

IN THE MATTER OF AVERY LAKE PROPERTY OWNERS ASSOCIATION

UIC Appeal No. 92-1

ORDER DENYING REVIEW

Decided September 15, 1992

Syllabus

Petitioner, a property owners association, seeks review of an underground injection control (UIC) permit issued for disposal of salt water from production wells owned or operated by an oil company. Petitioner seeks a hearing on various issues and review by the EPA regional office of all UIC permits in its vicinity.

Held: The petition for review is procedurally defective and does not otherwise raise any issues warranting review of the UIC permit determination. Accordingly, the petition for review is denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Petitioner, Avery Lake Property Owners Association, seeks review of a Class II underground injection control (UIC) permit issued by Region V of the U.S. Environmental Protection Agency pursuant to Part C of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq.*, as amended. The permit was issued to Trendwell Oil Corporation for disposal of salt water from oil production wells in Montmorency County, Michigan. Petitioner is an association of property owners seeking review of the permit determination. The Environmental Appeals Board has jurisdiction under §§ 124.2 and 124.19 of the Code of Federal Regulations (CFR). 57 Fed. Reg. 5320, *et seq.* (Feb. 13, 1992).

A.

In March 1992, Region V gave public notice of a draft permit prepared for the Trendwell Oil Corporation, the permit applicant. In response to the notice, Petitioner submitted a brief, one-page letter

of comments on April 9, 1992, and requested a public hearing. As a general matter, the comment letter did not focus on any specific permit conditions in the draft permit; instead, it expressed concern over increased well activity in general and concern over the risks that this type of activity might pose to water resources in the area. The Region responded to Petitioner by letter dated April 24, 1992, and assured Petitioner that the Trendwell permit was drafted in accordance with applicable requirements intended to address Petitioner's concerns. The Region issued the permit a few days later, on May 1, 1992. Petitioner then filed a timely, one-page petition for review with the Environmental Appeals Board on May 11, 1992. The petition reiterates the earlier request for a hearing and also seeks a moratorium on all UIC well drilling in the vicinity of the local aquifer. Petitioner designated several issues it wished to have reviewed.¹

B.

As a threshold matter, the Region did not commit error or abuse its discretion by not granting Petitioner's request for an administrative hearing. Under the regulations, the Region's decision to hold a public hearing is largely discretionary. *In re Spokane Regional Waste-to-Energy Project*, PSD Appeal No. 89-4, at 2 (Jan. 2, 1990); *cf. Pennzoil Exploration and Production Company*, UIC Appeal No. 88-1, at 2 (Nov. 16, 1990). The applicable regulations direct the permit issuer to hold a public hearing only when the permit issuer finds that there is a "significant degree of public interest in a draft permit." 40 CFR § 124.12(a). There was no such finding in this instance, and Petitioner has not shown or alleged in its petition that there was a significant degree of public interest warranting such a hearing.²

¹The grounds for review as set forth in the petition are as follows: First, Petitioner maintains that geological information adduced in a separate permit proceeding and presented in "studies by several university geologists and the U.S. Government" indicates that the information upon which the instant permit is based is out of date and demonstrates that the impermeability of the rock formations in northern Michigan are subject to question. Second, it maintains that the Agency is unaware of various old wells which may pose a threat to the local aquifer. Third, it maintains that the number of wells and applications for wells in its area has created a "threat of errors caused by haste and sloppy work" with respect to the monitoring and oversight of well operations. Fourth, it maintains that the Michigan Department of Natural Resources is incapable of properly monitoring and enforcing its responsibilities for the wells in its area. Finally, it challenges "EPA's practice of depending on data supplied by the applicants for the issuance and monitoring of UIC sites, resulting in de facto self-regulation on the part of the oil and gas industry."

²The petition for review does not disclose any facts about the membership or size of Petitioner's organization.

C.

Ordinarily, the scope of review of a UIC permit is confined to specific conditions in the permit, and those permit conditions will not be reviewed unless they are based on a clearly erroneous finding of fact or conclusion of law, or involve an important matter of policy or exercise of discretion that warrants review.³ See *In the Matter of Renkiewicz SWD-18*, UIC Appeal No. 91-4, p. 2 (June 24, 1992); 40 CFR § 124.19 (persons may petition the Board to review “any condition” of the permit decision); 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted is on the petitioner. *Renkiewicz, supra*, at 2; see 40 CFR § 124.19.

To acquire standing to seek review of any condition in a permit determination, a petitioner must have either commented on the draft permit or participated in a public hearing on the permit, if one was held. *Id.* In addition, the petition must include a statement of reasons supporting 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 the[] regulations.” *Id.* If a petitioner does not meet these requirements, the petition will not be considered unless it concerns “changes from the draft to the final permit decision.” *Id.* (Since there were no changes to the Trendwell permit, Petitioner is held to the “comment” standard.)

Under the regulations, the duty to comment on the draft permit requires persons who believe any condition of a draft permit is inappropriate to raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period. 40 CFR § 124.13. Commenters are required to make supporting materials available to the permit issuer upon request. *Id.* The collective purpose behind the various standing requirements in the regulations is explained in *In re Union County Resource Recovery*, PSD Appeal No. 90-1 (Nov. 28, 1990):

[T]he purposes of these regulations is to ensure that all matters are first raised with the permit issuer. In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit

³With respect to permit appeals under Part 124, Agency policy is that most permits should be finally adjudicated at the Regional level. 45 Fed. Reg. 33,412. While the Board has broad power to review decisions in UIC permit cases, the Agency intended this power to be exercised “only sparingly.” *Id.*

issuer can include an explanation of why none are necessary. As explained in the preamble to the regulations, “[t]he later stages [of the permit proceedings] are appellate in nature and new issues should not be raised on appeal.” 45 *Fed. Reg.* 33411 (discussing § 124.13).

Id. at 2–3.

In the opinion of the Board, the Petitioner has not met its burden of showing that the Region’s permit determination should be reviewed.

D.

First, except in one or two minor instances, the issues and requests in the petition are unrelated to conditions of the Trendwell permit, and thus they fall outside of the scope of matters ordinarily considered on review of a permit determination. Petitioner’s requests for review of all UIC permits in the area, and for a moratorium on all permit applications and UIC operations, are two examples of such requests.⁴ These matters go well beyond the individual permit conditions at issue in this proceeding. Therefore, they are not eligible for review.

Second, Petitioner has not demonstrated, nor even attempted to demonstrate, that any of the issues it is now seeking to raise on appeal were first raised in comments on the draft permit. See 40 CFR § 124.19. This procedural shortcoming, by itself, is grounds for dismissal of the petition. As previously indicated, this demonstration is critical to the integrity of the permitting process, for without it there can be no assurance that the permit issuer will have had an opportunity to address matters being raised on appeal.

Third, even if we ignore the previous deficiency, there are only a couple of instances where it can be fairly said that the Petitioner’s comments gave the permit issuer an opportunity to preview a matter before the Petitioner had raised it on appeal. Even so, in those instances, we are not persuaded that they in anyway compel review of the Region’s permit determination. Our reasons follow.

The first such instance centers on Petitioner’s expressions of concern about the adequacy of the geological data underlying the Region’s permit determination. Petitioner expresses this concern both

⁴See note 1, *supra*.

in its comments on the draft permit and in the petition for review. In its comments, Petitioner asserts that it was aware of "opinions from good authorities which show that the aquifer will be in definite danger of contamination through natural joints, fissures, cracks and cavities in the rock." Petitioner did not, however, provide the identity of these sources, or otherwise furnish the underlying geological evidence attributable to them. In its petition for review, Petitioner expresses similar, general concerns about the geological data but never supplies the information necessary to actually identify the sources, despite having received a specific request therefor from the Region.⁵ Petitioner merely refers to the sources as the "U.S. Government," "several university geologists," and "data brought forth in the public hearing on Draft Permit #MI-119-2D-0029, a nearby site * * *."⁶

These expressions of concern fail to establish a basis for reviewing the permit determination. As noted previously, the Region asked the Petitioner to be more specific in referring to the basis for its concern but the Petitioner did not comply. The Region's request was reasonable and clearly authorized by the regulations. 40 CFR § 124.13. Without greater specificity in the petition, the Region properly relied on its own information and expertise in evaluating the permit application. Petitioner's apparent refusal or unwillingness to provide more specific information leaves us no alternative but to conclude that its concerns are unsubstantiated. Indeed, a petitioner should not be heard to complain when its own disregard of the Region's request to supply information effectively prevents the Region and this tribunal from performing a further assessment of its contentions. Accordingly, the Board must dismiss this issue from consideration for review.

There is arguably one other matter that Petitioner has raised in its comments and therefore has preserved for consideration in a petition for review. It concerns an alleged disregard of the environment by well operators and an alleged inability of Michigan authori-

⁵The Region requested that Petitioner provide it with the referenced geological information. As of the date of the Region's response to the petition, Petitioner had not submitted the information.

⁶This reference to a specific UIC permit proceeding does not satisfy the specificity requirement. It is simply not practicable for the Region to suspend its normal activities to conduct a search of files in another proceeding for information that may or may not be the same information that prompted the Petitioner to make its assertions. Petitioner is in the best position to identify the documents that it believes support its position. The process for formulating permits is set forth in the Agency's regulations and, as stated in the body of the text above, places the burden on the Petitioner to persuade the reviewing tribunal that the Region's permit determination warrants review. Petitioner has not met that burden in this instance.

ties to exercise adequate oversight over the well operators. In regard to the well operators, Petitioner asserts in its comments that "too many of the [well] operators are here for the 'quick' buck and will leave us with a ruined forest, criss-crossed with roadways, eroded hillsides, contaminated waters and polluted streams." According to Petitioner, Michigan authorities are unable to regulate these operators properly. Petitioner states that it is therefore unable to "see why the Michigan DNR continues to process permits for such questionable [inadequately bonded and regulated] ventures."⁷

There are two reasons why these expressions of concern must be rejected as grounds for reviewing the Region's permit determination. First, as they relate to alleged irresponsible conduct of other well operators, they are simply irrelevant to the well operator whose permit is under consideration in this proceeding. There has been no allegation or proof of irresponsibility respecting Trendwell Oil Corporation. Moreover, the well operator's conduct will be governed by current requirements. For example, the instant permit incorporates conditions for operating standards as required by 40 CFR § 144.51(e), and the permittee is obligated to comply with these conditions or risk imposition of sanctions. *See, e.g.*, 40 CFR § 144.40 (failure to comply with permit conditions is grounds for termination of permit). Second, Petitioner's concerns about the oversight capacity of the State suggest that it is unaware that the UIC program for Michigan is administered by EPA, not the State of Michigan. 40 CFR § 147.1150. The UIC program consists of the requirements set forth in 40 CFR Parts 124, 144, 146, 148, and relevant portions of § 147.1150 of Part 147, and has been in effect since June 25, 1984, when EPA assumed responsibility for the program for Michigan.⁸

In view of EPA's role as the administrator of the UIC program in the State, the State's alleged inability to monitor and enforce what-

⁷ Similarly, in its petition, Petitioner expresses concern that the number of applicants for wells in the vicinity has created a "threat of errors caused by haste and sloppy work by the crews and by those charged with monitoring and overseeing the operations." In regard to the oversight capacity of State authorities, Petitioner asserts that the Michigan Department of Natural Resources is incapable of properly monitoring and enforcing its responsibilities in connection with wells in Petitioner's area.

⁸ Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), requires the Agency to administer the UIC program in States which do not have approved UIC programs. Michigan has not acquired primacy over the UIC program.

ever separate responsibilities it retains under State law is clearly outside the scope of this UIC permit proceeding.

For the reasons stated above, the petition for review is denied.
So ordered.