

EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW

ATTACHMENT C

Memorandum to the Dewey-Burdock UIC File:
NEPA

Functional Equivalence of UIC Permitting and
Aquifer Exemptions under the SDWA for the
Dewey Burdock Project

Administrative Record Document No. 263

MEMORANDUM

SUBJECT: NEPA Functional Equivalence of UIC Permitting and Aquifer Exemptions under the SDWA for the Dewey Burdock Project

FROM: Sarah Bahrman, Chief, Safe Drinking Water Branch

TO: The File

DATE: October 23, 2020

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BAHRMAN

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This memorandum documents the U.S. Environmental Protection Agency (EPA) Region 8's determination that its decision to approve or disapprove Powertech's applications at the Dewey-Burdock project site in South Dakota for Class III and Class V Underground Injection Control (UIC) permits and an aquifer exemption pursuant to the Safe Drinking Water Act (SDWA) is exempt from the National Environmental Policy Act (NEPA) consistent with EPA's longstanding view, as well as the U.S. Court of Appeals for the 8th Circuit's decision in *Western Nebraska Resources Council v. U.S. E.P.A.*, 943 F.2d 867 (8th Cir. 1991) and other relevant NEPA case law. Accordingly, EPA need not conduct a formal NEPA analysis prior to making its SDWA decisions on Powertech's applications for the UIC permits and aquifer exemption.

Background

EPA administers the SDWA UIC program in South Dakota, including aquifer exemption determinations. Powertech (USA) Inc. (Powertech) applied to EPA for two UIC Area Permits and one associated aquifer exemption for the Dewey-Burdock uranium in-situ recovery (ISR) site located near Edgemont, S.D. in southwestern Custer County, S.D. and northwestern Fall River County, S.D. Powertech applied for a UIC Class III Area Permit for injection wells for the ISR of uranium and a UIC Class V Area Permit for deep injection wells that will be used to dispose of ISR process waste fluids into the Minnelusa Formation after treatment to meet radioactive waste and hazardous waste standards. Powertech also applied for an aquifer exemption in connection with the Class III Area Permit to exempt the uranium-bearing portions of the Inyan Kara Group aquifers. EPA conducted an extensive public process regarding the proposed UIC permits and aquifer exemption, including holding two public comment periods in 2017 and 2019 and multiple public hearings as well as formal Tribal consultations throughout the Agency's decision-making process. EPA evaluated potential environmental impacts that may result from the project, including impacts to groundwater, surface water and air, as well as other potential impacts. EPA's public process and environmental impacts analysis is documented in the administrative record for EPA's Class III and Class V UIC permit and aquifer exemption decisions regarding the Dewey-Burdock project.

NEPA Compliance by EPA

Ordinarily, federal agencies must prepare an Environmental Impact Statement (EIS) for, *inter alia*, “major Federal Actions significantly affecting the quality of the human environment...” NEPA § 102(C), 42 U.S.C. § 4332(C). However, certain statutes administered by EPA contain explicit exemptions from compliance with NEPA. *See* Section 511(c) of the Clean Water Act (CWA), exempting most EPA actions under the Clean Water Act from NEPA’s requirements, and Section 7(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793(c)(1)), exempting all EPA actions under the Clean Air Act from the requirements of NEPA. Pursuant to those statutory exemptions, EPA need not undertake compliance with NEPA when undertaking certain actions.

In addition, the courts have exempted certain EPA actions from the procedural requirements of NEPA through the “functional equivalence” doctrine. *See* 72 Fed. Reg. 53652, 53654 (Sept. 19, 2007). Under this doctrine, the courts have found EPA to be exempt from the procedural requirements of NEPA for certain actions under multiple statutes, including SDWA. *Id.* The courts reasoned that EPA actions under these statutes are functionally equivalent to the analysis required under NEPA because they are undertaken with full consideration of environmental impacts and opportunities for public involvement. *Id.*

The U.S. Court of Appeals for the 8th Circuit found the SDWA is the functional equivalent of NEPA and therefore formal NEPA compliance is not required by EPA when the Agency takes action pursuant to the SDWA. *Western Nebraska Resources Council v. U.S. E.P.A.*, 943 F.2d 867 (8th Cir. 1991) (finding that a formal NEPA analysis was not required for issuance of an aquifer exemption under the SDWA by EPA Region 7 because the SDWA and EPA’s aquifer exemption issuance in that case were the functional equivalent of NEPA).¹ The court agreed with “the many circuits that have held that EPA does not need to comply with the formal requirements of NEPA in performing its environmental protection functions under ‘organic legislation [that] mandates specific procedures for considering the environment that are functional equivalents of the impact statement process.’” *Id.* at 871-872 (quoting and citing *State of Ala. ex rel. Siegelman*, 911 F.2d 499, 504 (11th Cir. 1990) and cases cited therein). The 8th Circuit “further agree[d] that [the] SDWA is such legislation, and that the procedures employed and the analysis undertaken by EPA in this proceeding covered the core NEPA concerns.” *Id.* at 872. Therefore, EPA’s alleged non-compliance with NEPA did not provide a basis for the court to reverse the Agency approval of the aquifer exemption. *Id.*²

¹ The Dewey Burdock project site is located in South Dakota. The U.S. Court of Appeals for the 8th Circuit has jurisdiction over South Dakota.

² In addition, EPA’s longstanding view is that regulatory actions taken under SDWA are exempt from NEPA’s EIS requirements. *See* 44 Fed. Reg. 64174 (Nov. 6, 1979).

NEPA Functional Equivalence of EPA's Decision on UIC Permits

In addition to EPA actions under the SDWA constituting the functional equivalence of NEPA in accordance with the court's decision in *Western Nebraska* and the NEPA functional equivalence doctrine, the EPA consolidated permitting regulations at 40 CFR § 124.9(b)(6) promulgated in 1980 specifically exempt certain EPA permitting actions, including the issuance of UIC permits, from NEPA:

“... NPDES permits other than permits to new sources as well as all RCRA, UIC and PSD permits are not subject to the environmental impact statement provisions of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4321.” 40 C.F.R. § 124.9(b)(6) (emphasis added).

In promulgating this regulation, EPA noted in the preamble to the final rule that “[w]hen these regulations were proposed, the preamble stated EPA’s position that [NEPA] does not require preparation of an [EIS] when permits are issued under the RCRA, UIC, or PSD programs, or when non-new source NPDES permits are issued... No comments opposing this position were received, and a number of comments supported it, either directly or by necessary implication. Accordingly, the same position has been adopted in the final regulations.” 45 Fed. Reg. 33290, 33406 (May 19, 1980) (internal citations omitted).

EPA’s Environmental Appeals Board (EAB or Board) has upheld the application of this regulatory exemption from NEPA to permitting actions in various contexts. *See e.g., In re IT Corp.* 1 E.A.D. 777, 1983 WL 192060 at *1-2 (1983) (Resource Conservation and Recovery Act (RCRA)); *In re Chemical Waste Management, Inc.* 2 E.A.D. 575, 1988 WL 236329 at *2 (1988) (RCRA); *In re U.S. Pollution Control, Inc.*, 3 E.A.D. 799, 1992 WL 82627 at *1 (1992) (RCRA); *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 171, 1999 WL 64235 at *35 (1999) (Clean Air Act (CAA) citing 40 C.F.R. § 124.9(b)(6) re: prevention of significant deterioration (PSD) permit and noting CAA statutory exemption); *In re Am. Soda, LLP*, 9 E.A.D. 280, 290-292, 2000 WL 893129 at *8-9 (2000) (SDWA) *In re Beeland Group, LLC*, 14 E.A.D. 189, 205-206, 2008 WL 4517160 at *13-14 (2008) (SDWA); *In re Windfall Oil and Gas, Inc.* 16 E.A.D. 769, 811, 2015 WL 3782844 at *30 (2015) (SDWA).

The EAB first addressed 40 C.F.R. § 124.9(b)(6) in the SDWA UIC permitting context in *In re Am. Soda, LLP*, 9 E.A.D. 280, 290-292, 2000 WL 893129 at *8-9 (2000). In a challenge to EPA Region 8’s issuance of a SDWA UIC Class III area permit, the EAB analyzed EPA’s NEPA obligations and the functional equivalence doctrine. “Notwithstanding NEPA’s general application to major federal actions, courts have long recognized that NEPA’s primary goal is to require government to consider the environmental consequences of its decision...[and] courts have developed the doctrine of ‘functional equivalency’ to ensure that NEPA remains consistent

with its primary goal and does not add one more regulatory hurdle to the process.” *In re American Soda* at 290.

The Board described the functional equivalency test as providing that “where a federal agency is engaged primarily in an examination of environmental questions, and where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal NEPA compliance with NEPA is not necessary, [and] functional compliance [is]... sufficient.” *In re Am. Soda* at 290-291 citing *Warren County v. North Carolina*, 528 F. Supp. 276, 286 (E.D.N.C. 1981).

The Board also noted that in *In re IT Corporation*, 1 E.A.D. 777 (Adm’r 1982) (RCRA), “the Administrator observed, ‘[T]he courts have recognized that Federal regulatory action taken by an agency with recognized environmental expertise, when circumscribed by extensive procedures, including public participation for evaluation of environmental issues, constitutes the functional equivalent of NEPA’s requirements’” *In re Am. Soda* at 291 (citing *In re IT Corporation* at 778). The EAB further noted that the Administrator held in *In re IT Corporation* that 40 C.F.R. § 124.9(b)(6) codified the caselaw on NEPA functional equivalence and that the RCRA permitting program was the functional equivalent of NEPA. *Id.*

Ultimately, the EAB found that 40 C.F.R. § 124.9(b)(6) was dispositive of the question of the UIC permit program’s functional equivalence to NEPA and under the plain language of the provision, Region 8 was not required to prepare an EIS in support of the UIC permit at issue in that case. *In re Am. Soda* at 291-292.

Similarly, in the context of an appeal of an EPA Region 5 permit authorizing construction and injection of a UIC Class I well, the EAB found that the “Part 124 permitting regulations codify the functional equivalence doctrine and exempt UIC permit actions from NEPA’s environmental impact statement requirement” and held that 40 C.F.R. § 124.9(b)(6) is “dispositive on the question of the UIC permit program’s functional equivalence to NEPA[,]’ and an environmental impact statement is not required for UIC permit issuance.” *In re Beeland Group, LLC*, 14 E.A.D. 189, 205-206, 2008 WL 4517160 at (2008) (citing *In re Am. Soda*). *Accord, In re Windfall Oil and Gas, Inc.* 16 E.A.D. 769, 811, 2015 WL 3782844 at *30 (2015) (citing *In re Am. Soda* in context of UIC permit authorizing construction of a UIC Class II well).

EPA’s actions regarding Powertech’s applications for SDWA Class III and Class V UIC permits are exempt from NEPA pursuant to 40 C.F.R. § 124.9(b)(6) as well as the functional equivalence doctrine and relevant caselaw and therefore EPA need not complete a formal NEPA analysis prior to action on the UIC permits. In addition, in this instance, EPA conducted an extensive public process regarding the proposed aquifer exemption and considered the environmental impacts of the UIC permits.

NEPA Functional Equivalence of EPA's Decision Regarding Aquifer Exemption

As discussed above, the U.S. Court of Appeals for the 8th Circuit, in the context of an EPA approval of an aquifer exemption, found that the SDWA is the functional equivalent of NEPA and therefore formal NEPA compliance is not required by EPA when the Agency takes action pursuant to the SDWA. *Western Nebraska Resources Council v. U.S. E.P.A.*, 943 F.2d 867 (8th Cir. 1991) (finding that a formal NEPA analysis was not required for issuance of an aquifer exemption under the SDWA by EPA Region 7 because the SDWA and EPA's aquifer exemption issuance in that case were the functional equivalent of NEPA).

EPA's action regarding Powertech's application for an aquifer exemption is therefore exempt from NEPA compliance under EPA's longstanding view, the NEPA functional equivalence doctrine and relevant caselaw. In addition, in this instance, EPA conducted an extensive public process regarding the proposed aquifer exemption and considered the environmental impacts of the exemption. EPA therefore need not conduct a formal NEPA analysis prior to action on the aquifer exemption at issue here.

Conclusion

EPA's actions in issuing the UIC permits and aquifer exemption for the Dewey Burdock project to Powertech under the SDWA are exempt from NEPA, consistent with EPA's long held position that all EPA actions under the SDWA are exempt from NEPA. In addition, in this instance EPA conducted an extensive public process as well as a thorough analysis of the environmental impacts of the project as documented in the administrative record for its decisions. Therefore, no further action by EPA is required pursuant to NEPA prior to taking action on these applications.