

# Underground Injection Control/Class VI Well: U.S. EPA Environmental Appeals Board Addresses Objection to Archer Daniels Midland Company Permit



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The United States Environmental Protection Agency (“EPA”) Environmental Appeals Board (“EAB”) addressed in a June 29th Order an objection to a Modified Class VI Underground Injection Control (“UIC”) issued to Archer Daniels Midland Company (“ADM”). See UIC Appeal No. 17-05.

Mr. Jeffrey Sprague objected to EPA Region 5’s issuance of a permit to ADM for an injection well to geologically sequester carbon dioxide.

A Class VI well involves a facility first capturing carbon dioxide (“CO<sub>2</sub>”) from emissions sources and then geologically sequestering it in deep subsurface rock formations for the purpose of long-term storage. CO<sub>2</sub> emissions are thereby lowered.

EPA promulgated regulations for such permits in 2010 utilizing the existing UIC regulatory framework. However, modifications were undertaken to address what has been characterized as the “unique nature of CO<sub>2</sub> injection for geologic sequestration.”

The EAB Order states that the original permit issued to ADM in 2004 was one of the first Class VI permits issued under the newly-developed regulations. Mr. Sprague participated in the permitting process appealing the 2015 final permit decision to EAB. However, the appeal was dismissed by Sprague after EAB notified him that his appeal was probably untimely.

ADM is stated to have subsequently constructed and tested the well. Based on technical data and site-specific information obtained from the construction and testing of the well, the company applied for a permit modification. The modification was stated to have included:

1. adding initial start-up monitoring and reporting;
2. updating well construction and geologic properties;
3. refining the computational model and measurements made during well construction; and
4. designating a larger area of review.

EPA Region V is stated to have indicated that the modifications ensured that the conditions of the modified permit were equally or more protective than the original permit.

Sprague raised four issues in appealing the permit to EAB that include:

1. whether EPA abused its discretion in declining to extend the public comment period;

2. whether the Endangered Species Act requires EPA to consult with the U.S. Fish and Wildlife Service prior to making its permit modification decision, even where the agency determines there will be no effects on federally endangered or threatened species of their habitats;
3. whether EPA erred by not including provisions in the permit that address private property rights; and
4. whether EPA was required to make its modeling software available to the public.

EAB's Order initially addressed the first and fourth issues. As to the fourth issue, EAB held that EPA was not required to provide access to proprietary modeling software.

EAB stated that EPA initially developed Class VI regulations to afford each applicant the flexibility to select an appropriate computational modeling approach based on available site characterization, monitoring, and operational data. It further stated that EPA contemplated the use of proprietary modeling, "recognizing that doing so would mean that the public would have to consider the assumptions and scientific bases for model conclusions, rather than replicating the results." The inputs, assumptions, and scientific bases for modeling used in connection with the modification of the permit was available to Sprague and the public.

As to EPA's refusal to extend the comment period, EAB held that a 34 day length "falls squarely within the time period prescribed by regulations and Petitioner did not demonstrate a need for additional time."

EAB also held that when an agency determines there will be no effect on any federally-listed species or critical habitat, the United Fish and Wildlife need not be consulted. Consequently, EPA was held to not be required to consult with the United States Fish and Wildlife Service in this instance because it determined the modified permit would have no effect on any federally-listed species or critical habitat.

Finally, EAB held that it is "well-settled" that property rights are governed by legal precepts that are outside the scope of UIC permitting authority.

[A copy of the decision can be downloaded here.](#)