

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

_____)
In re:)
)
Jett Black, Inc.,)
Syd H. Levine & Associates,)
and Syd H. Levine) UIC Appeal No. 01-01
)
UIC Permit)
Nos. KYA0361 & KYA0362)
)
_____)

ORDER DISMISSING PETITION FOR REVIEW

On May 27, 1999, the Board denied in part and remanded in part petitions for review of certain provisions of two Underground Injection Control (UIC) permits issued by United States Environmental Protection Agency Region IV ("Region") to Jett Black, Inc., pursuant to the Safe Drinking Water Act, as amended, 42 U.S.C. §§ 300f-300j-26. See *In re: Jett Black, Inc., Syd H. Levine & Associates, and Syd H. Levine*, UIC Appeal Nos. 98-3 & 98-5 (EAB, May 27, 1999), 8 E.A.D. _____. The Board remanded the permits to the Region on seven issues.¹ The Board's decision

¹In particular, the Board stated:

On remand, the Region is ordered to: (1) revise the language in condition I.C.1.(b)(i) of the permits so that it refers to fractures in the confining zone rather than the injection zone; (2) either add annulus gel to the list of approved annular fluids or provide an explanation for rejecting petitioners' request in light of the Region's past practices in this regard; (3) provide a reasoned response to petitioners' concerns regarding the need for a closed annulus; (4) revise the language of condition I.C.3 to clarify that it does not

stated that: "An appeal of the Region's determinations on remand will not be necessary to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)(iii)." *Jett Black*, slip op. at 35.

In a petition received on January 16, 2001, Jett Black, Inc., Syd H. Levine & Associates, and Syd H. Levine ("Petitioners"), nonetheless seek review of two revised permits issued by Region IV following the Board's May 27, 1999 order. See *Petition for Review of Underground Injection Control (UIC) Final Permit Decision ("Petition")*. According to Petitioners, the Region addressed the seven remanded issues in a letter dated December 1, 2000, and issued revised permits dated December 12, 2000. *Petition* at 3-4. In addition, the Region's December 1, 2000 letter states: "this determination on the seven issues remanded by the [Board] and the issuance of the final UIC permits shall constitute the Environmental Protection Agency's final action on UIC permits numbered KYA0361 and KYA0362." *Id.* at 4. The petition seeks

foreclose the possibility of continuing or resuming injection after a loss of mechanical integrity; (5) revise the permits to clarify that for wells that resume injection after having been shut-in, the permittee will have thirty days in which to submit an injection fluid analysis; (6) revise the language of condition I.E.3. or adequately respond to petitioners' concerns regarding its ability to obtain information on new wells constructed in the area of review of its existing wells; and (7) provide a detailed and fact-specific rationale for including a two-year MIT interval for the W-7 injection well on the Boling-Richards Unit Lease, refute petitioners' claim of inconsistent applications, or revise the testing interval.

Jett Black, slip op. at 34-35 (footnote omitted).

review of the Region's determination on remand on two of the seven issues: 1) the Region's refusal to approve the use of annulus gel as an annular fluid additive; and 2) the Region's refusal to remove a provision calling for monitoring of annulus pressure or to revise the permit so as to allow the injection wells to operate with an open annulus.

As previously noted, the Board's prior decision in this matter stated that an appeal of the Region's determination on remand "will not be necessary" to exhaust administrative remedies. It is true that this language, read in isolation, could be read as indicating that an appeal, while not required, is still permissible. However, the Board's May 27, 1999 decision goes on in the same sentence to specifically reference 40 C.F.R. § 124.19(f)(1)(iii). That provision states:

A final permit decision shall be issued by the Regional Administrator:

Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

40 C.F.R. § 124.19(f)(1)(iii).

The effect of this provision was clearly articulated by the Administrator in *In re Pennzoil Products Co.*, 3 E.A.D. 47, 52 n.7 (Adm'r, 1989) as follows:

Since the remand order in this case did not make any further reference to administrative appeal rights, and since the forgoing regulation is clear in denying further opportunities for administrative review in the

absence of such a reference, I am bound by the regulations and therefore must agree with the Region. Accordingly, in addition to the reasons stated above, the petition for review is also denied on the grounds that the petition is barred by 40 CFR § 124.19(f)(1)(iii).

In this case, not only was there no specific language in the Board's prior decision providing that an administrative appeal of the remand decision would be required, there was explicit language to the contrary. This language, when read in conjunction with the Board's citation to 40 C.F.R. § 124.19(f)(1)(iii), represented the Board's acknowledgment that no further review of the Region's decision on remand was contemplated.

Under these circumstances, the Region's determination on remand constitutes final Agency action pursuant to 40 C.F.R. § 124.19(f)(1)(iii), and there is, therefore, no basis for an appeal to the Board.

Accordingly, the above-captioned petition for review is dismissed.

So ordered.

Dated: January 19, 2001

ENVIRONMENTAL APPEALS BOARD

By: _____ /s/
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review in the matter of Jett Black, Inc., Syd H. Levine & Associates, and Syd H. Levine, UIC Appeal No. 01-01, were sent to the following persons in the manner indicated:

First Class Mail,
Postage Prepaid:

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Dated: January 19, 2001

_____/s/_____
Annette Duncan