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

In the Matter of:	)	
Windfall Oil & Gas Inc.	)	
	)	
UIC Permit No. PAS2D020BCLE	)	Permit Appeals UIC 14-73 *et al*

REGION III'S RESPONSE OPPOSING IN PART MARIANNE ATKINSON'S AND RICHARD ATKINSON'S MOTIONS FOR LEAVE TO FILE A REPLY

Two of the petitioners in this consolidated appeal, Marianne Atkinson and Richard Atkinson, have filed motions for leave to file a reply. Ms. Atkinson contacted Region III (Region) of the U.S. Environmental Protection Agency (EPA) on February 11, 2015, to ascertain whether the Region would oppose their motions. As communicated to Ms. Atkinson, the Region does not oppose the filing of a reply by the petitioners. Under permit appeal regulations, petitioners such as the Atkinsons may file a reply within 15 days of the service of the response. 40 C.F.R. § 124.19(b)(2). Consistent with this regulation, the Region does not oppose the motions to the extent that the Atkinson are asking the Environmental Appeals Board (the Board) to accept them as replies to the Region's response to their petitions.

However, the motions are also asking that their petitions not be subject to the "preservation" requirement articulated in 40 C.F.R. § 124.19(a)(4)(ii), which requires petitioners to demonstrate that each issue raised in a petition was raised during the public comment period.

If petitioners raise an issue for the first time in their petitions, they must explain why such issue was not required to be raised during the public comment period. *Id.* The Board has explained that this requirement is not merely an arbitrary hurdle, but rather it serves to ensure that the region issuing the permit has an opportunity to address any potential problems with the draft permit before it becomes final. *See In re Chevron Michigan, LLC of Traverse City*, UIC Appeal No. 13-03 (EAB Nov. 7, 2013)(Order Denying Review), slip op. at 13-15; *In re Env. Disposal* Systems, 12 E.A.D. 254, 293 (EAB 2005). The proper staging of the permit decision process allows the permit issuer to make timely and appropriate adjustment to the permit determination, or to explain why no adjustments are necessary. *See In re Chevron Michigan, LLC of Traverse City*, UIC Appeal No. 13-03 (EAB Nov. 7, 2013)(Order Denying Review), slip op. at 4. The Region does oppose petitioners' request to be excused from the preservation requirements of 40 C.F.R. § 124.19(a)(4)(ii).

Petitioners raise several arguments in support of their request to be excused from the requirements of 40 C.F.R. § 124.19(a)(4)(ii). They argue that they did not become aware of certain studies or publications until after the public comment period closed. They also argue that changes have occurred since the public comment period ended that now justify their raising new issues in their petitions. Neither of these arguments, however, justifies relief from the preservation requirement.

In her motion, Mrs. Atkinson argues that she should be allowed to challenge the permit on the basis that it does not specifically list the corrosion inhibitors that will be used to prevent corrosion in the injection well, even though she did not raise this particular objection during the comment period. She indicates that she was not aware at that time of the EPA publication, Final Injection Well Construction Practices and Technology, which was included in the Region's

response as Exhibit X, and which explains the commonplace practice of adding corrosion inhibitors and biocides to protect the mechanical integrity of the well. That document, as well as other publications explaining various aspects of the Underground Injection Control program, are available to all members of the public through EPA's internet site. *See generally* http://water.epa.gov/type/groundwater/uic/publications.cfm. The Board should not grant her motion on the basis of her lack of awareness of this publicly-available document.

Mrs. Atkinson also argues that her motion should be granted because the Region's response to the petitions effectively "changed and expanded" Windfall's permit to inject. A response filed with the Board, however, cannot modify the terms of a permit. The requirements of the final permit still limit what the operator can inject and still require the operator properly to maintain the well. *See* Docket #130, Region III's Response to Petitions for Review, Exh. BB at 3, 12; *see also* Exh. D at 3, 12 (the same requirements in the draft permit). The response only clarified that the permittee can add corrosion inhibitors and biocides to the fluid to be injected as necessary to properly maintain the well.

Mr. Atkinson also points to several alleged "changes" in support of his motion to excuse his petition from the requirements of 40 C.F.R. § 124.19(a)(4)(ii). First he argues that there was an unexpected change when the fault to the north of the proposed injection site was "removed" from the area of review. Second, he argues that the confining zone was changed from the Onondaga formation, which is immediately above the receiving formation, to the confining zone adjacent to the lowermost underground source of drinking water (USDW). Third, he argues that there will be Marcellus gas exploration near the proposed injection well. Finally, he argues that the Board should consider a 2014 study that was not available until September 2014. We address these arguments in turn.

Mr. Atkinson argues, as a basis for his motion that his petition should not be subject to the requirements of 40 C.F.R. § 124.19(a)(4)(ii) , that he did not learn of the uncertainty of the existence of the northern fault shown in a map of the area of review included with the application. It is unclear why this is relevant for his petition, as his petition did not raise arguments regarding the faults. *See* 40 C.F.R. § 124.19(c)(2) ("Petitioner may not raise new issues or arguments in the reply.") In any case, although the map showed the faults as copied from a map by the Pennsylvania Geological Survey, the geological data section of the application, which was available to public at the DuBois public library, clearly stated and documented that there is no evidence of such a fault in the drilling records. *See* Docket #130, Region III's Response to Petitions for Review, Exh. B-4 at 1, 3. (In contrast, the drilling records do confirm the presence of fault to the south of the proposed injection site. *See id.*; *see also* Docket #130, Region III's Response to Petitions for Review, Exh. CC at 8 (acknowledging in the Response to Comment Document that there is a fault to the south of the proposed injection site).)

Mr. Atkinson also claims that the confining zone for the injection operations has been changed, and that that fact provides grounds for his motion. Mr. Atkinson, however, misconstrues the Region's response on the issue of the confining zone. For the Windfall permit, the permittee identified the Onondaga formation as a confining zone, and in its response to the petitions for review, the Region argues that that formation-- the Onondaga --is an adequate confining zone. *See* Docket #130, Region III's Response to Petitions for Review, at 25-31. But the Region also recognizes that it is not the only confining zone in the area of the proposed injection well. *Id.* at 26. The fact that the response recognizes that there are several layers of confining zones between the receiving formation and the lowermost USDWs is not a "change" of confining zones that would excuse the petitioner from having to r his arguments during the

public comment period.

Mr. Atkinson's concerns about the confining zone most likely arise from having realized that the regulations only prohibit the fracturing of the confining zone that is adjacent to the lowermost UDSW, which is not the case for the Onondaga. See Docket #132, Richard Atkinson's Motion for Leave to File a Reply, at 2 (p. 5 in the electronic filing) (referring to 40 C.F.R. §146.23(a)(1)). Because in this permit the Region imposed a more protective injection pressure limit to prevent fracturing not only of the Onondaga, but also of the receiving formation itself, it is possible that Mr. Atkinson did not realize earlier that a permit could be issued allowing fracturing of deeper confining zones such as the Onondaga, as long as there is another confining zone free of open faults and fractures protecting USDWs. Nonetheless, the fact that the Region imposed conservative permit conditions with regards to the injection pressure limit does not mean that there has been a change in permit conditions that would merit relief from the preservation requirement.

Mr. Atkinson also raises as an argument in his motion the prospect of future Marcellus shale wells near the injection well. He expects future development of the Marcellus in the area, although no such wells currently exist nor are any being constructed in or near the perimeter of the area of review. That other parties may look into drilling and fracturing Marcellus shale wells in the future is not a reason to withhold a UIC permit. *See, e.g., In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. at 275 (finding that there is no authority for deferring consideration of a validly submitted UIC permit application on the basis of a potential permit application by a third party for a conflicting use of the geological resources). In any case, he does not demonstrate why the potential for Marcellus shale exploration should excuse his petition, which focuses on overpressurization of the annulus outside the long-string casing, from the preservation

requirements in the regulations, in light of the well-known Marcellus shale boom in Central and Western Pennsylvania.

Finally, Mr. Atkinson argues that because one of the studies cited in his petition was not released until September 2014, after the close of the comment period, he is justified in raising an argument in his petition based on that study. The Region acknowledges that petitioners could not have referred to the 2014 study in their comments. But the Region opposes reliance on that study not only because it is not part of the record, but because the miscellaneous segments cited by the petitioners in their briefs show that it is not relevant for the Windfall permit. See Docket #121, Richard Atkinson's Petition for Review, UIC-Appeal 14-188, Exhs. D - F. The 2014 study cited by Mr. Atkinson focuses on the vertical extent of hydraulic fracturing for Marcellus shale wells. There are no Marcellus shale wells within, or close to the perimeter of, the area of review of the proposed injection well.

Mr. Atkinson concludes his motion by restating the argument from his petition that the federal permit should include a monitoring requirement from the state well regulations. As explained in the Region's response, the Board does not have authority to evaluate compliance with state requirements or to impose such requirements. *See* Docket #130, Region III's Response to Petitions for Review, at 50-51. The motion also includes calculations of annular pressure where injectate has leaked into the annulus outside the long string casing, as he did in his petition. These technical calculations should not be considered for the first time in legal briefs at a permit appeal.

The issues that these petitioners raised for the first time in their petitions (*i.e.* imposing specific limits on the corrosion inhibitors to be used at the well; and requiring monitoring of the annulus outside the string casing to address concerns about overpressurization of that annulus)

could have and should have been raised during the public comment period. The arguments in their motions do not provide adequate justification to excuse these petitions from the preservation requirement. Although these petitioners can file a reply and the Board should grant them leave to do so, their petitions are subject to the requirements of 40 C.F.R. § 124.9(a)(4)(ii), and the Board should deny their request to excuse them from these requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the foregoing Region III's Response Opposing in Part Marianne Atkinson's and Richard Atkinson's Motions for Leave to File a Reply on the date specified below, by U.S. mail to:

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I also certify that I filed the original electronically with the Environmental Appeals Board.

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