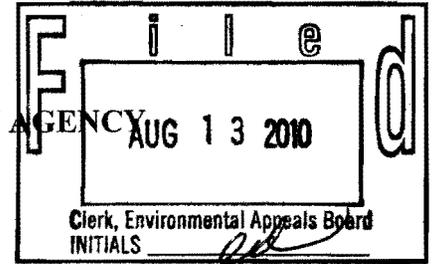


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re: _____)
)
Cherry Berry B1-25 SWD)
)
UIC Permit No. MI-055-2D-0042)
_____)

UIC Appeal No. 09-02

ORDER DENYING REVIEW

The U.S. Environmental Protection Agency (“EPA”), Region 5 (“Region”), issued a Class II underground injection control (“UIC”) permit for a well in Grand Traverse County, Michigan, number MI-055-2D-0042 (“Permit”),¹ to O.I.L. Energy Corp. (“OEC”) on October 9, 2009. Grobbel Environmental & Planning Associates, LLC (“Grobbel”), filed a timely petition for review (“Petition”) before the Environmental Appeals Board (“Board”) on November 4, 2009. For the reasons set forth below, the Board denies Grobbel’s request for review of the Permit.

The standards applicable to petitions for review of UIC permits, among others, are set forth in 40 C.F.R. part 124.² The threshold procedural requirements that a petitioner must meet

¹ Pursuant to Part C of the Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300h to 300h-8, the Administrator is required to promulgate regulations for state underground injection control programs to protect underground sources of drinking water. *See* 42 U.S.C. § 300h. The regulations governing underground injection wells are codified at 40 C.F.R. parts 144 to 148. EPA administers the UIC program in states, including Michigan, that have not obtained authorization to administer their own UIC program. *See* 40 C.F.R. §§ 144.1(e), 147.1151.

² The preamble to the part 124 rules states that the Board’s power of review “should only be sparingly exercised” and that most permit conditions should be finally determined at the Regional level. Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Beeland Group, LLC*, UIC Appeal No. 08-02, slip op. at 10, (EAB Oct. 3, 2008), 14 E.A.D. ____; *In re Env’tl. Disposal Sys., Inc.*, 12 E.A.D. 254, 263-64 (EAB 2005); *In re Am. Soda, LLP*, 9 E.A.D. 280, 286 (EAB 2000); *In re Puna Geothermal Venture*, 9 E.A.D. 243, 246 (EAB 2000). The Board may grant review of a UIC permit if it is based on a clearly erroneous

before obtaining Board review are “timeliness, standing, preservation of issues for review, and articulation of the challenged permit condition with sufficient specificity.”³ *In re Beeland Group, LLC*, UIC Appeal No. 08-02, slip op. at 8 (EAB Oct. 3, 2008), 14 E.A.D. ____; 40 C.F.R. § 124.19(a). The Board has frequently dismissed petitions that failed to meet these standards. *See, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 & n.17 (EAB 2002) (discussing denial of review based on petitioner’s failure to meet multiple threshold procedural requirements); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 128, 173 (EAB 1999) (“*Knauf I*”); *see also In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 and 08-03, at 3-5, 11 (EAB May 23, 2008) (Order Denying Review).

In the present case, Grobbel submitted a three-page letter alleging that the Region “failed to adequately demonstrate its fulfillment of its Safe Drinking Water Act obligations to protect subsurface drinking water resources,” and that the Region failed to assess both OEC’s need for

finding of fact or conclusion of law, or if it involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *see, e.g., Beeland*, slip op. at 9-10, 14 E.A.D. ____ . The petitioner bears the burden of demonstrating that review is warranted. *E.g., Env’tl. Disposal Sys.*, 12 E.A.D. at 264; *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 573 (EAB 2004); *Am. Soda*, 9 E.A.D. at 286; *Puna Geothermal*, 9 E.A.D. at 246.

³ In addition to filing a petition within thirty days after a final permit decision is issued by the Region, a petitioner must establish standing to appeal by demonstrating prior involvement in the public review process, either by filing written comments on the draft permit or participating in a public hearing. 40 C.F.R. § 124.19(a). The petition for review must also demonstrate that any issues raised on appeal were raised during the public comment period (including the public hearing) on the draft permit. 40 C.F.R. §§ 124.13, 19(a); *accord, Beeland*, slip op. at 9, 14 E.A.D. ____; *In re Weber # 4-8*, 11 E.A.D. 241, 244 (EAB 2003); *Am. Soda*, 9 E.A.D. at 288. Further, the petition must meet the standard of specificity for review, and contain, at a minimum, “two essential components: (1) clear identification of the conditions in the permit [that are] at issue, and (2) argument that the conditions warrant review.” *Puna Geothermal*, 9 E.A.D. at 274 (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 18 (EAB 1994)); *accord Beeland*, slip op. at 9, 14 E.A.D. ____.

the proposed well, and the potential for OEC to apply for reclassification of the Cherry Berry well from a Class II to a Class I well in the future. Upon review, the Petition satisfies the threshold procedural requirements of timeliness, standing, and preservation of issues for review. The Petition was timely filed within thirty days of the Region issuing the final Cherry Berry permit; Grobbel provided written and oral public comment at the public hearing held on May 19, 2009, in addition to submitting earlier written comments on May 9, 2009; and the issues raised in the Petition were all previously raised so that the Region had an opportunity to address them before issuing a final permit.

However, the Petition does not articulate any specific permit conditions for review, and thus Grobbel fails to satisfy this final threshold procedural requirement that must be met in order for the Board to review a UIC permit. In the paragraphs that follow Grobbel's allegation that the Region "failed to adequately demonstrate its fulfillment of its Safe Drinking Water Act obligations to protect subsurface drinking water resources," there is not a single reference to the Permit or any conditions therein. Petition at 1-2. Rather, Grobbel highlights the details of the geologic and topographic conditions that exist in the area of the proposed well, observing, among other things, that these conditions result in a high water table, that the residences in the area of the proposed Cherry Berry site rely solely on groundwater for drinking water, and that the proposed injection well would be near a potable water well.⁴ *Id.* Grobbel's failure to articulate

⁴ Moreover, Grobbel's Petition also refers to concerns not falling within the UIC permitting program, including using an existing well for disposal as an alternative to construction of a new one, the potential impacts of a surface or near-surface spill, and the potential future reclassification of the well that might allow it to accept liquid industrial waste. Petition at 2-3. The UIC permitting process is narrowly focused, with the SDWA statutory provisions and the UIC regulations establishing the only criteria a Region may use to decide whether to issue a permit. *Am. Soda*, 9 E.A.D. at 286, 289; *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567

any challenged permit condition with sufficient specificity is fatal to its appeal. *See* 40 C.F.R. § 124.19(a); *see also, Beeland*, slip op. at 15, 14 E.A.D. ____ (denying review where only “generalized concerns” are set forth to demonstrate clear error or an abuse of discretion); *Avon Custom Mixing*, 10 E.A.D. at 708 (denying review when “Avon’s arguments as to why the Board should grant review are general, unsubstantiated, and in part inapposite to the considerations of the [Clean Water Act].”); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 495-96 (rejecting challenge to endangered species analysis for lack of sufficient specificity); *In re Westborough and Westborough Treatment Plant Bd.*, 10 E.A.D. 297, 311 (EAB 2002) (denying review because “mere allegations of error are insufficient to support review”) (citations omitted); *Puna Geothermal*, 9 E.A.D. at 274-75, 277 (same); *Envotech*, 6 E.A.D. at 269-71 (same).

Because Grobbel does not appear to be represented by legal counsel, the Board endeavors to construe its Petition liberally. *See, e.g., Env'tl. Disposal Sys.*, 12 E.A.D. at 292 n.26; *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *Knauf I*, 8 E.A.D. at 127; *In re Federated Oil & Gas of Traverse City, Michigan*, 6 E.A.D. 722, 727 n.5; *In re Envotech, LP*, 6 E.A.D. 260, 268 & n.13 (EAB 1996). However, “[w]hile the Board does not expect or demand that [*pro se*] petitions will necessarily conform to exacting and technical pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason why the [permit issuer] erred in its permit decision in order for the petitioner's concerns to be meaningfully addressed by the Board.” *Env'tl. Disposal Sys.*, 12 E.A.D. at 292 n.26 (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994)); *accord In re Chukchansi Gold Resort*

(EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999) (“protection of interests outside of the UIC program [is] beyond [the Board’s] authority to review in the context of [a UIC] case”).

and Casino Wastewater Treatment Plant, NPDES Appeal Nos. 08-02 through 08-05, slip op. at 7 (EAB Jan. 14, 2009), 14 E.A.D. _____. Here, Grobbel's petition does not "provide sufficient specificity such that the Board can ascertain what issue is being raised," and thus even construing the Petition liberally, the Board must deny review. *Knauf I*, 8 E.A.D. at 127 (discussing procedural requirements for petitions for review and their application to petitioners who are not represented by counsel).

Finally, Grobbel's Petition also is deficient because it fails to state why the Region's response to Grobbel's comments on the draft permit is erroneous. Upon further inspection, it is evident that the entire Petition consists of the comments, reorganized and reprinted, often verbatim, that Grobbel previously submitted on the draft Cherry Berry permit. This Board has frequently stated that "[i]t is not sufficient simply to repeat objections made during the comment period; instead, a petitioner must demonstrate why the permit issuer's response to those objections is clearly erroneous or otherwise warrants review." *In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357, 399 (EAB 2007) (citations omitted); *accord In re Indeck-Elwood*, 13 E.A.D. 126, 190 (EAB 2006); *In re Prairie State Generating Co.*, 13 E.A.D. 1, 10-11 (EAB 2006); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *In re Teck Cominco Ala. Inc.*, 11 E.A.D. 457, 472-73 (EAB 2004); *Westborough*, 10 E.A.D. at 305; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) ("*Knauf II*"); *Federated Oil & Gas*, 6 E.A.D. at 726-27.

For these reasons, the Petition does not meet the requisite standards for Board review, and the Petition is therefore denied.

So ordered.⁵

Dated: *August 13, 2010*

ENVIRONMENTAL APPEALS BOARD

By: *Anna L. Wolgast*
Anna L. Wolgast
Environmental Appeals Judge

⁵ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of Cherry Berry B1-25 SWD, UIC Appeal No. 09-02, were sent to the following persons in the manner indicated:

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Annette Duncan
Secretary