



Tulane Environmental Law Clinic

February 3, 2011

Via FAX (225) 342-3094, email Joe.Ball@la.gov, and U.S. MAIL

Ref: 168-001.2

Joseph S. Ball, Jr.
Office of Conservation
Injection and Mining Division
PO Box 94275
Baton Rouge, LA 70804-9275

Re: Comments on Behalf of the Tulane Environmental Law Clinic on Toce Energy, LLC Class II permit Application No. 32625, Docket No. IMD 2011-01

Dear Mr. Ball:

Please consider the following comments on Toce Energy, LLC's ("Toce") application for a saltwater disposal permit for the Hal Stelly et al SWD Well No. 001, Serial Number 973765, Application Number 32625 located in Section 28, Township 12S, Range 2W, Gueydan Canal Field, Vermilion Parish, Louisiana. These comments are submitted by the Tulane Environmental Law Clinic on behalf of Jan Bertrand, Charlene Jannise, and Wilma Subra (the "commenters"). We reserve the right to rely on all comments submitted during the public comment period. Also we request a written response to all comments and notification when a decision regarding this permit has been made.

BACKGROUND

On April 29, 2009, Toce applied to the Department of Natural Resources, Office of Conservation ("DNR") for a permit to re-drill the Hal Stelly et al SWD Well (the "Disposal Well") as a disposal well for oil and gas exploration and production waste ("E&P Waste") generated by the J Ledoux et ux #1 well ("the Production Well"). The waste generated by the production well was to be piped over two-thousand feet through pipelines to the injection well. These pipelines, some buried and some above ground, cross rice and crawfish farms and canals containing agricultural water supply.

Public comments on the initial application raised concerns about, among others things, Toce's failure to answer the constitutionally required environmental assessment questions (the "IT Questions"), the appropriateness of the well's location in an area prone to hurricane storm surges, and the proximity of the well to residential locations and drinking water supply. DNR approved Toce's application with an Order effective on December 3, 2009.

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The Tulane Environmental Law Clinic, on behalf of Jan Bertrand, Charlene Jannise, and Wilma Subra, petitioned for judicial review of the DNR decision to approve the permit. On August 23, 2010, Judge Kelley heard arguments at the 19th Judicial District Court (“19th JDC”) in Baton Rouge, Louisiana, and found in petitioners’ favor. On September 9, 2010, the 19th JDC vacated DNR’s decision permitting the construction and operation of the Disposal Well.

Toce filed a devolutive appeal of Judge Kelley’s decision to the First Circuit Court of Appeals on October 19, 2010, as did DNR on October 26, 2010. On November 3, 2010, Toce submitted a new “application” for a permit to redrill the injection well, and attached responses to the IT Questions.

On or before December 23, 2010, DNR published a public notice concerning Toce’s application for a permit to construct and operate the same Disposal Well. Toce labeled its application for a “repermit” to re-drill the Disposal Well.

The commenters object to DNR’s issuance of a permit for Toce to construct or operate the Disposal Well. The issuance of a permit to Toce to construct or operate the Disposal Well is unlawful because (1) DNR no longer has jurisdiction over the permit as a result of its appeal of Judge Kelley’s decision to the First Circuit; (2) Toce erroneously applied for an on-site disposal permit for an off-site well; (3) Toce erroneously applied for a re-permit in its newest application instead of applying for a new permit; and (4) Toce’s application still fails to provide DNR with the information necessary to approve the permit and meet its obligations as public trustee, including failure (a) to demonstrate that adverse environmental impacts have been minimized or avoided to the greatest extent practicable and (b) to properly consider alternatives that would offer more protection to the environment. Further, the disposal well will be receiving waste from additional sources than the Disposal Well, invalidating the IT analysis and further invalidating the use of a Class II on-site disposal well application and permit for this Disposal Well.

For these reasons, DNR must deny approval of Toce’s application.

SPECIFIC COMMENTS

I. DNR no Longer Has Jurisdiction Over The Decision to Construct and Operate the Well.

DNR surrendered its jurisdiction over the decision to allow construction and operation of the Disposal Well when it appealed the 19th JCD decision to the First Circuit.. Toce also appealed Judge Kelley’s decision. By filing its appeal, DNR gave jurisdiction over the decision to permit this Disposal Well to the First Circuit Court of Appeals. Accordingly, DNR does not currently have jurisdiction to permit the construction or operation of the Disposal Well. Thus, DNR cannot approve Toce’s new application.

II. The Proposed Disposal Well Does not Qualify as an On-Site Well, so DNR's Permitting of the Disposal Well is Unlawful.

Toce's application for an on-site saltwater disposal well is unlawful because the proposed disposal well is not "on-site" under the definition provided by the Louisiana Administrative Code (the "Code"). The Code defines "on-site" to mean "on the same lease or contiguous property owned by the lessor, or within the confines of a drilling unit established for a specific well or group of wells." LAC 43:XIX.301. Similarly, "off-site" disposal is "outside the confines of a drilling unit for a specific well or group of wells, or in the absence of such a unit, outside the boundaries of a lease or contiguous property owned by the lessor upon which a well is drilled." LAC 43:XIX.501.

Here, the Disposal Well is not on the same lease or contiguous property owned by the lessor with the Production Well. Among other things, the property of Jerry Fontenot separates the properties on which each well is located. *See* Exhibits A & B. Also, the Disposal Well is not within the confines of the same drilling unit for the Production Well. *See id.* The location of Toce's proposed Disposal Well is thus "off-site." Accordingly, an "on-site" disposal well permit is unlawful. DNR must not approve Toce's application until Toce submits an off-site application, provides the relevant information, and meets the applicable regulations for an off-site disposal well.

III. Toce's Responses to the IT Questions Are Inadequate and Inaccurate.

Approval of Toce's application will violate DNR's public trustee duty because the supporting environmental analysis does not meet the requirements of Louisiana Constitution, Article IX, § 1, as set forth in *Save Ourselves v. Louisiana*, 452 So.2d 1152, 1154 (1984). The Louisiana Supreme Court interpreted Article IX, § 1 to require an agency such as DNR, "before granting approval of proposed action affecting the environment," to "determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." *Id.* at 1157. The Court explained that environmental costs and benefits must be given "full and careful consideration along with economic, social, and other factors." *Id.* at 1157.

a. Environmental Impacts Have Not Been Minimized or Avoided because, Contrary to Toce's Assertion, Photographs Show that no Berm Surrounds the Well Site.

The IT Analysis fails because it relies on the inaccurate assertion that a berm protects the disposal well from storm surge and the community from spills. The IT Analysis states that "[a] berm was built around the well pad to reduce the likelihood of any produced water that reaches the surface from entering the farmland surrounding the site." In this way, Toce admits that contamination from the well head is a potential adverse environmental impact. Because the proposed well site is prone to storm surges, this potential adverse impact is more likely and its

effects more likely to be severe. Toce also describes a practicable way to lessen this potential impact though the use of berms to isolate the site. However, photographs included in Toce's application show that there is no berm around the well site. Similarly, photographs of the disposal well, taken by Charlene Jannise on January 28, 2011, show that no berm surrounds the well site *See Exhibit C*. Instead, there is a ditch around the perimeter of the Disposal Well that drains into a roadside ditch. Accordingly, the IT analysis recognizes the potential adverse environmental impact of leaked waste in the event of an accident or during storm surges, but the project fails to minimize or avoid this problem. DNR must therefore reject Toce's application.

b. Environmental Impacts Have not Been Minimized or Avoided because the New Application Proposes Insufficient Perforations.

Toce fails to minimize or avoid adverse environmental impacts because the permit application proposes only ten feet of perforations, although the original application approved by DNR required thirty feet of perforations. Perforations are necessary to connect the casing to the reservoir. The current proposal includes perforations between 4,240 feet and 4,250 feet, where the original permit required perforations between 4,240 feet and 4,270 feet.¹ Using ten feet of perforations instead of thirty feet of perforations will increase the pressure in the Disposal Well, making it more susceptible to leakage. Accordingly, approval of the application fails to minimize or avoid potential adverse effects to the environment. Therefore, DNR must reject the application for this reason.

c. Environmental Impacts Have not Been Minimized or Avoided because there is no Secondary Confinement for the Flowlines.

Toce's proposed flowlines connecting the Producing Well to the Disposal Well fail to minimize or avoid adverse environmental impact because, in the event of a leak, there is no secondary confinement mechanism in place. Toce proposes to use fiberglass pipelines to transport the E & P Waste to the Disposal Well. Those pipes will cross rice and crawfish fields and ponds, as well as canals containing agricultural water supply. Any flowline leak can contaminate these farms and canals, as well as residential well water and ground water. Despite this risk, Toce does not provide secondary confinement of the flowlines. Indeed, the IT analysis does not even consider this alternative.

The proposed pipeline also does not avoid or minimize adverse environmental impacts because it is equipped with a manual – instead of automatic - shutdown device. Similarly, Toce proposes only visual inspection for leaks by field personnel, but portions of the flowline are buried or underwater, and thus not susceptible to visual inspection. Again, the IT Analysis fails to even consider these more protective alternatives. Accordingly, Toce's proposal fails to ensure

¹ Indeed, the original permit application was revised from 10 feet of perforations to 30 feet of perforations under DNR's advisement.

that adverse environmental impacts are minimized or avoided. Therefore, DNR must not approve this application.

d. Environmental Impacts Have Not Been Minimized or Avoided because the Application Does Not Fully Consider Real and Potential Environmental Impacts.

The IT Analysis fails to give full and careful consideration to the real and potential environmental impacts of its project. For example, the IT Analysis fails to account for risks of contamination of water wells close to the surface. First, incorrectly states that the closest well is 1320 feet away, but the property of Raoul Broussard, with its residential drinking water well, is only 760 feet away (See Exhibit D). Also, the IT Analysis considers only the impacts on underground source of drink water at 1150 feet, but fails to consider the actual drinking water wells that are closer to the surface and more susceptible to at or close to surface level leaks. Each residence near the proposed Disposal Well and its pipelines has a water well that provides the only source of drinking water for those residents. A known casing leak in the area at 680 feet in October, 2009, demonstrates the high potential for such spills. *See* Exhibit D.

In another example, the IT Analysis fails to consider the environmental impacts on the land used for flowlines in the event of a spill, leak, or rupture of the fiberglass pipes bringing waste from the Production Well to the Disposal Well.

Also, the It Analysis does not consider the environmental impacts of additional pipelines running from other production wells that Toce operates in the Gueydan Canal Field and now plans to send to the Disposal Well. *See* IT Questions and Answers at 1. The Gueydan Canal Field is an agricultural and residential area that spans miles. Yet the ‘environmental analysis’ justifying a decision to redrill and operate a disposal well to accommodate all of Toce’s wells in that area – now or in the future – fails to consider the environmental impacts of running pipelines to carry E&P waste to the Disposal Well. Indeed, the analysis even fails to consider what or where those other production wells are. Accordingly, DNR must reject Toce’s new application for failure to provide full and careful consideration of environmental impacts.

e. The IT Analysis Failed to Fully Consider Reasonable Alternative Sites and Projects that Would Offer More Protection to the Environment.

i. The IT Analysis’ Rejection of an Adjacent On-Site Alternative Disposal Well is Unreasonable.

The IT Analysis’ rejection of an on-site adjacent disposal well alternative is unreasonable because it failed to consider a well with specifications similar to those of the proposed Disposal Well or that would provide comparable storage and safety features - and rejected the alternative on that basis. The Constitution requires DNR to “consider whether alternate projects, alternate sites, or mitigative measures would offer more protection for the environment than the project as

proposed without unduly curtailing non-environmental benefits.” *Save Ourselves*, 452 So.2d at 1157. An analysis of alternative sites must be sufficient “to allow DNR to fully consider and thereafter make an informed determination that the site proposed by [the applicant] afforded the best balance of environmental costs versus economic, technical, or social benefits.” *In Re: Browning-Ferris Indust. Petitbois Landfill*, 657 So.2d 633, 638 (La. App. 1 Cir. 6/23/95). Here, instead of considering an alternative with adequate specifications, the environmental analysis proposes a hypothetical alternative that it rejects on the basis that its hypothetical specifications are somehow lesser than the Disposal Well. It does not explain why such specifications are lesser. And, while noting the hypothetical would cost less to construct than the Disposal well, it is unclear what the costs would be if built to specifications comparable to the Disposal Well. Accordingly, this alternative ‘consideration’ is inherently unreasonable. As such, it would be arbitrary and capricious, as well as a constitutional violation, for DNR to accept the IT Analysis.

Similarly, the IT Analysis fails to consider the environmental benefits of an adjacent on-site well. For example, an adjacent on-site disposal well would reduce the risks associated with piping the wastes generated at the Production Well to the Disposal Well through flowlines that cross over and through rice and crawfish farms and canals containing agricultural water supply. DNR therefore must not approve the application absent such an alternatives analysis.

ii. Toce Rejected Alternative Disposal Wells Without Sufficient Underlying Information.

The IT Analysis does not provide sufficient information on alternatives to reach reasonable conclusions. The Constitution requires DNR to “consider whether alternate projects, alternate sites, or mitigative measures would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits.” *Save Ourselves*, 452 So.2d at 1157. An analysis of alternative sites must be sufficient “to allow DNR to fully consider and thereafter make an informed determination that the site proposed by [the applicant] afforded the best balance of environmental costs versus economic, technical, or social benefits.” *In Re: Browning-Ferris*, 657 So.2d at 638. For example, the IT Analysis fails to describe the alternative flowline paths that would connect the Production Well to the potential alternative disposal wells. If such flowlines do not cross crawfish or other ponds before reaching the Disposal Well, it would provide an environmental benefit over the proposed well that must be considered. Similarly, the IT Analysis rejects one well because it has “inadequate casing” and “difficult surface conditions.” However, Toce does not explain what those casing specifications or surface conditions are. Accordingly, the IT analysis fails to fully consider these alternatives to reach the determination that the environmental costs are balanced out by economic, technical, or social benefits. Without this information, the environmental assessment is not complete and DNR must not approve the application.

iii. The IT Analysis Does Not Consider the Alternative of Strengthening the Disposal Well's Casing Pipe Which Has Suffered from Casing Loss.

The IT Analysis failed to consider the alternative of strengthen the Disposal Well's casing, despite recognition that the 9 5/8 casing line in place has suffered "casing loss" of 17.4% of the wall thickness. Accordingly, a determination that adverse environmental effects have been minimized or avoided is erroneous and DNR must not approve this application.

IV. Toce's Application Does not Meet the Requirements for the Proposed Project.

a. The Publicly Available Documents Are Inadequate or Incomplete.

The documents available at the Vermilion Parish Library, Gueydan Branch do not include an application with the same scope of information as the original permit application. For example, there is no "source well" information lists the wells the Toce proposes for the Disposal Well to accept E&P Waste from. This information is necessary to understand for the scope of the project. Since DNR does not have or is not providing such information for review, it cannot meet its public participation obligation.

b. Toce Incorrectly Applied for a "Repermit" Instead of Applying to "Redrill."

Toce incorrectly identifies its new application as one for a "repermit" to inject waste into the Disposal Well. The Disposal Well does not have a permit to "repermit" because the 19th Judicial District Court vacated the original permit to construct and operate. The 19th Judicial District Court's September 9, 2010, vacature rendered the original permit null and void. Therefore, a "repermit" is unlawful and Toce must submit a complete application for a new permit to construct and operate the Disposal Well. Because Toce did not, DNR must reject Toce's application.

c. Toce's "IT Analysis" Contemplates More Sources of Waste for the Disposal Well than the Original Application.

DNR must deny the application because it does not address the full scope of its project. Toce submits in the IT Analysis that it will inject produced water "from wells operated by Toce in the Gueydan Canal Field." Toce's new "application" does not contain any "source well" information, so that the new application appears to require the original application to be viable. But that original application states that the Ledoux Well will be the only source of E&P Waste injected in the Disposal Well. Because Toce now submits that it will direct the E&P Waste from additional, unidentified wells to the Disposal Well, further information should have been included in the application and related environmental analysis. For example, what additional source wells would be candidates? Would this Disposal Well become a commercial facility? What would the cumulative effects of such additional disposal be? Would these wells be connected to the Disposal Well via flowline piping, and if so, where would those flowlines run? Or, would the waste from the source wells be trucked from the source wells to the Disposal Well,

and if so, on what routes? Without such information as part of the record and available for public comment, DNR must not approve its application.

d. It is Unclear Whether the Application Includes the Project's Pipelines.

The lack of information concerning the pipelines to the Disposal Well, either from the Production Well or other Toce operations, suggests that Toce has or will seek permission for these pipeline separately. Has DNR issued separate permits for the pipelines from the Production Well to the Disposal Well? Will separate or additional permits be necessary for Toce or any other entity to run additional pipelines to the Disposal Well? Will separate or additional permits be necessary for Toce or any other entity to bring E&P Waste to the Disposal Well by truck? What procedures will DNR require before allowing any production well to discharge into the Disposal Well? Will such proceedings be subject to public notice and comment?

The commenters object to the current proposal for pipelines running from the Production Well to the Disposal Well. The commenters also object to DNR allowing any additional pipelines or trucks to discharge into the Disposal Well. The commenters request notice and an opportunity to comment before DNR allows any such additional discharges.

CONCLUSION

DNR must not approve Toce's application to construct and operate the Disposal Well because, among other things, it a) does not have jurisdiction over the permit decision, b) the application is incomplete and based on erroneous information and assumptions, and c) and the IT Analysis fails to fully consider environmental impacts or alternatives to the site and project. Accordingly, DNR's approval would violate Louisiana's law and Constitution, would be arbitrary and capricious, and not supported by a preponderance of the evidence on the record.

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