as informed by data including “a full suite of geophysical logs” from a test well and “regional geologic knowledge.” *Id.* at 2. According to Wabash’s Area of Review document, the analyses of geophysical logs from the test well were the “primary method of determining injection and confining zone properties.”<sup>4</sup> *Id.* at 15.

Wabash’s application documents inconsistently described when the modeled CO<sub>2</sub> plumes would reach their maximum extent. Orig. PISC at 10, 24 (describing the maximum lateral extent as year 14 (2 years post-injection)); *see also* Orig. AoR at 21 (describing the maximum extent of the CO<sub>2</sub> plumes as being

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<sup>3</sup> The geological summary is also referred to in the Administrative Record and appeal briefs as a Permit Application Narrative and “PGS.” For consistency and ease, this decision refers to this document in text as the Geological Summary and in citations as PGS. Similarly, this decision refers to the documentation regarding the area of review in text as “Area of Review document” and in citations as AoR.

<sup>4</sup> The confining zone is “a geological formation, group of formations, or part of a formation that is capable of limiting fluid movement above an injection zone.” 40 C.F.R. § 146.3.

reached at 62 years (50 years post-injection)); Orig. AoR at 22 (describing the maximum extent of the area of review as being reached at year 16 (4 years post-injection)).<sup>5</sup> Wabash acknowledged that the plumes “do migrate vertically” after reaching their horizontal extent, but explained that the movement is limited to the “Oneota formation,” the top of which lies approximately 2,000 feet below the lowermost USDW and approximately 4,300 feet below the surface. Orig. PISC at 10, 24; *see also* Orig. AoR at 7. In its initial application, Wabash requested an alternative PISC timeframe of 4 years instead of the 50-year default. *See* Orig. PISC at 10.

The Region rejected Wabash’s request for a 4-year PISC timeframe as “inadequate for the collection of data regarding the long-term stability of the CO<sub>2</sub> and pressure front and to validate/calibrate the model.” Region 5, U.S. EPA, *Underground Injection Control (UIC) Class [VI] Permit Applications WVCCS #1 and WVCCS #2 Permit Nos. IN-165-6A-0001 (Vermillion County) and IN-167-6A-0002 (Vigo County), Indiana (R05-IN-0001)*, at 13 G.4 (Sept. 28, 2022) (A.R. 70) (“Technical Review Letter” or “TRL”). The Region’s Technical Review Letter sought additional information to support Wabash’s application, including the request for an alternative PISC timeframe. Among other things, the Region sought clarification regarding “the timing of [the] maximum lateral extent cessation” of the CO<sub>2</sub> plume. *Id.* at 10. The Region observed that “the model doesn’t predict asymptotic pressure front readings until after Year 20 and it shows growth in the modeled [plume] front through Year 62.” *Id.* at 13. Without suggesting any specific or alternative PISC timeframe, the Region asked Wabash to address these and other issues “in order to further support a PISC period of less than 50 years.” *Id.* The Region also noted that owners and operators can petition for a reduction of the PISC period after a permit is issued under 40 C.F.R. § 146.93(a)(4). *Id.*<sup>6</sup>

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<sup>5</sup> The Area of Review document discusses the maximum lateral extent of the “AoR,” which is functionally based on the lateral extent of the CO<sub>2</sub> plume. Orig. AoR at 22.

<sup>6</sup> In rejecting the 4-year proposed alternative PISC timeframe, the Region requested a number of other changes to the application and supporting material for the permits. *See, e.g.,* TRL; Region 5, U.S. EPA, *Evaluation of the Class VI Application Narrative for Wabash Valley Resources Class VI Permit Application* (Sept. 10, 2021) (A.R. 67) (“EPA Review of PGS”); EPA, Region 5, *Evaluation of the AoR Delineation Modeling Approach for Wabash Valley Resources Class VI Permit Application* (Sept. 10, 2021) (A.R. 68) (“EPA Review of AoR”).

Between late 2022 and early 2023, following issuance of the Region’s Technical Review Letter, Wabash re-submitted its application and supporting material for the two permits. The second submission included a document entitled Wabash “Responses to EPA Technical Review Letter.” Wabash Carbon Services, *WCS Responses to EPA Technical Review Letter* (Nov. 11, 2022) (A.R. 71) (“Wabash Resp. to TRL”). The submission again included an Area of Review document, a Geologic Summary, and a PISC and Site Closure plan with unchanged titles and dates. *See, e.g.,* Wabash Carbon Services, *Area of Review and Corrective Action Plan 40 CFR 146.84(b) Wabash CCS Project* (Feb. 24, 2023) (A.R. 22) (“Rev. AoR”); Wabash Carbon Services, *Class VI Permit Application Narrative 40 CFR 146.82(a) Wabash CCS Project* (Feb. 24, 2023) (A.R. 21) (“Rev. PGS”); Wabash Carbon Services, *Post-Injection Site Care and Site Closure Plan 40 C.F.R. 146.93(a) Wabash CCS Project* (Feb. 24, 2023) (A.R. 24) (“Rev. PISC”). Wabash changed its proposed alternative PISC timeframe from 4 years to 10 years. Rev. PISC at 10.

In July 2023, Region 5 issued the draft permits for public comment, which included the 10-year PISC timeframe requested by Wabash. *See* Region 5, U.S. EPA, *Underground Injection Control Permit: Class VI, Permit Number: IN-165-6A-0001 (Vermillion County)*, attach. E (July 7, 2023) (A.R. 40); Region 5, U.S. EPA, *Underground Injection Control Permit: Class VI, Permit Number: IN-167-6A-0001 (Vigo County)*, attach. E (July 7, 2023) (A.R. 41) (collectively “Draft Permits”); Fact Sheet. After a public comment period, including a public hearing, the Region issued final permits along with a response to comments document. Region 5, U.S. EPA, *Underground Injection Control Permit: Class VI, Permit Number: IN-165-6A-0001 (Vermillion County)* (Jan. 19, 2024) (A.R. 1024); Region 5, U.S. EPA, *Underground Injection Control Permit: Class VI, Permit Number: IN-167-6A-0001 (Vigo County)* (Jan. 19, 2024) (A.R. 1025) (collectively “Final Permits”); Region 5, U.S. EPA, *Response to Comments, U.S. Environmental Protection Agency, Underground Injection Control, Class VI Underground Injection Permits IN-165-6A-0001 (Vermillion County) and IN-167-6A-0001 (Vigo County), Indiana Wabash Carbon Services, LLC*, at 18 (Jan. 19, 2024) (A.R. 1014) (“Resp. to Cmts.”).

The Lendermans, farmers in Indiana, filed a petition seeking Board review of the permit decisions. Petition for Review by Andrew Lenderman, Ben Lenderman, Floyd Lenderman, and Jessie Lenderman (Feb. 22, 2024) (“Pet.”). Following two unopposed requests from the Region to extend the time to file the response brief, and Petitioners’ unopposed extension of time to file its reply, the parties completed briefing in May 2024. *See* Reply of Petitioners Andrew Lenderman, Ben Lenderman, Floyd Lenderman and Jessie Lenderman to EPA and

Wabash Carbon Services, LLC (May 23, 2024) (“Reply Br.”). In June 2024, the Region filed a motion for leave to file a surreply and later filed an unopposed motion to extend the oral argument date by at least thirty days. The Board held oral argument in October 2024. Oral Argument Transcript (Oct. 23, 2024) (“Oral Arg. Tr.”).

#### IV. PRINCIPLES GOVERNING BOARD REVIEW

The Board’s review of UIC permits is governed by Agency permitting regulations at 40 C.F.R. part 124, which authorize parties to file petitions for review of EPA permit decisions. 40 C.F.R. § 124.19(a)(1). In promulgating these regulations, EPA intended that this “review should be only sparingly exercised.” Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also In re Beeland Grp., LLC*, 14 E.A.D. 189, 195-96 (EAB 2008).

In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). In considering an appeal, the Board first evaluates whether the petitioner has met threshold procedural requirements, including, among other things, whether an issue has been preserved for Board review. *See* 40 C.F.R. §§ 124.13, 124.19(a)(2)-(4); *see also In re Penneco Env’t Sols., LLC*, 17 E.A.D. 604, 617-18 (EAB 2018); *In re Seneca Res. Corp.*, 16 E.A.D. 411, 412 (EAB 2014).

The Board has discretion to grant or deny review of a permit decision. 40 C.F.R. § 124.19; *see In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394 (EAB 2011), *vacated & remanded on other grounds sub nom. Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014); *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 383 (EAB 2017). The petitioner must demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g., In re La Paloma Energy Ctr., LLC*, 16 E.A.D. 267, 269 (EAB 2014).

“When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised ‘considered judgment.’” *In re City of Lowell*, 18 E.A.D. 115, 132 (EAB 2020) (citing *In re Gen. Elec. Co.*, 17 E.A.D. 434, 560-61 (EAB 2018)); *see In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997). In the administrative record, the permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts on which it relied when reaching its conclusion. *E.g., In re Shell Offshore, Inc.*, 13 E.A.D. 357, 391 (EAB 2007). Without an articulation of the permitting authority’s analysis, the Board “cannot properly perform any review

whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality.” *In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 343 (EAB 2002) (remanding where record support for Region’s decision was “absent”). 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 was “rational in light of all information in the record.” *Id.* at 342; see *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).

## V. ANALYSIS

According to Petitioners, the Region failed to comply with the SDWA, NEPA, and the APA. The Region and Wabash disagree. In the analysis that follows, we first examine the Region’s approval of a 10-year PISC timeframe and conclude that the administrative record does not reflect the Region’s considered judgment given the regulatory requirements in § 146.93(c). We remand the permits to the Region to explain the basis for its conclusion that a 10-year alternative PISC timeframe is appropriate and ensures non-endangerment of USDWs, considering all the requirements of 40 C.F.R. § 146.93(c), including identifying the crucial facts on which it relies in support of that conclusion. We then deny review of the NEPA and APA portions of the petition. Accordingly, the Board remands the permit decisions in part and denies review in part.

### A. *The Record Does Not Reflect the Region’s Considered Judgment in Approving Wabash’s Alternative 10-Year PISC Timeframe Under the SDWA’s UIC Regulations*

Petitioners argue that the Region’s decision to “modify” the 50-year default PISC timeframe is “unsupported by the administrative record and must be denied as clearly erroneous.” *Pet.* at 16.<sup>7</sup> As explained further below, the Board has determined that the record does not demonstrate that the Region exercised considered judgment when approving the 10-year alternative PISC timeframe given the governing regulatory requirements. The Board has also been unable to

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<sup>7</sup> Petitioners also argue that the timeframe was not based on site-specific data, that “computational modeling alone is not sufficient to justify a modification of EPA’s ‘default’ period of 50 years” under the regulations, and that the record does not show that the “information gathering and analyses required by 40 C.F.R. § 164.93(c) were performed.” *Pet.* at 14, 16. Because we cannot conclude from the record the basis for the Region’s approval of the alternative PISC timeframe, and because we remand the permits for further consideration and explanation, we do not further address these arguments.

determine the basis for the Region’s approval of the alternative timeframe from the record as a whole. The absence of the Region’s considered judgment necessitates a remand of the permit decisions to the Region to provide the bases for its approval of the 10-year PISC timeframe—as an alternative to the 50-year default timeframe—given the requirements set forth in 40 C.F.R. § 146.93(c).

1. *The Region Did Not Explain the Basis for Its Conclusion that the Proposed 10-year PISC Timeframe Was Appropriate Under the Applicable Regulations*

Under the applicable regulations, the Region may approve a PISC timeframe other than the 50-year default if the Region concludes based on the demonstration provided by the permit applicant that the alternative PISC timeframe is appropriate and ensures non-endangerment of USDWs. 40 C.F.R. § 146.93(c). The demonstration by the permit applicant “must be based on significant, site-specific data and information,” “must contain substantial evidence that the geologic sequestration project will no longer pose a risk of endangerment to USDWs” at the end of the proposed alternative timeframe, and, importantly, “must include consideration and documentation” of the factors identified in 40 C.F.R. § 146.93(c)(1). While the Class VI regulations do not require the Region to conduct its own separate information gathering exercise or to conduct its own modeling, the Region is required to review and analyze the information and evidence that the permit applicant has considered and documented, and the Region must reach its own independent conclusion on whether the proposed alternative PISC timeframe is appropriate given these regulatory requirements. *Cf. In re FutureGen Indus. All., Inc.* 16 E.A.D. 717, 725, 728-29 (EAB 2015), *pet. for review dismissed as moot sub nom. DJL Farm L.L.C. v. EPA*, 813 F.3d 1048 (7th Cir. 2016).

The Region’s decision to approve an alternative PISC timeframe requires the exercise of considered judgment. In exercising its considered judgment, the Region must explain the basis for its determination including the crucial facts on which it relied in reaching its conclusion. *See, e.g., In re Town of Concord Dep’t of Pub. Works*, 16 E.A.D. 514, 517 (EAB 2014) (remanding to Region to further explain basis for changes to effluent limits); *see also In re West Bay Expl. Co.*, 17 E.A.D. 204, 221 (EAB 2016) (determining permit issuer failed to exhibit considered judgment where there were “unexplained discrepancies” between the administrative record and the Region’s explanation for its permitting decision). Without an articulation of the Region’s analysis of an alternative PISC timeframe in the record, the Board “cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality.” *Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. at 343 (remanding where record support for Region’s decision was “absent”); *see also*

*Gen. Elec.*, 17 E.A.D. at 559-561 (remanding where the permitting authority had not “documented in the record” that it “duly consider[ed]” issues raised in the comments as well as other relevant “seemingly inconsistent statements in the record”) (quoting *In re Pio Pico Energy Ctr.*, 16 E.A.D. 56, 131-34 (EAB 2013), *pet. for review vol. dismissed sub nom. Helping Hand Tools v. EPA*, No. 14-71267 (9th Cir. June 17, 2014)); *In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 44 (EAB 2010), *pet. for review denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App’x 219 (9th Cir. 2012).

In the matter before us, the basis for the Region’s decision to approve a 10-year alternative PISC timeframe is not found in the draft permits or the fact sheet. When the Region issued the draft permits, the permits required post-injection monitoring for 10 years, but did not identify that requirement as an alternative to the 50-year default PISC timeframe in the regulations. *See* Draft Permits at Attach. E; Fact Sheet at 1-2, 4. Neither the draft permits nor the fact sheet provides any basis for the Region’s approval of an alternative timeframe given the requirements for approval in 40 C.F.R. § 146.93(c).<sup>8</sup>

In its response to comments document issued with the Final Permits, the Region observed that “[n]umerous comments were received regarding the adequacy of the post injection period, the site closure process, and what happens after site closure is approved by EPA.” *Resp. to Cmts.* at 18. One commenter asked “[h]ow did the EPA determine that 10 years was sufficient time to monitor the wells after filling the wells stops.” William Wilson Jr., *Wabash Valley carbon injection well EPA Permits, NEGATIVE support for approving their permits* (Aug. 11, 2023) (A.R. 507). Another described the monitoring period as “insufficient.” Susan Strole-Kos, *Deny Wabash Carbon Services, Class VI UIC*

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<sup>8</sup> The regulation governing fact sheets, 40 C.F.R. § 124.8(b)(5), requires permit issuers to include in the fact sheet the “[r]easons why any requested variances or alternatives to required standards do or do not appear justified.” 40 C.F.R. § 124.8(b)(5). Because the adequacy of the Region’s fact sheet with respect to the alternative PISC timeframe was not raised or briefed on appeal, the Board declines to consider further whether this provision required more information in the fact sheet than the Region provided. The Board observes, however, that stating in the fact sheet that the permitting authority is approving an alternative PISC timeframe, rather than the 50-year default timeframe, and providing the permitting authority’s basis for that decision may be a more efficient and transparent practice, irrespective of whether it is required by 40 C.F.R. § 124.8(b)(5).

*Injection Wells Permits Vermillion (IN-165-6A-0001) and Vigo (IN-167-6A-0001) Counties, Indiana* (Aug. 19, 2023) (A.R. 773).<sup>9</sup>

In response, the Region observed that “40 C.F.R. § 146.93(b)(1) states that the PISC period should be for a duration of at least 50 years as a default.” Resp. to Cmts. at 18. The Region then stated that applicants can propose an alternative PISC timeframe “provided it is supported by data or modeling and demonstrates non-endangerment of USDWs.” *Id.* (citing 40 C.F.R. § 146.93(c)). Without discussing or analyzing the specific regulatory requirements under 40 C.F.R. § 146.93(c), the Region stated, “The results of computational modeling demonstrate that the [Wabash] carbon dioxide plume and pressure front will become stable vertically and horizontally 10 years post injection. Therefore, EPA has established an alternative PISC period of 10 years post injection.” Resp. to Cmts. at 18. The Region concludes its response to comments regarding the alternative PISC timeframe, stating: “Based on these factors, [the Region] has determined that the alternate PISC period and the post injection monitoring plan are appropriate and will be protective of USDWs.” Resp. to Cmts. at 18 (Cmt. #10).<sup>10</sup>

The Region’s response to comments on the alternative PISC timeframe does not demonstrate considered judgment in approving an alternative PISC timeframe under 40 C.F.R. § 146.93(c). To begin with, the Board cannot tell from the

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<sup>9</sup> Wabash argues that Petitioners failed to preserve their arguments regarding the PISC timeframe. Response of Wabash Carbon Services, LLC to Petition for Review, at 12 (Apr. 22, 2024). Petitioners, however, need not be the source of comments to preserve them for appeal, so long as the issue was raised by another commenter. *In re Maui Electric Company*, 8 E.A.D. 1, 9 n.9 (EAB 1998). Moreover, the Region itself characterized the comments received as raising concerns about “the adequacy of the post injection period” and it then responded to those comments. *See* Resp. to Cmts. at 18 (Cmt. #10).

<sup>10</sup> The Region also notes in the response to comments document that the PISC timeframe “may be extended” in the future and that, “[i]n the unlikely event that impacts to the ground water are detected, corrective actions must be implemented.” Resp. to Cmts. at 18 (Cmt. #10) (citing Final Permits at 25 (cond. P(6)(d))); *see also* 40 C.F.R. § 146.93(b)(3)-(4). While it is true that the PISC timeframe in the permits may be extended in the future if appropriate under the regulations, this is not a relevant consideration under 40 C.F.R. § 146.93(c). The Class VI regulations establish a well-defined process for considering and approving an alternative PISC timeframe that is shorter than the default timeframe of 50 years *during the permitting process*. The opportunity to revise the permit in the future is no substitute for the Region’s obligation to follow the permitting regulations during the permitting process.

Region’s response whether the Region applied the appropriate standard when it considered and approved the proposed alternative 10-year PISC timeframe. The regulations require the applicant’s demonstration to be based on “*significant site-specific data and information*,” and that it “must contain *substantial evidence* that the geologic sequestration project *will no longer pose a risk of endangerment to USDWs* at the end of the alternative [PISC] timeframe.” 40 C.F.R. § 146.93(c) (emphasis added); *see also* EPA Region 5 Response to Petition for Review of EPA Permit Decisions, at 31-32 (May 10, 2024) (“Reg. Resp. Br.”) (describing this requirement). In its response to comments document, however, the Region leaves out the substance of what is required when it states that an applicant can propose an alternative PISC timeframe “provided it is supported by data or modeling and demonstrates non-endangerment of USDWs.” Resp. to Cmts. at 18 (citing 40 C.F.R. § 146.93(c)). Without more, the Board cannot be sure what standard the Region applied in deciding whether to approve the alternative PISC timeframe.

The Board also cannot discern the Region’s considered judgment in the rationale the Region provided for its approval of the PISC timeframe in the response to comments document. For example, the Region states that the injected CO<sub>2</sub> plume and pressure front will become “stable” 10 years after injection ceases. *See* Resp. to Cmts. at 18. The regulation does not refer to stabilization of the plume. Factors 2 and 3 of the regulation require documentation and consideration of the predicted timeframe for “pressure decline” and the “cessation of migration.” 40 C.F.R. § 146.93(c)(1)(ii)-(iii). It is unclear how the Region’s assessment of when the plume and pressure front will be “stable” is sufficient to demonstrate that the Region considered factors 2 and 3, let alone all of the factors in 40 C.F.R. § 146.93(c)(1) in approving the 10-year PISC timeframe.

In explaining the basis for the Region’s conclusion that a 10-year alternative PISC timeframe was appropriate, the Region—in its brief on appeal—points elsewhere in the response to comments document to explain the Region’s decision on the PISC timeframe. Reg. Resp. Br. at 35-64. The Region does not, however, identify places in the response to comments document that show the Region evaluated all of the information relevant to an approval under 40 C.F.R. § 146.93(c)(1). As an illustration, the Region’s response brief identifies no place in the response to comments or the record for the Region’s perspective on factors 4-6. *See* 40 C.F.R. § 146.93(c)(1)(iv)-(vi); Reg. Resp. Br. at 44-48 (citing only to documents submitted by Wabash and the Technical Review Letter for these factors and identifying nowhere in the record where the factors are considered by the Region based on the revised submissions).

Additionally, although some of the information relevant under 40 C.F.R. § 146.93(c) is discussed elsewhere in the response to comments document, it is not clear from those discussions whether the Region was considering the information in the context of determining whether a 10-year alternative PISC timeframe would be appropriate given the regulatory requirements for approving an alternative under 40 C.F.R. § 146.93(c). As one example, the Region is required to consider well construction both as it relates to the UIC requirements for construction generally and in considering an alternative length for the PISC timeframe. *See* 40 C.F.R. §§ 146.86, 146.93(c)(1)(ix). On appeal, the Region cites to its response to a comment raising concerns about the construction and mechanical integrity of the injection wells as evidence that the Region considered well construction in approving the 10-year PISC timeframe. Reg. Resp. Br. at 53-54 (citing to Resp. to Cmts. at 20-21 and 40 C.F.R. § 146.86 (general well construction requirements)). The Region's response concludes, "Therefore, EPA finds that the mechanical integrity of the injection wells would be able to be maintained *over the proposed duration of the injection activities*." Resp. to Cmts. at 21 (emphasis added). This conclusion, however, does not speak to whether the well construction supports an alternative PISC timeframe of 10 years after injection ceases and, therefore, does not explain the basis for the Region's determination that the alternative PISC timeframe is appropriate.

The Board has been unable to find, and Wabash and the Region have been unable to point to where in the administrative record the Region analyzes or considers the alternative 10-year PISC period in the context of all the regulatory requirements for approval of an alternative timeframe under 40 C.F.R. § 146.93(c). In fact, the first and only time the Region offered an explicitly stated connection between the 10-year alternative PISC timeframe and the regulatory factors required to be demonstrated by Wabash for approval of the alternative timeframe was in its Response to the Petition in this appeal. The response brief on appeal, however, is not part of the administrative record of decision. *See* 40 C.F.R. § 124.18(c) (administrative record for EPA-issued permit is considered complete on date final permit is issued). Additionally, while the Region's response brief relies on materials submitted by Wabash for each of the factors in 40 C.F.R. § 146.93(c)(1), the Region's independent review and analysis of those factors and of the crucial facts on which the Region relied in approving a 10-year PISC is what is required. As described above, the Region does not articulate in the record its review and analysis of the alternative PISC timeframe, given all of the regulatory requirements.

2. *The Record as a Whole Does Not Demonstrate the Basis for the Region's Approval of the Alternative PISC Timeframe.*

As the Region notes, the Board has in prior cases looked to the record as a whole and determined that a region has exercised considered judgment. *See, e.g., FutureGen*, 16 E.A.D. at 728 (viewing the record as a whole and concluding that the permitting authority had conducted a thorough and independent review of the permit applicant's modeling). In this case, the Region cites to the "entirety of the record" or "all of the information in the record" in arguing that the Region's analysis may be found by looking at the record as a whole. Reg. Resp. Br. at 38-39, 60, 65; *see also* Oral Arg. Tr. at 25, 52. But even in reviewing the record as a whole, the Board is unable to discern the Region's independent review and analysis of Wabash's documentation, or the basis for the Region's conclusion that an alternative 10-year PISC timeframe was appropriate given all of the applicable regulatory requirements.

For example, the record does not reflect whether the questions posed by the Region in its Technical Review Letter were answered to the Region's satisfaction. As explained in Part III above, Wabash's initial application proposed a 4-year PISC timeframe, in lieu of the regulatory default timeframe of 50 years. Orig. PISC at 10. Based on its review of Wabash's permit application, the Region issued a detailed Technical Review Letter to Wabash, rejecting Wabash's proposed 4-year alternative PISC timeframe as "inadequate for the collection of data regarding the long-term stability of the CO<sub>2</sub> and pressure front and to validate/calibrate the model." TRL at 13. As described above, the Region sought, among other things, clarification regarding "the timing of [the] maximum lateral extent cessation" of the CO<sub>2</sub> plume and specifically asked Wabash to address these and other issues "in order to further support a PISC period of less than 50 years." TRL at 10, 13.

On appeal, the Region points to a Wabash document entitled "WCS Response to the TRL" as responsive to the Region's questions and concerns in its Technical Review Letter. *See* Wabash Carbon Services, WSC Response to EPA Technical Review Letter (Nov. 11, 2022) (A.R. 71) ("Wabash Resp. to TRL"). That document, however, contains more than 100 pages that are essentially blank and does not respond to the questions and concerns raised by the Region in the Technical Review Letter with respect to the proposed PISC timeframe.<sup>11</sup> *See, e.g.,*

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<sup>11</sup> In its appeal brief, the Region erroneously describes Wabash's Response to EPA's Technical Review Letter as having "191 pages of analysis, explanation, and information to address all the issues raised in the TRL." Resp. Br. at 5; *but see* Wabash

*id.* at 183-187. We have identified nothing in the record that explains the Region’s apparent conclusion that 10 years is an adequate timeframe “for the collection of data regarding the long-term stability of the CO<sub>2</sub> and pressure front,” or to validate and calibrate the model, where, according to the Region’s Technical Review Letter, 4 years was not sufficient. TRL at 13.

The Region also cites the “revised” documents that Wabash provided with its re-submitted application to explain Wabash’s response to questions raised by the Region in the Technical Review Letter. Wabash’s “revised” documents, however, were substantially the same documents as originally submitted with respect to Wabash’s proposed 4-year PISC timeframe. For example, the titles and dates of the “revised” documents remained unchanged from the initial submissions. *Compare* Orig. PISC, Orig. AoR, and Orig. PGS, with Rev. PISC, Rev. AoR, and Rev. PGS. The only apparent substantive change made in the revised PISC was to replace the number “4” with the number “10” for the proposed alternative PISC timeframe. *Compare* Orig. PISC at 5, 10, with Rev. PISC at 5-6, 10.<sup>12</sup>

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Resp. to TRL. Contrary to the Region’s assertion, there is not a “direct one-to-one matchup on the objections raised by the Region and all of the re-submissions provided by Wabash.” Reg. Resp. Br. at 34.

At oral argument, both the Region and Wabash acknowledged that the document did not include responses to all of the Region’s questions in the Technical Review Letter. Oral Arg. Tr. at 32-33, 91. The remainder of the responses, they contend, are contained in other documents in the record that Wabash submitted to the Region. *Id.* at 35-36, 92-95 (identifying as responsive, without specific citation, the revised AoR and the revised PISC). The Board has not been able to locate such responses in the record concerning the alternative PISC period.

<sup>12</sup> The Revised PISC also replaced a map with a more zoomed-in, satellite version of the same image with the same caption. *Compare* Orig. PISC at 5, with Rev. PISC at 5-6. The Revised Geological Summary includes more detail regarding the geography of the injection site. *See* Rev. PGS at 4-56. The Revised Area of Review document includes some new discussion regarding model calibration, *see* Rev. AoR at 27, but includes no discernable substantive changes to the figure showing plume growth over time (Figure 13) or to the narrative text that discusses that figure, despite the Region’s comments and questions about the graph and request that Wabash provide clarification. *Compare* Orig. AoR at 21-22, with Rev. AoR at 21-22 (the one change the Board identified between these pages are the insertion of the word “Lower” in front of “Oneota” and the correcting of a typographical error, “coarsness” to “coarseness”).

Both the Region and Wabash at oral argument pointed to Figure 13 in the revised Area of Review document as the basis for the Region's determination that 10 years was an appropriate alternative PISC timeframe. Oral Arg. Tr. at 26-27, 81. Figure 13 states that it represents the "[m]aximum plume distance from injection wells over time." Rev. AoR at 22. This graph, however, was not cited by the Region in its response to comments document on the PISC timeframe and remained unchanged from the original Area of Review document supporting the 4-year timeframe. Additionally, as described above, and among other things, the Region had specifically sought clarification on "the timing of [the] maximum lateral extent cessation" of the CO<sub>2</sub> plume. TRL at 10.<sup>13</sup> Without more of an explanation from the Region in the record, the Board cannot discern whether the Region (a) relied on the graph, (b) ever received the clarification it sought on the maximum extent of the plume and was satisfied with the response, or (c) based its approval of the 10-year alternative PISC timeframe on all the requirements under 40 C.F.R. § 146.93(c).

In sum, even looking beyond the Region's explanation in the response to comments document and viewing the record in this case as a whole, the Board cannot discern the basis for the Region's approval of the alternative 10-year PISC timeframe given the applicable regulatory requirements.

3. *The Absence in the Record of the Region's Considered Judgment Necessitates a Remand*

The Board has consistently remanded permits in cases where the record does not reflect the basis for the Region's decision. *See, e.g., In re Bear Lake Props., LLC*, 15 E.A.D. 630, 638-40 (EAB 2012) (remanding UIC permit to the Region to provide analysis of the number of drinking wells around the site in question where the record contained discrepancies); *In re San Jacinto River Auth.*, 14 E.A.D. 688, 701 (EAB 2010) (remanding a permit decision where the Region "failed to clearly articulate" a "complete and cogent analysis" of how it applied Texas water quality standards to the permitting decision); *Gen. Elec.*, 17 E.A.D.

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<sup>13</sup> In its second submission of application documents, Wabash's varied description of when the modeled CO<sub>2</sub> plumes would reach their "maximum lateral extent" also remained unchanged. Rev. PISC at 10, 24 (describing the maximum lateral extent as year 14 (2 years post-injection)); *see also* Rev. AoR at 22 (describing the maximum extent of the AoR as being reached at year 16 (4 years post-injection)) and Rev. AoR at 21 (describing the maximum extent of the CO<sub>2</sub> plume as being reached at 62 years (50 years post-injection)).

at 559-561 (remanding a Resource Conservation and Recovery Act permit where the Board could not conclude from the record that the Region exercised considered judgment in relying on the Toxic Substances Control Act Landfill regulation that it routinely waived to select off-site disposal and the Region had failed to reconcile seemingly inconsistent statements in the record). Without an articulation of the Region's analysis, based on the required demonstration using the factors to be documented and considered, the Board cannot properly perform any review of the Region's analysis, and therefore cannot determine whether the Region has exercised considered judgment in reaching its conclusion. *See Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. at 343 (remanding where record support for Region's decision was "absent").

Although the Region and Wabash urge the Board to defer to the permit writer's technical expertise, the Board cannot do so where the administrative record reflects that the Region rejected the technical basis for a 4-year alternative, the technical basis remained unchanged when the 10-year alternative timeframe was proposed, and the Region did not clearly explain its subsequent decision to approve a 10-year timeframe or identify the crucial facts on which it relied for that approval given regulatory requirements. Deferring to a region's scientific and technical expertise does not mean "blind acceptance." *In re Stonehaven Energy Mgmt., LLC*, 15 E.A.D. 817, 830 (EAB 2013). The Board has long held that the Region's scientific and technical determinations must be "adequately explained and supported by information in the administrative record." *Id.*

The necessity of the Region providing its consideration and rationale in the record of decision is of paramount importance to transparent, efficient, and sound decisionmaking. Because the record does not reflect the Region's considered judgment in approving the alternative 10-year PISC timeframe in the permit decisions at issue, we remand these permits to the Region.

On remand, the Region must explain the basis for its conclusion that an alternative 10-year PISC timeframe is appropriate and ensures non-endangerment of USDWs, addressing the requirements of 40 C.F.R. § 146.93(c) including the crucial facts on which it is relying in support of that conclusion.<sup>14</sup> The relevant facts and information supporting the Region's decision to approve a 10-year

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<sup>14</sup> The Board observes that, while a factor-by-factor analysis by the Region may not be required under 40 C.F.R. § 146.93(c), it may provide to the permit applicant and the public a more efficient and transparent method for demonstrating the Region's consideration of the regulatory factors and the basis for its conclusion.

alternative PISC timeframe may very well be in the record, what is lacking is the Region's analysis in the record of how the alternative PISC timeframe is consistent with the regulations and the Region's identification of the crucial facts on which it relied.<sup>15</sup>

*B. Petitioners' NEPA Arguments Were Not Preserved for Review*

Petitioners also challenge the Region's permit decisions arguing that the Region failed to comply with NEPA. Pet. at 7-12. Petitioners contend that the Region clearly erred by not taking a "hard look" at the environmental impacts of the permits, not adequately considering cumulative impacts of the project, and not considering alternatives to the project under NEPA. Pet. at 8-12. The Region and Wabash argue that NEPA issues were not properly preserved and that, in accord with Board regulations and precedent, review of this issue should be denied on that basis. Regulations governing permit review require that a petitioner "demonstrate \* \* \* that each issue being raised in the petition was raised during the public comment period." 40 C.F.R. § 124.19(a)(4)(ii).<sup>16</sup> Thus, as a threshold matter, we first consider whether Petitioners' NEPA arguments were properly preserved for review by the Board and, for the reasons stated below, we conclude they were not.

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<sup>15</sup> Petitioners also argue that the amount of financial assurance required is insufficient because it is based on a 10-year PISC timeframe that is "unsupported by the administrative record," rather than the 50-year default timeframe. Pet. at 16-17. Under 40 C.F.R. § 146.85(a)(2), permittees are required to demonstrate financial responsibility sufficient to cover the cost of, among other things, post injection site care and site closure that meets the requirements of 40 C.F.R. § 146.93. At oral argument, Petitioners acknowledged that their financial assurance arguments are directly tied to the 10-year PISC timeframe. Oral Arg. Tr. at 23 (acknowledging that its PISC timeframe and financial assurance arguments are linked and that the period of financial assurance must match the PISC timeframe). Because the Board is unable to determine whether the Region exercised its considered judgment as to the 10-year timeframe, the Board does not resolve whether the financial assurance required for the permits was sufficient.

<sup>16</sup> An exception to this requirement is found in 40 C.F.R. § 124.13, which provides that only those issues that are "reasonably ascertainable," must be raised. However, for this exception to apply, a petitioner must explain why an issue not previously raised was not "reasonably ascertainable" during the public comment period. 40 C.F.R. § 124.19(a)(4)(ii). Petitioners have not asserted or argued that this exception applies, and the Board concludes it does not.

Petitioners point to several comments in support of having met their obligation to raise NEPA issues during the comment period. Pet. at 9-10; Reply Br. at 2-3. But none of the comments Petitioners identify mention NEPA, the need to do a cumulative impacts or alternatives analysis under NEPA, or NEPA's "hard look" requirement. Rather, Petitioners' comments express a series of concerns with the proposed permits and related operational activities, without any connection to NEPA or discussion of NEPA requirements. Pet. at 9-10, 11-12; Reply Br. at 2-3. The Region addressed Petitioners' comments in the response to comments document, discussing some directly and dismissing others as outside the scope of the UIC program. The Region understandably did not, however, construe any comment as raising any issue with respect to NEPA.

Because no commenter raised any issue with respect to NEPA during the public comment period, the Region did not have an opportunity to consider and respond to the NEPA arguments Petitioners now raise on appeal.<sup>17</sup> An issue must be "specifically raised during the public comment period" so that the Region is not forced to "guess the meaning behind imprecise comments," *City of Lowell*, 18 E.A.D. at 167 (quoting *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 2001) and *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002)). If comments do not include "specific issues of concern and the information and arguments that support the commenter's objections," the permitting authority "has no meaningful opportunity to respond to a comment by either modifying or denying the permit or by explaining why no modification or denial is appropriate in its Response to Comments." *In re Gen. Elec. Co.*, 18 E.A.D. 575, 638-639 (EAB 2022). Because no commenter raised NEPA during the comment process, the NEPA issues were not preserved and are denied on that basis.<sup>18</sup>

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<sup>17</sup> Petitioners cite *Adams v. EPA*, 38 F.3d 43 (1st Cir. 1994) for the proposition that public comments should be liberally construed. Reply Br. at 3. But this case is distinguishable from *Adams*. In *Adams*, the First Circuit found that the participants in the public comment process explicitly cited the governing statute and raised questions directed at the substantive matter at issue. 38 F.3d at 52. Petitioners here identified nothing in the public comment process that cited NEPA or raised questions directed at the Region's obligations under NEPA.

<sup>18</sup> Even if Petitioners had properly preserved their NEPA arguments, which they did not, Petitioners would not prevail, as the UIC permitting program is exempt from NEPA. See *In re Powertech (USA) Inc.*, 19 E.A.D. 23, 40-42 (EAB 2024) (discussing Board precedent explaining that UIC permitting program is exempt from NEPA).

*C. The APA Standard for Judicial Review Does Not Apply to the EAB's Review of a Petition*

Finally, in one conclusory paragraph, Petitioners argue that the Region's permit decisions violate the Administrative Procedure Act based on the Region's alleged "fail[ure] to consider cumulative effects and alternatives as required by NEPA and fail[ure] to require a proper PISC plan and financial assurance." Pet. at 17. Petitioners do not cite to any particular provision of the APA but assert that the Region's decision is "arbitrary and capricious." *Id.* Presumably, Petitioners are relying on the APA standard for judicial review under 5 U.S.C. § 706(2)(a).<sup>19</sup> That section of the APA provides that a reviewing court must "hold unlawful and set aside agency action" that is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The APA standard for judicial review of Agency decisions, however, is not the standard of review governing this appeal to the Board.

The Board's review of these permit decisions is governed by 40 C.F.R. part 124. 40 C.F.R. § 124.19(a)(1) (authorizing parties to petition the EAB for review of EPA permit decisions). Under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). To show that review is warranted, the petitioner must demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g., La Paloma Energy Ctr.*, 16 E.A.D. at 269. These requirements are the lens through which the Board reviews petitions. Because the APA standard for judicial review of agency action does not apply in this appeal, we deny review of Petitioners' APA challenge. The Board has reviewed the challenged permit decisions in this appeal consistent with the provisions of part 124.

## VI. CONCLUSION

For the reasons stated above, the Board remands the permits in part and denies review in part. The final permit decisions on remand become the final agency action subject to judicial review. 40 C.F.R. § 124.19(l). Although an appeal to the Board is a prerequisite to judicial review of a final permit decision, *id.*

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<sup>19</sup> To the extent that the Petition is referring to something other than the standard for judicial review under 5 U.S.C. § 706, the Board denies review based on Petitioners failure to sufficiently articulate the issue in their petition for review. 40 C.F.R. § 124.19(A)(4)(i); *see Powertech (USA) Inc.*, 19 E.A.D., at 32-33.

§ 124.19(l)(1), an appeal is not required following a Board remand of a permit decision unless the Board “specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.” *Id.* § 124.19(l)(2)(iii). Under the circumstances of this case, the Board is not requiring, and will not accept, an appeal to the Board on the final permit decision following remand in this case.<sup>20</sup>

So ordered.

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<sup>20</sup> The Region filed a Motion to File Surreply Brief in this appeal. The Board here denies that motion. The Region was granted additional time and 8,000 additional words for its response brief, for a total of 22,000 words. Order Granting Extension of Time (Mar. 18, 2024); Order Granting Second Extension of Time (Apr. 23, 2024); Order Extending Limit on Length of Region’s Response Brief (May 3, 2024). Based on the outcome of this decision and the additional words and time previously granted, the Board will not grant the Region’s request for another opportunity to explain its decision in a surreply.