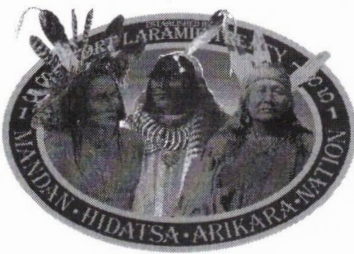


ATTACHMENT C



MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Mark N. Fox
Office of the Chairman

July 16, 2018

Craig Boomgaard
Environmental Protection Agency
Region 8
Mail Code: 8P-W-UIC
1595 Wynkoop Street
Denver, Colorado 80202-1129

Re: Draft Class II UIC Permit No. ND22349-11250 for Red Murphy SWD No. 1

Dear Mr. Boomgaard:

Please find enclosed the Mandan, Hidatsa and Arikara Nation's ("MHA Nation") comments on the Draft Class II Underground Injection Control ("UIC") Permit No. ND22349-11250 for Red Murphy SWD No. 1 ("Draft Permit") to be operated by Goodnight Midstream Bakken, LLC within the Fort Berthold Indian Reservation. The Environmental Protection Agency ("EPA") issued a public notice for the Draft Permit on June 1, 2018.

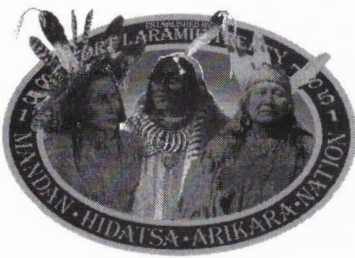
EPA should deny the proposed permit until approval for waste disposal is obtained from the MHA Nation in accordance with MHA Nation laws. The use of underground disposal wells within the boundaries of the Reservation is prohibited without prior authorization from the MHA Nation. The MHA Nation enacted its waste disposal laws to protect tribal trust lands and ensure that the health and safety of our members and residents of the Reservation are not threatened by the disposal of harmful oil and gas byproducts on the Reservation.

Any permit issued by EPA must be directly coordinated with the MHA Nation. As highlighted in EPA's Policy on Consultation and Coordination with Indian Tribes ("Tribal Policy") issued on May 4, 2011, "EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership, ..." Denying or withholding the Draft Permit until approval is obtained from the MHA Nation is required by EPA's Tribal Policy, EPA's treaty and trust responsibilities, and the MHA Nation's sovereign authority to protect the health and welfare of its members and its homelands. Thank you for your consideration of the enclosed comments.

Sincerely,

/Mark N. Fox/

Mark N. Fox
Chairman



MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Mark N. Fox
Office of the Chairman

Mandan Hidatsa and Arikara Nation Comments on Draft Class II UIC Permit No. ND22349-11250 for the Red Murphy SWD No. 1

July 16, 2018

I. Introduction

The Environmental Protection Agency (“EPA”) should deny the Draft Class II Underground Injection Control (“UIC”) Permit No. ND223490-11250 for Red Murphy SWD No. 1 (“Draft Permit”) sought by Goodnight Midstream Bakken, LLC (“Goodnight”). Currently, Goodnight’s application does not comply with applicable laws of the Mandan, Hidatsa and Arikara Nation (“MHA Nation”) governing waste disposal on the Fort Berthold Indian Reservation (“Reservation”). In addition, EPA’s assessment of the Draft Permit does not include the likelihood that waste disposed in the well will impact tribal trust lands and waters. At a minimum, EPA should withhold issuing any permit until Goodnight complies with MHA Nation law.

Goodnight is seeking a permit to operate a waste disposal well within the exterior boundaries of the Reservation. The Draft Permit was submitted for approval pursuant to the EPA’s Underground Injection Control program, as set forth under the Safe Drinking Water Act of 1974, 42 U.S.C. § 300f *et seq.* (“SDWA”), and Title 40, Part 144 of the Code of Federal Regulations. In addition to EPA’s requirements, MHA Nation law requires that Goodnight obtain approval for the disposal of waste and other hazardous substances associated with the exploration or production of oil and gas on the Reservation. Goodnight has not contacted the MHA Nation to obtain approval for waste disposal within the Reservation.

MHA Nation approval for waste disposal within the Reservation is required to protect tribal trust lands and the health and welfare of MHA Nation’s members, residents of the Reservation. The MHA Nation’s authority over Goodnight’s proposed activities within the Reservation stems from the MHA Nation’s federally approved Constitution and laws enacted pursuant to that Constitution. In addition, the United States Supreme Court recognizes and affirmed the inherent authority of Indian tribes to regulate such activities to protect the health and welfare of a tribe.

Finally, EPA’s Policy on Consultation and Coordination with Indian Tribes (“Tribal Policy”) requires that that EPA work directly with the MHA Nation in the issuance of any permit as the sovereign entity with the primary authority over the Reservation. EPA’s Tribal Policy highlights the Guiding Principle that “EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s

land and membership, ..." EPA Tribal Policy at 3 (May 4, 2011). This Guiding Principle implements and is required by EPA's treaty and trust responsibility to the MHA Nation. In light of MHA Nation's laws and EPA's requirement to coordinate with the MHA Nation any permit should be denied or withheld until Goodnight obtains approval from the MHA Nation.

II. MHA Nation Approval is Required Prior to Issuance of Any Permit

MHA Nation laws governing waste disposal within the Reservation require that Goodnight obtain approval from the MHA Nation. Goodnight has not contacted the MHA Nation for this approval. Approval is needed to comply with MHA Nation laws, to prevent the contamination of trust lands, and ensure the protection of the health and welfare of MHA Nation members, residents of the Reservation, and the Reservation itself.

As EPA is aware, the MHA Nation's Reservation is located in the heart of the Bakken Formation, which is the largest continuous oil accumulation in the lower 48 states. Oil and gas development within the Reservation significantly expanded over the past decade. While oil and gas development presents opportunities for economic growth, it also presents hazards to the health and safety of the members of the MHA Nation if not properly regulated. In order to protect the MHA Nation's members and residents of the Reservation from the harmful effects of oil and gas development, the MHA Nation enacted Resolution No. 11-75-VJB governing the disposal of waste associated with the exploration and development of oil and gas on the Reservation. Please see Resolution No. 11-75-VJB attached.

Resolution No. 11-75-VJB provides that "[a]ll waste or other hazardous substances associated with the exploration or production of oil and gas on the Fort Berthold Reservation must be disposed of in an authorized facility in accord with all tribal, local state, and federal laws and regulations." The Resolution defines "authorized facility" as a "waste management, storage, transfer or disposal site or facility which meets the requirements of applicable federal, tribal or state regulations and is approved by the Tribal Council as the place for such management or disposal of waste covered by this regulation." Accordingly, Resolution No. 11-75-VJB requires that the MHA Nation's Tribal Council approve any waste disposal facility.

The Draft Permit for Red Murphy SWD No. 1 fits squarely within the scope of facilities and activities regulated by the MHA Nation under Resolution No. 11-75-VJB. When enacting this Resolution, the MHA Nation was keenly aware that the waste injected into disposal wells, even on fee lands within the Reservation, contains harmful compounds that could contaminate trust lands and groundwater resources. Consequently, the MHA Nation required that such disposal wells be strictly regulated by the MHA Nation and obtain approval prior to construction or use.

The MHA Nation's regulatory authority over waste disposal wells stems from its federally approved *Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation* ("MHA Nation Constitution"). Please see MHA Nation Constitution attached. The MHA Nation drafted its constitution under to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA). Then, pursuant to authority delegated by Congress, the Secretary of the

Interior reviewed and approved the MHA Nation Constitution in 1936. *See* MHA Nation Constitution at 12.

Similar to the authority Congress delegated to EPA under the Clean Water Act or the Safe Drinking Water Act for the approval of tribal standards governing water quality within a Reservation, under the IRA, Congress delegated to the Department of the Interior the authority to approve tribal constitutions that would organize the tribal governing body and set out the authority of Indian tribes to govern their members, lands and resources. The MHA Nation utilized the authority provided in its Constitution to pass its laws regulation waste disposal facilities within its Reservation.

The MHA Nation Constitution provides in Article I that the jurisdiction of the MHA Nation “shall extend to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation....” MHA Nation Constitution at 1 (emphasis added). In addition, Article VI § 3 empowers the MHA Nation’s governing body, the Tribal Business Council, with “all necessary sovereign authority - legislative and judicial - for the purpose of exercising the jurisdiction granted ... in Article I of this Constitution.” *Id.* at 6. Article VI § 5 (j) provides the MHA Nation’s governing body with authority over “natural resources” which includes land, water and groundwater resources. *Id.* at 8.

The MHA Nation’s regulation of waste disposal wells pursuant to its authority under its Congressionally authorized and federally approved Constitution is similar to tribal authority exercised under the Clean Water Act. For example, in *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998), the Court upheld EPA’s approval of tribal regulation of reservation water resources pursuant to the Clean Water Act even when that regulation affects non-Indians—such as Goodnight in this case. The Court’s affirmation of tribal authority was based in part on EPA’s “generalized finding that due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation....” *Id.*

Similarly, the MHA Nation took action to protect its members and Reservation lands, waters and groundwater from waste disposal associated with oil and gas activities. Whether under the Clean Water Act or the Indian Reorganization Act, in both cases federal officials approved the tribal enactments, the tribes took action to protect their land and water resources, and the approved tribal authority extends to both Indians and non-Indians within the boundaries of the respective reservations. As the Ninth Circuit noted it would be practically impossible to separate damage to water resources on “non-Indian fee land from impairment on the tribal portions of the Reservation.” *Id.* The same is true for waste injected into fee lands as it migrates or trespasses onto trust lands and could contaminate groundwater and drinking water through cracks in the well.

The MHA Nation also has inherent authority over non-Indian activities on fee lands within the Reservation. While it is not necessary for the EPA to reach this issue, given the Federal government’s affirmation of the MHA Nation’s authority in the MHA Nation Constitution, the MHA Nation’s inherent authority provides for the regulation of all waste

disposal facilities within the Reservation including facilities operated by non-Indians on fee lands.

The U.S. Supreme Court recognized and upheld the inherent authority of Indian tribes to regulate the activities of non-Indians on fee lands within reservations. In *Montana v. United States*, the Supreme Court held that tribes retain inherent civil authority “over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 566 (1981). Underground disposal of oil and gas waste products, including hazardous waste, is exactly the kind of non-Indian activity that threatens the “health of welfare” of an Indian tribe.

Oil and gas operations, including waste disposal, is an inherently dangerous activity that results in numerous spills and leaks of hazardous fluids. In the last 12 months, oil and gas companies operating in North Dakota reported 300 “general” spills outside of the oil field. Many of these spills occurred during activities related to waste disposal. See <https://deq.nd.gov/FOIA/Spills/default.aspx/> (accessed on June 30, 2018). All of these spills threatened the “health and welfare” of the MHA Nation, its members, residents of the Reservation and Reservation lands and waters. When a spill occurs within the Reservation, in most cases it is the MHA Nation, not EPA and not the State of North Dakota that responds.

III. EPA Regulations Implementing the Safe Drinking Water Act Recognize Tribal Authority Over Waste Disposal Wells

Consistent EPA’s treaty and trust responsibility to Indian tribes and its Tribal Policy, the regulations implementing the SDWA affirm that EPA should consider tribal authorities and interests in overseeing and permitting Class II wells in Indian Country like the Red Murphy SDW No. 1 disposal well under consideration here. EPA regulations provide that the Administrator “may promulgate an alternate UIC Program for Class II wells on any Indian reservation or Indian lands.” 40 C.F.R. § 144.2. In its oversight and permitting, EPA is further directed to consider “[t]he interest and preferences of the tribal government having responsibility for the given reservation or Indian lands.” 40 C.F.R. § 144.2 (a).

In this case, EPA should promulgate “an alternative UIC Program” to manage the large number of disposal wells proposed for the Reservation and prevent impacts to tribal trust lands and waters. This alternative UIC program should be developed in consultation to include the “interest and preferences” of the MHA Nation. As set out in Resolution No. 11-75-VJB, EPA’s alternative UIC Program for the Reservation should include coordination with and the approval of the MHA Nation.

EPA’s regulation of Class II wells and EPA incorporation of tribal “interests and preferences” extends to all lands and persons within the Reservation. EPA regulations define “Indian lands” to mean “‘Indian Country’ as defined in 18 U.S.C. 1151. That section defines Indian country as: (a) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;...” 40 C.F.R. § 144.3.

Red Murphy SDW No. 1 is within the Reservation and within Indian Country as defined by EPA. As a result the Red Murphy SDW No. 1 is subject to EPA's requirements in 40 C.F.R. § 144.2 for the consideration of the MHA Nation's "interests and preferences." The MHA Nation expressed its interests and preferences in Resolution No. 11-75-VJB and EPA should abide by this clear expression of the MHA Nation's interests and preferences.

IV. EPA Must Assess Impacts to Trust Lands and Waters from Waste Disposal Wells

Red Murphy SWD No. 1 must also be assessed for its likely impact to tribal trust lands and waters. As a result of disastrous federal allotment policies in the late 1800's and early 1900's the MHA Nation's Reservation is a checkerboard of fee, allottee and trust lands. Oil and gas activities on any of these lands will have an impact on neighboring lands. Red Murphy SWD No. 1 and any other disposal well within or near the Reservation must be assessed for its impacts on trust lands and waters. This is one of the obvious reasons why the MHA Nation's authority and EPA's SDWA authority cover the entire Reservation or Indian Country and not specific types of parcels.

EPA should obtain and include in its assessment of Red Murphy SWD No. 1 and other UIC wells, an August 15, 2017 analysis by Bureau of Land Management's (BLM) Branch of Fluid Minerals in the Montana/Dakotas State Office entitled "Reconnaissance Study of the Potential Area and Radius of Influence from Saltwater Disposal Wells Within and Near the Fort Berthold Indian Reservation, North Dakota." This analysis shows that a number of disposal wells on the Reservation, whether on fee or allottee lands, are already impacting neighboring tribal trust lands. While this report is marked "confidential," EPA should obtain this report from its sister Federal agency as a starting point for its assessment of disposal wells within the Reservation

Even using BLM's overly conservative assumptions regarding substrate pore space and despite BLM's lack of site specific geological analysis, BLM's results show that many disposal wells within the Reservation are being injected with waste at a rate and volume that is already resulting in migration of waste on to trust lands. In addition, a recent review of the wells assessed by BLM in this analysis shows that current disposal volumes, less than a year later, can be as high as eight times (8x) the amounts assessed by BLM. EPA must consider these impacts in assessing Red Murphy SWD No. 1 as well as the potential for waste, injected at high volumes and pressures to fracture or breakthrough the well and impact the MHA Nation's groundwater and drinking water resources.

Even a brief geologic analysis shows that the Draft Permit proposes drilling Red Murphy SWD No. 1 in one of the poorest sandstone intervals on the Reservation. This means that the disposed waste will migrate far from the injection site and contaminate MHA Nation trust lands only about 700 feet away. For example, assuming an injection rate of 15,000 barrels per day, the waste disposed in Red Murphy SWD No. 1 will infiltrate trust lands in 3 years. Consistent with its trust responsibility, EPA must, in consultation with the MHA Nation, study the geological characteristics of waste disposal sites and determine an acceptable injection rate prior to issuing waste disposal permits.

V. Draft Permit Violates EPA's Trust Responsibility to the MHA Nation and EPA's Tribal Policy

In administering the UIC program under the Safe Drinking Water Act, EPA retains its fiduciary obligation to "safeguard Indian interests in land." *HRI Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1245 (10th Cir. 2000) (citing *Drummond v. United States*, 324 U.S. 316, 318 (1945)). Therefore, when overseeing and permitting underground injection wells located in Indian country, or otherwise having a potential impact on Indian lands, EPA's duties extend beyond ensuring that drinking water sources remain untainted. EPA, as trustee for the MHA Nation and its members, must also protect against other adverse impacts on Indian lands. The Draft Permit, as currently written, does not adequately monitor and protect against potential harms to MHA Nation lands and waters, including the infiltration of contaminated waters into tribally owned pore space.

Each underground injection well has an associated "injection zone" defined as "a geological 'formation,' group of formations, or part of a formation receiving fluids through a well." 40 C.F.R. § 146.3. The injection zone for the Red Murphy SWD No. 1 is a sandstone formation known as the Inya Kara formation. Because of the sandstone lithology of the Inya Kara formation, contaminated fluids can percolate through the formation and enter into pore space owned by the MHA Nation. Any such infiltration of contaminated fluids would constitute a trespass on the part of the well operator and a breach of trust on the part of the EPA. The Draft Permit does not contain measures to prevent this harmful phenomenon from occurring.

Review of the Draft Permit reflects that the injection zone underlies the MHA Nation's trust lands. The Draft Permit identifies an Area of Review ("AOR"), consisting of lands within a fixed three quarter mile radius of the proposed Red Murphy SWD No. 1. Lands comprising this AOR include MHA Nation trust lands. Pursuant to federal regulations, the purpose of the AOR is to establish an estimated perimeter within which injected fluids could potentially migrate into drinking water sources. *See* 40 C.F.R. § 146.6. Thus, the Draft Permit acknowledges the potential for injected fluids to infiltrate portions of the injection zone underlying MHA Nation trust lands, yet fails altogether to establish any mechanism to prevent this infiltration. In fact, the Draft Permit provides for an unlimited volume of fluid to be injected into the Red Murphy SWD No. 1, meaning that an unlimited quantity of contaminated water is likely to permeate MHA Nation trust lands.

The Draft Permit must contain adequate mechanisms to monitor the volume of contaminated fluid flowing into portions of the injection zone underlying MHA Nation's trust lands. The Draft Permit must also establish a maximum injection volume, as is necessary to prevent infiltration into tribally owned pore space. These additional terms must be developed with reliance on empirical studies performed in consultation with the MHA Nation. The Draft Permit should also establish penalties for injection of fluids in excess of the maximum volume, including, without limitation, forced shutdown of the injection well and the payment of fines for any violation to provide for any needed remediation.

In addition, EPA's Tribal Policy highlights the Guiding Principle that "EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership, ..." EPA Tribal Policy at 3 (May 4, 2011). This Guiding Principle implements and is required by EPA's treaty and trust responsibility to the MHA Nation. In light of MHA Nation's laws and EPA's requirement to coordinate with the MHA Nation any permit should be denied or withheld until Goodnight obtains approval from the MHA Nation.

VI. Environmental Appeals Board Decisions Do Not Limit Tribal Authority and EPA's Trust Responsibility in Issuing UIC Permits

The MHA Nation is not aware of any Environmental Appeals Board (EAB) decisions that would limit EPA's ability to consider and abide by MHA Nation Resolution No. 11-75-VJB when processing a UIC permit application. In consultation with the MHA Nation, EPA referenced five decisions potentially affecting EPA's ability to incorporate tribal law in its permitting decisions. Those decisions were:

- In Re: Envirotech, 6 E.A.D. 260 (EAB 1996)
- In Re: Beckman Production Services, 5 E.A.D. 10 (EAB 1994)
- In the Matter of Terry Energy Ltd., E.A.D. 159 (EAB 1992)
- In Re: Environmental Disposal Systems Inc., 12 E.A.D. 254 (EAB 2005)
- In Re: Core Energy LLC, Order Denying Review, UIC Appeal No. 07-02 (Dec. 19, 2017)

Each of these decisions involved an appeal by parties who argued that EPA failed to adequately incorporate limitations required by state and local law or ensure that property rights were adequately protected when issuing a UIC permit. The EAB denied all of these appeals on the basis that EPA is not authorized to consider factors beyond those specifically set forth in the SDWA and its regulations when deciding whether to issue a UIC permit.

None of these decisions considered the sovereign authorities of Indian tribes, EPA's government-to-government relationship with Indian tribes, EPA's ability to implement alternate UIC Programs on tribal lands, and EPA's Tribal Policy. EPA has a trust responsibility to administer its programs in compliance with EPA's Tribal Policy, in which EPA recognizes tribes as "sovereign entities with primary authority and responsibility for each tribe's land and membership." As this language reflects, EPA's trust responsibility includes administering its programs in a manner that acknowledges and respects tribes' "primary authority" over their reservation lands.

The SDWA and its regulations also do not circumscribe this trust responsibility in any way. To the contrary, by incorporating Tribe-specific provisions authorizing EPA to "promulgate an alternate UIC Program for Class II wells on any Indian reservation or Indian lands" and to consider "[t]he interest and preferences of the tribal government having responsibility for the given reservation or Indian lands," the applicable regulations acknowledge the unique trust relationship between federal agencies and Indian Tribes. 40 C.F.R. § 144.2.

Based on this review, there does not appear to be an EAB decision that would limit EPA's existing regulations, policy and responsibilities to defer to and coordinate with the MHA Nation.

VII. Conclusion

Pursuant to Safe Drinking Water Act regulations, EPA's Tribal Policy, and EPA's treaty and trust responsibility to the MHA Nation, EPA must deny or withhold the Draft Permit until Goodnight obtains approval for the proposed waste disposal pursuant to MHA Nation laws. MHA Nation laws governing waste disposal within the Reservation were enacted pursuant to the MHA Nation Constitution approved by the Secretary of the Interior. The MHA Nation has its own authority to regulate waste disposal on the Reservation and EPA regulations direct that EPA exercise its permitting authority in direct coordination with the MHA Nation and according to MHA Nation interests and preferences.