

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

_____)
In re:)
)
Florence Copper, Inc.) UIC Appeal No. 17-01
)
UIC Permit No. R9UIC-AZ3-FY11-1)
)
_____)

PERMITTEE FLORENCE COPPER, INC.'s RESPONSE TO PETITION FOR REVIEW
FILED BY JOHN L. ANDERSON

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TABLE OF ATTACHMENTS

1 – Region 9’s Notice of Stay of Contested Permit Conditions

STATEMENT OF COMPLIANCE WITH THE WORD LIMITATION

This response brief complies with the 14,000 words limitation found at 40 C.F.R. § 124.19(d)(3).

RESPONSE

Under the version of 40 C.F.R. § 124.19(a)(4) in effect at the time that John L. Anderson (“Mr. Anderson”) filed his petition for review (“Petition”) of underground injection control (“UIC”) Permit No. R9UIC-AZ3-FY11-1 (“Permit”), the Petition was required to:

- Identify the contested Permit condition or other specific challenge to the Permit decision, 40 C.F.R. § 124.19(a)(4)(i) (2016);
- Demonstrate, by providing specific citation to the administrative record, that each issue being raised in the Petition was raised during the public comment period including any public hearing relating to the Draft Permit, 40 C.F.R. § 124.19(a)(4)(ii) (2016);
- Explain why Region 9’s response to the comment(s) was clearly erroneous or otherwise warrants review, 40 C.F.R. § 124.19(a)(4)(ii) (2016); and
- Demonstrate that Region 9’s decision to issue the Permit was based on a finding of fact or conclusion of law that was clearly erroneous or an exercise of discretion or important policy consideration that the Environmental Appeals Board should in its discretion review. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B) (2016).

Mr. Anderson’s Petition fails in every respect to satisfy the above conditions.

First, the Petition does not identify a contested Permit condition or other specific challenge to the Permit decision.¹ The Petition states generalities based on technical articles that

¹ Region 9’s January 30, 2017 notice of stay of contested Permit conditions states that the Petition “did not clearly identify contested permit conditions” but then infers that the Petition contests two permit conditions: “No Migration into or between Underground Sources of Drinking Water (USDWs)” and “Adequate Protection of USDW.” **Attachment 1**, at 1-2. FCI respectfully disagrees with the inference. On its face, the Petition does not challenge any conditions of the Permit that are geared to prevent migration of fluids into or between USDWs or otherwise protect USDWs. Moreover, it was not necessary for Region 9 to construe that the Petition contests permit conditions in order to justify a stay of the Permit pending this appeal. *Compare* 40 C.F.R. § 124.16(a)(1) (“If the permit involves a new facility or new injection well . . . the applicant shall be without a permit for the proposed new facility, injection well . . . pending final agency action”) (emphasis added) *with* 40 C.F.R. § 124.16(a)(2)(i) (“The Regional

are attached to the Petition. From one of the articles, the Petition lists “CONS” that are not specific to the Permit but that, according to Mr. Anderson, would justify a denial of the Permit. *See, e.g.*, Petition at 1-2 (“Loss of leach solution can result in groundwater contamination . . . Planning and development of solution mining projects requires considerable field testing, which sometimes proves to be difficult and costly . . . Total copper recoveries are generally less than conventional methods . . . It is generally very difficult to observe what is really happening below the earth’s surface . . . [etc.]”) (emphases added). Nothing on the list rises to the level of a challenge to a specific condition or aspect of the Permit. The assertion that “[t]here has never been an in-situ mine where the aquifer was recovered to drinking water standards during or after the mine was abandoned,” Petition at 1, likewise does not challenge a specific condition or aspect of the Permit. Therefore, the Petition does not satisfy 40 C.F.R. § 124.19(a)(4)(i) (2016) and should be denied.²

Second, the Petition does not demonstrate that each issue raised in the Petition was raised during the public comment period including any public hearing relating to the Draft Permit. The Petition neither attaches nor cites to written comments on the Draft Permit. The Petition asserts

Administrator shall identify the stayed provisions of permits for existing facilities, injection wells . . . All other provisions of the permit for the existing facility, injection well . . . become fully effective and enforceable 30 days after the date of the notification required in paragraph (a)(2)(ii) of this section); *see* 40 C.F.R. §§ 124.2 and 146.3 (“Facility or activity means any ‘HWM facility,’ UIC ‘injection well,’ NPDES “point source” or “treatment works treating domestic sewage” or State 404 dredge or fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs.”). (Emphasis added.)

² *See In re Seneca Res. Corp.*, 2014 EPA App. LEXIS 21, at *3 (EAB 2014) (“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.”); *id.* at n.1 (“Although the Board generally endeavors to construe liberally the issues presented by a *pro se* petitioner, so as to fairly identify the substance of the arguments being raised, the Board nevertheless ‘expect[s] such petitions to provide sufficient specificity to apprise the Board of the issues being raised.’”) (quoting *In re Sutter Power Plant*, 8 E.A.D. 680, 687-88 (EAB 1999)); *id.* at *3 (“If a petitioner fails to meet a threshold requirement, the Board typically denies or dismisses the petition for review.”).

that Region 9 “did not respond to my specific concerns and comments made at the hearing held in Florence on January 22, 2015.” Petition at 1. But the Petition does not link any of the issues that are asserted in the Petition to statements Mr. Anderson raised at the hearing. *See id.* at 1-2. Indeed, the Petition does not even allege that Mr. Anderson commented at the hearing on any of the issues asserted in the Petition. *Id.* Therefore, the Petition does not satisfy 40 C.F.R. § 124.19(a)(4)(ii) (2016) and should be denied.³

Third, the Petition fails to explain why Region 9’s responses to comments on the Draft Permit were clearly erroneous or otherwise warrant review. *See* Petition at 1-2. This failure makes sense, given that the Petition does not link any of the issues that are asserted in the Petition to any comments that were made on the Draft Permit. *Id.* Therefore, the Petition does not satisfy 40 C.F.R. § 124.19(a)(4)(ii) (2016) and should be denied.⁴

Fourth, the Petition fails to demonstrate Region 9’s decision to issue the Permit was based on a finding of fact or conclusion of law that was clearly erroneous or an exercise of discretion or important policy consideration that the Board should in its discretion review. This failure makes sense, given the non-specific nature of the assertions in the Petition. Therefore, the Petition does not satisfy 40 C.F.R. § 124.19(a)(4)(i)(A)-(B) and should be denied.⁵

Region 9, based on the record before it and its technical expertise and experience, has determined that the pilot test project under the terms and conditions of the Permit will not adversely affect an underground source of drinking water. *See* Response to Comments at 36 (“The permit is specifically written to prevent contaminants from migrating out of the exempted aquifer and into a USDW relied upon by local residents.”); *id.* at 43 (“the Agency has thoroughly

³ See footnote 2.

⁴ See footnote 2.

⁵ See footnote 2.

considered the ways in which fluids can escape from the injection activity into a USDW and concluded that the UIC permit conditions are fully compliant with the mandates of the UIC regulations to protect USDWs”); *id.* at 18, 19, 20, 29, 30, 32, 34, 35, 39, 44 and 47 (explaining how the Permit protects USDW). Any statements or inferences in the Petition to the contrary are without basis in the administrative record. For this reason as well, the Petition should be denied. *See In re Envotech, L.P.*, 6 E.A.D. 260, 284 (EAB 1996) (“absent compelling circumstances, the Board will defer to a Region’s determination of issues that depend heavily upon the Region’s technical expertise and experience”)

CONCLUSION

For the reasons stated above, FCI requests that the Environmental Appeals Board deny the Petition.

Dated: April 6, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached **PERMITTEE FLORENCE COPPER, INC.'s RESPONSE TO PETITION FOR REVIEW FILED BY JOHN L. ANDERSON** to be served by e-mail and by Federal Express (next day delivery) upon the persons listed below.

Dated: April 6, 2017



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