

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

In re:)
)
Archer Daniels Midland Company)
Decatur, Illinois)
Facility CCS#2)
)
Underground Injection Control)
Permit No.: IL-115-6A-0001)
_____)

UIC Appeal No. 14-72

**MOTION TO DISMISS PETITION FOR
FAILURE TO MEET THRESHOLD FILING REQUIREMENTS**

Archer Daniels Midland Company (“ADM”), the permit applicant in this matter, by and through its counsel, respectfully requests that the Environmental Appeals Board (“Board”) dismiss the petition to review the above-described permit (“Petition”) filed by Jeffrey Sprague (“Petitioner”) because the Petition fails to meet the threshold filing requirements of 40 C.F.R. §124.19(a)(4)(ii). In addition, ADM supports the *Motion to Dismiss Petition as Untimely* filed by the United States Environmental Protection Agency, Region 5 (“EPA”), on November 12, 2014 (“EPA Motion to Dismiss”), the grounds for which are incorporated by reference herein, because the Petition fails to meet the filing deadline requirements of 40 C.F.R. §124.19(a)(3). ADM respectfully reserves its right to present substantive responses to the Petition in accordance with 40 C.F.R. §124.19(b)(3) if the Board denies the two Motions to Dismiss.

In support of its motion, ADM states the following:

1. On April 16, 2014, EPA notified the public of the opportunity to comment on a draft Underground Injection Control (UIC) Permit (No. IL-115-6A-0001) for the ADM facility in Decatur, Illinois, for the construction and operation of a new Class VI well for injection of carbon dioxide. The well is referred to as CCS#2. The public comment period ended on May 30, 2014.

2. On May 6, 2014 and May 30, 2014, Petitioner submitted comments to EPA. Petition at pp. 1,2.

3. On September 23, 2014, EPA issued a final Class VI UIC permit, No. IL-115-6A-0001, to ADM. Along with the final permit, EPA issued a Response to Comments (RtC), which detailed EPA's responses to all public comments it received on the proposed permit during the comment period. *See* EPA Motion to Dismiss, ¶3 and Attachment 1. EPA responded to each of Petitioner's comments in the RtC. *See* RtC at pp. 1, 4, 12-14, 23 and 32-33.

4. The notice of the final permit and RtC were mailed to ADM and all individual commenters who participated in the public comment process. *See* EPA Motion to Dismiss ¶3. Petitioner received the final permit notice and RtC. *See* EPA Motion to Dismiss ¶3.

5. The RtC provided detailed instructions on pages numbered 81 and 82 on how to appeal the final permit to the EAB, as provided in 40 C.F.R. §124.19. The cover letter EPA sent to Petitioner transmitting the final permit and RtC also outlined the requirements of 40 C.F.R. §124.19 and provided mailing and filing information. *See* EPA Motion to Dismiss ¶3.

6. On October 28, 2014, Petitioner filed the Petition with the Board. The Petition objects that EPA failed: (1) to enter into consultation with the United States Fish and Wildlife Service ("USFWS") in accordance with Section 7 of the Endangered Species Act ("Comment

1”); (2) to address Illinois property law issues related to ownership of subsurface pore space (“Comment 2”); (3) to provide reasonable access to proprietary modeling software (“Comment 3”); (4) to require ADM to evaluate ambient pollutant concentrations and air deposition impacts from well construction, drilling, completion, and injection activities (“Comment 4”); and (5) to require ADM to retrieve a continuous core from the injection zone rock (“Comment 5”).

7. The Petition should be dismissed for failure to meet the threshold filing requirements of 40 C.F.R. §124.19. To start, the Board should dismiss the Petition for all of the reasons set forth in the EPA Region 5 Motion to Dismiss, which reasons are all incorporated by reference here. Separately, the Board should also dismiss the Petition for failure to meet 40 C.F.R. §124.19(a)(4)(ii). In particular, the Petition raises new issues not raised during the public comment period and fails to explain why EPA’s responses to Petitioner’s comments in the RtC are clearly erroneous or otherwise warrant review.

8. In considering any petition filed under 40 C.F.R. §124.19(a), the Board first evaluates whether the petitioner has met threshold procedural requirements. 40 C.F.R. §124.19(a)(2)-(4); *see also In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). If the Board concludes that a petitioner satisfies all threshold pleading obligations, only then does the Board evaluate the merits of the petition for review. *See Indeck-Elwood*, 13 E.A.D. at 143. If a petitioner fails to meet a threshold requirement, the Board typically denies or dismisses the petition for review. *See, e.g., In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-12 and 10-13 at 7 (EAB June 9, 2010) (Order Dismissing Two Petitions for Review as Untimely); *In re Presidium Energy, LC*, UIC Appeal No. 09-01, at 5 (EAB July 27, 2009) (Order Denying Review) (concluding petition lacked required specificity); *In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 and 08-03, at 4, 10-11 (EAB May 23, 2008) (Order Denying Review)

(concluding petitions lacked both standing and specificity); *see also In re Envotech, LP*, 6 E.A.D. 260, 265-69 (EAB 1996) (dismissing multiple petitions on threshold grounds of timeliness, standing and specificity, all in the context of an order denying review).

9. In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. §124.19(a)(4). The petitioner bears that burden even when the petitioner is unrepresented by counsel (or pro se), as is the case here. *In re Seneca Res. Corp.*, UIC Appeals Nos. 14-01, 14-02, and 14-03, slip op. at 2-3 (EAB May 29, 2014), citing, *In re New Eng. Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249-50 (EAB 1999).

10. The revised part 124 regulations, which incorporate Board precedent, require a petition to contain, at a minimum, each of the following three essential components: (1) clear identification of the contested permit condition or other specific challenge to the permit decision at issue; (2) a demonstration that any issue being raised on appeal has been preserved for Board review (*i.e.*, was raised during the public comment period or public hearing on the draft permit), or an explanation as to why the issue was not required to be raised; and (3) argument, with factual and legal support, as to why the permit condition or other challenge warrants review by the Board, including an explanation as to why the Region's response to comment on the issue raised, if any, was clearly erroneous or otherwise warrants review.^{1/}

^{1/} See 40 C.F.R. § 124.19(a)(4); 78 Fed. Reg. 5,281 (January 25, 2013); *see also Seneca Res.* at 4 n. 3: "Recent revisions to the regulations governing permit appeals were intended to better clarify the required contents of a petition, by incorporating the Board's interpretations of permit appeal regulations into the text of the rule itself. Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals, 78 Fed. Reg. 5,281, 5,282, 5,283-84 (Jan. 25, 2013) (explaining that rule was intended to clarify for practitioners the required contents for a petition); *see also In re LCP Chems. - N. Y.*, 4 E.A.D. 661, 664 (EAB 1993) (summarizing the threshold requirements for a petition for review under 40 C.F.R. § 124.19); *see also Native Vill. of Kivalina IRA*

11. Although the Petition states that “Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124” (Petition, p. 1), the Petition fails to demonstrate that “each issue being raised in the petition was raised during the public comment period.” 40 C.F.R. §124.19(a)(4)(ii). In particular, the Petition suggests that Comment 1 was timely raised during the public comment period by referencing “impacts to threatened and endangered species.” See Petition, pp. 3-4. However, the full context of Petitioner’s cited reference is to “impacts to threatened and endangered species” associated with an “air quality impact analysis,” not “impacts to threatened and endangered species” associated with EPA’s consultation with USFWS. See RtC, p. 4, Comment #16 (“Such an [air quality impact] analysis must include . . . “impacts to threatened and endangered species . . .”). In fact, the words “United States Fish and Wildlife Service,” “USFWS,” “consult,” or “consultation” are nowhere to be found in the Petitioner’s comments. See RtC, p. 4, Comment #16. Consequently, because Comment 1 was not raised during the public comment period and the Petition fails to explain why such issue was not required to be raised during the public comment period, the comment should be dismissed.

12. Similarly, although the Petition states that “Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124” (Petition, p. 1), the Petition fails to “provide a citation to the relevant comment and response and explain why the Regional Administrator’s response to the comment was clearly erroneous or otherwise warrants review” for any of the comments raised. While the Petitioner may not be satisfied with the

Council v. EPA, 687 F.3d 1216, 1219 (9th Cir. 2012) (upholding the Board’s consistent interpretation of [40 C.F.R. §]124.19’s minimum threshold requirements), *aff’g In re Teck Alaska, Inc.*, NPDES Appeal No. 10-04, at 7-11 (EAB Nov. 18, 2010).”

provisions of the final ADM Class VI permit, EPA responded to each of the issues Petitioner raised in his comments in the RtC. *See* RtC at pp. 1, 4, 12-14, 23 and 32-33.

13. For Petitioner's claim that EPA failed to consult with the USFWS (i.e., Comment 1), the Petition cites the RtC as evidence that the claim was raised during the public comment period and asserts that EPA "improperly ignored, or at least did not provide a reasoned response, to this commenter's concern over the absence of an analysis addressing 'impacts to threatened and endangered species.'" Petition, p. 4. Even if Comment 1 is not separately dismissed by the Board as new as described in Paragraph 11 above, EPA addressed the fleeting reference to "impacts to threatened and endangered species" in the first section of the RtC. RtC, p. 1. That section of the RtC is specifically devoted to "general comments and comments directed at matters outside the scope of the UIC Program's purview" (RtC, p. 1), and "clarifies that because they raise matters that are not addressed by the UIC regulations and are outside the scope of the UIC permit process, EPA does not respond to them specifically in this document." *Id.* The Petition fails to explain why EPA's response that the issue is outside the purview of the UIC Program was clearly erroneous or otherwise warrants review. Consequently, the comment should be dismissed. *See also*, ¶ 11 above.

14. For Petitioner's claim that EPA failed to address Illinois property law issues related to ownership of subsurface pore space (i.e., Comment 2), the Petition asserts that EPA "chose to ignore, or at least dodge, providing a well-reasoned response to this comment." Petition, p. 5. Yet EPA also addressed this issue as one falling outside the scope of the UIC

permit process.^{2/} RtC, p. 4. The Petition does not explain why EPA's conclusion that this issue is outside the scope of the UIC permit process is clearly erroneous or otherwise warrants review. Consequently, the comment should be dismissed.

15. For Petitioner's claim that EPA failed to require ADM to evaluate ambient pollutant concentrations and air deposition impacts (*i.e.*, Comment 4), the Petition asserts that EPA "has chosen to ignore, or at least evade" (Petition, p. 7) the comment, although the Petition acknowledges that EPA "consider[ed] this comment 'Out of Scope.'" *Id.* The Petition offers no explanation whatsoever of why the comment should not be considered "out of scope." Because the Petition does not go on to explain why EPA's conclusion that this issue is outside the scope of the UIC permit process is clearly erroneous or otherwise warrants review, the comment should be dismissed.

16. The other two issues raised in the Petition were addressed directly by EPA responses in the RtC and the Petitioner failed to explain how EPA's responses are clearly erroneous or otherwise warrant review.

17. In response to Petitioner's comments regarding EPA's failure to provide reasonable access to proprietary modeling software ("Comment 3"), EPA stated:

EPA believes that it is unreasonable to set the duration of a public comment period such that a member of the public can first become proficient in and then run a complex geomechanical, geochemical and hydrogeologic simulation model.

In compliance with 40 CFR 146.84, ADM and its consultants selected and applied ECLIPSE 300 to the geology and planned injection at the site. EPA independently evaluated ADM's approach using the STOMP-CO2 simulator including an evaluation of the project's hydrogeologic setting and the site conceptual model in comparison to the site characterization information submitted by the permit applicant. EPA staff and

^{2/} Notably, EPA's conclusion is supported by 40 C.F.R. §144.35(b) and (c) which expressly excludes from UIC permitting property rights of the sort suggested by Petitioner's comment.

contractors that performed the evaluation have degrees and experience in geology, engineering, and computational and multi-phase fate and transport modeling.

Through EPA's independent evaluation, EPA concluded that ADM appropriately developed and implemented their modeling approach and that ADM's AoR delineation based on the maximum extent of the plume and pressure front was found to be reasonable. Detailed documentation of EPA's independent evaluation can be found in the Administrative Record for this permitting action in a document titled "Evaluation of Area of Review (AoR) Delineation Modeling: Archer Daniels Midland (ADM) Class VI Injection Project".

RtC at pp. 13-14. Although the Petition provides a citation to the Petitioner's comment in the RtC (Petition, pp. 5-6), the Petition fails completely to either provide a "citation to the relevant . . . response" or to "explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19 (a)(4)(ii). Instead, the Petition simply quotes the original comment (Petition, p. 5-6), apparently expecting the Board to treat the comment as one to which EPA provided no response at all. EPA's responses to Petitioner's comments appear on the very same pages that the Petition cites to support the fact that the comments were made during the public comment period. Since the Petition does not explain why EPA's response is clearly erroneous or otherwise warrants review, the comment should be dismissed.

18. The Petition takes essentially the same approach for the issue on EPA's failure to require ADM to retrieve a continuous core from the injection zone rock. In particular, the Petition cites the EPA Response to Comments at pp. 32-33 solely for the purpose of quoting the Petitioner's original comment without either acknowledging or providing a citation for the relevant EPA response, which appears on the very same pages as follows:

EPA notes that ADM is required to submit core samples of the injection zone, per Part J(1)(b) of the permit, which is consistent with the requirements of the Class VI rule. These additional data will be evaluated before injection may begin, under Part Q of the permit. Therefore, the permit language has not been modified based upon this comment.

EPA believes that the information that ADM will collect as part of the pre-injection testing required at 40 C.F.R. §146.87, combined with information on the confining zone

submitted with ADM's permit application and reviewed by EPA, provide sufficient information on which to validate the modeling inputs and support its determination that the CO2 injection will not endanger USDWs.

RtC at pp. 32-33. The Petition does not explain why this response to the comment was clearly erroneous or otherwise warrants review. Since the Petition fails to explain why EPA's response is clearly erroneous or otherwise warrants review, the comment should be dismissed.

19. As was the case in *Seneca Resources*, and a long line of Board precedent, this Petition does not discuss or "explain why the [Region's] response[s] to the comment[s] [were] clearly erroneous or otherwise warrant[] review," as required by 40 C.F.R. §124.19(a)(4)(ii). *See, e.g., In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010); *see also In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review.").^{3/} Consequently, the Petition should be dismissed.

^{3/} *Seneca Res.* at 7 n. 4: "Federal circuit courts of appeal have consistently upheld the Board's threshold requirement to demonstrate, with specificity, that review is warranted, including the requirement that a petitioner must substantively confront the permit issuer's response to the petitioner's previous objections. *See, e.g., Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1219 (9th Cir. 2012), *aff'g In re Teck Alaska, Inc.*, NPDES Appeal No. 10-04, at 7-11 (EAB Nov. 18, 2010); *City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) ("[Petitioner] simply repackag[ing] its comments and the EPA's response as unmediated appendices to its Petition to the Board * * * does not satisfy the burden of showing entitlement to review."), *aff'g In re Wastewater Treatment Fac. of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, 310 F. App'x 770, 775 (6th Cir. 2009) (concluding that the Board correctly found petitioners to have procedurally defaulted where petitioners merely restated "grievances" without offering reasons why the permit issuer's responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review); *see also* 78 Fed. Reg. at 5,282."


20. In accordance with 40 C.F.R. §124.19(f)(2), the undersigned counsel contacted the Petitioner via email on November 19, 2014, to ascertain whether he consents or objects to this motion. As of the time of submission of this motion, the Petitioner has not responded. The undersigned counsel has also conferred with counsel for EPA and is authorized to state that EPA does not object to this motion and supports dismissal of the Petition.

For the reasons set forth above, ADM respectfully requests that the Board grant this *Motion to Dismiss Petition for Failure to Meet the Threshold Filing Requirements*. ADM also respectfully requests that the Board allow ADM to present substantive responses to the Petition in accordance with 40 C.F.R. §124.19(b)(3) if the Board denies the EPA Motion to Dismiss and this Motion to Dismiss. In such case, ADM agrees to substantively respond to the Petition within the same timeframe separately granted to EPA for its response on the merits as indicated by the Board's November 18, 2014 *Order to Show Cause Why Petition Should Not Be Dismissed and Staying Other Deadlines*. ADM agrees to that timeframe to avoid prolonging the overall time for a final Board decision.

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Dated: November 20, 2014

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CERTIFICATE OF SERVICE

I hereby certify that today, November 20, 2014, the following were served on the Environmental Appeals Board via the EAB eFiling system: (1) a Motion to Dismiss Petition for Failure to Meet Threshold Filing Requirements; (2) a Notice of Appearance; and (3) this Certificate of Service.

I further certify that I will serve via UPS a paper copy set of the above described documents, identical to the electronically filed versions and printed from those same PDF versions, and the original signature pages of the Motion, Notice of Appearance, and Certificate of Service on the Environmental Appeals Board within the required mailing period at the following address:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, room 3334
Washington, DC 20004

I also certify that today, November 20, 2014, I served via the United States Postal Service paper copies of (1) the Motion to Dismiss Petition for Failure to Meet Threshold Filing Requirements; (2) the Notice of Appearance; and (3) this Certificate of Service that were printed from the PDF versions used in the electronic filing to the following persons and addresses:

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