IN THE MATTER OF RENKIEWICZ SWD–18

UIC Appeal No. 91–4

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided June 24, 1992

Syllabus

Petitioner John H. French, Jr., has filed an appeal of an underground injection control (UIC) permit issued by U.S.E.P.A. Region V to Muskegon Development Company for a disposal well on property abutting that of Mr. French. Petitioner contends that the permit is inadequate in respect to the adequacy of the information in the permit application, precautions for protection of the confining zone, protection of threatened or endangered species, and demonstration of financial responsibility.

Held: The issues of the adequacy of the permit application as it relates to the location of other wells and of the applicability and effect of the Endangered Species Act are remanded to Region V for further investigation and appropriate action. Review of two of the remaining issues is denied because they were not properly preserved for review. Review of the final issue is denied for failure to demonstrate that review is appropriate under the applicable appeal provision, 40 CFR § 124.19.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

This case involves an appeal of a permit issued by U.S. Environmental Protection Agency Region V to the Muskegon Development Company of Mt. Pleasant, Michigan. The permit authorizes the operation of a newly drilled injection well located in Otsego County, Michigan. The purpose of the well is for disposal of salt water from production wells owned and operated by the Permittee. The well, named Renkiewicz SWD–18, is classified as a Class II well[1] under

[1] Class II wells are defined as:

(b) * * * Wells which inject fluids:

Continued

the regulations implementing the Safe Drinking Water Act, as amended (42 U.S.C. 300f et seq.).[2]

The Petitioner is John H. French, Jr., the owner of property abutting the well site. The Petition for Review sets forth five bases on which review is being sought, as discussed below.

II. *DISCUSSION*

Initially, it should be noted that under the rules that govern this proceeding, a UIC permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 CFR § 124.19; 45 Fed. Reg. 33412 (May 19, 1980). The preamble to § 124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id.* The burden of demonstrating that review is warranted is on the petitioner.

The Petition sets forth the following five bases for seeking review:

(a) Attachment B of the Permit Application does not contain sufficient information for issuance of a UIC permit;

(b) The UIC permit does not contain adequate precautions to prevent fracturing of the confining zone;

(c) Attachment G of the Permit Application does not contain sufficient information for issuance of a UIC permit;

(d) U.S.E.P.A. did not establish permit conditions as required for protection of endangered or threatened species under the Endangered Species Act; and

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(1) Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection.

(2) For enhanced recovery of oil or natural gas; and

(3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

40 CFR § 144.6(b).

[2] Regulations implementing the underground injection control portion of the Safe Drinking Water Act relevant to this appeal are found at 40 CFR Parts 144, 146 and 147.

(e) Muskegon Development Company has not adequately demonstrated its financial responsibility as required under 40 CFR § 144.52(a)(7).

Region V responded to the Petition at the request of the Chief Judicial Officer.[3] In its Response, the Region contends that Petitioner cannot appeal these issues because they have not been preserved for review. The Region also addresses the merits of the five issues for consideration should the issues be found to have been preserved for review.

The procedures for the issuance of a UIC permit are found in 40 CFR Part 124. Two important provisions of Part 124 relate to the obligation of persons to raise their objections to a permit prior to an appeal. 40 CFR § 124.13 provides in part:

> All persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10.

In addition, 40 CFR § 124.19 provides in part:

> any person who filed comments on that draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision * * *. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations * * *.

[3] At that time, the Agency's Judicial Officers provided support to the Administrator in his review of permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished and all cases pending before the Administrator, including this case, were transferred to the Environmental Appeals Board. 57 Fed. Reg. 5321 (Feb. 13, 1992).

Adherence to these requirements is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final.[4] Therefore, a threshold analysis is required to determine whether Petitioner complied with §§ 124.13 and 124.19 and thus preserved these issues for review. As noted, Region V contends that he did not.

Petitioner provided comments on the draft permit to Region V by letter of July 23, 1991. We have examined that letter to see whether it raises the issues subsequently raised on appeal. Since the comments in the letter are substantially less specific than the issues framed for appeal, it is only with a very generous reading that we find the necessary correspondence for any of the issues.

Even with this liberal reading, two of the issues raised on appeal clearly were not raised in Petitioner's earlier comments. These are the issues relating to the adequacy of Attachment G and the demonstration of financial responsibility. No reason has been given to conclude that these issues were not reasonably ascertainable at the time of the public comment period. There were no changes from the draft to the final permit that bear on these issues. Therefore, these two issues have not been preserved for review, and review is accordingly denied.

Adequacy of Attachment B: We now turn to the remaining three issues, which were preserved for review. The first of these issues relates to the adequacy of Attachment B of the Permit Application. Attachment B states that "[t]here are no water wells within the area of review. There are no wells or dry holes within the area of review that have penetrated the intended disposal zone." Attachment A defines the area of review as the area within ¼ mile of the proposed Renkiewicz SWD–18.

The Petitioner, both in his comments on the draft permit and in his petition, indicates that he has two water wells on his property, which is within the area of review. The Petition also states that he believes that Muskegon Development Company has five producing wells within the area of review. In Region V's Response to the Petition, the Region indicates that it has no information in the Administrative Record to decide whether this deficiency exists. The Region indicates that it would be concerned if the representations in the

[4] *See In re Shell Oil Company,* RCRA Appeal No. 88–48, at 3 (March 12, 1990) ("These rules help to ensure that the Region has an opportunity to address any concerns raised by the permit, thereby promoting the Agency's longstanding policy that most permit issues be resolved at the Regional level.").

Permit Application were not accurate, and is investigating this issue through its permit review authority under 40 CFR § 144.39, relating to modification or revocation or reissuance of permits. The Region thus suggests that if this issue is found to be preserved for review, it be remanded to the Region for further investigation. Accordingly, this issue is remanded to Region V to determine whether there are any other wells within the area of review and to make any modifications to the permit necessitated by the results of this investigation.

Protection of Endangered or Threatened Species: 40 CFR § 144.4 lists Federal laws that may apply to the issuance of permits under Part 124. Included in this list is the Endangered Species Act, 16 U.S.C. § 1531 et seq. This provision requires the Regional Administrator to ensure "that any action authorized by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat." 40 CFR § 144.4(c).

Petitioner asserts that Region V ignored the applicability of this act, notwithstanding that the area is a nesting area for the American Bald Eagle (a threatened species) and part of a limited breeding area for the Kirkland Warbler (an endangered species). Petitioner in particular expresses concern about the effects of the noise and air emissions from the engine(s) used to drive the injection pump.

The Region, in its Response, concedes that if threatened or endangered specifies are impacted, the Region must take that into consideration. The Region indicates, however, that it does not have enough information to determine whether the Endangered Species Act applies and, if so, what impact the well would have on endangered or threatened species. It suggests that if this issue is found to be preserved for review, it be remanded to the Region for further investigation. Therefore, this issue is remanded to the Region for further review and appropriate action.

Precautions to Prevent Fracturing of the Confining Zone: Finally, the Petitioner expresses a concern that the calculated fracture pressure of the confining zone is 650 PSI (see Permit Application Attachment H) while the specification sheet for the pump to be used in the well indicates a discharge pressure of 970 PSI (see Permit Application Appendix, National J–60 Triplex pump specification sheet). Petitioner thus is concerned that with a discharge pressure greater than the calculated fracture pressure, there will be fracturing of the confining zone.

Region V, in its Response to the Petition, notes that the permit, on page A–1 of 1, limits injection pressure to a maximum of 625 PSI. The footnote to this limitation makes clear that it is being established to prevent confining-formation fracturing. The permit also includes a provision expressly prohibiting "injection at a pressure which initiates fractures in the confining zone * * *" Section II(B)(1)(b); Permit at 11. Region V further states that it is up to the permittee to determine how to achieve compliance; EPA will not normally dictate the precise method of compliance with a limitation on injection pressure.

Petitioner further challenges the permit because it does not "specify requirements concerning the proper use, maintenance and installation of monitoring equipment" as allegedly required by 40 CFR § 144.54(a). However, the Petition does not accurately quote this section. The section actually requires specification of requirements "concerning the proper use, maintenance and installation, *when appropriate*, of monitoring equipment" (emphasis added). This provision allows broad discretion in determining whether any such requirements should be specified. The Region has included a provision relating to the monitoring of wellhead injection pressure which specifies a minimum monitoring frequency of weekly and a minimum reporting frequency of monthly. Section II(B)(2)(d); Permit at 12. Petitioner has not shown why this provision is inadequate or inconsistent with § 144.54(a).

We believe the limitation on injection pressure and the provision for monitoring such pressure fully comply with the requirements of the UIC regulations; Petitioner has failed to meet his burden under 40 CFR § 124.19, and thus review is denied.

III. *CONCLUSION*

The issues of the adequacy of Attachment G of the Permit Application and demonstration of financial responsibility have not been preserved for review, and review is accordingly denied. Review of the issue of the adequacy of precautions against fracturing the confining zone is denied for failure to demonstrate that review is warranted under 40 CFR § 124.19. The issues relating to the adequacy of Attachment B to the Permit Application (existence of other wells) and the applicability and effect of the Endangered Species Act are hereby remanded to the Region for further proceedings consistent with this

order.[5] The Region should give public notice of this remand under 40 CFR § 124.10. Appeal of the remand decision will not be required to exhaust administrative remedies under § 124.19(f)(1)(iii) of the rules. In accordance with 40 CFR § 124.16(a)(1), since the contested permit is for a new injection well, the permit will remain stayed pending final agency action on remand.

So ordered.

[5] Although § 124.19 of the rules contemplates that additional briefing will be submitted upon the grant of a Petition for Review, a direct remand without additional submissions is appropriate where, as here, it does not appear that further briefs on appeal would shed light on the issues to be addressed on remand. *See, e.g., In re Chemical Waste Management, Inc.*, RCRA Appeal No. 87–12, at 5 (May 27, 1988).