

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

_____)	
In re:)	
)	
Florence Copper, Inc.)	Appeal No. UIC 17-02
)	
UIC Permit No. R9UIC-AZ3-FY11-1)	
)	
_____)	

REGION 9 MOTION FOR LEAVE TO FILE SURREPLY

The United States Environmental Protection Agency (“EPA”) Region 9 (“Region”) moves for leave to file its Surreply to Petitioner’s Consolidated Reply in Support of Its Petition for Review of UIC Permit No. R9UIC-AZ3-FY11-1 (“Reply”) submitted by the Gila River Indian Community (“Petitioner”) in Appeal No. UIC 17-02. In support of this motion, the Region states that its Surreply responds to matters presented in the Petitioner’s Reply that contain misstatements of the record, and the Region seeks permission from Environmental Appeals Board (“EAB” or “Board”) to file its Surreply to avoid any potential confusion arising from such misstatements.

The regulations regarding the appeal of permits clearly state that Petitioners are precluded from raising “new issues or arguments in the reply.” 40 C.F.R. § 124.19(c)(2). The Board has discretion to grant requests to file surreply briefs and typically does so in cases where new arguments are raised in opposing reply briefs or where further briefing would assist the Board in resolving disputed issues. E.g., *In re Arcelor Mittal Cleveland Inc.*, (EAB December 9, 2011) (Order Granting in Part EPA's Motion to File Surreply, Denying Petitioner's Request to Provide

Additional Information, and Granting Oral Argument); *Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, at 11 (EAB Mar. 19, 2008) (Order Denying Review); *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10 to -12, at 1-2 (EAB Aug. 3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing). In addition, the EAB Practice Manual states, “[i]f a reply brief has been filed, the EAB may similarly, upon motion, allow the filing of a surreply brief.” EAB Practice Manual, § IV.D.6.b. at 49. In accordance with 40 C.F.R. § 124.19(f)(2), the Region contacted both Petitioner and Florence Copper, Inc. (“FCI”) regarding whether each party concurs or objects to this motion. Petitioner objects to this motion; FCI has indicated that it concurs with this motion. The Region respectfully requests that the EAB grant leave to file the attached proposed Surreply in this matter.

Date: May 9, 2017

Respectfully submitted,

/s/ Alexa Engelman

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached **REGION IX's MOTION FOR LEAVE TO FILE SURREPLY and REGION IX's SURREPLY** to be served by electronic mail upon the persons listed below.

Date: May 9, 2017

Respectfully submitted,

/S/ Alexa Engelman

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REGION 9 SURREPLY

The United States Environmental Protection Agency (“EPA”) Region 9 (“Region”) submits this Surreply for the following reasons:

- 1) While Petitioner’s Consolidated Reply in Support of Its Petition for Review of UIC Permit No. R9UIC-AZ3-FY11-1 (“Reply”) submitted by the Gila River Indian Community (“Petitioner”) repeats many statements made in the original Petition for Review, certain misstatements and inaccuracies made in the Reply may create potential confusion of the record. Clarifying these matters further confirms that Petitioner’s assertions do not establish any basis for review of the subject UIC Permit or the need for oral argument. As explained in the Region’s Response to Petition for Review (“Response”), the Region’s permit decision complied with the UIC Class III regulations, and was explained and supported in the administrative record.

- 2) To highlight one area where Petitioner for the first time identifies contested permit conditions, without carrying the burden under 40 C.F.R. § 124.19(a)(4)(i) to clearly set out with legal and factual support, Petitioner’s contentions for why the permit decision should be reviewed.

Failure to Address Petitioner’s Comments

Petitioner claims that “the Region failed to respond to or otherwise acknowledge the Community’s specific concerns about FCI’s lack of experience with this unproven technology” and claims these were “significant comments to which the Region was required to respond but never did.” Reply at 4. This is a misstatement of the record. In its Response, the Region directly

addressed Petitioner's claim that despite the extensive operational and monitoring requirements in the Permit, the Region must consider factors outside the UIC regulations, such as the Permittee's "demonstrated experience in the permitted activity" or "specific capacity of an ISCR [] operator to handle this type of precision monitoring... and response necessary to prevent environmental harm" in determining whether to issue the permit. Response at 16-17 (quoting Petition at 9, 11). In its Response, the Region pointed to the Administrative Record, which details responses to Petitioner's concerns regarding the past use of the ISCR technology and permit conditions designed to ensure protection of underground sources of drinking water. Response at 16; AR #581; AR #596. However, Petitioner failed to acknowledge this response or the controlling EAB precedent discussed in the Region's Response, which makes clear that evidence of past compliance activities with EPA permitting is not a basis for EPA denial of a permit. Response at 17.

To the extent that the Reply acknowledges the Region's response to Petitioner's comment, it characterizes that response as insufficient. Reply at 4-5. The Region was not clearly erroneous in responding to Petitioner's claims of the Permit activities as "unproven technology" by pointing to an example of similar ISCR operations documented in the record within the same property and to Permit conditions designed to protect underground sources of drinking water in accordance with UIC regulations. However, the Petitioner has failed to engage with the substance of the Region's response. *See* Response at 5-6 (citing EAB Practice Manual (Aug. 2013) at 45; *In re City of Attleboro*, 14 E.A.D. 398, 405 (EAB 2009), ("[T]he Board will not entertain vague or unsubstantiated claims."); *In re Westborough*, 10 E.A.D. 297, 305, 311-312 (EAB 2002) (noting that "a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review"))).

Contested Permit Conditions

For the first time in its Reply, Petitioner specifically identifies a list of Permit conditions that it asserts "are inadequate to protect water resources." Reply at 1. The regulations regarding the appeal of permits clearly state that Petitioners are precluded from raising "new issues or arguments in the reply." 40 C.F.R. § 124.19(c)(2). As pointed out in the Region's Response, the Petition failed to specify permit conditions that were inconsistent with UIC regulations or clearly erroneous. Response at 8, 9, 14, 16. The Region went to great lengths in the Response to address Petitioner's concerns regarding monitoring, injectate constituents and responsiveness to comments identified by Petitioner, despite the lack of specific challenges to Permit terms in the Petition. However, in the Reply, Petitioner for the first time points to specific permit terms, makes a vague assertion that they are inadequate, and does so without explaining why those Permit terms fail to meet requirements of the UIC regulations or are otherwise clearly erroneous. The Region identified these permit terms as possible Permit sections implicated by the Petitioner's unclear assertions when the Region was required to issue a Notice of Stay in accordance with 40

§ C.F.R. 124.16.¹ However, Petitioner never raised these specific arguments in their Petition, and by naming the Permit terms for the first time in its Reply, again fails to carry the burden to explain why the Region was clearly erroneous in crafting these protective Permit requirements.

Administrative Record

Finally, Petitioner implies that the Administrative Record is inadequate because it does not contain “reference to or otherwise document FCI’s ISCR-UBO experience” and further, that it was “necessary for the Region to consider this information before issuing a permit.” Reply at 7. Petitioner additionally describes how material recently submitted by Permittee FCI in their Response brief was insufficient to demonstrate prior operational experience. It is important to note that the Region did not rely upon the material submitted during the EAB appeal process in its decision to issue the FCI UIC Permit. However, the Region did rely upon the extensive documentation in the Administrative Record to draft protective permit conditions to meet UIC regulations and responded in depth to Petitioner’s concerns regarding monitoring, migration and other issues in the Response to Comments and in the Statement of Basis. *See* AR #581, #596. The record is clear that the Region carefully considered FCI’s application, designed and documented permit conditions to assure that regulatory requirements were met, and was responsive to Petitioner’s comments. Petitioner does not point to any requirement in the UIC regulations for evidence of the permittee’s experience in a given technology and has not shown in its Petition that the Permit conditions designed under EPA’s authority under the Safe Drinking Water Act to protect the groundwater resources of concern to Petitioner are clearly erroneous or otherwise warrant review by the Board.

¹ As stated in the Region’s January 30, 2017 Notice of Stay:

Three entities timely petitioned the EPA’s Environmental Appeals Board (EAB) for review of the Permit: the Gila River Indian Community (GRIC), John L. Anderson, and the Town of Florence and South West Value Partners-GITS MR, LLC (SWVP) (joint petition filed). Each entity did not clearly identify contested permit conditions as described in 40 C.F.R. § 124.19(a). However, based on a review of the petitions, the EPA concludes that the entities contest the permit conditions listed and described below...

Gila River Indian Community, Appeal No. 17-02

II.B.2. No Migration into or between Underground Sources of Drinking Water (USDWs)

II.B.3. Adequate Protection of USDWs

II.E. Well Operation

II.E.6.d. Injectate Fluid Limitations

II.F. Monitoring Program

II.H. Contingency Plans