

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In re:)
)
)

UIC Permit Number: UT22291-10328)
Enhanced Oil Recovery Well RBU 1-10D)
River Bend Unit, Uintah County, Utah)
API No. 43-047-34312)

PETITION FOR REVIEW

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Exhibit 1 – U.S. Environmental Protection Agency, DRAFT Permit, EPA UIC Permit UT22291-10328, Well: RBU 1-10D, API No. 43-047-34312 (July 1, 2014)

Exhibit 2 – Letter from Southern Utah Wilderness Alliance to Tom Aalto and Bruce Suchomel, U.S. Environmental Protection Agency Region VIII with Comments Prepared by Briana Mordick (Aug. 26, 2014)

Exhibit 3 – U.S. Environmental Protection Agency, FINAL Permit, UIC Permit Number: UT22291-10328, API No. 43-047-34312 (Nov. 27, 2014)

Exhibit 4 – U.S. Environmental Protection Agency, Response to Public Comments on EPA Permit Number: UT22291-10328 for RBU 1-10D Class II Enhanced Oil Recovery Well in the River Bend Unit, Uintah County, UT (Nov. 27, 2014)

Exhibit 5 – Gasco Energy Inc., Underground Injection Control (UIC) Permit Application, UIC Class II Injection Well, River Bend Unit (RBU) 1-10D, API # 43-047-34312 (Revised, June 17, 2014)

Exhibit 6 – Declaration of Briana Mordick

INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Southern Utah Wilderness Alliance (“SUWA”) petitions for review of the United States Environmental Protection Agency, Region 8’s (“EPA”) final Class II Underground Injection Control (“UIC”) Permit for permit number UT22291-10328, which was issued to Gasco Energy, Inc. (“Gasco”) on November 17, 2014.

BACKGROUND

On July 1, 2014, the EPA released a draft UIC permit for Gasco’s River Bend Unit 1-10D enhanced oil recovery well located in Township 10 south, Range 18 east, section 10, Uintah County, Utah. A thirty-day comment period was held following publication of a Public Notice Announcement in the Uintah Basin Standard and Vernal Express newspapers. *See* EPA, DRAFT Permit, EPA UIC Permit UT22291-10328, Well: RBU 1-10D, API No. 43-047-34312 (July 1, 2014) (“Draft Permit”) (attached as Exhibit 1).

On August, 26, 2014, SUWA submitted a cover letter and comments prepared by Briana Mordick, Staff Scientist, Natural Resources Defense Council, on the Draft Permit. *See* Letter from SUWA to Tom Aalto and Bruce Suchomel, EPA Region VIII (Aug. 26, 2014) (transmitting Ms. Mordick’s comments on the Draft Permit) (collectively, “SUWA Comments on Draft Permit”) (attached as Exhibit 2). Ms. Mordick raised concerns regarding well design and construction, injection pressure, reservoir stimulation, and the Area of Review. Relative to the issue discussed in this petition for review, Ms. Mordick stated that “the proposed [maximum allowable injection pressure (“MAIP”)] is too high and may endanger [Underground Sources of Drinking Water (“USDW”)] by allowing injected fluids to fracture the confining zone, which may create pathways through which injected fluids can migrate into USDW.” *Id.* at 6. Ms. Mordick also noted that according to Gasco’s UIC Permit Application “the TDS concentration of a

representative sample of injection fluids is 158,679 mg/L” which would have a specific gravity (“SG”) of approximately 1.125 g/ml. *Id.* EPA, however, calculated the MAIP with a SG of approximately 1.025, the average TDS for seawater (35,000 mg/L). *See id.*

On November 17, 2014, the EPA issued its final permit which included a separate Response to Public Comments document for Gasco’s River Bend Unit 1-10D enhanced oil recovery well. *See* EPA, FINAL Permit, UIC Permit Number: UT22291-10328, API No. 43-047-34312 (Nov. 27, 2014) (“Final Permit”) (attached as Exhibit 3); EPA, Response to Public Comments on EPA Permit Number: UT22291-10328 for RBU 1-10D Class II Enhanced Oil Recovery Well in the River Bend Unit, Uintah County, UT (“EPA Response to Comments”) (attached as Exhibit 4).¹ The EPA did not respond to or otherwise address SUWA’s comments that the proposed MAIP was too high because it relied on an inaccurate SG for the injectate.

THRESHOLD PROCEDURAL REQUIREMENTS

SUWA satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. By submitting written comments on the Draft Permit SUWA has standing to petition for review of the permit decision. *See generally* SUWA Comments on Draft Permit; *see also* 40 C.F.R. § 124.19(a)(2). EPA considered SUWA’s comments and responded to them in the Final Permit. *See* EPA Response to Comments at 1. The issues raised in SUWA’s petition for review were raised during the public comment period and therefore were preserved for review. SUWA’s petition is timely since the petition was filed within thirty-days of the issuance of the Final Permit on November 17, 2014. *See* 40 C.F.R. § 124.19(a)(3).

¹ EPA’s Response to Public Comments can also be found at the end of the Final Permit. SUWA however has attached a separate copy for easier reference thereto.

ARGUMENT

I. The EPA is Required to Respond to Significant Comments

The EPA is required to “[b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period.” 40 C.F.R. § 124.17(a)(2). A comment is “significant” when “if true, [it] raise[s] points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed” action. *Home Box Office v. FCC*, 567 F.2d 9, 35, n.58 (D.C. Cir. 1977). This Board has explained that strict compliance with 40 C.F.R. Part 124 provides assurance that EPA gave “serious consideration to comments before or at the time of making [its] final permit.” *In re Weber*, 2003 WL 23019916 at *3 (2003) (EAB); *see also In the Matter of: Atochem North America, Inc. Calvert City, Kentucky*, 3 E.A.D. 498, 499 (1991) (remanding final permit decision because EPA failed to consider or respond to public comments) (“*Atochem*”); *In re: Rockgen Energy Center*, 8 E.A.D. 536, at *13 (1999) (remanding final permit decision because state agency failed to give “thoughtful and full consideration to all public comments before making the final permit determination”). The failure to properly consider or respond to public comments “is neither harmless, inconsequential, nor trivial.” *In re Weber*, 2003 WL 23019916 at *4. “[A] remand is in order” when EPA fails to adhere fully to the public participation requirements of Part 124. *Id.* at 5; *see also In Re: Rockgen Energy Center*, 8 E.A.D. at *14.

The Board has routinely remanded final permit decisions whenever it has determined that the decision-making agency failed to specifically address significant comments received or issued a final decision prior to responding to comments. *See, e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, at *12 (2000) (remanding to state agency because the agency “did not specifically address in its response to comments the [appellants] alternative calculation” of a lead standard);

Atochem, 3 E.A.D. at 499 (remanding because the agency failed to respond to comments and issued its response to public comments after it released the final decision); *In re McGowan*, 2 E.A.D. 604, 606 (1988) (remanding due to Region’s “total lack of a response” to petitioner’s comments). This is “to ensure that the permit issuer fully complies with the requirements to give adequate and timely consideration to public comments at the time of issuing a final permit decision.” *In re Weber*, 2003 WL 23019916 at * 5.

II. The EPA Failed to Respond to Significant Comments Provided By SUWA

The EPA failed to respond to SUWA’s comment that the agency had dangerously miscalculated the MAIP when it used the wrong SG for the injectate. SUWA’s expert raised the concern that the MAIP calculated in the Draft Permit was “too high and may endanger USDWs by allowing injected fluids to fracture the confining zone, which may create pathways through which injected fluids can migrate into the USDW.” SUWA Comments on Draft Permit at 6. Ms. Mordick explained that the MAIP figure determined by EPA was too high given the SG of the injectate. *Id.* Specifically, she noted “[t]he permit application submitted by Gasco indicates that the [total dissolved solids (“TDS”)] concentration of a representative sample of injection fluid is 158,679 mg/L, or approximately 4.5 times the average TDS concentration of seawater.” *Id.*² Relying on the SG of 158,679 mg/L provided by Gasco in its application, Ms. Mordick

² In her comments on the Draft Permit, Ms. Mordick explained that EPA appeared to be using the SG for seawater, 1.025 (which has a TDS of approximately 35,000 mg/L), in its MAIP calculation. *See* SUWA Comments on Draft Permit at 6. On December 17, 2014, well after SUWA submitted its comments, EPA belatedly provided a copy of attachments E-1 and G-2, items that were referenced but not included in Gasco’s permit application. These documents confirm that EPA’s reliance on an SG of 1.025 for its MAIP calculation is erroneous. *See* Declaration of Briana Mordick ¶ 6 (attached as Exhibit 6). At the very least EPA’s decision should be remanded for a full explanation of its consideration of SUWA’s comments and EPA’s decision to rely on the lower SG figure.

concluded that “the MAIP for the [proposed injection well] would be 1637 psig, or approximately 16% lower than the EPA’s proposed MAIP.” *Id.* at 7.

The EPA made no changes in the Final Permit to the MAIP and failed to respond to SUWA’s comment on the SG of the injectate. In its response to comments, EPA stated that the Final Permit complied with 40 C.F.R. § 146.23(a)(1)³ because it had calculated formulation fracture pressure using the top of the injection interval as the value for depth. *See* EPA Response to Comments at 3. EPA, however, provided no data or information on the SG of the injectate used to arrive at its ultimate MAIP calculation. *See id.* The EPA’s failure to respond to SUWA’s comments and its failure to explain – either in the Final Permit or its Response to Comments – what SG level it relied on for its calculations is arbitrary and capricious.

Importantly, the SG relied on by SUWA’s expert to conclude that the MAIP was set too high is the same as provided by Gasco in its UIC Permit Application. *Compare* Gasco Energy Inc., Underground Injection Control (UIC) Permit Application, UIC Class II Injection Well, River Bend Unit (RBU) 1-10D, API # 43-047-34312 at 7, Tbl. G-1: Summary of TDS Concentrations – Representative Injection Fluid (Revised, June 17, 2014) (TDS level of 158,679 mg/L) *and id.* Attachment G-2 Injectate Water Analysis (both G-1 and G-2 are included in Exhibit 5), *with* SUWA Comments on Draft Permit at 6 (same). In its response to comments, it is unclear whether EPA relied on the SG level provided by Gasco, or some other number, to arrive at its conclusion. *See, e.g.*, EPA Response to Comments at 3 (no SG number provided); *see also In re Steel Dynamics, Inc.*, 9 E.A.D. at *12 (agency must specifically address comments,

³ 40 C.F.R. § 146.23(a)(1) states: “Injection pressure at the wellhead shall not exceed a maximum which shall be calculated so as to assure that the pressure during injection does not initiate new fractures or propagate existing fractures in the confining zone adjacent to the USDWs. In no case shall injection pressure cause the movement of injection or formation fluids into an underground source of drinking water.”

including appellants' alternative calculations); *In re: Rockgen Energy Center*, 8 E.A.D. at *13 (agency must give “thoughtful and full consideration to all public comments before making the final permit determination”). EPA did not provide the information necessary to confirm or justify its conclusion, and failed to respond to SUWA’s specific comment which demonstrated that the MAIP was too high.

Moreover, the EPA appears to have relied on a TDS level and corresponding SG well below 158,679 mg/L to conclude that the Final Permit did not violate 40 C.F.R. § 146.23(a)(1). *See* EPA Response to Comments, Attachment B at 1 (“The average injection water will have a TDS of 27,000 mg/L, corresponding to a [SG] of 1.02.”) (emphasis added). If in fact EPA relied on a SG level other than that provided by Gasco in the company’s Permit Application, this change in direction requires that, at a minimum, EPA provide a reasonable explanation, including why the agency no longer considers a SG of 158,679 mg/L to be appropriate or accurate. *See Sorenson Communications, Inc. v. FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009) (“An agency must provide a rational explanation when it departs from an existing regulation or position.”) (citing *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1151, 1165 (10th Cir. 2002)); *WildEarth Guardians v. EPA*, 770 F.3d 919, 941 (10th Cir. 2014) (“An unexplained deviation from past practice can render an agency’s decision arbitrary and capricious.”). EPA failed to provide such an explanation here and its decision must be remanded for further consideration.

CONCLUSION

This Board should grant review of and remand the Final Permit in order for EPA to adequately respond to the specific and significant comments raised by SUWA. SUWA has shown that its challenge to the Final Permit is based on a finding of fact or conclusion of law that

is clearly erroneous, and/or, an exercise of discretion or an important policy consideration that the Board should review. *See* 40 C.F.R. § 124.19(a)(4)(i).

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to 40 C.F.R. § 124.19(d)(3), SUWA hereby states that this Petition for Review contains 2,133 words, which does not exceed the 14,000 word limit set by the Board. *See* 40 C.F.R. § 124.19(d)(3).

/s/ Landon Newell

