IN RE WEBER # 4-8

UIC Appeal No. 03-01

REMAND ORDER

Decided December 11, 2003

Syllabus

Daniel E. Weber ("Petitioner") petitions the Environmental Appeals Board ("Board") for review of a Class II Underground Injection Control ("UIC") final permit for disposal of fluids from oil and gas production. During the public comment period, the Petitioner timely submitted to United States Environmental Protection Agency ("Agency"), Region V ("Region") his first set of written comments (First Comment Letter). The Region subsequently issued the final permit to Team Completions, L.L.C. ("Permittee"), but its response to the First Comment Letter was dated three days after permit issuance. Because it appeared to the Board that the Region's response to the First Comment Letter may not have been part of the record before the Agency decision maker when she issued the permit decision, this Board issued an Order for Clarification and to Show Cause ("Order to Show Cause") to the Region.

In response, the Region admits that the duly delegated officer did not sign the Region's response to the First Comment Letter before she issued the final permit, and thus technically it was not part of the administrative record. The Board rejects the Region's assertions that the Region's errors were inconsequential because regional staff had conducted all appropriate reviews. The idea behind the regulations at 40 C.F.R. §§ 124.17 and 124.18 is that the *decision maker* have the benefit of the comments and the response thereto to inform his or her permit decision.

Held: In order to effectuate the requirements of 40 C.F.R. §§ 124.17 and 124.18, the Board hereby vacates the permit decision and remands this case to the Region for the purpose of requiring the Region to reconsider and reissue a final permit decision, based on the administrative record.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. *STATEMENT OF THE CASE*

Daniel E. Weber ("Petitioner") petitions the Environmental Appeals Board ("Board") for review of a Class II Underground Injection Control ("UIC") final

permit for disposal of fluids from oil and gas production. United States Environmental Protection Agency ("EPA" or "Agency") Region V (the "Region") opposes review of the permit, which the Region issued on April 8, 2003, to Team Completions, L.L.C. ("Team Completions" or "Permittee") pursuant to the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f-300j-26.[1] The permit is for an existing disposal well, Weber # 4-8, in Grand Traverse County, Michigan.

Before reaching the merits of the substantive issues the Petitioner raises in the petition, we must first decide whether to remand the permit decision because the Region failed to adhere fully to the procedural requirements of 40 C.F.R. Part 124 during the permit issuance process. Specifically, we must decide whether to remand the permit because the Region failed to comply with 40 C.F.R. §§ 124.17 and 124.18, requiring that the Agency decision maker issue a response to comments at the time of permit issuance and base his or her permit decision on the administrative record, including the response to comments.

II. *PROCEDURAL HISTORY*

A. *Permit Application and Issuance*

Team Completions submitted a permit application to the Region, which the Region received on December 26, 2002. Through a "Public Notice" dated February 28, 2003, the Region announced plans to issue a Class II injection well permit and invited comments on that proposal. Administrative Record ("AR"), Exhibit ("Ex.") 5 (Public Notice). As proposed by the Region, Team Completions would use its existing injection well to inject oilfield brines into a rock formation 1,750 feet below the ground surface. *Id.* The Public Notice stated that the Region must receive any written comments within 30 days after February 28, 2003. *Id.* Moreover, the Public Notice provided that persons could request a public hearing in writing, and that any such request must state the issues proposed to be raised at the hearing. *Id.*

The Region timely received Petitioner's first set of written comments on the draft permit on March 11, 2003. AR Ex. 7 (First Comment Letter). In his comments, the Petitioner, an adjacent landowner, opposed the permit, requested a public hearing, and briefly raised the following concerns about the well's use as an alleged "dumping ground" for oilfield brines: (1) the impact on Petitioner's water, which the Petitioner uses for crop irrigation, household use, and drinking water; (2) the effect on the sale and value of Petitioner's land; (3) the integrity of the well casings at the Permittee's well; and (4) the basis for the site selection. In a letter dated March 31, 2003, the Petitioner submitted more detailed comments to

[1] The Agency administers the UIC program in the State of Michigan. 40 C.F.R. § 147.1151.

the Region, some of which raised new issues. AR Ex. 9 (Second Comment Letter). The Region received the Second Comment Letter on April 9, 2003, after the close of the public comment period.[2]

The Region issued the final permit on April 8, 2003, to the Permittee and notified the Permittee of its issuance by letter dated April 9, 2003. AR Ex. 25 (Final Permit (April 8, 2003)); AR Ex. 8 (Transmittal Letter of Final Permit, from the Region to the Permittee (April 9, 2003)). It was not until April 11, 2003, however, three days *after* permit issuance, that the Region signed and sent the Petitioner a written response to his First Comment Letter. *See* AR Ex. 12 (Letter from the Region to the Petitioner, dated April 11, 2003, with certified mail receipt showing the Region mailed it to the Petitioner on April 11, 2003);[3] Brief of Respondent at 6 n.2 (July 21, 2003).

B. *Proceedings Before the Board*

The Petitioner timely filed his petition, which the Board received on May 20, 2003. The Region filed its response, the administrative record, and the certified index for the administrative record on July 21, 2003. Following consideration of the petition and the Region's response, on November 6, 2003, this Board issued an Order for Clarification and to Show Cause ("Order to Show Cause") to the Region. It appeared to the Board that Petitioner's First Comment Letter and the Region's response thereto may not have been part of the record before the Agency

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[2] The Region's February 28, 2003 Public Notice stated "We must receive your comments within 30 days after the date at the top of this notice." AR Ex. 5. Because the Region received the Second Comment Letter on April 9, 2003, it appears to be untimely, as it was not filed until *after* the close of the public comment period, and the Petitioner has made no showing why the issues and arguments were not reasonably ascertainable during the comment period. *See* 40 C.F.R. §§ 124.13 (requiring all reasonably ascertainable issues and reasonably available arguments to be filed during the public comment period), 124.19(a) ("The petition shall include a statement of the reasons supporting * * * review, including a demonstration that any issues being raised were raised during the public comment period * * * to the extent required by these regulations * * * .").

Apparently as a courtesy, the Region did respond to Petitioner's Second Comment Letter after it had issued the final permit. *See* AR Ex. 12 (Region's Response to Petitioner's First Comment Letter) at 4 (April 11, 2003); AR Ex. 16 (Region's Response to Petitioner's Second Comment Letter) at 1, 4 (April 18, 2003). (We use the word "apparently" advisedly because the Region's response is not officially part of the administrative record as it postdates permit issuance. *See infra* Part IV and 40 C.F.R. § 124.18.) However, simply by responding to the apparently late comments, the Region did not reopen the comment period or make these comments timely. The Region expressly stated that the Second Comment Letter was late and thus could not form the basis of any appeal. Moreover, as a matter of good government, the Region should retain the flexibility to freely respond to citizens[1] concerns, even those belatedly raised, without impairing the efficiency and finality of the permitting process.

[3] The April 11, 2003 Letter from the Region to the Petitioner appears to be the only "response to comments" document issued in response to Petitioner's First Comment Letter.

decision maker when she issued the permit decision on April 8, 2003. Order to Show Cause at 3.

In its response to the Board's Order to Show Cause, the Region "admits, with considerable regret, that the Region's response to the first comment letter was not in fact signed by the duly delegated officer before the permit decision and thus not officially part of the administrative record." Region's Response to Order for Clarification and to Show Cause at 1 (Nov. 19, 2003) ("Response to Order to Show Cause"). The Region further states that it can produce affidavits demonstrating that all technical review of the comments and responses was complete prior to issuance of the permit, but acknowledges that the record does not reflect strict compliance with the requirements of 40 C.F.R. § 124.17. *Id.*

III. *PRINCIPLES OF LAW*

Pursuant to the rules governing these proceedings, a person who comments on a draft permit may petition for review of any condition of the final permit. 40 C.F.R. § 124.19(a). The petition must state the reasons supporting review and demonstrate that any issues raised were raised during the public comment period. *Id.* Furthermore, the petition must show that the permit condition in question is based on either: (1) a finding of fact or conclusion of law that is clearly erroneous, or (2) an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. *Id.*

Of particular relevance to the present proceedings, the rules provide, "*At the time that any final permit decision is issued* under § 124.15, the Director shall issue a response to comments." *Id.* § 124.17(a) (emphasis added).[4] Moreover, the Regional Administrator must base the final permit decision on the administrative record, which must be "complete" on the date he or she issues the final permit. *Id.* § 124.18. These requirements ensure that the decision maker gives serious consideration to comments before or at the time of making his or her final permit decision. *See In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 556 (EAB 1999); *In re Atochem N. Am., Inc.*, 3 E.A.D. 498, 499 (Adm'r 1991).

IV. *ANALYSIS*

In the instant case, the Petitioner contends in the Petition for Review that his rights as an adjacent landowner were breached. Petition for Review at 1. He

[4] In the case of an Agency-issued permit, the regulations define the term "Director" as the Regional Administrator or an authorized representative. *See* 40 C.F.R. § 124.2.

further states: "1) Myself and the other landowners were denied a Public Meeting" and "2) Not a single issue raised in the document I sent to Mr[.] Roy [the permit writer] has been addressed. Find enclosed a copy of that document." *Id.* The document enclosed with the petition is the Second Comment Letter, dated March 31, 2003. The Petition concludes by demanding that EPA rescind the permit and that the Permittee cease the dumping of hazardous oil field brine. *Id.*

As we observed earlier, 40 C.F.R. §§ 124.17 and 124.18 are designed to ensure that the decision maker gives serious consideration to public comments at the time of making his or her final permit decision. *See In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 556 (EAB 1999) (remanding part of a prevention of significant deterioration permit because record did not make clear whether the state had meaningfully complied with 40 C.F.R. § 124.18, which requires that the decision maker base the permit decision on the administrative record, including the comments received during the public comment period); *In re Atochem N. Am., Inc.*, 3 E.A.D. 498, 499 (Adm'r 1991) (vacating permit decision and remanding Resource Conservation and Recovery Act permit where EPA failed to timely respond to public comments in accordance with 40 C.F.R. § 124.17 before issuing the permit).

The Region nonetheless argues that despite its failure to strictly comply with 40 C.F.R. §§ 124.17 and 124.18, "the circumstances surrounding this omission [of the Region's Response to the First Comment Letter from the administrative record] were entirely bureaucratic in nature." Response to Order to Show Cause at 1. The Region contends that staff had completed all technical reviews of the permit and the comments before permit issuanceand that a remand of the permit would add little to the process beyond demonstrating literal compliance with the regulations. *Id.*

The Region's brief misses the point. Its error is neither harmless, inconsequential, nor trivial. The idea behind the regulations is that the *decision maker* have the benefit of the comments and the response thereto to inform his or her permit decision. Thus, while it is important in its own right that agency staff consider public comments in the course of recommending action on the permit, their review cannot substitute for the obligations the regulations impose on the decision maker. These regulations focus on the actions of the *decision maker* and the record he or she has to consider, not on whether his or her staff have reviewed public comments and prepared a draft response thereto. Significantly, *Atochem* emphasized that the decision maker must consider comments with a truly open mind, rather than with a view to defending a decision he or she already has made. 3 E.A.D. at 499. To accept the Region's argument, and short circuit the permit process as the Region urges, would denigrate, if not render superfluous, the important role the Agency decision maker must exercise.

Accordingly, because of the importance of adhering fully to the public participation requirements of these regulations, we conclude a remand is in order. Although this remand may not result in any change in the Region's ultimate permit decision, remand is nonetheless appropriate to ensure that the permit issuer fully complies with the requirement to give adequate and timely consideration to public comments at the time of issuing a final permit decision. *Rockgen*, 8 E.A.D. at 557; *Atochem*, 3 E.A.D. at 499.

In remanding the permit to the Region, we do not decide whether the Region must hold a public hearing, as the Petitioner urges in his petition. As the Region's response to this request was set forth in the Region's April 11, 2003 letter to the Petitioner, it is not part of the administrative record before us. Therefore, we do not reach that issue, notwithstanding the broad discretion afforded to the Agency to make such determinations. *See* 40 C.F.R. § 124.12(a)(1) (The Region "shall hold a public hearing whenever [it] finds, on the basis of requests, a significant degree of public interest in a draft permit(s)."); *In re City of Fort Worth*, 6 E.A.D. 392, 407 (EAB 1996); *In re Avery Lake Prop. Owners Assoc.*, 4 E.A.D. 251, 252 & n.2 (EAB 1992).

V. *CONCLUSIONS OF LAW*

For the foregoing reasons we conclude that the Region violated 40 C.F.R. §§ 124.17 and 124.18 when it issued the permit. Specifically, it clearly erred because it issued the permit, although at the time of the decision, the decision maker did not have the response to comments required by 40 C.F.R. § 124.17 in the record before her. Therefore, the decision maker did not base her decision on the administrative record, which must include the response to comments.

VI. *ORDER*

Accordingly, in order to effectuate the requirements of the governing regulations, the Board hereby vacates the permit decision and remands this case to the Region for the purpose of requiring the Region to do the following: reconsider and reissue a final permit decision, based on the administrative record, exercising its discretion as appropriate and in accordance with the facts and the law. This Remand Order does not reopen the public comment period. An administrative appeal of the remand decision will be required to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1).

So ordered.