

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

)	
IN THE MATTER OF)	
)	
POWERTECH (USA) INC.)	UIC APPEAL 11-_____
)	
UIC PERMIT NO. CO51237-08412)	
)	

PETITION FOR REVIEW OF UIC PERMIT

Submitted by:

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2. July 24, 2009 CARD comments on Draft Permit (without exhibits)
3. December 24, 2009 CARD comment letter on revised Draft Permit (without exhibits)
4. Responsiveness Summary for the UIC Class V Final Permit Decision
5. Statement of Basis for UIC Class V Permit
6. October 27, 2009 Petrotek Engineering Corp. report
7. Statement of Basis and Purpose for the agency's Underground Injection Control Regulations issued by the EPA's Office of Drinking Water (May, 1980; National UIC Program Docket Control Number D 01079)
8. Final Permit
9. "Topo and Drill Hole Location Map, Indian Springs and Centennial Uranium Projects"
10. May 12, 2003 letter from Mark E. Hoffman, Project Manager for Exxon Mobil to Tony Waldron, Colorado DRMS, regarding reclamation activities at the Indian Springs Prospecting project (with internal attachments)
11. 1982 Rocky Mountain Energy report to State of Colorado
12. August 2007 Powertech (USA) Inc. "Activity Update"
13. October 16, 2007 letter from Mr. Richard Blubaugh, Powertech (USA) Inc. to Mr. Jim Woodward, www.powertechexposed.com (excerpt)

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INTRODUCTION

Pursuant to 40 CFR § 124.19(a), Coloradoans Against Resource Destruction (“CARD” or “Petitioner”) files this Petition for Review of Final UIC Permit No. CO51237-08412, issued under cover letter signed by Stephen S. Tuber, Assistant Regional Administrator, EPA Region VIII (“EPA”) to Powertech (USA) Inc. (“Powertech” or “applicant”) on December 3, 2010. Cover letter attached as Exhibit 1. The entire permit, as well as certain conditions, was issued without compliance with federal law as described herein. These errors also involve significant policy matters, which warrant discretionary review by the Environmental Appeals Board. 40 CFR § 124.19(a).

Upon the filing of this Petition for Review, because this permit involves a new injection well, “the applicant shall be without a permit for the proposed new facility ... pending final agency action.” 40 CFR § 124.16(a)(1). Further, in this case, Petitioner is contesting the legality of EPA’s issuance of the permit as a whole in addition to specific conditions. Therefore, the filing of this Petition renders the applicant without a permit as a whole. See also, 40 CFR § 124.16(a)(2)(i) (“Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions.”).

In this case, EPA issued a Draft UIC Permit for reinjection of contaminated water resulting from an aquifer pump test associated with the proposed Powertech (USA) Inc. in-situ leach uranium mine on June 15, 2009. A public hearing on the draft permit was held on July 20, 2009. Petitioner submitted extensive comments on this Draft Permit. July 24, 2009 CARD comments attached (without exhibits) as Exhibit 2. In response to public comments identifying errors in the Draft Permit, EPA re-issued a revised Draft Permit on or about November 20, 2009, and held a second public hearing on December 21, 2009, with the comment period set by EPA to

end December 24, 2009. Petitioner again timely submitted comments on the re-issued Draft Permit. December 24, 2009 CARD comment letter attached (without exhibits) as Exhibit 3. EPA issued a Final Permit on December 3, 2010.

An individual permit was necessary in this case because of the risk of contamination to underground sources of drinking water. Powertech proposes conducting an aquifer pump test which will involve pumping groundwater from the A2 sandstone within the Upper Fox Hills Formation. While the injection well is screened only within the A2 sandstone aquifer in the Upper Fox Hills Formation, the injection well intersects the overlying Laramie Formation, which holds aquifers that provide underground sources of drinking water. As explained by EPA:

The groundwater in the A2 sandstone contains concentrations of constituents regulated under the Safe Drinking Water Act (SDWA) that exceed drinking water standards. These constituents include uranium, antimony, and radium. The Laramie Formation contains aquifers that do not exceed the SDWA drinking water standards for uranium, antimony, and radium. The main purpose of the UIC Class V Permit is to protect the aquifers in the Laramie Formation from contamination during injection.

Responsiveness Summary for the UIC Class V Final Permit Decision, at 1 (attached as Exhibit 4).

In issuing the Final UIC Permit, EPA deliberately refused to review critical and relevant information upon which the EPA based its fundamental conclusions that the injection permit would be protective of underground sources of drinking water. This information includes existing data in the possession of the applicant derived from the applicant's previous aquifer pump tests conducted in the same area and geologic formations as the proposed reinjection well. This prior pump test data formed the basis of the applicant's expert conclusions included in the permit application materials, upon which EPA expressly relied in making a determination that the injection permit would provide sufficient protection for underground sources of drinking water. Despite the admitted relevance of this information and express reliance upon it in the

permitting documents, however, EPA refused to require submittal or even conduct a review of this data in violation of the Administrative Procedure Act (“APA”).

Similarly, EPA also failed to request or review relevant information on the existence and condition of the extensive historic bore-holes previously drilled in the vicinity of the proposed underground injection well. The record demonstrates that these historic bore-holes were in some instances improperly abandoned or sealed, thus providing potential pathways for contamination. EPA’s refusal to require submittal, or conduct any review of, this relevant information violates the APA.

EPA’s issuance of Powertech’s UIC permit is particularly significant because it marks the first instance in the nation of EPA having permitting jurisdiction for an in-situ leach uranium mine. While the permit currently under review in this proceeding is not for injection of leaching chemicals, it nevertheless involves reinjection of fluids containing uranium, radium, and antimony in concentrations that exceed drinking water standards.

ISSUES ON WHICH REVIEW IS SOUGHT

I. EPA failed to require submittal, or to conduct any review of, relevant information from previous aquifer-pump tests upon which EPA based its decision to issue the permit.

In issuing a Final Permit to Powertech for a new Class V injection well associated with a planned aquifer pump test, EPA failed to require submittal of, or to conduct the required review of, relevant data from prior pump tests conducted by the applicant in the same geologic formations. As established under federal court and EAB precedent, federal agencies may not simply refuse to consider relevant and available information. This is particularly true where, as here, the agency permitting documents specifically rely on that same information as a basis for issuing the permit.

In the Statement of Basis for the permit, EPA explained that its finding that issuance of the permit would not endanger the drinking water quality in the overlying Laramie Formation was based on the applicant's report produced by Petrotek Engineering Corporation in support of Powertech's mineral prospecting permit application submitted to State of Colorado:

The Petrotek report that is included in the administrative record for the second Draft Permit demonstrates that the injectate will travel less than 50 feet from the injection well (see page 5 of the report).

Statement of Basis for UIC Class V Permit, at 10 (attached as Exhibit 5). In response to Petitioner's comment that EPA was required to review the prior pump test information, EPA stated:

EPA does not need the information from the two previous aquifer-pump tests that Powertech has conducted at the proposed Centennial mine site in order to develop permit requirements that are protective of underground sources of drinking water during the proposed injection activity. As discussed in Section 4A, the area of impact from the proposed injection activity is expected to extend less than 50 feet away from the injection well.

Responsiveness Summary at 16.

However, the Petrotek report, and its conclusions as to transmissivity, hydraulic conductivity, and storativity of the A2 sandstone, which in turn resulted in Petrotek's "50 feet" determination adopted by EPA, was based expressly on the data derived from the previous aquifer pump tests. See Petrotek report at 3, 5, 8 (attached as Exhibit 6). Thus, although EPA relied exclusively on the Petrotek conclusions in making its determination regarding the hydraulic conductivity of the A2 sandstone, the agency refused to review or even request a copy of the underlying data upon which the Petrotek conclusions were based. This is despite the fact that Petitioner's comments specifically alerted EPA to the need for such a review.

Under the Administrative Procedure Act ("APA"), an agency determination must be invalidated where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law.” 5 U.S.C. § 706; *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 736 (D.C.Cir.2001).

“In making this inquiry, the court ‘must consider whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotations omitted). **At a minimum, the defendants must have considered relevant information** and articulated an explanation establishing a “rational connection between the facts found and the choice made.” *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 626, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986); *Tourus Records*, 259 F.3d at 736.

Hubbard v. U.S., 496 F.Supp.2d 194, 199 (D.D.C. 2007) (emphasis added).

The EAB has expressly held EPA to a similarly demanding requirement regarding completeness of the administrative record:

Permitting authorities have “an affirmative duty to inquire into and consider all relevant facts” pertaining to the specific statutory and regulatory criteria established for each permit program, and they must ensure they have developed an adequate record upon which to make a reasoned permit decision. *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 620 (2d Cir. 1965); *see also In re Pub. Serv. Co. of N.H.*, 1 E.A.D. 332, 344 (Adm’r 1977) (“[t]he courts have made clear that the Agency must take affirmative steps to obtain the information necessary to [render] sound decisions under the statutes it administers, even at the cost of delay”). **This Board, for example, has remanded numerous permitting decisions because the permit issuers failed to expend the time and effort needed to adequately explore and document their analyses of mandatory permitting criteria.** *See, e.g., In re Phelps Dodge Corp.*, 10 E.A.D. 460, 522-25 (EAB 2002) (Endangered Species Act critical habitat data); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 414-19 (EAB 1997) (air emissions limits for mercury and thallium); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 710-12 (EAB 1996) (Clean Air Act prevention of significant deterioration data); *In re Envotech, L.P.*, 6 E.A.D. 260, 299-300 (EAB 1996) (UIC waste minimization certification required under 40 C.F.R. § 146.70(d)(1)).

In re Environmental Disposal Systems, Inc., 12 E.A.D. 254, 274 (EAB 2005) (emphasis added).

Where, as here, supporting information is found lacking in the administrative record, the proper remedy is to remand the decision back to the agency to ensure that any permitting decision is based upon a complete record:

Additionally, as noted above, if the Board determines that certain relevant information should have been considered, the Board would likely remand the permit decision back to the Region. *E.g.*, *Steel Dynamics*, 9 E.A.D. at 179-80 (remanding because data was not included in the public record); *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 141-44 & nn.32, 34, 174-75 (EAB 1999) (remanding, in part, to correct serious deficiencies in the administrative record and because of the failure to include certain details in the administrative record); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 99-103 (EAB 1998) (declining to rely upon new data on appeal and remanding to allow permitting authority to prepare updated report, followed by notice and comment).

In re USGEN New England, Inc. Brayton Point Station, 11 E.A.D. 525, 562 n. 61 (EAB 2004)

The EPA is expressly authorized to require submittal of this relevant pump test information pursuant to 40 CFR § 144.27. Indeed, although drafted prior the finalization of the complete Class V regulatory program, the EPA's Statement of Basis and Purpose for the agency's Underground Injection Control Regulations issued by the EPA's Office of Drinking Water (May, 1980; National UIC Program Docket Control Number D 01079) demonstrates the need for EPA review of this information based on potential problems that can occur where injectate containing contaminants is injected above or below an underground source of drinking water and the geologic information is lacking:

[I]f the confining stratum which separates the injection zone from an overlying or underlying underground source of drinking water is either fractured or permeable, the fluids can migrate out of the receiving formation and into the protected region.

For obvious reasons, there are no well construction standards which can address this problem of migration of fluids through this pathway. Consequently, the regulations propose two provisions to assure that fluids do not travel this pathway into underground drinking water. First, the regulations require that, prior to the issuance of a permit, the geologic characteristics of the injection zone and confining strata be reviewed. Data already available from the states can assist Directors in making these reviews. A permit should only be issued upon the Director's finding that the underground formations are sufficiently sound to contain fluids in the injection zone.

Statement of Basis and Purpose for the agency's Underground Injection Control Regulations issued by the EPA's Office of Drinking Water (May, 1980; National UIC Program Docket Control Number D 01079), at 13-14 (attached as Exhibit 7).

EPA asserts that the prior pump test data is not required to be submitted in the context of the agency's permitting decision because "[b]oth the Draft and Final Permits require that the results of the proposed aquifer-pump test be submitted to EPA for review before EPA authorizes injection of the stored groundwater back into the A2 sandstone." Responsiveness Summary at 16. This characterization is inaccurate, as the Final Permit Condition E requires only that Powertech submit "a summary of the aquifer-pump test results." Final Permit at 4 (attached as Exhibit 8). A "summary" of the results does not equate to the underlying data in terms of completeness for review, and as such this Condition is inadequate. In any case, this information will presumably be submitted and then reviewed by EPA without any public review or further ability for comment, thus depriving the public of any meaningful opportunity to raise concerns or otherwise question the results. Such a tactic of requiring such important and determinative information to be considered outside of the normal public process effectively eliminates public participation in the permitting process and should not be allowed. Importantly, nowhere in the permitting documents does EPA assert that the prior pump test information is confidential, burdensome to acquire, or unavailable in any way.

In this case, because the EPA's conclusions, including the pivotal "50 feet" determination, were made without support in the administrative record, the Board should remand the permit back to the agency for a complete review as required by the Administrative Procedure Act.

II. EPA failed to require submittal, or to conduct any review of, relevant information regarding the existence and condition of historic bore-hole drilling in the vicinity of the proposed injection well.

Similar to the missing pump test data, EPA failed to require the applicant to provide any information related to the location of historic bore-holes drilled in the area. These old wells may

present significant problems with respect to protecting underground sources of drinking water.

The EPA's 1980 Statement of Basis and Purpose (National UIC Program Docket Control

Number D 01079) provides a clear description of the problem, at pages 14-15:

One of the common ways by which fluids can enter an underground source of drinking water is by migration through improperly abandoned and improperly completed wells. This would occur if fluids moving laterally within an injection zone encountered an improperly abandoned or completed well, and, following the path of least resistance, flowed upward within the well until entering an overlying underground source of drinking water or overflowing onto the land surface. Because of the large number of wells drilled in the past, and because well operation and abandonment have not always benefitted from close regulatory scrutiny, contamination by this route can present a significant risk to public health.

...

[In the case of a potential problem], however, the well operator would be expected to correct it. Correcting the problem could mean that the well operator would have to plug a faulty well at his/her expense.

National UIC Program Docket Control Number D 01079, at 14-15 (attached as Exhibit 7).

In this case, the extent of the prior drilling in the area is highly significant. As demonstrated by the attached map prepared by Powertech and altered only with respect to identifying local roadways and the location of the injection well (section 33), and entitled "Topo and Drill Hole Location Map, Indian Springs and Centennial Uranium Projects", there are literally thousands of historic wells in the areas proposed by Powertech for in situ leach uranium mining, and many wells in the area proposed for injection under the Draft Permit. (Map attached as exhibit 9); *see also* Petrotek Report (Exhibit 6) at Figure 12-1. In order to discharge its duties under the Safe Drinking Water Act and the APA, the applicant should be required to provide information demonstrating that these wells have been properly abandoned in a manner that will not allow for communication between the injection area and the overlying underground source of drinking water.

The concerns with the previous abandonment of these wells are well documented. Indeed, documents suggest that many of these wells were not properly abandoned and could provide a conduit between the aquifers. For instance, a May 12, 2003 letter from Mark E. Hoffman, Project Manager for Exxon Mobil to Tony Waldron, DRMS, regarding reclamation activities at the Indian Springs Prospecting project (attached as exhibit 10 (with internal attachments)) states:

Prospecting was conducted as described in three Notices of Intent to Conduct Prospecting Operations submitted to the Colorado Department of Natural Resources, Mined Land Reclamation Board, dated August 23, 1977, November 10, 1978, and October 27, 1980 (Attachment A). A total of 492 uranium exploration boreholes were drilled during this period.

...

Mr. J.J. Faulhaber, of Alternative Energy, in an interoffice memo, dated May 28, 1985 (Attachment D) summarized borehole abandonment procedures and standards for the Project. Boreholes were abandoned with drilling mud consisting of varying viscosities from the bottom of the hole to ten feet below the ground surface. Cement plugs were installed from ten feet to the surface or two feet below the surface depending upon local cultivation practices.

The borehole abandonment standards varied over the course of the Project, but the most stringent standards applied to the 1980 drilling program...

The boreholes were drilled into the stratigraphic horizon that contains the Laramie-Fox Hills aquifer, a regional hydrogeologic unit that spans the base of the Laramie Formation and the top of the Fox Hills Formation. In a letter to Mr. Kenneth Holmes (Mobil), dated February 23, 1982 (Attachment E), Ms. Walker [Colorado Division of Mining] expressed concerns over the use of drilling mud in an interval of an aquifer, and the potential for contaminants in the Upper Laramie Formation to enter the Laramie-Fox Hills aquifer.

The interoffice memo referred to in this excerpt (exhibit 10, internal attachment D) also refers to well abandonment procedures that were done in the 1970s, before Colorado legislation passed in the early 1980s (House Bill 1195) that required more substantial protections in drill hole abandonment procedures to protect groundwater. These documents refer to use of such materials as “beet pulp” in the abandonment procedure in wells.

Other historic documents demonstrate that other companies drilled substantially more numbers of wells in the area in the 1970s and 1980s, including Rocky Mountain Energy, who reported to the State of Colorado in 1982 that it drilled some 2,142 holes in the area, including in the section proposed for the injection permit (attached as exhibit 11). There is little data on the abandonment procedures used in these wells, but one might assume they consisted of similar techniques that were standard at the time that gave rise to the State of Colorado's concerns with respect to aquifer communication and contamination with the Mobil project wells. In any case, the EPA should require the applicant to provide all information regarding these wells, any abandonment information, and require repair and proper closure prior to any injection authorization.

In addition, the applicant's own documents demonstrate that there have been problems encountered with abandonment procedures at historic drill holes. In an August 2007 Powertech (USA) Inc. "Activity Update" (attached as exhibit 12), the company recounts its experiences in discovering and attempting to repair broken well casings that appear to have been improperly abandoned in the first instance. As stated by the applicant:

Some wells were broken off at ground surface during the intervening 20 plus years. We have attempted to locate wells with GPS system and hand digging. Some wells we could not locate this way and we used a backhoe to find the buried well. We gently raked 4 inches at a time searching for the casing. We did not break any wells with our backhoe. The photos found on some websites are actually jagged broken casings that were buried for 20 plus years.

Further, Powertech is on record in a letter dated October 16, 2007 from Mr. Richard Blubaugh, Powertech (USA) Inc. to Mr. Jim Woodward, www.powertechexposed.com (excerpt attached as exhibit 13) overtly recognizing the problems associated with historic well abandonment procedures in defending assertions that it or its contractors were responsible for leaving open well casings:

While these open well casings are on property owned by Powertech, these are not wells that were drilled by Powertech or its contractors. In fact, the wells left unprotected were drilled by previous exploratory efforts in the 1980s, and were uncovered by Powertech's geotechnical teams while in the process of locating each bore site.

In response to these local community concerns with respect to the potential failures of historic well abandonment, the applicant affirmatively committed to "ensuring that **all wells on its properties** meet state and local safety requirements and standards." In issuing a permit for injection of contaminated fluids, EPA should hold Powertech to its commitments to the local community and require the applicant to submit this additional information of proper well abandonment as part of the permit review process, and before the grant of any such permit.

With respect to the impacts associated with conductivity between aquifers via historic well holes in the direct vicinity of the currently proposed aquifer pump test, Powertech simply asserts that "the condition of the exploration boreholes and monitoring wells installed by others is unknown but will be evaluated through ongoing monitoring during the pumping test and reinjection of the produced fluid." Petrotek Report at 6. However, no information is provided as to what efforts Powertech has made to assess the condition of these holes, what methodology Powertech proposes to use in conducting these evaluations, nor why such information is unavailable from the previous pump tests conducted in the vicinity.

In a similar manner, Powertech asserts that a "detailed review of available potentiometric-level data for Section 33 monitoring wells shows the data to be consistent and does not indicate any apparent anomalies, which may be caused by vertical leakage through artificial penetrations." Petrotek Report at 6. Again, the data upon which this review was conducted was not included in the submittals or otherwise publicly available, nor is the methodology or techniques used in conducting such a review evident. As a result, the EPA's administrative record for this permit simply does not contain the necessary data upon which assumptions were made, nor a description of the

scientific methodology employed to arrive at a conclusion that the permit will be protective of underground sources of drinking water.

Overall, the SWDA and associated regulations provide that “no injection shall be authorized by permit or rule if it results in the movement of fluid containing any contaminant into Underground Sources of Drinking Water” 40 CFR § 144.1(g). In order to ensure compliance with the SDWA and EPA regulations, the EPA must assess the evidence with respect to the existence and potential cross-aquifer communication that may result from these historic wells, and require proper abandonment be completed prior to issuing a permit for injection. However, as it currently stands, the record is insufficient to demonstrate that the permit will achieve the protection of all USDW. As such, the strictures of the APA preclude the issuance of a permit in this case until the applicant or EPA can provide sufficient evidence demonstrating the ability to comply with applicable law.

III. This case presents substantial policy issues that warrant review.

In addition to the administrative record deficiencies and resulting clearly erroneous findings of fact and conclusions of law detailed herein, the Board should exercise its discretion based on important policy considerations at issue in this case. In particular, the Board should accept review of this case to ensure that EPA permitting exercises be based on a policy that ensures decision are based upon a full record, with evidence to support all conclusions inherent in the decision-making process, and to ensure full participation by the affected public.

The EAB has opined on the importance of EPA conducting a full review of the relevant facts underlying a permitting decision:

the goal inherent in the permitting process [is] that, to the maximum extent possible, permit decisions be fully informed by all relevant and available information. It is difficult to fathom a policy rationale for denying permit decisionmakers access to potentially relevant and instructive information;

In re Arecibo & Aguadilla Regional Wastewater Treatment Plants, 12 E.A.D. 97, 129 (EAB 2005).

To suggest that the most current information should not be considered by the Region in making its final decision ... would, without more, appear to be unsound from a policy perspective. The process of informed decisionmaking — presumably a universal public policy goal — is normally enhanced by the acquisition of more information.

Id. at 132.

Further, with respect to the issue of ensuring public participation, the EPA's tactic in this case of requiring submittal of critical information on the results of the proposed aquifer pump test only after the public processes has ended is unsound from a policy perspective. In this case, the Board should accept review to consider the weighty issue of how the EPA involves the public in permitting decisions, including the ability to review and comment on critical pieces of information affecting the protection of underground sources of drinking water.

CONCLUSION

Because the EPA's issuance of the Final UIC Permit for the Powertech (USA) Inc. injection well was based on clearly erroneous findings of fact and conclusions of law under the APA, this Board should grant review. Further, these errors involve significant policy matters, which warrant discretionary review by the Environmental Appeals Board. Based upon the failure to comply with the APA in the Final Permit, Statement of Basis, and Responsiveness Summary, the Board should remand the permit to the EPA regional office.

Respectfully submitted this 3rd day of January, 2011.

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