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April 10, 2008

ENVIR. APPEALS BOARD

BY OVERNIGHT DELIVERY

US Environmental Protection Agency
Eurika Durr
Clerk of the Board, Environmental Appeals Board
1341 G Street, NW, Sixth Floor
Washington, DC 2005

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Re: In Re: Beeland Group, LLC, Beeland Disposal
Well #1, Appeal Nos. 08-01, 08-02 and 08-03

Dear Ms. Durr:

Enclosed please find an original and six copies of Intervenor/Respondent Beeland Group, LLC's Response to Petition Nos. 08-01, 08-02 and 08-03. Please return one file stamped copy to me in the enclosed self addressed postage paid envelope.

Thank you for your assistance.

Sincerely,



Gregory L. Berlowitz

cc: Service List

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

In Re:)
)
BEELAND GROUP, LLC)
BEELAND DISPOSAL WELL #1)
)
UIC PERMIT NUMBER: MI-099-11-0001)
)

Appeal Nos. UIC 08-01,
08-02, and 08-03.

ENVIRONMENTAL APPEALS BOARD

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**Intervenor/Respondent Beeland Group LLC's Response
to Petition Nos. 08-01, 08-02, and 08-03**

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Permittee and Intervenor-Respondent Beeland Group, LLC, by and through its attorneys Mayer Brown LLP and Zimmerman, Kuhn, Darling, Boyd, Quandt and Phelps, PLC, responds to consolidated Petition Nos. 08-01, 08-02, and 08-03 (collectively “Petitions”) and hereby seeks dismissal of Petitions on summary disposition grounds.

Introduction

In 2007, Beeland Group, LLC, of Jackson, Michigan (“Beeland”) applied to the United States Environmental Protection Agency (“EPA”) for a permit to construct and operate a new Class I injection well in Antrim County, Michigan for the disposal of non-hazardous liquid waste. Beeland also applied to the Michigan Department of Environmental Quality (“MDEQ”), Office of Geological Survey (“OGS”), on January 5, 2007 for a non-hazardous injection well permit pursuant to the Mineral Wells Act, Part 625 of Michigan’s Natural Resources and Environmental Protection Act, P.A. 451 of 1994, as amended (“NREPA”).

On April 12, 2007, the EPA issued a draft permit for the injection well. The public comment period that followed lasted 107 days, ending on July 27, 2007—77 days above and beyond the 30-day period required by 40 C.F.R. § 124.10. The EPA and the MDEQ held a joint public hearing on June 13, 2007, in Alba, Michigan, which had been noticed to the public via newspaper on April 12th and May 13th. The EPA Region 5 UIC Branch also mailed public notices to interested parties. One-hundred ninety people attended the public hearing.

The EPA published its Response to Comments on February 7, 2008, and issued Beeland its final permit, effective March 12, 2008 (Permit number MI-009-11-0001).

The Environmental Appeals Board (the “Board” or “EAB”) has received three Petitions, from the following parties, to review Beeland’s Permit: Allen and Tricia Freize (UIC 08-01); Star Township, Antrim County, and Friends of the Jordan River (UIC 08-01); and Dr. John W.

Richter, President, Friends of the Jordan River Watershed (UIC 08-03) (collectively "Petitioners"). The Petitions were consolidated by Order of the Board on March 28, 2008. The Petitioners in 08-01 state that they are members of "Friends of the Jordan." Petition 08-03 is submitted by Dr. Richter and written on the letterhead of the "Friends of the Jordan River Watershed, Inc." Friends of the Jordan River, which is one of the Petitioners bringing Petition 08-02, and Friends of the Jordan River Watershed, Inc. are the same organization.¹ The only listing in the State of Michigan for a "Friends of the Jordan River" entity is for a nonprofit - "Friends of the Jordan River Watershed, Inc.," with registered agent John Richter. *See Corporation Division Business Entity Search Results*, from Michigan Department of Labor and Economic Growth, attached as Exhibit 1. For the purposes of this response, we will refer to each of the various Friends of the Jordan representations as "FOJR."

On March 28, 2008, this Board granted Beeland's Motion for Leave to Intervene and ordered that Beeland file its response seeking summary disposition of the Petitions by April 11, 2008. *See In re Beeland Group, LLC, Beeland Disposal Well #1*, UIC Appeal Nos. 08-01, 08-02, 08-03, slip op. at 4 (EAB, Mar. 27, 2008) (Order Consolidating Cases, Granting Motion to Intervene, and Granting Extension of Time).

Standard of Review

The Board's power to review "should only be sparingly exercised." 45 Fed. Reg. 33,290, 33, 412 (May 19, 1980). As the operative regulations provide, "most permit conditions should be finally determined at the Regional level." *Id.*

¹ Petition 08-02 refers to "Friends of the Jordan River, whose address is P.O. Box 412, East Jordan, MI 49727;" Petition 08-03 refers to "Friends of the Jordan River Watershed, Inc.," whose address is P.O. Box 412, East Jordan, MI 49727.

Thus it is infrequent that the Board will grant review in a permit appeal. The Board exercises this authority only when the petitions for review and the administrative record are abundantly persuasive that the Board's active involvement in the matter is warranted.

In Re: Steel Dynamics, Inc., 9 E.A.D. 740, 743-44 (EAB 2001) (quoting *In Re: Knauf Fiber Glass, GmbH*, 8 E.A.D. 1, 7 (EAB 2000) (denying review PSD permit). The petitioner bears the burden of demonstrating that review is warranted. See *In the Matter of: Renkiewicz SWD-18*, 4 E.A.D. 61, 66 (EAB 1992).

Appeals of UIC permits are governed by 40 C.F.R. Part 124. 40 C.F.R. § 124.1. In a Part 124 review, the Board "begins its analysis by assessing the petitioner's compliance with a number of important threshold procedural requirements," including timeliness, standing and preservation of an issue for review. *In Re: Sutter Power Plant*, 8 E.A.D. 680, 685 (EAB 1999); see also *Knauf Fiber Glass*, 8 E.A.D. at 5.

Preserving Issues For Appeal

To preserve an issue for appeal, a petitioner must demonstrate:

that any issues being raised in an appeal were raised during the public comment period (including any public hearing) to the extent required by these regulations * * *.

40 C.F.R. § 124.19(a).

The applicable regulations require that:

all persons who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing).

40 C.F.R. § 124.13; see *In Re: Core Energy, LLC*, UIC Appeal No. 07-02, slip op. at 2 (EAB Dec. 19, 2007) (dismissing petition for review where petitioners' comments were not sufficiently

specific to put the EPA on notice of the issues being raised for review) (internal citations omitted); *In Re: Sierra Pacific Industries*, 11 E.A.D. 1 (EAB 2003) (dismissing petition when petitioner failed to raise issues during comment period and when petitioner's comments lacked specificity). These requirements ensure "that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the longstanding policy that most permit decisions should be decided at the Regional level, and to provide predictability and finality to the permitting process." *In re: New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001); *see Sutter Power Plant*, 8 E.A.D. at 687.

Content and Scope of the Petition

A petition for review must contain certain fundamental information in order to justify consideration on the merits. *In Re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996). The EAB has jurisdiction to review "any condition of the permit decision." 40 C.F.R. § 124.19. In order to properly challenge such a condition, the petition must include: (1) a statement of the reasons supporting review; (2) a demonstration that the issues were raised during the public comment period; and (3) a showing that the condition in question is based on "(1) a finding of fact or conclusion of law which is clearly erroneous, or (2) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a).

On this latter point, "[p]etitioners must include specific information supporting their allegations. 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." *Knauf Fiber Glass*, 8 E.A.D. at 5 (EAB 2000); *see also Sierra*

Pacific, 11 E.A.D. at 6 (petitioner “must state his/her objections to the permit and explain why the permit issuer’s previous response to those objections [during the comment period] is clearly erroneous, an improper exercise of discretion, or otherwise warrants review. Failure to do so may result in denial of review.”); *In Re: Massachusetts Port Authority*, NPDES Appeal No. 07-16, slip op. at 3 (EAB Sept. 19, 2007) (denying review in part because petitioner failed to identify specific permit conditions and failed to demonstrate how those conditions were based on clearly erroneous conclusions, an improper exercise of discretion or an important policy consideration warranting review.)

Scope of Review Specifically for UIC Permits

Even for those issues that have been properly preserved during the comment period and properly presented in the petition, the grounds for review must be within the scope of the Safe Drinking Water Act (SDWA) and the UIC regulations themselves for the Board to have jurisdiction to review.

As the Board has made clear on prior occasions, review of UIC permit decisions extends only to the boundaries of the UIC permitting program itself, with its SWDA-directed focus on the protection of USDWs, and no farther. Thus, the Board is only authorized to review UIC permit conditions to the extent that they affect a well's compliance with the SDWA and applicable UIC regulations. Accordingly, where petitioners raise concerns outside the scope of the UIC program, the Board will deny review.

Core Energy, slip op. at 3 (internal citations omitted); *accord In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 724 (EAB 1997) (holding that the Board had no authority to intervene on issues outside the permit process).

For the following reasons, each of the three Petitions fall outside of the narrow scope of review established for EAB review of UIC permits, and review therefore should be denied.

**RESPONSE & ARGUMENTS REGARDING PETITIONS 08-01, 08-02,
AND 08-03 ON SUMMARY DISPOSITION GROUNDS**

A. Review of Petition 08-01 Should Be Denied for Lack of Standing and Failure to Meet the Fundamental Information Requirements of 40 CFR § 124.19

Petition 08-01, attached hereto as Exhibit A, is a one-page grievance letter that claims this is a “case of environmental discrimination” and calls EPA and MDEQ “environmental criminals.” Because Petitioners lack standing and because Petition 08-01 fails to meet the “fundamental information” requirements of 40 C.F.R. § 124.19, review should be denied.

A person has standing and may appeal a permit decision only if that person participated in the permit process leading up to the permit decision, either by filing comments on the draft permit or by participating in the public hearing. 40 CFR § 124.19(a). Petitioners make no claim that they participated in the permit process. They make no claim that they filed comments. They make no claim that they participated in the public hearing. As a result, they lack standing for Board review.

In addition, Petition 08-01 contains no statement of the reasons supporting review, fails to demonstrate that the “environmental discrimination” issue or criminal allegations were raised during the public comment period, and does not identify any disputed “condition” or explain why EPA’s decision on the condition is improper. The letter does not even seek review of the Permit, or any other specific form of relief that could be provided by the Board. The Petition therefore must be denied.

This case is very similar to *Massachusetts Port Authority*. In that case, a petitioner filed a letter opposing the issuance of a permit on the grounds that the permit would constitute an “assault” on the “fragile ecosystem” and contended that the permit demonstrated a flawed process at work. The EPA challenged review, claiming that the appeal was “meritless.” The

Board agreed, denying review on three grounds: (1) the petitioner lacked standing because his petition failed to demonstrate that he commented during the comment period; (2) the petitioner failed to identify any specific permit conditions he was objecting to that allegedly changed between the draft and final versions of the permit; and (3) the petitioner made no attempt to demonstrate that any particular terms or conditions of the permit were based on findings of fact or conclusions of law that are clearly erroneous, an improper exercise of discretion, or an important policy consideration warranting Board review. *Massachusetts Port Authority*, at 3.

Review should be denied in this case for the same reasons. As with the Petitioner in *Massachusetts Port Authority*, Petitioners fail to demonstrate that they raised their grievances during the public comment period and thus lack standing to appeal the permit. They also fail to highlight any disputed “condition,” mandating denial of review. *Id.* (Petition “must contain clear identification of the permit conditions at issue and argument that the conditions warrant review.”) And, finally, as this Board held in *Massachusetts Port Authority*, review will be denied when petitions lack the requisite specificity. Petitioners’ one-page letter, which complains about “environmental discrimination . . . in a fragile watershed” and calls EPA and MDEQ “environmental criminals,” but provides no concrete permit conditions or violations of UIC or SDWA regulations, falls squarely into this category. Review of Petition 08-01, therefore, should be denied for lack of standing and for failure to meet the fundamental information requirements of 40 CFR § 124.19.

B. Review of Petition 08-02 Should be Denied for Failure to Challenge Conditions of the Permit, Failure to Meet Fundamental Information Requirements, and Failure to Challenge Conditions Within the Scope of Board Review

Star Township, Antrim County, and Friends of the Jordan River (“Petitioners”) filed Petition 08-02. Petitioners challenge the following eight permit “conditions:”

1. The Permit conditions are not protective of the drinking water.
2. The conclusion that the Bell Shale is an impermeable confining zone is erroneous as no data to support this conclusion was submitted.
3. There is insufficient data on the quality of the injected fluids, existing reservoir conditions, and effect of the injectate on the surrounding material and fluids.
4. Waste characterization and effects of the leachate were not appropriately considered.
5. The EPA's [sic] failed to require documentation and analyze the environmental consequences and potential for adverse effects in violation of the SDWA and NEPA.
6. The public was not provided with all relevant information for purposes of full and fair public participation which is an inappropriate exercise of discretion by the EPA.
7. Policy considerations warrant review of the permit.
8. The EPA failed to include an analysis focused particularly on the low-income community whose water is threatened in violation of the environmental justice provisions under Executive Order 12898 and 40 C.F.R. § 144.52(a)(9).

Pet. 08-02, at 5.

Petition 08-02 must be dismissed in its entirety. As demonstrated in detail below, each challenge to an alleged condition of the permit is fatally flawed.

1. Review Must be Denied for Petitioners' Argument that the Permit is not Protective of the Drinking Water and not Supported by the Record

Petitioners allege that "the Permit is not protective of drinking water and is not supported by the record." *Pet. 08-02*, at 8. In support of their allegations, Petitioners state that Permittee is required "to provide sufficient data to demonstrate that the USDWs will be protected" and enumerate the "key areas of information." *Id.* Review of this issue must be declined. First, the issue raised is an attack on the permit application. Petitioners do not cite any authority, nor has Beeland been able to find any, that a challenge to the Permittee's application, standing alone, is a sufficient basis for review by the Board. *Compare* 40 C.F.R. § 124.13, *Obligation to Raise*

Issues and Provide Information During the Public Comment Period, (establishing requirements for submitting comments for persons who believe “any condition of a draft permit is inappropriate”) with 40 C.F.R. § 124.19, *Appeal of RCRA, UIC, NPDES, and PSD Permits* (establishing requirements for petitions to review “any condition of the permit decision”); *see also, e.g., Envotech*, 6 E.A.D. 260 at 283-85 (where allegations of inadequate application materials have been made, review will not be granted unless the Petitioner can demonstrate that the additional information would have led the Region to a different conclusion).

Furthermore, Petitioners’ challenge must be dismissed as it fails to include the fundamental information necessary to justify consideration on the merits. Petitioners’ argument on this claim lacks any clear identification of any disputed permit conditions, as is required by the regulations. *Massachusetts Port Authority*, at 3. This vagueness alone is fatal to the Petition. *Envotech*, 6 E.A.D. at 267-71 (review denied when petitioners raised general issue of safety and failed to identify any specific condition in the permit allegedly creating a safety risk).

Finally, and perhaps most importantly, Petitioners make no attempt to explain why EPA’s response on this issue was based on erroneous findings of fact or conclusions of law or an improper exercise of discretion. EPA plainly determined that the application was adequate, that the proposal complied with the regulatory requirements and that the well would be protective of drinking water. See EPA Response to Comments *Background* at 2-3. As EPA explained to Petitioners,

EPA has established the UIC regulations to protect underground sources of drinking water. The likelihood of a leak is very small, and the risk of contaminating an underground source of drinking water is much smaller. This conclusion is based both on the protectiveness of the UIC technical specifications when they are applied to a particular well application, and the real world experience. Information has been generated for many years from near-by wells injecting brine waters with contaminant levels

similar to the proposed Beeland Group well into the same injection zone. Beyond the data from the existing near-by brine wells, the design, engineering, construction, operation and maintenance requirements applicable to the Beeland Group permit application provide a very high level of confidence that a leak will not occur. If one should occur through the injection process, the leak will be detected very quickly and the injection well will cease operating until the problem is corrected. These measures, and others required in the permit, all serve to ensure that operation of the well will not contaminate USDW.

EPA Response to Comments, *Issues Related to Bay Harbor* Response to Comment 19 at 7.

Petitioners' failure to point out the error in this and similar statements in the record concerning the permit's ability to protect drinking water compels denial of review.

2. Review Must be Denied for Petitioners' Argument that the Conclusion that the Bell Shale is an Impermeable Confining Zone is Erroneous

Petitioners next assert that use of the Bell Shale as a confining layer is erroneous because EPA assumes "that the Bell Shale will be a confining layer without any evidence that this is in fact the case," citing a lack of "documentation or data in the application for Permit to substantiate that the USDW will be protected by the Bell Shale." *Pet.* 08-02, at 9. Petitioners also argue that not all shale formations are impermeable and "that the permeability of the Bell Shale in the area of the Injection Site has not been definitely determined, therefore it cannot be considered a 'cap' rock or seal . . . [t]his constitutes error by the EPA in the issuance of the Permit and in their Responses to Comments that state that the Bell Shale will be a confining zone." *Pet.* 08-02 at 10.

As a threshold issue, this issue was not preserved for appeal. None of the numerous comments cited by Petitioners address this specific issue and thus fail to alert EPA to Petitioners' belief that EPA's determination that the Bell Shale will act as an impermeable confining zone is unsupported by data. Most of the comments identified by Petitioners have little or nothing to do