

EPA Environmental Appeals Board Rejects Citizens' Appeal Of Underground Injection Control Permit

The Environmental Appeals Board (EAB) of the United States Environmental Protection Agency (EPA) recently rejected the administrative appeals brought by two citizens challenging an Underground Injection Control (UIC) permit issued to Sun Pipe Line Company (Sun) to dispose of natural and artificial brine by using a deep well to inject it into a geological formation from 3,900 to 4,450 feet below the Romulus, Michigan area. *In re Sun Pipe Line Company*, UIC Appeals Nos. 02-01 and 02-02 (EAB July 11, 2002).

In November 1999, Sun applied to EPA Region V for a permit to construct and operate a Class I non-hazardous liquid waste underground injection disposal well at Sun's pipeline terminal facility near Romulus. The well would be used to dispose of natural and artificial brines produced during Sun's expansion of the liquified petroleum gas underground storage caverns at its terminal facility using a solution mining process. Class I wells are defined under EPA's Safe Drinking Water Act (SDWA) regulations as including "industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water." Sun also planned to later extract the brine using the same well.

EPA issued a draft permit on April 6, 2001; issued a public notice providing for a 30-day comment period on April 26, 2001; and issued another public notice on June 20, 2001, providing for a public hearing on July 24, 2001. On July 17, 2001, EPA issued another public notice stating that an "information meeting" to discuss the permit would be held from 6 to 7 p.m. on July 24, 2001, the same date as the public hearing, and extended the public comment period until August 20, 2001. EPA issued Sun's permit on February 26, 2002, after which Jim Rarey and Sandra Yerman filed separate petitions for review.

Yerman Petition

Sandra Yerman submitted comments to EPA on August 10, 2001, in which she: (i) questioned allegedly conflicting statements by EPA personnel regarding the distance toxic waste would travel from other injection wells owned by Environmental Disposal Systems (EDS); (ii) argued that UIC permits should not be issued to both Sun and EDS because the proximity of the Sun well would compromise the integrity of EDS's injection zone; and (iii) that the permit should protect Michigan taxpayers from a possible takings/reverse condemnation lawsuit by Sun. EPA had previously issued permits to EDS to operate two Class I hazardous waste injection wells in Romulus.

EPA responded to Yerman's comments by stating that it did not anticipate that the EDS wells would impact the Sun well and that the impacts of the Sun well would be limited in nature. Further, EPA added a condition to Sun's permit providing that Sun must monitor for hazardous constituents on a monthly basis if Sun extracts materials from the well while EDS is injecting hazardous wastes. With respect to the possible takings/reverse condemnation comment, EPA responded that the permit did not convey any property rights or any exclusive privilege and did not authorize any injury to persons or property or invasion of property rights, nor did it authorize infringement of any state or local law or regulation.

On March 22, 2002, Yerman filed her petition for review, alleging seven bases for review:

1. Sun should be required to analyze extracted brine on a daily, rather than monthly, basis.

2. The permit should specifically provide that Sun should address any notice of non-compliance to the Director of the Michigan Department of Environmental Quality (MDEQ).
3. Sun should be required to certify to the MDEQ Director that it “has read and is personally familiar with all terms and [revised] conditions of the Permit.”
4. EPA should not allow the Romulus public library to dispose of a copy of the final permit 90 days after the public comment period closes.
5. The permit should require Sun to protect Michigan taxpayers from a North American Free Trade Agreement (NAFTA) Chapter 11 Investment Provision lawsuit.
6. The permit is invalid because the version published on the Internet contains a typographical error.
7. A letter referenced by EPA in its response to public comments should be provided to her under the Freedom of Information Act (FOIA).

Rarey Petition

Jim Rarey attended the July 23, 2001, public hearing, but did not submit written comments until December 31, 2001, more than four months after the public comment period closed. His written comments sought answers to two questions he alleged he raised during the public hearing: (i) whether Sun’s intention to use the same well for both disposal and recovery would require additional permitting by EPA; and (ii) Sun’s decision to not use other geologic formations as a location for the injection well.

Rarey filed his petition for review on March 29, 2002, also raising seven issues for review:

1. Whether the public was improperly denied the opportunity to comment on data added to the public record by Sun on September 18, 2001, after the public comment period closed.
2. Whether Sun disclosed to the public that the injection well actually would be used for storage of brine, rather than disposal.
3. Whether EPA failed to comply with the National Environmental Policy Act (NEPA) by erroneously segmenting the project, thereby preventing meaningful review of the entire project under NEPA.
4. Whether Sun failed to inform the public of its simultaneous application to MDEQ for a brine withdrawal well permit.
5. Whether the allegedly excessive amount of water required for solution mining would negatively impact the Great Lakes.
6. Whether Sun failed to demonstrate the technical feasibility of injection brine into the involved geologic formation at 2,000 gallons per minute without causing fracturing of the formation.
7. Whether Sun failed to demonstrate the technical feasibility of recovering brine from the formation.

Legal Framework For Review

The EAB explained that it has consistently held that “the SDWA . . . and the UIC regulations . . . establish the *only* criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit.” Therefore, the EAB stated that it was authorized to review UIC permitting decisions only with respect to a well’s compliance with the SDWA and UIC regulations.

The EAB further explained that under EPA’s regulations, a decision to issue a UIC permit ordinarily would not be reviewed by the EAB unless the challenger shows that a permit condition at issue is based on: (i) a clearly erroneous finding of fact or conclusion of law; or (ii) “an exercise of discretion or an important policy consideration that the Board should, in its discretion, review.” Further, the petitioner has the burden of demonstrating that the EAB’s review is warranted.

Action On Rarey Petition

The EAB first considered Mr. Rarey’s petition and held that he did not have standing to file a petition for review and, therefore, denied his petition in its entirety. The EAB explained the standing requirements under EPA’s decisionmaking procedural rules as follows:

[A] petitioner has “standing” to pursue an appeal of the conditions of a final permit that are identical to the conditions of the draft permit only if the petitioner filed timely comments on the draft permit or participated in the public hearing on the draft permit. . . .

A petitioner who failed to file timely comments on a draft permit or participate in the public hearing will only have standing to pursue an appeal to the extent that the conditions in the draft permit are changed in the final permit.

The EAB further explained, based on its prior holdings, that “participation” does not include “mere attendance” at a public hearing – simply attending a public hearing does not give EPA the opportunity to consider and respond to a person’s specific comments on a draft permit, which is the purpose of the rules’ standing requirements.

EPA and Sun argued that Rarey filed his comments more than four months after the close of the public comment period and, therefore, failed to comply with the requirements of EPA's rules for standing to challenge a permit condition. EPA and Sun further argued that Rarey did not make any comments at the public hearing and, therefore, did not "participate" in the hearing under EPA's rules.

The EAB observed that, although the public hearing registration form indicated that Rarey was present at the hearing, his name did not appear in the transcript of the hearing, thus implying that he made no comments at the hearing. Rarey, however, asserted that he may not have identified himself when he commented at the hearing. Contrary to Rarey's assertions, however, the transcript of the hearing identified ten times where an unidentified speaker made comments, yet none of the issues raised by Rarey in his written comments were raised at the hearing. In addition, Rarey also indicated on the public hearing registration form that he did not wish present oral comments at the hearing. Therefore, the EAB held that Rarey lacked standing to bring an appeal of the permit because he neither submitted written comments during the public comment period nor did he participate in the public hearing.

Action On Yerman Petition

The EAB examined each of Yerman's bases for appealing Sun's UIC permit and denied review on all of them.

Monthly vs. Daily Chemical Analysis

EPA argued that the EAB should deny review of this issue because Yerman neither cited to any regulation requiring daily analysis nor offered any explanation why monthly analysis was not sufficiently protective. The EAB agreed that a petitioner must demonstrate why EPA's decision is clearly erroneous or otherwise warrants review. The EAB further stated that it

typically gives deference to EPA's discretion in deciding the amount of sampling necessary to obtain representative data. Consequently, the EAB denied review of this issue.

Sending Written Non-Compliance Reports To The Director

Yerman argued that there was ambiguity in the permit regarding where written reports of non-compliance should be sent. The EAB disagreed and denied review of this issue. Although the paragraph requiring submission of the written report did not name the MDEQ Director, the immediately preceding paragraph required that oral reports of non-compliance be made to the Director and the EAB thought it was, therefore, clearly intended that the follow-up written report should also be submitted to the Director.

Certification To The Director

Yerman argued that the permit should require that Sun certify to the Director that it has read and is personally familiar with the *revised* conditions of the permit, not simply the conditions of the permit. The EAB denied review on this issue, characterizing Yerman's suggested language as "surplusage," given that a "revised" permit condition was nevertheless a condition of the permit that Sun was obligated to certify it had read and was familiar with.

Protection From NAFTA Chapter 11 Suit

Both EPA and Sun argued that: (i) private property rights issues are not a basis for the EAB to review a UIC permit; and (ii) issuance of a UIC permit does not implicate property rights as a matter of law. The EAB explained the rather complicated reasoning behind Yerman's assertion of this issue as follows:

[Yerman's] concern appears to be that in the event that EDS' well contaminates Sun's well, and [EPA] revises either of their permits in a manner that imposes a financial burden, either company may initiate a "takings" action or, through an international affiliate, bring a NAFTA Chapter 11 Investment Provision lawsuit against the State of Michigan, alleging that Michigan's actions were

“tantamount to expropriation.” . . . NAFTA’s Chapter 11 investment provisions require governments to compensate international investors if a governmental action is “tantamount to expropriation” of the company’s assets.

The EAB agreed that neither the SDWA nor its UIC regulations authorize EPA to regulate property rights – they are only designed to protect underground drinking water sources. In other cases, the EAB had previously held that private property matters were not a basis for review of a UIC permit. Therefore, the EAB denied review, finding that, consistent with its prior holdings, NAFTA property rights and “takings” cases are not within the scope of the SDWA and the UIC regulations – to which the EAB’s scope of review is limited.

Library’s Disposal Of Final Permit Copy

Yerman argued that it was improper for EPA to advise the Romulus Public Library in a letter to dispose of a copy of the final permit after 90 days. The library had acted as a repository for documents related to the permit during the public comment period. The EAB agreed with EPA and Sun that Yerman’s failure to challenge a specific term of the permit on this issue was fatal to her claim and, therefore, denied review of the issue.

Typo In Internet Version

The version of the permit posted by EPA on the Internet contained an incorrect expiration date. EPA argued that posting on the Internet was not integral to the permit’s conditions and, therefore, could not serve as a basis for the EAB’s review. Further, the issue was moot because the error had been corrected. Therefore, the EAB denied review of the issue.

FOIA Request

Regarding the final issue, Yerman requested a copy of a letter referenced in EPA’s response to comments document pursuant to the FOIA. On this issue, the EAB stated: “At the outset, we note that a permit appeal is not the appropriate vehicle for making a FOIA request.”

EPA had nevertheless provided the letter to Yerman in response to her request. The EAB denied review of the issue also because it was not a challenge to a permit condition.

Accordingly, the EAB dismissed both the Yerman petition and the Ramsey petition in their entirety. *Sun Pipe Line Company*, UIC Appeals Nos. 02-01 and 02-02 (EAB July 11, 2002).

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