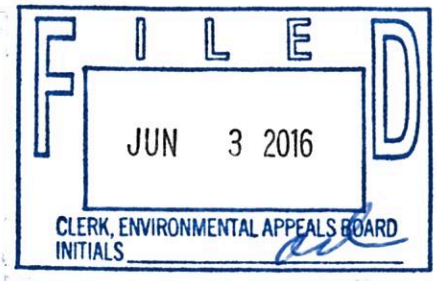

(Slip Opinion)

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

In re: Savoy Energy, L.P. UIC Permit No. MI-091-2D-0004	UIC Appeal Nos. 16-01, 16-02, & 16-03

[Decided June 3, 2016]

ORDER DISMISSING PETITIONS FOR REVIEW

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

IN RE SAVOY ENERGY, L.P.

UIC Appeal Nos. 16-01, 16-02, & 16-03

ORDER DISMISSING PETITIONS FOR REVIEW

Decided June 3, 2016

Syllabus

In March 2016, the U.S. Environmental Protection Agency, Region 5 ("Region") issued an Underground Injection Control permit ("UIC Permit") to Savoy Energy, L.P. The Environmental Appeals Board ("Board") received three petitions for review of the UIC permit. Thereafter, the Region filed motions requesting a voluntary remand of the UIC permit. In support of the remand request, the Region stated that it did not fully address public comments concerning a request for a public hearing and that it wishes to cure this defect by holding a public hearing, "after which the Region will decide whether to reissue the permit with a supplemental response to comments, draft a new permit for public comment, or deny the permit." In supplemental statements, the Region clarified that it "intends to withdraw the [UIC Permit], re-notice the same permit for public comment, and hold a public hearing." It "will then issue a new permit decision after consideration of both previously and newly submitted comments, all consistent with the Part 124 permitting regulations."

Held: The Motions are granted as appropriate under both 40 C.F.R. sections 124.19(j) and 124.19(n). Accordingly, UIC Appeal Nos. 16-01, 16-02, & 16-03 are DISMISSED. Petitioners may file a petition for review with the Board under 40 C.F.R. section 124.19(a) challenging the Region's new permit decision after completion of the proceedings on remand and they must do so if they wish to preserve the option of seeking judicial review of the Region's new permit decision.

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Ward:

In March 2016, the U.S. Environmental Protection Agency, Region 5 ("Region") issued an Underground Injection Control permit, Number MI-091-2D-0004 ("UIC Permit") to Savoy Energy, L.P. The UIC Permit is a Class II permit

for injection of fluids produced in association with oil and gas production. In April, the Environmental Appeals Board ("Board") received three petitions for review of the UIC Permit from the Raisin Charter Township (UIC Appeal No. 16-01), the River Raisin Watershed Council (UIC Appeal No. 16-02), and Summerville Township (UIC Appeal No. 16-03).

The Region did not file responses to the petitions, but instead filed motions[1] requesting a voluntary remand of the UIC Permit "in order for the Region to hold a public hearing, and ensure that the substantive and procedural requirements of 40 C.F.R. parts 124, 144, and 146 have been met." Motions at 1. The Region stated further that, "[u]pon review of the record, the Region has determined that comments requesting a public hearing were not fully addressed during the permitting decision process. The Region now wishes to cure this defect by holding a public hearing, after which the Region will decide whether to reissue the permit with a supplemental response to comments, draft a new permit for public comment, or deny the permit." Motions at 2. In Supplemental Statements, the Region clarified that it "intends to withdraw the [UIC Permit], re-notice the same permit for public comment, and hold a public hearing." It "will then issue a new permit decision after consideration of both previously and newly submitted comments, all consistent with the Part 124 permitting regulations." Supplemental Statements at 1-2.

"[A]t any time prior to 30 days after" the Region files its response to a petition for review, the Region may unilaterally withdraw a permit and prepare a new draft permit upon notification to the Board and interested parties. 40 C.F.R. § 124.19(j). The Region's Motions did not notify the Board that it intended to withdraw the UIC Permit and re-notice the same permit for public comment as required by 40 C.F.R. section 124.19(j). However, the Supplemental Statements do serve as the required notification to the Board, and the re-noticing of the permit for public comment will serve as the required notification to interested parties.

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[1] The Region filed three motions seeking voluntary remand captioned with the three appeal numbers listed above, and three supplemental statements in support. Except for the names of the parties the Region contacted to determine if they concurred, the motions and statements are identical. *See* Motions of EPA Region 5 for Voluntary Remand and Supplemental Statements Pursuant to Board Clarification Order filed in UIC Appeal Nos. 16-01, 16-02, and 16-03. For simplicity, the Board will refer to these pleadings as "Motions" and "Supplemental Statements" respectively.

Going forward, the Board recommends that the Regions be explicit in their motions to the Board on these points. But given the Region's clarification in its Supplemental Statements, the Board concludes that the Region's request for remand is appropriate under 40 C.F.R. section 124.19(j). *Compare In re Lee Ranch Coal Co.,* NPDES Appeal No. 14-04, at 3-4 (EAB June 24, 2015) (Order Scheduling Oral Argument) (directing parties to address whether Region had satisfied requirements of 40 C.F.R. section 124.19(j) where Region purported to withdraw a permit without also preparing a new draft permit decision).

And even if 40 C.F.R. section 124.19(j) did not apply, the Board has broad discretion to grant a remand request: "[a] voluntary remand is generally available where the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before reissuing the permit."[2] *In re Desert Rock Energy Co., LLC,* 14 E.A.D. 484, 493 (EAB 2009); *see also* 40 C.F.R. § 124.19(n) (stating that the Board "may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal"). Here, the Region has stated its intent to withdraw the UIC Permit, re-issue the same permit for public comment, hold a public hearing, and then issue a new permit decision after consideration of previously and newly submitted comments. Allowing the Region to proceed with this process will serve administrative efficiency. Further, two of the three petitioners, the Raisin Charter Township (UIC Appeal No. 16-01) and the Summerfield Township (UIC Appeal No. 16-03) have concurred in the Region's request.[3]

The Board also takes the opportunity to note another path Regions may follow under 40 C.F.R. section 124.19(j), consistent with past Board precedent. Specifically, before the 30-day window closes under section 124.19(j), a Region may unilaterally withdraw a permit and re-issue a new draft permit, so long as it

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[2] After the 30-day window under 40 C.F.R. section 124.19(j) closes, the Region must file a motion with the Board seeking a voluntary remand of the permit before withdrawing it, stating explicitly its intentions regarding withdrawal, reissuance, and notification of interested parties. *In re West Bay Exploration Co.*, UIC Appeal Nos. 13-01 & 13-02, at 4 n.4 (EAB May 29, 2013) (Order Denying Reconsideration).

[3] The third petitioner, River Raisin Watershed Council (UIC Appeal No. 16-02), did not respond to the Region's request for its position on the Motions and did not file any opposition to the Motions with the Board (which was due May 25, 2016, 40 C.F.R. § 124.19(f)(3)).

contemporaneously notifies the Board and interested parties of the withdrawal and reissuance. In that circumstance, rather than filing a motion for voluntary remand, the Region would file a motion to dismiss the petition as moot. *See, e.g., In re San Jacinto River Auth.*, NPDES Appeal No. 07-19, at 1-2, 4 (EAB Mar. 28, 2008) (Order Dismissing Petition for Review); *In re Wash. Aqueduct Water Treatment Plant*, NPDES Appeal No. 03-07 (EAB Dec. 15, 2003) (Order Dismissing Petition for Review).

Under the circumstances here, the Board GRANTS the Motions for voluntary remand as appropriate under both 40 C.F.R. sections 124.19(j) and 124.19(n). Accordingly, UIC Appeal Nos. 16-01, 16-02, & 16-03 are DISMISSED. Petitioners may file a petition for review with the Board under 40 C.F.R. section 124.19(a) challenging the Region's new permit decision after completion of the proceedings on remand, and they must do so if they wish to preserve the option of seeking judicial review of the Region's new permit decision.[4]

So ordered.

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[4] The Board directs that an appeal to the Board following the Region's decision on remand is required to exhaust administrative remedies before EPA. 40 C.F.R. § 124.19(*l*)(2)(iii).

CERTIFICATE OF SERVICE

I certify that the foregoing Order Dismissing Petitions for Review in the Matter of Savoy Energy, L.P., UIC Appeal Nos. 16-01, 16-02, and 16-03, were sent to the following parties in the manner indicated below:

Via Pouch Mail:
Susan Prout
Office of Regional Counsel
U.S. EPA, Region 5 (C-14J)
77 West Jackson Blvd.
Chicago, IL 60604

Leonardo Chingcuanco
Office of Regional Counsel
U.S. EPA, Region 5 (C-14J)
77 West Jackson Blvd.
Chicago, IL 60604

Via U.S. Certified Mail:
Jack Rokos, Operations Manager
Savoy Energy, L.P.
P.O. Box 1560
Traverse City, MI 49685

Jim Palmer, Superintendent
Raisin Charter Township
5525 South Occidental Hwy
Tecumseh, MI 49286

John Calhoun, Chairman
River Raisin Watershed Council
320 Springbrook Ave. Suite 102
Adrian, MI 49221

John Chandler, Supervisor
Summerfield Township
26 Saline Street
Petersburg, MI 49270

Dated: JUN 13 2016

Annette Duncan, Secretary
U.S. Environmental Protection Agency
Environmental Appeals Board