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

In re:	)	
Wabash Carbon Services, LLC	)	UIC Appeal No.: 24-01
Class VI Underground Injection Permits	)	
Permit Nos. IN-165-6A-0001 (Vermillion) and IN-167-6A-0001 (Vigo)	)	

REPLY OF PETITIONERS ANDREW LENDERMAN, BEN LENDERMAN, FLOYD LENDERMAN and JESSIE LENDERMAN TO EPA AND WABASH CARBON SERVICES, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
TABLE OF ATTACHMENTS iv
STATEMENT OF COMPLIANCE WITH WORD LIMITATION v
STATEMENT REGARDING ORAL ARGUMENT vi
I. INTRODUCTION 1
II. PETITIONERS ADEQUATELY PRESERVED THE GROUNDS FOR THEIR CHALLENGE 1
III. EPA'S PERMITTING ACTIONS ARE NOT WHOLLY EXCLUDED FROM NEPA REVIEW 5
IV. SDWA CLAIMS 13
III. CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Adams v. U.S. E.P.A.,
38 F.3d 43 (1st Cir. 1994) 3
Am. Textile Mfrs. Inst., Inc. v. Donovan,
452 U.S. 490 (1981) 15, 17
Amigos Bravos v. Molycorp, Inc.,
166 F.3d 1220 (10th Cir. 1998) 4
Burlington Truck Lines, Inc. v. United States,
371 U.S. 156, (1962) 14
Citizens to Pres. Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 15, 17
Limerick Ecology Action, Inc. v. U.S. Nuclear Regul. Comm'n ,
869 F.2d 719 (3d Cir. 1989) 8
Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 15
Dubois v. U.S. Dep't of Agric.,
102 F.3d 1273 (1st Cir. 1996) 3
Exch. Comm'n v. Chenery Corp.,
332 U.S. 194 (1947) 14
Fund For Animals v. Hall,
448 F. Supp. 2d 127 (D.D.C. 2006) 8
In re Beeland Grp., LLC,
14 E.A.D. 189 (EAB 2008) 7
In Re FutureGen Alliance, Inc.,
16 E.A.D. 717 (April 28, 2015) 13, 14
In re Windfall Oil & Gas, Inc.,
16 E.A.D. 769 (EAB 2015) 7
NRDC v. USEPA,
31 F. 4th 1203 (9th Cir. 2022) 11
San Luis & Delta-Mendota Water Auth. v. Jewell,
747 F.3d 581 (9th Cir. 2014) 8
Sierra Club, Inc. v. United States Forest Service,
897 F. 3d 582 (4th Cir. 2018) 17
Western Nebraska Resources Council v. USEPA,
943 F.2d 867 (8th Cir. 1991) 7, 9, 10
Wyoming Lodging & Rest. Ass'n. v. U.S. Dep't of Interior,
398 F. Supp. 2d 1197 (D. Wyo. 2005) 4

FEDERAL STATUTES

42 U.S.C. § 4332(H) 11

FEDERAL REGULATIONS

40 C.F.R. § 124.19(d)(3) 5
40 CFR 1508.4 6
40 CFR Part 146 ..... 8, 9
40 CFR Part 1502 10
40 CFR § 6.101(b) 6
40 CFR § 124.19(a)(4)(ii) 5
40 CFR § 124.19(c)(2) 1
40 CFR § 124.9 11
40 CFR § 144.7 9
40 CFR § 146.81-.95 7
40 CFR § 146.93(c) 13, 14, 17
40 CFR § 146.93(c)(1)(v) 15
40 CFR § 1501.1 11
40 CFR § 1501.5 10
40 CFR § 1508.1 12
40 CFR §§ 6.205 & 6.206 10
40 CFR §§ 124.13 or 124.19(a)(4) 2, 3, 4
40 CFR §§ 124.9(b)(6) and 6.101(b) ..... Passim
40 CFR §§ 1502.10, .14 & .16 10
EPA actions under the Clean Air Act from,
72 Fed. Reg. 53652 (Sept. 19, 2007) 5

OTHER AUTHORITIES

43 Fed. Reg. 55978 (Nov. 29, 1978) 6
2 Am. Jur. 2d Administrative Law § 548 15
C.J.S Public Administrative Law and Procedure § 552 (same) 15

TABLE OF ATTACHMENTS

Attachment 1: NEPA Functional Equivalence of UIC and Permitting and Aquifer Exemptions under the SDWA for the Dewey Burdock Project (Sarah Bahrman, EPA's Chief, Safe Drinking Water Branch: October 23, 2020).

Attachment 2: EPA Approves Permits to Begin Construction of Wabash Carbon Services Underground Injection Wells in Indiana's Vermillion and Vigo Counties, (EPA January 24, 2023).

Attachment 3: CEQ Issues New Guidance to Responsibly Develop Carbon Capture, Utilization and Sequestration, (White Huse Council on Environmental Quality February 15, 2022).

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This reply brief complies with the requirements that replies not exceed 7,000 words. 40 C.F.R. § 124.19(d)(3). This reply brief, excluding attachments, is approximately 6199 words in length.

STATEMENT REGARDING ORAL ARGUMENT

Petitioners request that the Environmental Appeals Board hold oral argument in this matter because the issues involved are technically complex and because the appeal presents important policy considerations.

I. INTRODUCTION

Petitioners, who are farmers in Indiana whose real property is subject to condemnation for use in an experimental carbon sequestration project, have challenged the Underground Injection Control ("UIC") permits issued by EPA to Wabash Carbon Services, LLC ("Wabash" or "WCS"). *See Lenderman Petition for Review*; *see, e.g.*, Administrative Record ("AR"), Doc. 449 (comments of Andrew Lenderman dated 8/11/2023). According to EPA and press accounts, the UIC project has been conceived for the purpose of facilitating plans by Wabash Valley Resources to produce hydrogen using petroleum coke, which in turn will be used to produce fertilizer. The CO2 emissions from that industrial complex will be transported and injected into geology underlying Petitioners' properties.[1] *See* EPA Public Notice (July 2023) (AR, Doc. 1012). EPA and Wabash have together filed over 100 pages of responses. They responses advance three arguments. First, that Petitioners did not preserve their claims for review, and therefore the Board should not even consider them. Second, that no part of NEPA applies to EPA's UIC permitting decisions. And, third, that EPA adequately reviewed and appropriately approved Wabash's alternative ten-year post-injection care ("PISC") period and associated financial assurance. This reply is filed in accordance with 40 CFR § 124.19(c)(2).

II. PETITIONERS ADEQUATELY PRESERVED THE GROUNDS FOR THEIR CHALLENGE

EPA explains in considerable detail all the ways in which it sought public comment and meaningful participation of environmental justice communities and reached out to underserved

[1] *See, e.g.*, "A proposed fertilizer plant in Indiana, backed by millions in federal incentives, would pump CO2 under farmland miles away," The Eagle Grove Eagle (Sept. 7, 2023) https://theeaglegroveeagle.com/content/developer-chose-rural-carbon-sequestration-site-avoid-controversy-it-didn%E2%80%99t-go-well (last accessed May 17, 2024).

areas and the elderly. *EPA Br.,* 23-24. All laudable goals. Without a hint of irony, however, it devotes considerably more space to claiming that none of the comments it received can be used to challenge its permit decision. *EPA Br.,* 10-17 (claiming Petitioners did not raise issues with requisite specificity to comply with 40 CFR §§ 124.13 or 124.19(a)(4)). Wabash says more of the same. *Wabash Br.,* 9-13. Both are wrong.

Petitioners are farmers. They and many others from their farming community have sincere concerns about the Permits, which will authorize the largest carbon sequestration wells ever permitted by EPA. While the Petitioners are not lawyers, they are intimately familiar with the land around them, having farmed there for generations. As a result, they and fellow concerned citizens astutely expressed their legitimate concerns about the Permits and associated impacts, both in writing and at a public hearing. *See* "*A developer chose a rural carbon sequestration site to avoid controversy. It didn't go well*," Energy News Network (August 29, 2023), available at https://energynews.us/2023/08/29/a-developer-chose-a-rural-carbon-sequestration-site-to-avoid-controversy-it-didnt-go-well/. Those concerns are spread across the administrative record. *See*, *e.g.*, AR, Doc. 1006, Transcript of Public Hearing, pp. 31-32 (concerns about pipeline impacts on environment); pp. 39 & 48 (CO2 pipeline safety); pp. 57-58, 64-65 (project to result in significant infrastructure changes and to result in both fertilizer plant and production of toxic anhydrous ammonia; reduction in emissions is a better alternative); p. 66 (existing ammonia pipeline less than .5 miles from site); AR, Doc 1012, Written Comments from Public Hearing, pp. 2 (disruption to wildlife); pp. 3-4, 25 (concerns about construction and operational truck traffic, noise and light pollution); p. 28 (impacts of transporting CO2 to injection sites); and pp. 34 & 39 (impacts of using petcoke as feedstock and concerns about production of hydrogen and ammonia at facility dependent on CO2 storage); AR Doc. 309, 326, 364, 376, 414, 421, and 455 (written comments

expressing concerns about means and impacts of transporting CO2 to injection sites and path of potential pipelines); AR, Doc. 652 (comment arguing that underground storage is poor alternative and green alternatives are better); AR, Doc. 262 & 326 (comments raising concerns about light pollution in historic low light environment); AR, Doc. 262, 326, 364 (comments concerning impacts from additional noise and industrial truck traffic); AR, Doc. 263, 773, 525, 524, 532, 537, & 543 (comments raising concerns with long-term liability post-injection); AR, Doc.273, 507, 661 (asking how did EPA determine 10 years was a sufficient post-injection monitoring period, how were financial assurances calculated and how do they compare to U. Illinois estimates); AR, Doc. 661 (noting need for sample of Potosi Dolomite, a target injection formation, to determine capillary pressure, permeability and lateral extent of plume).

Public comments should be liberally construed and need not "present technical or precise scientific or legal challenges to specific provisions of the draft permit." *Adams v. U.S. E.P.A.*, 38 F.3d 43, 52 (1st Cir. 1994); *see also Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996) (holding that comments were "sufficient to notify the agency of the potential alternatives" and that "the district court erred in concluding that plaintiffs were required to 'offer[ ] specifics as to how to implement a suggested alternative water storage system.").

In *Adams,* the Environmental Appeals Board rejected an NPDES permit challenge on EPA's assertion that the challenger had "not properly raised the issue of ODC [Ocean Discharge Criteria] during the public comment period." *Adams,* 38 F. 3d at 40. The First Circuit disagreed. It explained that while "the public comments do not present technical or precise scientific or legal challenges to specific provisions of the draft permit…[t]he purpose of the regulation [at 40 CFR 124.13] is not to foreclose participation in the process, but to provide notice to EPA so it can address issues in the early stages of the administrative process." *Id.* at 52. Adopting the test urged

by EPA, explained the Court, "would be inconsistent with the general purpose of public participation regulations…." *Id*. It therefore rejected the notion that commenters had an obligation to include detailed scientific information or complex legal arguments based on the minutiae of arcane provisions of environmental statutes and rules:

> Such a strict construction would have the effect of cutting off a participant's ability to challenge a final permit by virtue of imposing a scientific and legal burden on general members of the public who, initially, simply wish to raise their legitimate concerns regarding a wastewater facility that will affect their community, in the most accessible and informal public stage of the administrative process, where there is presumably some room for give and take between the public and the agency.

Id. Likewise, it does not matter who offers a public comment. "So long as the agency is informed of a particular position and has a chance to address that particular position, any party may challenge the action based upon such position whether or not they actually submitted a comment asserting that position." *Wyoming Lodging & Rest. Ass'n. v. U.S. Dep't of Interior*, 398 F. Supp. 2d 1197, 1210 (D. Wyo. 2005); *see also Amigos Bravos v. Molycorp, Inc.*, 166 F.3d 1220 n. 3 (10th Cir. 1998).

Comments filed during the public comment period here meet the liberal standard for preserving issues raised by Petitioners in this appeal. Indeed, EPA's Response to Comments, discussed below, acknowledged many of these comments despite characterizing them as "out of scope" and beyond its review. *See* EPA RTC, pp. 2-4 (Petition, Attachment 5).[2] Wabash and EPA also claim that apart from the failure of the public comments to preserve issues for appeal, the Petition did not provide Administrative Record citations to some of those public comments in

[2] EPA contends that comments need to be specific enough that it can address them before making a final permit decision. EPA Br., 10. Fair enough, but on the issue of NEPA compliance the assertion rings hollow because both in this case and in many that it cites in its brief its legal position is that it has no obligation to comply with any aspect of NEPA. And, in its response to comments, it rejected any obligation to respond to comments outside the literal scope of the UIC permitting rules. *See* RTC, p. 2 (Attachment 5 to Petition).

violation of 40 CFR § 124.19(a)(4)(ii). Wabash Br., 12; EPA Br., 15-16. But EPA's own Response to Comments and its characterizations of the comments demonstrates that EPA knew exactly where in the administrative record the public comments addressed the issues raised by Petitioners.

III. EPA'S PERMITTING ACTIONS ARE NOT WHOLLY EXCLUDED FROM NEPA REVIEW

EPA concedes that absent an exemption, its issuance of a UIC permit is a "federal action" generally subject to the Environmental Assessment provisions of NEPA. *EPA Br.,* 18. Both EPA and Wabash claim that EPA's rules have "exempted" EPA-issued UIC permits under the SDWA from *any* application of NEPA. *Wabash Br.,* 1 ("UIC permits are categorically exempt from …NEPA"); *EPA Br.,* 18 (UIC permits "explicitly exempted…under functional equivalency doctrine…and regulatory exemptions codifying that doctrine at 40 CFR §§ 124.9(b)(6) and 6.101(b)). But those assertions are untrue and are at odds with the specific "codifications" of both the Council on Environmental Quality (CEQ) and EPA. Nor do the "functional equivalency" cases relied upon by EPA and Wabash extend a wholesale NEPA exemption to UIC permits.

Federal actions may be excluded from NEPA review either by Congress or by rule. For example, Congress excepted EPA actions under the Clean Air Act from NEPA review. 72 Fed. Reg. 53652, 53654 (Sept. 19, 2007) (Congress provided in 1974 that all actions taken under CAA are deemed not to be major federal actions significantly affecting the environment). Congress did not extend such an exclusion to EPA's actions under the SDWA.

As for authorizing agencies to exclude certain actions from NEPA review, Congress charged the CEQ "with overseeing…NEPA implementation across the Federal Government."[3]

[3] *See* https://ceq.doe.gov/laws-regulations/regulations.html

Pursuant to that authority, the CEQ issued rules in 1978 authorizing agencies to create "categorical exclusions" for "categories of actions which do not individually or cumulatively have a significant effect on the environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations…." 43 Fed. Reg. 55978, 56004-05 (Nov. 29, 1978) (codifying 40 CFR 1508.4). In cases where a Federal permitting agency makes the requisite finding of no significant effect, "neither an environmental assessment nor an environmental impact statement is required."

Thus, the rule recognized that the EIS provisions of NEPA are not its only component—that an "environmental assessment" is a separate NEPA component. The rule recognized also that an agency can avoid both an EIS and an environmental assessment, , but only if it makes the requisite finding of no significant impact for a category of activities.

But EPA has never adopted a categorical exclusion for UIC permits. Instead, in 1980, it issued its current rule codified at 40 CFR §124.9(b)(6) (excusing EPA-issued UIC permits only from the "environmental impact statement provisions of …NEPA."). Because the rule did not include a finding that UIC permits would have no significant impact, it did not excuse or purport to excuse EPA from the separate obligation to conduct an "environmental assessment" or comply with provisions of NEPA not involved in an EIS. That EPA's rule did not assert a categorical exclusion in its rulemaking is dispositive---by its plain language it did not even purport to exclude UIC permits from the environmental assessment component of NEPA.[4]

[4] EPA claims also that its NEPA rule at 40 CFR § 6.101(b) provides that UIC permits are the "functional equivalent" of NEPA review. EPA Br., 21(stating that under § 6.10(b) EPA codified the functional equivalence doctrine). It does not. That rule does not answer the question of what EPA actions are subject to NEPA. Rather, it provides simply that "Subpart A through C of this part do not apply to EPA actions for which NEPA review is not required."

Nor is that conclusion altered by cases cited by Wabash and EPA. Both parties rely principally on three prior rulings of this Board. *Wabash Br.,* 15 & *EPA Br.,* 19-20 (citing *In re Am. Soda, LLP*, 9 E.A.D. 280 (EAB 2000); *In re Beeland Grp., LLC*, 14 E.A.D. 189 (EAB 2008) & *In re Windfall Oil & Gas, Inc.* 16 E.A.D. 769 (EAB 2015)). In each of those cases the Board responded only to an argument that EPA was required to prepare an EIS (without mention of an environmental assessment) with the unremarkable ruling that 40 CFR §124.9(b)(6) absolved EPA of that obligation. But that has never been the issue in this case. Petitioners concede that EPA's rule excuses it from preparing an EIS. And in none of those cases did the permit challenger argue that NEPA required anything other than an EIS from which EPA was excused by the rule. Thus, none of those decisions can be used to broaden the clear and narrowly limited regulatory language that EPA used to exclude itself solely from the obligation to prepare an EIS. That language is clear, unambiguous, and narrowly limited to EIS's.

Finally, both Wabash and EPA also rely heavily on *Western Nebraska Resources Council v. USEPA*, 943 F.2d 867 (8th Cir. 1991) to argue that all of EPA's actions under the SDWA are subject to a categorical NEPA exclusion under the "functional equivalence" doctrine. *EPA Br.*, 20; *Wabash Br.*, 14. There, too, they paint with too broad a brush.

The "functional equivalence doctrine" stands for the proposition that separate NEPA review is unnecessary where EPA's permitting action broadly addresses the same environmental issues as does NEPA. But here, EPA made no such determination. It did not explain how the narrow criteria for approving Class VI UIC wells at 40 CFR § 146.81-.95 address any of the core functions of NEPA. Likewise, it made no attempt to define the scope of the "federal action" at issue, evaluate alternatives or the cumulative impacts of either the UIC project, the fertilizer factory that depends on the UIC permit or the pipeline or other transportation system necessary to deliver

CO2 from the plant to the UIC sites. Instead, it simply rejected any suggestion that impacts outside the narrow scope of the UIC permitting criteria were relevant. EPA's Response to Comments includes an entire section characterizing any comment not limited to the specific criteria of 40 CFR Part 146 as "out-of-scope" comments to which no response is necessary. *See* RTC, ¶ 3, pp. 1-2 ("EPA is not obligated to respond" to "matters outside the scope of the UIC Program's purview….") (included as Attachment 5 to Petition for Review).

NEPA, though, by design frequently requires federal permitting agencies to consider issues (such as alternatives and cumulative effects) that may not fall within the narrow confines of a particular permitting program. *See, e.g., Fund For Animals v. Hall*, 448 F. Supp. 2d 127, 134 (D.D.C. 2006) (holding that "neither the Migratory Bird Hunting Frameworks or the Endangered Species Act's ('ESA') Section 7 consultation process are the functional equivalents of NEPA's environmental review process" because they did not require the United States Fish and Wildlife Service to analyze the "cumulative impacts" of the proposed rules.); *Limerick Ecology Action, Inc. v. U.S. Nuclear Regul. Comm'n*, 869 F.2d 719, 730 (3d Cir. 1989) (explaining that, while "the case law suggests that where review of environmental implications occurs under a 'functional equivalent' of NEPA the review need not be repeated", "these cases do not suggest that NEPA can never require consideration of additional alternatives simply because there is some overlap in the considerations required by both statutes"; nor do these "cases indicate that an issue *not* considered under [a given statutory framework] need not be considered under NEPA."); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 651 n. 51 (9th Cir. 2014) ("Although NRDC does not urge us to adopt the 'functional equivalent' approach, ... the statutes and regulations reveal that Section 7 of the ESA and NEPA involve different processes that measure different kinds of environmental impacts.").

In *Western Nebraska*, the EPA action at issue was not even a UIC permit. It was the grant of an "aquifer exemption," a process that is regulated under criteria set forth in 40 CFR § 144.7. UIC permits, issued under 40 CFR Part 146, follow a different process subject to different criteria. Thus, a case which evaluated whether an EPA-granted aquifer exemption served as the "functional equivalent" of NEPA review provides no basis for concluding that UIC permits involve a level and intensity of review that is functionally equivalent to NEPA.

Further, the Court in *Western Nebraska* did not declare broadly that actions under the SDWA necessarily provide a functional equivalence to NEPA . Instead, after thorough review, the Court found that "the procedures employed and the analysis undertaken by EPA *in this proceeding* covered *the core NEPA concerns*." 943 F. 2d at 872 (emphasis supplied). Importantly for this case, EPA's analysis there extended to an extensive consideration of "alternatives." *Id*. (finding that "EPA's decision to permit the mining of …uranium deposits by means of injection technology, which will have substantially less adverse environmental effects than *alternatives* such as strip mining, is a permissible…interpretation…[t]hat is supported by the record and adequately explained by the agency."). Just that sort of alternatives analysis, which allowed the Court to conclude that the aquifer exemption under the SDWA "covered the core NEPA concerns," was required but is missing here.

EPA and Wabash counter that any NEPA requirements to conduct an alternatives analysis or evaluate the cumulative impacts of the action belong exclusively to the subset of rules established solely for the purpose of conducting an EIS, and therefore fall squarely within the EIS exception established in 40 CFR § 124.9(b)(6) (providing that "UIC . . . permits are not subject to the environmental impact statement provisions of section 102(C) of the National Environmental

Policy Act."). *Wabash Br*., 15 (citing 40 CFR §§ 1502.10, .14 & .16); *see also EPA Br*., 21. Not so.

The rules of both the CEQ and EPA distinguish the elements of "environmental assessments" and "findings of no significant impact" (not excluded by 40 CFR § 124.9(b)(6)) from "environmental impact statements" (which are excluded). *Compare* 40 CFR § 1501.5 (prescribing CEQ requirements for "environmental assessments") *with* 40 CFR Part 1502 (requirements for "environmental impact statements") and *compare* 40 CFR §§ 6.205 & 6.206 (EPA's NEPA rules for "environmental assessments" and findings of no significant impact) *with* § 6.207 (environmental impact statements). Importantly, the rules of both agencies for preparing "environmental assessments" (as opposed to EIS's) expressly require agencies to consider "alternatives," establish baseline conditions that may be impacted by the proposed action and alternatives and the "environmental impacts of the proposed action and alternatives." 40 CFR § 1501.5 (CEQ rule requiring EA for "proposed action" requires discussion of "the purpose and need for the proposed project, *alternatives* as required by Section 102(2)(E) of NEPA, and the environmental impacts of the proposed action and *alternatives*….") and 40 CFR § 6.205.(e) (EPA rule providing "an EA must include…."). And finally, the exclusion in 40 CFR § 124.9(b)(6) references only the EIS requirements of section 102(C)[5] of NEPA while other sections of NEPA require consideration of alternatives. Section 102(H) of NEPA, for example, requires that EPA "study, develop, and describe appropriate alternatives to recommended courses of action in any

[5] 40 CFR § 124.9(b)(6) provides that "UIC…permits are not subject to the [EIS] provisions of section 102(2)(C) of [NEPA]."

proposal which involves unresolved conflicts concerning alternative uses of available resources"). 42 U.S.C. § 4332(H).[6]

The CEQ's rules provide further that agencies should "determine" the scope of NEPA application as a "threshold" issue. 40 CFR § 1501.1. Thus, the rule allows agencies to determine that "the proposed activity or decision is expressly exempt from NEPA under another statute" or that "another statute's requirements serve the function of agency compliance with [NEPA]." But the rule requires a "determination," *id.* § 1501.1(a), that the public can review, comment on and challenge. EPA did not do that here. It has, however, certainly done so in other cases involving individual UIC permits. *See, e.g.*, "NEPA Functional Equivalence of UIC and Permitting and Aquifer Exemptions under the SDWA for the Dewey Burdock Project" (Sarah Bahrman, EPA's Chief, Safe Drinking Water Branch: October 23, 2020).[7] Because it was required to make these "determinations" as part of the administrative record, its belated efforts now to assert NEPA exemptions or exclusions or to argue that it actually conducted some sort of NEPA analysis in its brief must be disregarded as impermissible post-hoc agency rationalization. *See, e.g., NRDC v. USEPA*, 31 F. 4th 1203, 1206-07 (9th Cir. 2022) ("Courts do not 'accept appellate counsel's post-hoc rationalizations for agency action'" and "an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

[6] EPA's own NEPA website observes that the alternatives analysis required in "environmental assessments" derives from NEPA Section 102(E)(and is therefore not subject to the NEPA review exclusion in 40 CFR § 124.9). See discussion of EA/FONSI at https://www.epa.gov/nepa/national-environmental-policy-act-review-process .

[7] The memo is available at https://downloads.regulations.gov/EPA-R08-OW-2019-0512-0226/attachment_263.pdf and included as Attachment 1 to this memorandum. Additionally, EPA has made express findings of projects eligible for a "categorical exclusion" from NEPA review. See Categorical Exclusion for the Anthony Water and Sanitation District Drinking Water System Project (Dec. 16, 2020) (available at https://www.nadb.org/uploads/files/catex_anthony_nm_water_ext.pdf . Indeed, EPA maintains a form for making categorical exclusion determinations: https://www.epa.gov/system/files/documents/2022-10/NEPA%20CATEX%20Form%20Fillable.pdf It did none of that here.

Finally, claims by Wabash (*Br.,* 15) and EPA (*Br.,* 12) that applicable NEPA rules do not require consideration of "cumulative impacts" or "indirect effects" of a carbon storage project are at odds with EPA's own announcement of its approval of this project. There, EPA announced that it "follows guidance from the [CEQ] to ensure that advancement of carbon capture …and sequestration technologies are done in a responsible matter…." and inserted a link to that guidance.[8] The linked CEQ Guidance, dated February 15, 2022, states simply and unequivocally that the "actions that should be taken" by federal agencies in reviewing carbon capture and storage projects include: "evaluating *direct, indirect and cumulative effects* and identifying and implementing appropriate mitigation and avoidance measures." *See "CEQ Issues New Guidance to Responsibly Develop Carbon Capture, Utilization and Sequestration,*" (CEQ, Feb. 15, 2022) (emphasis supplied).[9] Each of these terms are defined by the CEQ, and include "reasonably foreseeable" effects of the action to patterns of land-use and related effects on air, water and ecosystems as well as the "incremental effects of the action when added to the effects of … "reasonably foreseeable [future] actions" regardless whether undertaken by an agency or private organization. *See* 40 CFR § 1508.1. Here, despite the fact that the UIC permit is an apparent necessary predicate for a large-side industrial operation, will itself require new pipeline construction, create new noise and light sources and give rise to construction activity and industrial traffic changes, EPA has failed even to determine if the permit will spawn indirect or cumulative

[8] *See* "EPA Approves Permits to Begin Construction of Wabash Carbon Services Underground Injection Wells in Indiana's Vermillion and Vigo Counties," (EPA Jan. 24, 2023) (available at https://www.epa.gov/newsreleases/epa-approves-permits-begin-construction-wabash-carbon-services-underground-injection) (copy included as Attachment 2).

[9] The CEQ announcement is available here: https://www.whitehouse.gov/ceq/news-updates/2022/02/15/ceq-issues-new-guidance-to-responsibly-develop-carbon-capture-utilization-and-sequestration/ (copy included as Attachment 3).

effects that require further analysis. That failure violated NEPA and warrants a reversal of the permit decision.

IV. SDWA CLAIMS

Petitioners challenged the sufficiency of EPA's findings that the UIC application complied with the Safe Drinking Water Act and the UIC rules. *Petition*, 12-17. In particular, they claimed that EPA had not demonstrated that its decision to reduce the post-injection site care ("PISC") plan from the default period of 50 years to just 10 years adequately considered all of the criteria set out in 40 § 146.93(c). In response, EPA contends that it did consider all of the required criteria and made a reasoned decision. *EPA Br.*, 31-68.

In support of its broad claims, EPA sites two sets of documents: those submitted by Wabash as part of the application and those prepared by EPA evaluating the sufficiency of the application. *Compare EPA Response*, Table of Attachments, Attachments 9-12 (application documents submitted by Wabash) *with* Attachments 5—8 (EPA's Technical Review Letter and EPA Reviews of: Permit Geology, Area of Review and Financial Assurance). They are not equivalent documents. One set consists of application; the other contains EPA's review and analysis of the application. Wabash, however, suggests that if the regulatory criteria are addressed in either set of documents then that should suffice. It claims that so long as the application included information responsive to the regulatory criteria then EPA was not compelled to "engage in the meaningless formality of ticking through and . . . discussing in its RTC each of the items listed in 40 CFR § 146.93(c)." Wabash Br., 22-23 (citing *In Re FutureGen Alliance, Inc*., 16 E.A.D. 717, 725 (April 28, 2015) (holding that EPA was not required to conduct independent modeling)).

But Petitioners do not contend that EPA was required to conduct independent modeling; just that it was required to review the application and independently articulate how the information was sufficient to meet each of the criteria set forth in 40 CFR § 146.93(c) before allowing the largest CO2 storage project ever permitted to reduce its PISC plan from fifty years to ten. Indeed, that is precisely what EPA did in the *FutureGen* case cited by Wabash,[10] and requiring EPA here to independently evaluate and explain its evaluation of each required criterion is not a "meaningless formality" or box "ticking" exercise as Wabash suggests.

EPA accepts that its obligation was to do more than simply approve the application without making detailed findings of compliance; indeed, it spends the largest part of its brief arguing that it separately evaluated each of the regulatory criteria for shortening the PISC phase. *EPA Br.,* 31-68. But portions of that effort fall short, and can only be seen as the sort of post-hoc explanation by its counsel that cannot be used to support a deficient initial permit determination. *See, e.g., Sec. & Exch. Comm'n v. Chenery Corp*., 332 U.S. 194, 196 (1947) (holding that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168–69, (1962) ("*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.").

"When an agency structures its decision solely by summarizing evidence presented by the contending parties and describing the parties' opposing views, without making specific factual

[10] While the Board determined that EPA was not required to conduct independent modeling in the *FutureGen* case, it affirmed EPA's permitting decision precisely because EPA **did** demonstrate how it had reviewed and considered all of the applicable criteria. 16 E.A.D at 727("the steps [EPA] took to independently evaluate FutureGen's modeling are fully explained in the record.") (emphasis added).

findings in support of its own conclusions, it fails to meet its statutory obligation[.]" 2 Am. Jur. 2d Administrative Law § 548; C.J.S Public Administrative Law and Procedure § 552 (same). And, "[w]hile there is a requirement that agencies give reasons, there is an implicit corollary that the decision must stand or fall on the basis of the reasons stated." Schwartz, Administrative Law, 591 (1984). Accordingly, courts have consistently rejected belated justifications, whether provided by the agency itself or its counsel, raised on appeal. *See, e.g., Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981) ("the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action."); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (rejecting "litigation affidavits" from agency officials as "merely 'post hoc' rationalizations."); *see also Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020) ("The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.").

EPA's failure to "show its work" and fairly articulate its rationale for approving portions of the permit application stand out in one glaring instance. One of the regulatory criteria EPA was required to analyze to approve an alternative PISC period was "the predicted rate of CO2 trapping in the immobile capillary phase, dissolved phase, and./or mineral phase." 40 CFR § 146.93(c)(1)(v). A public comment observed that a site specific sample of the rock in the Potosi Dolomite, one of the target injection zones, was absent from the data for one of the well sites. AR, Doc. 661 (Comment dated 8/18/2023 submitted by Michael Watkins). The comment continued, noting that "[t]his is still needed to determine capillary pressure, permeability, and lateral extent of the plume due to vuggy intervals." *Id*.

In its responses, EPA largely avoided technical details raised by comments like these. Instead, it assured the public that, while it had received "numerous comments regarding the three-dimensional model, its accuracy, and its use of [the applicant's Revised Area of Review]", Wabash "evaluate[d] the behavior of the injected carbon dioxide in the subsurface" by "perform[ing] computational modeling *using site-specific variables*." EPA's RTC #4 (Attachment 5 to Petition). Thus, EPA implicitly agreed with the commenter that site specific rock analyses were required to predict CO2 trapping rates, but stated that the necessary "site specific" variables were used in the modeling effort.

EPA doubles down on this assertion in its brief. There, it cites numerous application documents and claims that "the model scenarios described in element #4 above included predicted rates of CO2 plume migration that accounted for trapping in the immobile capillary phase, dissolved phase and the mineral phase." *EPA Br.,* 46 (citing Rev. PISC; Rev PGD and Rev. AOR). Thus, it effectively asserts that there were no data gaps concerning the Potosi Dolomite because such "site specific variables" comprised part of the modeling effort.

But EPA's contentions about the contents of the record are unsupported by and at odds with the Revised Area of Review (AoR) that it also cites. *See EPA Br.,* 46 (citing Rev. AoR). The Revised AoR states without equivocation that no "site specific variables" were available or used for considering the rate of CO2 trapping from the Wabash #1 well:

> No core was obtained from the Potosi Dolomite from the Wabash #1 well, thus no site-specific laboratory measurements of relative permeability, capillary pressure, or rock compressibility were available.

Rev. AoR, p. 19 (*EPA Br.,* Attachment 10). Thus, the record cited by EPA shows that "site specific variables" were NOT used in predicting CO2 trapping rates for at least one of the injection wells.

EPA's failure to explain this apparent contradiction is arbitrary and capricious. *Sierra Club, Inc. v. United States Forest Service*, 897 F. 3d 582, 590 (4th Cir. 2018) (holding that an agency's decision is arbitrary and capricious where the agency offers an explanation that runs counter to the evidence before the agency). While EPA may be able to explain the contradiction on remand, its failure to do so in its permit review analyses and response to comments cannot be corrected through briefing on appeal and requires the Board to vacate the permit decision. *See, Am. Textile Mfrs. Inst., Inc.*, 452 U.S. at 539; *see also Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 419 (1971).

III. CONCLUSION

In sum, EPA has glossed over commentor's concerns regarding the analysis Wabash uses to justify the proposed ten-year PISC period and EPA's decision does not provide a suitable explanation for EPA's position as to each of the criteria prescribed by 40 C.F.R. § 146.93(c). Because EPA failed to adequately address these critical factors, the Board must vacate EPA's decision and remand the case to the EPA with instructions to provide an adequately reasoned decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to EPA Region 5 Response to the Petition for Review in the matter of Wabash Carbon Service, LLC, Class VI Underground Injection Permits, Permit Nos. IN-165-6A-0001 (Vermillion) and IN-167-6A-0001 (Vigo), were served, by First Class U.S. Mail on the following persons, this 23rd Day of May 2024:

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DATE: May 23, 2024

Attachment 1

MEMORANDUM

SUBJECT: NEPA Functional Equivalence of UIC Permitting and Aquifer Exemptions under the SDWA for the Dewey Burdock Project

FROM: Sarah Bahrman, Chief, Safe Drinking Water Branch

SARAH BAHRMAN Digitally signed by SARAH BAHRMAN Date: 2020.10.23 11:26:29 -06'00'

TO: The File

DATE: October 23, 2020

This memorandum documents the U.S. Environmental Protection Agency (EPA) Region 8's determination that its decision to approve or disapprove Powertech's applications at the Dewey-Burdock project site in South Dakota for Class III and Class V Underground Injection Control (UIC) permits and an aquifer exemption pursuant to the Safe Drinking Water Act (SDWA) is exempt from the National Environmental Policy Act (NEPA) consistent with EPA's longstanding view, as well as the U.S. Court of Appeals for the 8th Circuit's decision in *Western Nebraska Resources Council v. U.S. E.P.A.*, 943 F.2d 867 (8th Cir. 1991) and other relevant NEPA case law. Accordingly, EPA need not conduct a formal NEPA analysis prior to making its SDWA decisions on Powertech's applications for the UIC permits and aquifer exemption.

Background

EPA administers the SDWA UIC program in South Dakota, including aquifer exemption determinations. Powertech (USA) Inc. (Powertech) applied to EPA for two UIC Area Permits and one associated aquifer exemption for the Dewey-Burdock uranium in-situ recovery (ISR) site located near Edgemont, S.D. in southwestern Custer County, S.D. and northwestern Fall River County, S.D. Powertech applied for a UIC Class III Area Permit for injection wells for the ISR of uranium and a UIC Class V Area Permit for deep injection wells that will be used to dispose of ISR process waste fluids into the Minnelusa Formation after treatment to meet radioactive waste and hazardous waste standards. Powertech also applied for an aquifer exemption in connection with the Class III Area Permit to exempt the uranium-bearing portions of the Inyan Kara Group aquifers. EPA conducted an extensive public process regarding the proposed UIC permits and aquifer exemption, including holding two public comment periods in 2017 and 2019 and multiple public hearings as well as formal Tribal consultations throughout the Agency's decision-making process. EPA evaluated potential environmental impacts that may result from the project, including impacts to groundwater, surface water and air, as well as other potential impacts. EPA's public process and environmental impacts analysis is documented in the administrative record for EPA's Class III and Class V UIC permit and aquifer exemption decisions regarding the Dewey-Burdock project.

NEPA Compliance by EPA

Ordinarily, federal agencies must prepare an Environmental Impact Statement (EIS) for, *inter alia*, "major Federal Actions significantly affecting the quality of the human environment…" NEPA § 102(C), 42 U.S.C. § 4332(C). However, certain statutes administered by EPA contain explicit exemptions from compliance with NEPA. *See* Section 511(c) of the Clean Water Act (CWA), exempting most EPA actions under the Clean Water Act from NEPA's requirements, and Section 7(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793(c)(1)), exempting all EPA actions under the Clean Air Act from the requirements of NEPA. Pursuant to those statutory exemptions, EPA need not undertake compliance with NEPA when undertaking certain actions.

In addition, the courts have exempted certain EPA actions from the procedural requirements of NEPA through the "functional equivalence" doctrine. *See* 72 Fed. Reg. 53652, 53654 (Sept. 19, 2007). Under this doctrine, the courts have found EPA to be exempt from the procedural requirements of NEPA for certain actions under multiple statutes, including SDWA. *Id.* The courts reasoned that EPA actions under these statutes are functionally equivalent to the analysis required under NEPA because they are undertaken with full consideration of environmental impacts and opportunities for public involvement. *Id.*

The U.S. Court of Appeals for the 8th Circuit found the SDWA is the functional equivalent of NEPA and therefore formal NEPA compliance is not required by EPA when the Agency takes action pursuant to the SDWA. *Western Nebraska Resources Council v. U.S. E.P.A.*, 943 F.2d 867 (8th Cir. 1991) (finding that a formal NEPA analysis was not required for issuance of an aquifer exemption under the SDWA by EPA Region 7 because the SDWA and EPA's aquifer exemption issuance in that case were the functional equivalent of NEPA).[1] The court agreed with "the many circuits that have held that EPA does not need to comply with the formal requirements of NEPA in performing its environmental protection functions under 'organic legislation [that] mandates specific procedures for considering the environment that are functional equivalents of the impact statement process.'" *Id.* at 871-872 (quoting and citing *State of Ala. ex rel. Siegelman*, 911 F.2d 499, 504 (11th Cir. 1990) and cases cited therein). The 8th Circuit "further agree[d] that [the] SDWA is such legislation, and that the procedures employed and the analysis undertaken by EPA in this proceeding covered the core NEPA concerns." *Id.* at 872. Therefore, EPA's alleged non-compliance with NEPA did not provide a basis for the court to reverse the Agency approval of the aquifer exemption. *Id.* [2]

[1] The Dewey Burdock project site is located in South Dakota. The U.S. Court of Appeals for the 8th Circuit has jurisdiction over South Dakota.

[2] In addition, EPA's longstanding view is that regulatory actions taken under SDWA are exempt from NEPA's EIS requirements. *See* 44 Fed. Reg. 64174 (Nov. 6, 1979).

NEPA Functional Equivalence of EPA's Decision on UIC Permits

In addition to EPA actions under the SDWA constituting the functional equivalence of NEPA in accordance with the court's decision in *Western Nebraska* and the NEPA functional equivalence doctrine, the EPA consolidated permitting regulations at 40 CFR § 124.9(b)(6) promulgated in 1980 specifically exempt certain EPA permitting actions, including the issuance of UIC permits, from NEPA:

> "… NPDES permits other than permits to new sources as well as all RCRA, UIC and PSD permits are not subject to the environmental impact statement provisions of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4321." 40 C.F.R. § 124.9(b)(6) (emphasis added).

In promulgating this regulation, EPA noted in the preamble to the final rule that "[w]hen these regulations were proposed, the preamble stated EPA's position that [NEPA] does not require preparation of an [EIS] when permits are issued under the RCRA, UIC, or PSD programs, or when non-new source NPDES permits are issued… No comments opposing this position were received, and a number of comments supported it, either directly or by necessary implication. Accordingly, the same position has been adopted in the final regulations." 45 Fed. Reg. 33290, 33406 (May 19, 1980) (internal citations omitted).

EPA's Environmental Appeals Board (EAB or Board) has upheld the application of this regulatory exemption from NEPA to permitting actions in various contexts. *See e.g.*, *In re IT Corp*. 1 E.A.D. 777, 1983 WL 192060 at *1-2 (1983) (Resource Conservation and Recovery Act (RCRA)); *In re Chemical Waste Management, Inc*. 2 E.A.D. 575, 1988 WL 236329 at *2 (1988) (RCRA); *In re U.S. Pollution Control, Inc*., 3 E.A.D. 799, 1992 WL 82627 at *1 (1992) (RCRA); *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 171, 1999 WL 64235 at *35 (1999) (Clean Air Act (CAA) citing 40 C.F.R. § 124.9(b)(6) re: prevention of significant deterioration (PSD) permit and noting CAA statutory exemption); *In re Am. Soda, LLP,* 9 E.A.D. 280, 290-292, 2000 WL 893129 at *8-9 (2000) (SDWA) *In re Beeland Group, LLC,* 14 E.A.D. 189, 205-206, 2008 WL 4517160 at *13-14 (2008) (SDWA); *In re Windfall Oil and Gas, Inc.* 16 E.A.D. 769, 811, 2015 WL 3782844 at *30 (2015) (SDWA).

The EAB first addressed 40 C.F.R. § 124.9(b)(6) in the SDWA UIC permitting context in *In re Am. Soda, LLP,* 9 E.A.D. 280, 290-292, 2000 WL 893129 at *8-9 (2000). In a challenge to EPA Region 8's issuance of a SDWA UIC Class III area permit, the EAB analyzed EPA's NEPA obligations and the functional equivalence doctrine. "Notwithstanding NEPA's general application to major federal actions, courts have long recognized that NEPA's primary goal is to require government to consider the environmental consequences of its decision…[and] courts have developed the doctrine of 'functional equivalency' to ensure that NEPA remains consistent

with its primary goal and does not add one more regulatory hurdle to the process." *In re American Soda* at 290.

The Board described the functional equivalency test as providing that "where a federal agency is engaged primarily in an examination of environmental questions, and where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal NEPA compliance with NEPA is not necessary, [and] functional compliance [is]… sufficient." *In re Am. Soda* at 290-291 *citing Warren County v. North Carolina*, 528 F. Supp. 276, 286 (E.D.N.C. 1981).

The Board also noted that in *In re IT Corporation*, 1 E.A.D. 777 (Adm'r 1982) (RCRA), "the Administrator observed, '[T]he courts have recognized that Federal regulatory action taken by an agency with recognized environmental expertise, when circumscribed by extensive procedures, including public participation for evaluation of environmental issues, constitutes the functional equivalent of NEPA's requirements'" *In re Am. Soda* at 291 (citing *In re IT Corporation* at 778). The EAB further noted that the Administrator held in *In re IT Corporation* that 40 C.F.R. § 124.9(b)(6) codified the caselaw on NEPA functional equivalence and that the RCRA permitting program was the functional equivalent of NEPA. *Id.*

Ultimately, the EAB found that 40 C.F.R. § 124.9(b)(6) was dispositive of the question of the UIC permit program's functional equivalence to NEPA and under the plain language of the provision, Region 8 was not required to prepare an EIS in support of the UIC permit at issue in that case. *In re Am. Soda* at 291-292.

Similarly, in the context of an appeal of an EPA Region 5 permit authorizing construction and injection of a UIC Class I well, the EAB found that the "Part 124 permitting regulations codify the functional equivalence doctrine and exempt UIC permit actions from NEPA's environmental impact statement requirement" and held that 40 C.F.R. § 124.9(b)(6) is "'dispositive on the question of the UIC permit program's functional equivalence to NEPA[,]' and an environmental impact statement is not required for UIC permit issuance." *In re Beeland Group, LLC,* 14 E.A.D. 189, 205-206, 2008 WL 4517160 at (2008) (citing *In re Am. Soda). Accord, In re Windfall Oil and Gas, Inc.* 16 E.A.D. 769, 811, 2015 WL 3782844 at *30 (2015) (citing *In re Am. Soda* in context of UIC permit authorizing construction of a UIC Class II well).

EPA's actions regarding Powertech's applications for SDWA Class III and Class V UIC permits are exempt from NEPA pursuant to 40 C.F.R. § 124.9(b)(6) as well as the functional equivalence doctrine and relevant caselaw and therefore EPA need not complete a formal NEPA analysis prior to action on the UIC permits. In addition, in this instance, EPA conducted an extensive public process regarding the proposed aquifer exemption and considered the environmental impacts of the UIC permits.

NEPA Functional Equivalence of EPA's Decision Regarding Aquifer Exemption

As discussed above, the U.S. Court of Appeals for the 8th Circuit, in the context of an EPA approval of an aquifer exemption, found that the SDWA is the functional equivalent of NEPA and therefore formal NEPA compliance is not required by EPA when the Agency takes action pursuant to the SDWA. *Western Nebraska Resources Council v. U.S. E.P.A.*, 943 F.2d 867 (8th Cir. 1991) (finding that a formal NEPA analysis was not required for issuance of an aquifer exemption under the SDWA by EPA Region 7 because the SDWA and EPA's aquifer exemption issuance in that case were the functional equivalent of NEPA).

EPA's action regarding Powertech's application for an aquifer exemption is therefore exempt from NEPA compliance under EPA's longstanding view, the NEPA functional equivalence doctrine and relevant caselaw. In addition, in this instance, EPA conducted an extensive public process regarding the proposed aquifer exemption and considered the environmental impacts of the exemption. EPA therefore need not conduct a formal NEPA analysis prior to action on the aquifer exemption at issue here.

Conclusion

EPA's actions in issuing the UIC permits and aquifer exemption for the Dewey Burdock project to Powertech under the SDWA are exempt from NEPA, consistent with EPA's long held position that all EPA actions under the SDWA are exempt from NEPA. In addition, in this instance EPA conducted an extensive public process as well as a thorough analysis of the environmental impacts of the project as documented in the administrative record for its decisions. Therefore, no further action by EPA is required pursuant to NEPA prior to taking action on these applications.

Attachment 2

EPA Approves Permits to Begin Construction of Wabash Carbon Services Underground Injection Wells in Indiana's Vermillion and Vigo Counties

January 24, 2024

Contact Information
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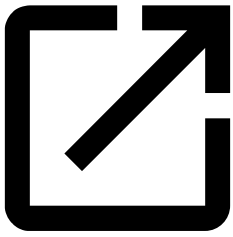
CHICAGO (Jan. 24, 2024) – Today, the U.S. Environmental Protection Agency (EPA) issued permits that allow Wabash Carbon Services LLC to construct two wells for the eventual injection and permanent storage of carbon dioxide underground, one at a site in Vermillion County and another in Vigo County, Indiana. Following extensive review and public engagement, EPA determined that the wells meet all requirements for initial approval, including stringent safety measures. Once the wells are constructed, the applicant will require separate approval from EPA before underground injection of carbon dioxide can begin, and the agency will maintain robust oversight. These underground injection wells will be used to store carbon dioxide from nearby fertilizer production that has been captured prior to release to the atmosphere, reducing emissions that contribute to climate change.

"After a thorough technical review and engagement with the public, including consideration of over 1,000 public comments, EPA has determined that the two proposed wells meet public health and safety requirements to move forward," said **EPA Region 5 Administrator Debra Shore.** "Today's action will help reduce industrial carbon dioxide emissions that contribute to climate change while protecting nearby communities and essential groundwater resources in Vermillion and Vigo counties. We look forward to continued engagement with these communities as construction proceeds."

The process of storing carbon underground to reduce emissions into the atmosphere is known as "carbon sequestration." If and when EPA authorizes the start of injection, Wabash Carbon Services plans to inject up to 1.67 million metric tons of carbon dioxide per year into the wells over an injection period of 12 years. Wabash is required to continuously monitor and fulfill reporting requirements—during the 12 years of proposed carbon dioxide injection and 10 years

thereafter—to ensure that the injection wells work properly, the carbon dioxide does not move from its injected location and drinking water sources are protected.

The well sites were selected following extensive research to ensure the carbon dioxide can be safely stored in the rock formations about 5,000 feet below the ground. Studies of the site show that there is about 2,100 feet of solid rock, including very low-permeability shale, between the deepest source of drinking water in the area and the proposed carbon dioxide reservoir below, creating an effective and impermeable confining zone.



EPA follows guidance from the Council on Environmental Quality to ensure that the advancement of carbon capture, utilization, and sequestration technologies are done in a responsible manner that incorporates the input of communities and reflects the best available science. Under the Safe Drinking Water Act, EPA has developed specific and rigorous criteria to protect underground sources of drinking water from carbon dioxide stored underground. EPA will continue to facilitate extensive public engagement around carbon sequestration projects under the Safe Drinking Water Act.

Attachment 3

FEBRUARY 15, 2022

CEQ Issues New Guidance to Responsibly Develop Carbon Capture, Utilization, and Sequestration

Today, the White House Council on Environmental Quality (CEQ) delivered new guidance to Federal agencies to help ensure that the advancement of Carbon Capture, Utilization, and Sequestration (CCUS) technologies is done in a responsible manner that incorporates the input of communities and reflects the best available science. The development of this guidance was mandated by the Utilizing Significant Emissions with Innovative Technologies (USE IT) Act, which was signed into law in December, 2020.

Carbon Capture, Utilization, and Sequestration (CCUS) refers to technologies that remove carbon pollution from the ambient air or from point sources like smokestacks, and permanently store the carbon. In factories, CCUS can reduce emissions from chemical reactions and high-temperature processes that are difficult and expensive to decarbonize. To achieve a net-zero economy, scientific analyses have found that the United States and other countries will need to remove and store carbon pollution that has already been released into the atmosphere.

"With industries moving quickly to adopt and deploy carbon capture technologies, Federal agencies can play a key role in ensuring that projects are done right and in a way that reflects the needs and inputs of local communities," **said CEQ Chair Brenda Mallory.** "The guidance issued today provides Federal agencies a framework for helping guide CCUS deployment in a manner that is environmentally sound and that cuts cumulative pollution in nearby communities."

The Administration recognizes the imperative for CCUS actions to be considered in a timely manner and in the context of a strong regulatory regime that includes early consultation with Tribal Nations and meaningful

engagement with communities, stakeholders, and other sovereigns. It further recognizes that CCUS projects can create good-paying, union jobs and training programs. Responsible CCUS deployment will require effective permitting, efficient regulatory regimes, meaningful public engagement early in the review and deployment process, and measures to safeguard public health and the environment.

The guidance builds on CEQ's June 2021 CCUS report and identifies measures to facilitate sound and transparent environmental reviews for CCUS projects. It also encourages agencies to prepare publicly available life cycle analyses of carbon capture and utilization and carbon dioxide removal projects.

The CCUS guidance also underscores the importance of incorporating environmental justice and equity considerations early into the review and deployment of CCUS projects to protect overburdened communities from direct, indirect, and cumulative effects. The guidance reiterates the need to develop robust Tribal consultation and stakeholder engagement plans and to conduct regular engagement. Agencies are further encouraged to prioritize the development and application of environmental justice best practices for CCUS efforts.[1] Actions that should be taken include:

- Evaluating the impacts of proposed CCUS actions on potential host communities early in the planning process;
- Providing information about the effects, costs and benefits of CCUS in advance of Tribal consultation and stakeholder engagement;
- Consulting Tribal Nations on potential CCUS projects in a manner that strengthens Nation-to-Nation relationships;
- Avoiding the imposition of additional burdens on overburdened and underserved communities, including by evaluating direct, indirect, and cumulative effects and identifying and implementing appropriate mitigation and avoidance measures; and
- Providing transparency and accountability to communities with respect to applicable mitigation measures designed to reduce environmental effects.

As agencies prepare to implement more than $12 billion in CCUS investments provided by the Bipartisan Infrastructure Law, this guidance will promote projects informed by community perspectives and aligned with climate, public health, and economic goals.

Today's guidance was released as part of a White House announcement on clean manufacturing, which includes announcements on federal procurement of clean materials, innovation to decarbonize and strengthen the US manufacturing sector, clean hydrogen, and trade policy.

Members of the public may submit comments on the guidance at https://www.federalregister.gov/d/2022-03205 (Docket ID: CEQ-2022-0001) until March 18, 2022.

The full CCUS guidance can be read **HERE**.

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