IN RE ARCHER DANIELS MIDLAND COMPANY

UIC Appeal No. 17-05

ORDER DENYING REVIEW

Decided June 29, 2017

Syllabus

Mr. Jeffrey Sprague petitioned the Environmental Appeals Board to review a modified Class VI Underground Injection Control ("UIC") permit that the U.S. Environmental Protection Agency Region 5 ("Region") issued to Archer Daniels Midland Company ("ADM") for an injection well to geologically sequester carbon dioxide. EPA modified the original permit to reflect project-specific data obtained during well construction and the required pre-operational testing of the well.

Petitioner contends the Region: (1) abused its discretion in declining to extend the public comment period; (2) erred in failing to consult with the U.S. Fish and Wildlife Service ("FWS") prior to making its permit modification decision; (3) erred by not including provisions in the permit that address Illinois real property law; and (4) erred when it failed to make modeling software available to the public.

Held: Petitioner has not demonstrated that review of this permit modification is warranted on any of the grounds presented. The petition for review is denied.

The Board began by addressing the first and fourth issues listed above, as both involve claims related to Petitioner's ability to comment on the proposed modification. On the fourth issue, the Board held that the Region was not required to provide access to proprietary modeling software. EPA intentionally developed the Class VI regulations to afford each permit applicant the flexibility to select an appropriate computational modeling approach based on available site characterization, monitoring, and operational data. In doing so, the Agency specifically 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 the modeling used in connection with the modification of ADM's permit was available to Petitioner and the public.

The Board then held that the Region did not abuse its discretion in declining to extend the public comment period. The 34-day comment period provided by the Region falls squarely within the time period prescribed by regulations and Petitioner did not demonstrate the need for additional time. The Region provided a sufficient opportunity for public comment on the proposed permit modification.

Third, the Board held that when an agency determines there will be no effect on any federally-listed species or critical habitat, the agency need not consult with FWS. Thus, the Region was not required to consult with FWS here because it determined the modified permit would have no effect on any federally-listed species or critical habitat.

And, finally, the Board held that it is well-settled that property rights are governed by legal precepts that are outside the scope of UIC permitting authority. Any available remedy for potentially impacted property rights or neighboring landowners lies elsewhere, and not in a challenge to this permitting decision.

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Mary Beth Ward.

Opinion of the Board by Judge Mary Kay Lynch:

I. *STATEMENT OF THE CASE*

The U.S. Environmental Protection Agency ("EPA" or "Agency") Region 5 issued a modified Class VI Underground Injection Control ("UIC") permit to Archer Daniels Midland Company for an injection well to geologically sequester carbon dioxide. The proposed changes modify the original permit to reflect project-specific data obtained during well construction and the required pre-operational testing of the well. Mr. Jeffrey Sprague, the only person other than Archer Daniels Midland to comment on the proposed modified permit, timely petitioned the Environmental Appeals Board ("Board") to review the modified permit decision.[1] Both EPA Region 5 ("Region") and Archer Daniels Midland filed responses to the

[1] Mr. Sprague also commented on the original permit, which became effective December 1, 2014. Mr. Sprague appealed that permit decision but moved to voluntarily dismiss the appeal after the Board issued an order to show cause why the petition should not be dismissed as untimely. *See In re Archer Daniels Midland Co.*, UIC Appeal No. 14-72 (EAB Nov. 18, 2014) (Order to Show Cause Why Petition Should Not Be Dismissed); *In re Archer Daniels Midland Co.*, UIC Appeal No. 14-72 (EAB Nov. 26, 2014) (Order Dismissing Petition for Review).

petition. For the reasons set forth below, the Board concludes that Mr. Sprague has not demonstrated review is warranted and, thus, denies the petition for review.

II. *PRINCIPLES GOVERNING BOARD REVIEW*

A. *Petitioner's Burden on Appeal*

The Code of Federal Regulations, Title 40 section 124.19, governs Board review of a UIC permit.[2] In any petition filed under 40 C.F.R. § 124.19(a), the petitioner bears the burden of demonstrating that review is warranted. To the extent a petitioner challenges an issue that the permit issuer addressed in its response to comments, the petitioner must provide a record citation to the comment and response and explain why the permit issuer's previous response to that comment was clearly erroneous or otherwise warrants review. *Id.* § 124.19(a)(4)(ii);[3] *see, e.g.*, *In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001), *review denied sub nom. City of Abilene v. U.S. EPA*, 325 F.3d 657 (5th Cir. 2003). The Board consistently has denied review of petitions that fail to meet this burden. *E.g.*, *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) ("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."); *In re Hadson Power 14*, 4 E.A.D. 258, 294-95 (EAB 1992) (denying review where petitioners merely reiterated comments on the

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[2] EPA revised the rules governing appeals from permit decisions, effective May 22, 2017. *See* Procedures for Decisionmaking, 82 Fed. Reg. 2230, 2236-37 (Jan. 9, 2017) (revising 40 C.F.R. §§ 124.19, .20); *see also* Further Delay of Effective Dates for Five Final Regulations Published by the Environmental Protection Agency Between December 12, 2016 and January 17, 2017, 82 Fed. Reg. 14,324 (extending effective date of rule revision to May 22, 2017). These amendments are procedural in nature and do not substantively alter the Agency's review of permit appeals. *See* 82 Fed. Reg. at 2230, 2231. Additionally, the revised rules apply only to filings submitted after the effective date of the rule, May 22, 2017, and, thus, do not apply to any filings in this matter.

[3] Effective May 22, 2017, section 124.19(a)(4)(ii) was revised "to further clarify that parties are to provide in their briefs appropriate reference to the administrative record (*e.g.*, by including the document name and page number) as to each issue raised." Procedures for Decisionmaking, 82 Fed. Fed. Reg. at 2233. This clarification does not affect the outcome of this appeal.

draft permit and attached a copy of their comments without addressing permit issuer's responses to comments).

Where, as here, a petitioner is not represented by legal counsel, the Board endeavors to liberally construe the petition to fairly identify the substance of the arguments being raised. *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 292 n.26 (EAB 2005); *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996). While the Board "does not expect such petitions to contain sophisticated legal arguments or to employ precise technical or legal terms," the Board nevertheless "does expect such petitions to provide sufficient specificity to apprise the Board of the issues being raised." *Sutter Power Plant*, 8 E.A.D. at 687-88; *accord In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995). The Board also expects such petitions "to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted." *Sutter Power Plant*, 8 E.A.D. at 688; *accord In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994). Thus, the burden of demonstrating that review is warranted rests with the petitioner challenging the permit decision, even where not represented by legal counsel. *In re New Eng. Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249-50 (EAB 1999).

B. *Standard of Review*

Under 40 C.F.R. § 124.19, the Board has discretion to grant or deny review of a permit decision. *See In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394-95 (EAB 2011) (citing Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)), *remanded on other grounds sub nom. Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014). The Board ordinarily denies review of a permit decision (and thus does not remand it) unless the petitioner demonstrates that the permit decision is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g., In re La Paloma Energy Ctr., L.L.C.*, 16 E.A.D. 267, 269 (EAB 2014).

In reviewing a permit issuer's exercise of its discretion, the Board applies an abuse of discretion standard. *See, e.g., In re Guam Waterworks Auth.*, 15 E.A.D. 437, 443 n.7 (EAB 2011). The Board will uphold a permit issuer's reasonable exercise of discretion if that exercise is cogently explained and supported in the record. *See In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997) ("acts of discretion must be adequately explained and justified"); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("[w]e have

frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner").

On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer's technical expertise and experience, so long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *See In re FutureGen Indus. All.*, 16 E.A.D. 717, 733-35 (EAB 2015). In reviewing any permitting decision, the Board is cognizant that the Board's power to grant review "should be only sparingly exercised," and "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also* Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013).

III. *REGULATORY FRAMEWORK FOR CLASS VI WELLS*

This matter involves the modification of a Class VI injection well permit under EPA's UIC program. The original permit issued to Archer Daniels Midland Company in 2014 was one of the first permits issued under EPA's then newly-developed regulations for Class VI wells. *See FutureGen*, 16 E.A.D. at 719 & n.2 (citing *In re Archer Daniels Midland Co.*, UIC Appeal No. 14-72 (EAB Nov. 26, 2014) (granting voluntary dismissal of the petition for review of that permit)). This type of well allows a facility to first capture carbon dioxide ("CO_2") from emissions sources and then geologically sequester that CO_2 in deep subsurface rock formations for the purpose of long-term storage, thereby lowering CO_2 emissions. *Id.* at 722. The Agency promulgated regulations for these permits in 2010, based on the pre-existing UIC regulatory framework, with modifications to address the unique nature of CO_2 injection for geologic sequestration. *See* 40 C.F.R. §§ 146.81 to 146.95; Federal Requirements Under the UIC Program for CO_2 Geologic Sequestration Wells, 75 Fed. Reg. 77,230 (Dec. 10, 2010) ("Class VI Well Regulations").

Among other things, applicants for a Class VI injection well permit must delineate an "area of review" for the permit, and that delineation must be approved by the permitting authority.[4] 40 C.F.R. § 146.84(b). The area of review is "the

[4] UIC regulations use the term "Director" to describe the permitting authority. 40 C.F.R. § 146.3 (defining "Director"). In this case the permitting authority for the Archer Daniels Midland permit is EPA's Regional Administrator for Region 5. For clarity, the

region surrounding the geologic sequestration project where [underground sources of drinking water] may be endangered by the injection activity." *Id.* § 146.81(d). EPA's regulations require a Class VI injection well permit applicant to delineate the area of review using "computational modeling that accounts for the physical and chemical properties of all phases of the injected carbon dioxide stream and is based on available site characterization, monitoring, and operational data." *Id.* § 146.84(a). The permit applicant must use the computational modeling to predict "the projected lateral and vertical migration of the [CO_2] plume and formation fluids in the subsurface from the commencement of injection activities until the plume movement ceases, until pressure differentials sufficient to cause the movement of the injected fluids or formation fluids into [an underground source of drinking water] are no longer present, or until the end of a fixed time as determined by the [permitting authority]." *Id.* § 146.84(c)(1). The regulations also require that whenever monitoring and operational conditions warrant (but at a minimum fixed frequency not to exceed every five years), the permittee must reevaluate the area of review and submit an amended area of review and corrective action plan. *Id.* § 146.84(e).

At the time the regulations were promulgated, the Agency specifically recognized the uncertainties surrounding geologic sequestration and adopted an "adaptive rulemaking approach." Class VI Well Regulations, 75 Fed. Reg. at 77,240. By structuring the regulations to allow for an iterative permitting program, which accounts for increased knowledge and operational experience as permitting moves forward, the Agency established necessary requirements during the earliest phases of geologic sequestration deployment, while also creating a mechanism for incorporating into the permit, as needed, any new research, data, or information. *See id.* at 77,240-41; *see also* 40 C.F.R. § 146.84(e) (pertaining to the requirement to regularly evaluate the area of review). The Agency anticipated that new information could "increase protectiveness, streamline implementation, reduce costs, or otherwise inform the requirements" for geologic sequestration of CO_2. Class VI Well Regulations, 75 Fed. Reg. at 77,241. To that end, Class VI well regulations require permittees to run appropriate tests and gather information during well construction and prior to injection well operation, and to reevaluate the area of review, based on new information obtained as needed. *See* 40 C.F.R. §§ 146.84(e), 146.87; *see also* U.S. EPA, Underground Injection Control Permit, Class VI, IL-115-6A-0001, CCS #2 at 5, 7 (Jan. 19, 2017) (Administrative Record

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Board will refer to the "permitting authority," or "permit issuer," or the Region, as appropriate, in places where the regulations use the term "Director."

("AR") No. 488) ("Permit") (requiring Archer Daniels Midland to conduct pre-operation testing and to reevaluate the area of review as frequently as monitoring and operational conditions warrant). The permit modification that is the subject of this appeal is the result of information that Archer Daniels Midland obtained during well construction and the required pre-operational testing. EPA Region 5, Fact Sheet for Archer Daniels Midland Class VI Permit Modification: *EPA Seeks Comments on Plan to Modify an Existing Carbon Storage Permit* at 2 (Nov. 2016) (AR No. 126) ("Fact Sheet").

IV. *PROCEDURAL AND FACTUAL HISTORY*

Region 5 issued the original permit to Archer Daniels Midland Company ("ADM") in 2014. Mr. Sprague ("Petitioner") participated in that permitting process and appealed the 2014 final permit decision to the Board. That appeal was dismissed, however, on Petitioner's motion, after the Board alerted Petitioner that his appeal was likely untimely. *See In re Archer Daniels Midland Co.*, UIC Appeal No. 14-72 (EAB Nov. 18, 2014) (Order to Show Cause Why Petition Should Not Be Dismissed); *In re Archer Daniels Midland Co.*, UIC Appeal No. 14-72 (EAB Nov. 26, 2014) (Order Dismissing Petition for Review). After the original permit was issued, ADM constructed and tested the well. Based on technical data and site-specific information obtained from the construction and testing of the well, ADM applied for a permit modification that includes: (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. Fact Sheet at 2; EPA Response to Appeal of Permit Modification at 2 (Mar. 8, 2017) ("Region's Resp. Br."). The Region indicates that these modifications ensure that the conditions of the modified permit are equally or more protective than the original permit. Region's Resp. Br. at 2.

The Region issued a draft permit modification on November 8, 2016. Petitioner submitted comments on December 6 and 13, 2016, which included a request for additional time to comment. *See* Letter from Jeffrey Sprague to Andrew Greenhagen, EPA Region 5, Public Comments – ADM Draft Modified Permit (IL-115-6A-0001) for CCS Well #2, ¶3 (Dec. 6, 2016) (AR No. 448) ("Comments on Draft Permit Modification"). The comment period ended December 14, 2016. The only other commenter on the draft permit was ADM. On January 19, 2017, the Region issued the final modified permit and its response to comments document. This petition for review of the final modified permit followed.

V. *ANALYSIS*

Petitioner raises four issues on appeal: (1) whether the Region abused its discretion in declining to extend the public comment period; (2) whether the Endangered Species Act requires the Region to consult with the U.S. Fish and Wildlife Service prior to making its permit modification decision, even where the Region determines that there will be no effects on federally endangered or threatened species or their habitats; (3) whether the Region erred by not including provisions in the permit that address private property rights; and (4) whether the Region was required to make its modeling software available to the public.[5] Petition for Review at 5, 6-7, 8, 9 (Feb. 7, 2017) ("Petition"). The Board will address the first and fourth issues first, as both involve claims related to Petitioner's ability to comment on the proposed modification. The Board will then address Petitioner's contentions regarding the Region's compliance with the Endangered Species Act and, finally, the Region's alleged failure to account for property rights in the permit.

As a preliminary observation, the Board notes that Petitioner raised all but the first issue above during the initial permitting proceedings, *compare In re Archer Daniels Midland Co.,* UIC Appeal No. 14-72 (EAB Oct. 28, 2014) (Petition for Review) *with* Petition, and raised these issues again during the public comment period on the draft permit modification. These issues are not specific to any modification of the permit. Rather the arguments raise questions regarding the obligations of the permitting authority in issuing Class VI injection well permits.

When the Region opened the public comment period for the modified permit, the Region stated that "only the conditions proposed for modification [were] re-opened for comment." Fact Sheet at 1. Based on that statement, the Region and ADM argue that these issues are beyond the scope of the modification and, thus, beyond the scope of appeal.[6] *See* Region's Resp. Br. at 14; ADM Response to Petitions for Review at 7, 15 (Mar. 8, 2017) ("ADM Resp. Br."). In

[5] In accordance with 40 C.F.R. § 124.16(a)(2)(ii), the Region determined that the modification to the permit's area of review is the only portion of the modification subject to stay during this appeal; the remaining provisions of the permit modification are severable and substantially unaffected by the appeal. EPA Statement Under 40 C.F.R. § 124.16(a)(2)(i) (Mar. 9, 2017) (Region's Resp. Br., Attach. 1).

[6] In a separate argument, the Region and ADM contend that consideration of property rights is beyond the scope of the UIC permit program. Region's Resp. Br. at 14; ADM Resp. Br. at 13. This argument is addressed in Part V.C, below.

light of the outcome of our evaluation of these issues on the merits, the Board is not addressing whether Petitioner's arguments are beyond the scope of the permit modification and this appeal.

Additionally, the Region and ADM challenge the petition on the threshold ground that Petitioner has failed to adequately address the Region's response to comments by explaining why the Region's explanations were inadequate as required by 40 C.F.R. § 124.19(a)(4)(ii). Region's Resp. Br. at 10, 14, 16; ADM Resp. Br. at 5, 12, 16-17. The Board addresses these arguments, as appropriate, below.

A. *The Region Provided a Sufficient Opportunity for Public Comment on the Proposed Permit Modification*

Petitioner first argues that the Region abused its discretion in declining to extend the public comment period. Petitioner sought more time, at least in part, so that he could independently evaluate the area of review using the computational modeling software used by ADM or the Region[7] which, he argues, the Region should have made available. For the reasons stated below, the Board concludes that Petitioner was provided a sufficient opportunity to comment, both because the Region was not required to make modeling software available and because the Region did not abuse its discretion in deciding not to extend the public comment period. The Board addresses first the issue of whether the Region was required to make the modeling software available to Petitioner.

1. *The Region Was Not Required to Make Proprietary Modeling Software Available to Petitioner*

As noted above, Petitioner seeks access to the modeling software "to independently corroborate or refute [the Region's] procedures and findings." Comments on Draft Permit Modification ¶2 (acknowledging that "the model inputs would certainly be part of the administrative record," but noting that "the software to run those inputs is certainly not," and arguing that "the public cannot adequately

[7] The modeling software used by ADM to delineate that area of review was the ECLIPSE 300 with the CO2STORE module. Resp. to Comments at 7. In his comments, Petitioner mistakenly assumes EPA used the ECLIPSE model to delineate the area of review, when in fact the Region conducted its evaluation of ADM's area of review modeling effort using the modeling simulator STOMP. *See id.*; Comments on Draft Permit Modification ¶ 2. On appeal, Petitioner seeks access to both the modeling software used by ADM and the modeling simulator used by the Region. Petition at 10.

respond to the modeling results, nor the choice made by [the Region] regarding modeling assumptions, data inputs, and model implementation without having access to the model itself"); *see also* Petition at 9 (arguing only for "access to the proprietary software" and an "opportunity to independently audit the modeling methodology and results"). Petitioner does not here challenge any of the Region's findings based on modeling, or suggest that the Region erred in forming its substantive conclusions. Nor does Petitioner raise any issue with respect to ADM's modeling and analysis, which was clearly set forth in Attachment B of both the draft modified permit (which was available, both electronically and at the local public library, from the time the draft permit was opened for public comment) and final modified permit. *See* Permit Attach. B, "Area of Review and Corrective Action Plan" (AR Nos. 125, 488), *available at* https://www.epa.gov/uic/proposed-permit-modification-adm-class-vi-well-decatur-ill (last viewed on June 26, 2017) (clearly setting forth ADM's computational model, the modeling effort undertaken, and ADM's analysis and conclusions); *see also* Fact Sheet at 1 (identifying that the draft permit was available electronically, at the Decatur Public Library, and by contacting the permitting authority directly). Rather, Petitioner argues that the question whether the Agency had to make proprietary software available to Petitioner is an "important policy and/or potential legal consideration[] that the Board should review." Petition at 3. As explained more fully below, the Board disagrees and declines to do so.

In his comments on the draft permit modification, Petitioner argued that the Region must provide access to the proprietary modeling software used to delineate the area of review for the project "at little or no expense" to the public, so that, as described above, members of the public could "independently corroborate or refute [the Region's] procedures and findings." Response to Comments for Draft Modified Class VI Permit Issued to Archer Daniels Midland (ADM) at 7 (Jan. 19, 2017) (AR No. 451) ("Resp. to Comments"). In support of this comment, Petitioner points to the practice in the Agency's Office of Air and Radiation of making readily available the modeling software that is acceptable for permitting and suggests that the UIC Branch of the EPA's water division should do the same. *Id.* Petitioner further suggests that if licensing or cost considerations are an obstacle to making the software available to the public, then the permittee should provide the resources to remedy the situation. *Id.* at 7-8.

In response to Petitioner's comments, the Region stated that it was not required to make the modeling software available to the public, through temporary license or otherwise. Resp. to Comments at 7-8. The Region distinguished the air permitting program from the UIC permitting program, explaining that "the two programs' approaches are not analogous." *Id.* at 7. The Clean Air Act ("CAA")

mandates that the Office of Air and Radiation ensure "consistency" in modeling applications and "encourages the standardization of model applications" by regulation. *Id.* (citing 40 C.F.R. pt. 51); *see also id.*, appx. W; 42 U.S.C. §§ 7475, 7620 (requiring the Agency to develop regulations for standardizing air quality modeling to be used for purposes of permitting under the CAA). In support of this mandate, the Region explained, the Office of Air and Radiation has made certain modeling software available online. Resp. to Comments at 7.

"In contrast," the Region further explained, "the Safe Drinking Water Act does not mandate" standardized modeling. Resp. to Comments at 7. Rather, "[the] UIC program intentionally developed the Class VI regulations to afford each permit applicant * * * the flexibility to select an appropriate computational modeling approach * * * that 'accounts for the physical and chemical properties of all phases of the injected carbon dioxide stream and is based on available site characterization, monitoring and operational data.'" *Id.* at 7-8 (citing 40 C.F.R. § 146.84). Additionally, the Region explained that the Agency, in establishing the UIC approach, thought it appropriate to ensure "sufficient flexibility to adequately identify the area with increased risks to [underground sources of drinking water] using the most current and compliant modeling approach" and that to do so "ensures that as technologies advance, new, innovative technologies that meet the regulations can be applied at Class VI projects."[8] Resp. to Comments at 8; *see also* Class VI Well Regulations, 75 Fed. Reg. at 77,249.

The Region then described its evaluation of ADM's modeling, including all of ADM's modeling inputs, to "ensure that the modeling effort meets the requirements of [the regulations] and that the model accurately reflects the available site characterization data as well as the pre-operational logging and testing results." Resp. to Comments at 8. Ultimately, the Region's evaluation concluded that "ADM's model is based upon a reasonably constructed and applied approach." *Id.* at 9. Finally, the Region indicated that its complete evaluation, including the model inputs and the results of the Region's evaluation, were contained in its report, which

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[8] The Region also differentiated between CAA modeling and the computational models used for Class VI wells by describing CAA models as less complex, stating that "[m]uch of the modeling conducted under the [CAA] involves simplified situations of a steady state, single source, inert pollutant." Resp. to Comments at 7. In contrast to the CAA modeling, the Region described the computational modeling for Class VI projects as more "complex," stating that it is "multi-phase, and consists of potentially multi-source scenarios which can include millions of nodes (data points) that often require supercomputing capabilities." Response to Comments at 8.

is part of the administrative record. The administrative record was available to Petitioner upon request. *Id.* at 9-10 (citing U.S. EPA, ADM CCS2 Memo to the Record – AoR (Oct. 28, 2016) (AR No. 433), as well as numerous other files available in the administrative record).

On appeal, Petitioner does not refute the Region's distinction between the statutory and regulatory requirements of the CAA program versus the UIC program. Nor does he refute that the Class VI regulations specifically contemplate the use of proprietary modeling as a means of providing a permit applicant flexibility to select the most appropriate model. Petitioner also does not cite anything in support of his argument that EPA is required to make proprietary modeling software available to commenters. Rather, on appeal, Petitioner essentially reiterates his prior comments[9] and also argues that his education and experience are "uniquely applicable to evaluating [the Region's] modeling procedures and results" and that it is "disingenuous" for the Agency to provide an opportunity for public comment without making the modeling available. Petition at 10. Petitioner's failure to specifically identify the Region's response to comments and to explain why the Region's response was clearly erroneous or otherwise warrants review is, alone, grounds for denying the petition for review on this issue. 40 C.F.R. § 124.19(a)(4)(ii); *see In re Seneca Res. Corp.*, 16 E.A.D. 411, 416 (EAB 2014) (citing *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010)).

In any event, the Region's explanation for why it was not required to make the proprietary modeling software available to the public is reasonable and well supported. First, when the Agency promulgated the regulations governing Class VI wells, it specifically contemplated whether to allow the use of proprietary modeling software and specifically permitted that use, *after considering comments both for and against the use of proprietary modeling software*. *See* Class VI Well Regulations, 75 Fed. Reg. at 77,249. The Agency's final approach allowed the use of proprietary models at the discretion of the permitting authority, after concluding that such use would not prevent full evaluation of modeling results and assumptions. *Id.*; *see also* 40 C.F.R. § 146.84(b) (requiring the permittee to delineate the area of review in a manner "acceptable to the [permitting authority]"). In doing so, the Agency was cognizant that the use of proprietary computational

[9] Specifically, Petitioner repeats his contention that EPA should choose to make the modeling software available to the public at no cost.

models would mean that the public would have to consider the assumptions and scientific bases for model conclusions, rather than replicating the results. 74 Fed. Reg. at 77, 249.

In guidance promulgated for evaluating the area of review and corrective action, the Agency more specifically identified peer-reviewed models that have been used for modeling an area of review; the guidance identified both the STOMP and ECLIPSE models that were used in the ADM proceeding. *See* Office of Water, U.S. EPA, EPA 816-R-13-005, *Geologic Sequestration of Carbon Dioxide, Underground Injection Control (UIC) Program Class VI Well Area of Review Evaluation and Corrective Action Guidance* at 28-29 (May 2013) ("AoR & Corrective Action Guidance"). That guidance recognized again that some proprietary models may not be freely available to the general public, and may prevent full evaluation of model results by the public. AoR & Corrective Action Guidance at 29. In light of that fact, the Agency provided that, when using a proprietary model for delineating an area of review, permit applicants should clearly disclose to the permitting authority the code assumptions and, if necessary, governing equations and equations of state with the permit application. *Id.*

To the extent Petitioner disagrees with the underlying policy determinations made by the Agency when it promulgated the Class VI regulations, an appeal to the Board is not the proper forum. The Board is charged with reviewing permitting decisions and determining whether the permitting authority has acted in accordance with Agency regulations, not with reviewing those underlying Agency regulations. *See FutureGen*, 16 E.A.D. at 724 (noting that an appeal to the Board is not the appropriate forum for petitioners dissatisfied with the structure of the UIC regulations or the policy judgments underlying them) (citing *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001) ("As the Board has repeatedly stated, permit appeals are not appropriate fora for challenging Agency regulations."); *In re City of Port St. Joe and Fla. Coast Paper Co.*, 7 E.A.D. 275, 286 (EAB 1997) ("A permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them")). The Board will not reconsider, in this appeal, the Agency's 2010 policy determination reflected in its regulations to allow the use of proprietary models notwithstanding the recognition that that the public would likely have to consider the assumptions and scientific bases for model conclusions, rather than replicating the results.

Second, the Region does not have the authority or right to make either the modeling software used by ADM or the model used by the Region available to the Petitioner. The Region does not have access to the ECLIPSE software that was used by the permittee. Region's Resp. Br. at 18 n.5. Additionally, the Region's

use of the STOMP model is governed by a "Software User Agreement" that restricts the use of that model to government use only and does not allow the government to make it available to others. *Id.* at 18 & Attach. 4.

Third, although Petitioner argues that it is "disingenuous" to allow the public to comment on a permit without providing access to the computational modeling software, the Board has rejected the notion that review of a permittee's modeling requires the Agency to independently replicate the results. In *FutureGen,* the first appeal from a Class VI UIC permit, the Board held that the permitting authority was not required to independently model the plume or the area of review in order to determine that the permittee's modeling was sufficient. *See FutureGen,* 16 E.A.D. at 728-29. Instead, the Board determined that the Region's review of the modeling inputs and assumptions that were used with the site characterization data and the proposed operational information was sufficient to determine whether the permittee's modeling approach was suitable. *Id.* at 733-35. Just as the permitting authority can evaluate a permit applicant's modeling without independently modeling the plume or area of review, so too can the public comment on the modeling application and conclusions drawn from it without independently modeling the plume. This is precisely what the Agency contemplated when it promulgated the Class VI regulations allowing the use of proprietary models. *See id.* at 728 n.10*; see also* 75 Fed. Reg. at 77,249 (specifically allowing the use of proprietary modeling while cognizant of the fact that the use of proprietary computational models would mean that the public would have to consider the assumptions and scientific bases for model conclusions, rather than replicating the results).

In this case, Petitioner had access, both electronically and at his local public library, to the basis for ADM's modeling and analysis from the time the public comment period was opened for the proposed modified permit. *See* Draft Permit, Attach. B (AR No. 125), *available at* https://www.epa.gov/uic/proposed-permit-modification-adm-class-vi-well-decatur-ill (last viewed on June 12, 2017); *see also* Fact Sheet at 1 (providing notice to commenters regarding where to find the draft permit). Furthermore, as the Region explained in its response to comments, the Region independently reviewed ADM's modeling using a computational tool that is one of the methods recognized in the AoR & Corrective Action Guidance and made its review available in the administrative record.[10] Resp. to Comments at 7.

[10] Specifically, the Region conducted its evaluation of ADM's modeling using "STOMP," which stands for "Subsurface Transport Over Multiple Phases" and is one of

The Region assessed the computational approach, the conceptual and geologic model and its consistency with formation testing results, constitutive relations, model boundaries, maximum injection pressure and all other model inputs to ensure that ADM's modeling effort met the requirements of the Class VI regulations and that the model accurately reflects the available site characterization data, as well as the pre-operational logging and testing results. *Id.* at 8-9. Based on that assessment, the Region concluded that ADM's model was based on a reasonably constructed and applied approach. *Id.* The bases for the Region's assessment of ADM's modeling for the permit modification are described in detail in its response to comments, including its consideration of uncertainties and sensitivities. *Id.* at 8-17. As the Region noted, its complete evaluation, including the model inputs and the results of the Region's evaluation, were contained in its report, which is part of the administrative record. The administrative record was available to Petitioner upon request, as are numerous other files in support of the Region's decision. *Id.* at 9-10 (citing U.S. EPA, ADM CCS2 Memo to the Record – AoR (Oct. 28, 2016) (AR No. 433), as well as numerous other files available in the administrative record.).

As explained above, Petitioner stated in his comments that he was aware that the model inputs "would certainly be part of the administrative record," but rejects the notion that the general public should be "expected to accept on faith [the Region's] modeling and methodology and results without being provided the software and data to independently corroborate or refute those procedures and findings." Comments on Draft Permit Modification, ¶2. In fact, Attachment B to the draft permit (entitled Area of Review and Corrective Acton Plan), which as noted above was available to Petitioner from the outset of the public comment period, contained nineteen pages that explained ADM's computational modeling including a description of the model, a description of the modeling effort undertaken, detailed information about the model inputs and assumptions, and the modeling results.

It appears, however, that Petitioner was not interested in determining whether he could sufficiently review the model inputs and assumptions, or the Region's evaluation of the modeling. Rather, Petitioner has argued only that it was error to deny him access to either model. The Board concludes, however, that the Region was not required, either as a matter of law or as a matter of policy, to provide

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the computational modeling tools recognized in the EPA's guidance on delineating an area of review for Class VI wells. *See FutureGen,* 16 E.A.D. at 727 & n.8 & accompanying text (citing the AoR & Corrective Action Guidance at 28-29).

access to the modeling software (and a lengthier public comment period) so that Petitioner could independently model the area of review to evaluate the modeling that EPA and ADM relied upon and the results obtained. As such, and for the reasons explained above, Petitioner has not met his burden to demonstrate review is warranted with respect to the availability of the modeling software.

2. *The Region Did Not Abuse Its Discretion in Declining to Extend the Public Comment Period*

In a separate, but overlapping, argument relating to his ability to comment on the draft permit modification, Petitioner contends that the Region abused its discretion when it did not extend the comment period at Petitioner's request. Petition at 5-6. Petitioner argues that the Region's decision was "totally inappropriate" given the "voluminous and complicated nature of the [a]dministrative [r]ecord," the "travel hardships" associated with viewing and evaluating the full administrative record, and Petitioner's "deep interest" in the permitting activity for this project.[11] *Id.* For the reasons discussed below, the Board concludes the Region did not abuse its discretion in declining to extend the public comment period for the modified permit.

Permitting regulations governing the timing of the public comment period provide that "[p]ublic notice of the preparation of a draft permit * * * shall allow at least 30 days for public comment." *See* 40 C.F.R. § 124.10(b). Section 124.13 provides that "[a] comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time shall be granted * * * to the extent that a commenter who requests additional time demonstrates the need for such time." *Id.* § 124.13. The Board "read[s] these provisions as establishing a minimum comment period length of 30 days, as well as authorizing the permit issuer, in its discretion, to extend the comment period." *See In re City of Palmdale*, 15 E.A.D. 700, 710 (EAB 2012) (citing *In re Shell Offshore, Inc.*, 15 E.A.D. 536, 604 (EAB 2012), *aff'd sub nom. Alaska Wilderness League v. U.S. EPA*, 727 F.3d 934 (9th Cir. 2013)); *see also*

[11] As discussed in Part V.A.1, above, Petitioner separately sought the modeling software and underlying data so that he could "independently corroborate or refute" the procedures used and the findings by the Region. Resp. to Comments at 7. As explained, however, the Region was not required to make the modeling software available. Thus, the fact that Petitioner sought more time to obtain the software to run the models himself cannot serve as a basis for extending the comment period.

In re Genesee Power Station, 4 E.A.D. 832, 841 (EAB 1993) (noting that the applicable regulation only requires public comment periods to last 30 days).

The public comment period on the draft modification to ADM's permit lasted thirty-four days. *See* Certificate of Service – Transmittal of Public Notice and Fact Sheet *via* U.S. Mail (Nov. 10, 2016) (AR No. 483); Fact Sheet at 1(stating that the public comment period would close on December 14, 2016); *see also* Petition at 4 (stating that public notice was provided on November 10, 2016, and that the public comment period ended December 14, 2016). Thus, the length of the comment period falls squarely within the time period prescribed by regulations, and the Board must examine whether the Region abused its discretion when it declined Petitioner's request to extend the comment period. *See Palmdale*, 15 E.A.D. at 710.

As stated above, the permit issuer has the discretion to allow additional time for commenting when a commenter "demonstrates the need for such time." *See* 40 C.F.R. § 124.13. In reviewing a permit issuer's exercise of discretion not to extend a public comment period, the Board considers the permit issuer's need to balance the public's desire for an extended review period against other factors, such as the permit issuer's obligation to timely issue or deny a permit application. *See Palmdale*, 15 E.A.D. at 711-13 (setting out the factors the Board has considered in reviewing a permitting authority's decision on whether to extend a comment period, and upholding the Region's decision not to extend a public comment period where the request was based only on the volume of the record and petitioner had not identified any issue he needed more time to consider or explained why the comment period had been insufficient for that task); *Shell Offshore*, 15 E.A.D. at 520-23 (upholding the Region's decision not to extend the public comment period after weighing the community's need to consider multiple permits with overlapping comment periods against the time-sensitive nature of a new source review permit and the length of time the permitting process had already taken). The Board also considers whether the public has received a meaningful opportunity to review and comment on a draft permit. *See, e.g., Genesee Power Station*, 4 E.A.D. at 842 (upholding the denial of an extension of the public comment period based on Board's conclusion that the public received a meaningful opportunity to make their views known and the permitting authority had demonstrated that it took seriously all comments it had received). *Cf. Conf. of State Bank Supervisors v. Office of Thrift Supervision*, 792 F. Supp. 837, 844 (D.D.C. 1992) (denying claim that comment period should have been longer where statute did not require agency to provide more than 30-day comment period and 30 days was not unreasonable).

During the public comment period, Petitioner requested an additional 90 days (for a total of 120 days) to comment on the draft permit modification. *See* Comments on Draft Permit Modification ¶3. Petitioner's request for the

extension, which was submitted with his comments about one week before the public comment period ended, stated that 30 days was a "woefully insufficient" period of time to review the full administrative record for a full-time employed individual with normal obligations. *Id.* Petitioner's justification for the extension was as follows:

> [the Region] has taken well over a year's time to prepare the draft amended permit. It is incomprehensible that a 30[-] day public review and comment period, which would include the hardship of traveling to Chicago to review the full administrative record, would be sufficient time for a full-time employed individual with normal obligations to provide more than just a cursory response on the amended permit. Clearly, a 30[-] day comment period is woefully insufficient. It also seems more than coincidental that [the Region] has scheduled the public comment period to coincide with the end of the year holiday period, just when outside obligations seem to multiply.

Comments on Draft Permit Modification ¶3.[12]

The Region declined to extend the comment period. *See* Resp. to Comments at 2. In support of that determination, the Region explained that the 34-day comment period was in compliance with the permitting regulations, and that the length of the public comment period "reflects a commitment to making timely permitting decisions while fully considering the information submitted to ensure a protective decision." Resp. to Comments at 2. The Region also stated that "[the] decision on the length of the public comment period is commensurate with the scope of changes [that have been] made since the permit was issued in 2014," and that its decision not to extend the comment period reflects consideration of the fact that only the modifications to the permit were subject to public comment (and the original [p]ermit was not open for review."). *See* Resp. to Comments at 2-3; Region's Resp. Br. at 8-9.[13] Further, in response to Petitioner's comment regarding

[12] Petitioner also objected to the lack of access to the modeling software that ADM and the Region used to model the plume and delineate the area of review, which the Board rejected in Part V.A.1, above. *See* Comments on Draft Permit Modification ¶2.

[13] In fact, except for this challenge to the Region's decision not to lengthen the public comment period on the draft permit modification, the only issues Petitioner raises in this appeal, are three issues (nearly identical, if not verbatim) to ones he raised with respect to the original permit in 2014.

the timing of the public comment period, the Region explained that "[t]he timing of [the Region's] draft decision and the associated comment period coincided with [the Region's] receipt of complete information from the permittee and completion of [the Region's] analysis." Resp. to Comments at 2.

On appeal, Petitioner's primary justification for a longer comment period is to allow him the time to obtain the data and conduct simulations to corroborate or dispute the Region's findings using the proprietary modeling software. Petition at 5. The Board rejected Petitioner's argument that he is entitled to access to the modeling software for that purpose in Part V.A.1, above, and thus this argument cannot serve as a basis for more time to comment. Petitioner also argues that the Region "seems to have chosen to ignore" his comments on the initial permit issued in 2014. Petition at 6. The Region, however, was not required to consider the 2014 comments during this permit modification proceeding; thus, this argument, too, fails.

In response to the Region's explanation that the length of the public comment period is commensurate with the scope of changes made, Petitioner argues that the table of permit modifications spanned fifty-one pages. Petition at 6. Petitioner also continues to focus on the "voluminous and complicated nature" of the record and the "associated travel hardships faced by Petitioner," without identifying and demonstrating any issue he needed more time to consider, or explaining why the comment period was insufficient for that task. Petition at 5-6. In making these arguments, Petitioner does not address the fact that the scope of the permit modification was limited or that documentation describing the computational modeling was available online, at the Decatur Public Library, and from the permitting authority upon request. *See* Part V.A.1, above (describing the availability of Appendix B to the draft modified permit). Petitioner's conclusory assertion that the time allotted by the regulations was insufficient simply does not demonstrate a need for more time as contemplated by section 124.13 of the permitting regulations.

In sum, Petitioner's arguments do not establish that the Region abused its discretion when it declined to extend the public comment period. *See Palmdale,* 15 E.A.D. at 710 (upholding the Region's decision not to extend the public comment period where the request was based on the volume of the record only and petitioner had not identified any issue he needed more time to consider or explained why the comment period had been insufficient for that task); *Shell Offshore*, 15 E.A.D. at 520-23 (upholding the Region's decision not to extend a public comment period based on the petitioner's desire for more time to review and comment on two separate permit proceedings that ran concurrently). Based on the

applicable regulatory requirements and the circumstances of this case, the Board concludes that the Region did not abuse its discretion in declining Petitioner's request to extend the public comment period.

B. *The Region Was Not Required to Consult with U.S. Fish and Wildlife Service Because It Determined the Project Would Have No Impact on Any Listed Federal Species or Critical Habitat*

Petitioner next argues that the Region violated the Endangered Species Act ("ESA") by failing to consult with the U.S. Fish and Wildlife Service ("FWS") prior to issuance of the modified permit. Petition at 6-8. The Region explained that it was not required to consult with FWS because it determined that the proposed modifications to the permit would have no impact on any federally listed species or critical habitat, in accordance with the ESA and its implementing regulations. *See* Region's Resp. Br. at 11-12; Resp. to Comments at 5; *see also* Memorandum from Jeffrey McDonald to Well file for IL-115-6A-0001, CCS #2, Re: Evaluation of NHPA and ESA at ADM's CCS #2 (Oct. 26, 2016) (AR No. 424) ("ESA Memo"). Petitioner does not challenge the Region's determination that the modification would have no impact. Rather, Petitioner argues that the Region was required to consult with FWS irrespective of its own determination.[14] Thus, the Board examines next whether the Region was required to consult with FWS prior to issuing a modified permit to ADM, even though the Region had determined that the modifications to the permit would have no impact on any federally listed species or critical habitat.

Section 7 of the ESA, enacted in 1973, requires all federal agencies to ensure, through consultation with the Secretary of the Interior,[15] that their actions

[14] As noted previously, ADM argues that this issue is beyond the scope of this permit modification, however, as indicated, the Board does not address this issue in this petition for review. *See* Part V, above.

[15] The Secretary of the Interior, whose ESA authority is exercised by FWS, has jurisdiction over terrestrial and freshwater aquatic species. The Secretary of Commerce also has jurisdiction under the ESA, in its case over marine species, and the National Marine Fisheries Service acts on Commerce's behalf in this regard. *See* ESA §§ 3(15), 4, 16 U.S.C. §§ 1532(15), 1533. In light of the fact that only terrestrial and freshwater aquatic species are implicated by this permit, we will refer to "FWS" throughout the remainder of this opinion.

are not likely to jeopardize the continued existence of federally listed species[16] or result in the destruction or adverse modification of a species' critical habitat.[17] ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Section 7 responsibilities come into play when a regulated "agency action" − such as the issuance of a federal permit − is pending.[18] ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.01-.02. Federal agencies typically begin the section 7 process by determining whether a proposed action "may affect," directly or indirectly, listed species or designated critical habitat in a particular geographical area.[19] ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14(a) ("Each [f]ederal agency shall review its actions * * * to determine whether any action may affect listed species or critical habitat.").

Importantly, if an agency decides that its proposed action will have no effect on listed species or designated habitat in the action area, the section 7 process ends. *See* 50 C.F.R. § 402.14(a). If, however, the agency decides the action "may affect" these entities, the agency must then consider whether the action is "likely to have an adverse effect" on any federally listed species or critical habitat. *Id.* § 402.14(b)(1). An affirmative answer to the latter inquiry leads to the initiation of

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[16] A "listed species" is "any species of fish, wildlife, or plant [that] has been determined to be endangered or threatened under section 4 of the [ESA]." 50 C.F.R. § 402.02. The lists of species determined to be currently endangered or threatened are set forth in 50 C.F.R. §§ 17.11-.12.

[17] "Critical habitat" consists of specific areas containing physical and biological features that are "essential to the conservation of the species" and that may require special management or protection. ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A); *see* 50 C.F.R. § 402.02 (definition of "critical habitat"); 50 C.F.R. pts. 17, 226 (critical habitat lists).

[18] *See* 50 C.F.R. § 402.14(a) (requiring each federal agency to "review its actions at the earliest possible time[.]").

[19] "Direct effects" are a project's immediate impacts on listed species or their habitats, *see Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987), while "indirect effects" are effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02 ("effects of the action" definition). The "effects of the action" also include the effects of other actions that are "interrelated or interdependent with" the project.

formal section 7 consultation with FWS. *Id.* § 402.14(a)-(c).[20] In other words, the permitting authority is not required to consult with FWS if the permitting authority determines that a permitting action will have no impact on any federally listed species or critical habitat. *See id.*; *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 486 (EAB 2002); *In re Indeck-Elwood LLC*, 13 E.A.D. 126, 196 n.134 (EAB 2006); *see also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447-1448 (9th Cir. Ariz. 1996) (a "no effect" determination by the U.S. Forest Service obviated the need for formal consultation with the FWS under the ESA) (*citing Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995)).

During the permit modification process for ADM, the Region made a determination that the permit modification would have "no effect" on any federally listed species or critical habitat. *See* Resp. to Comments at 5; *see also* ESA Memo at 1. Specifically, the Region determined that "[i]nformation from ADM and the Richland Community College submitted in November 2013 supported [the Region's] determination for the original permit issuance that the two [listed] species for Macon County (the Indiana Bat and the Eastern Prairie Fringed Orchid) were not present and would not inhabit the largely industrial and agricultural area where the well is located." ESA Memo at 1. The Region further stated that since the original permit was issued "all ground disturbance associated with the construction of the well, associated pipelines, monitoring wells, and other surface equipment have been completed." *Id.* Thus, the Region determined that "the proposed modifications are only administrative in nature, and the proposed modifications will not affect any listed species, or critical habitat and will only impact the permitted injection zone between 5,553 feet and 7,043 feet below the ground surface." Resp. to Comments at 5.

As stated above, Petitioner does not deny that the Region made the above determination; nor does Petitioner argue that the determination was made in error, or that any species or habitat will be impacted by this modified permit. Rather, in response to the Region's response to comments, Petitioner asserts that the Region "is not at liberty to [forgo] consultation with the FWS," citing a footnote in the Board's decision in *Indeck-Elwood*. Petition at 7-8 (citing *Indeck-Elwood*, 13 E.A.D. at 208 n.154). Petitioner's reliance on *Indeck-Elwood*, however, is misplaced. In that case, the Region did not make a determination that its permitting

[20] In contrast to a "no effect" determination, when the permitting authority determines that an action is "not likely" to adversely affect a listed species, concurrence by the FWS is required. 50 C.F.R. §§ 402.13(a), 402.14(b)(1).

decision would have no effect any federally listed species or critical habitat. Rather, during the pendency of the appeal in that matter, the Region entered into an "informal consultation" with FWS pursuant to 50 C.F.R. § 402.13, based on its determination that the Indeck-Elwood permit "may" have an effect on a listed species, but concluded after informal discussions with, and the concurrence of, the FWS that the permit was "not likely to adversely affect any federally-listed species." *Indeck*-Elwood, 13 E.A.D. at 198-99. The focus of the discussion to which Petitioner refers was on the fact the Region waited until the issue was raised on appeal before it consulted with the FWS to satisfy the requirements of the ESA. The quote upon which Petitioner relies, when read in context, does not stand for the proposition that consultation with FWS is required prior to the issuance of every permit. Rather, the Board's point in footnote 154 in *Indeck-Elwood* was that – where the Agency is required to consult with FWS because the action may affect a listed species or critical habitat – it is "prudentially inadvisable" for a permitting authority to wait until the pendency of a permit appeal. *See Id.*, 13 E.A.D. at 208 n.154. Importantly, and as stated above, the Board in *Indeck-Elwood* also clearly explained that when "an agency determines there will be *no* effect on any federally-listed species or critical habitat, * * * the agency need not formally consult" with FWS. *Id.* at 196 n.134 (emphasis in original); *see also id.* at 206 n.148 (clarifying that "consultation [with FWS] is not required for all PSD permits," and that "consultation is required only when the federal action 'may affect' listed species or designated critical habitat").

In sum, Petitioner has not met his burden to demonstrate that review of the Region's determination to forgo consultation with FWS was clear error or an abuse of discretion. As such, the Board denies review of this issue.

C. *Property Rights Are Beyond the Scope of a UIC Permit*

Lastly, Petitioner argues that the Region "failed to include provisions [in the modified permit that are] consistent with Illinois real property law" to protect landowners potentially impacted by the anticipated CO_2 plume. Petition at 8-9. The Region responds that the protection Petitioner seeks is beyond the scope of the Region's UIC permitting authority. Region's Resp. Br. at 14-15; *see also* ADM Resp. Br. at 12-15. The Region also argues that Petitioner failed to demonstrate why the Region's response to his comments was clearly erroneous, as is required by regulations governing permit appeals. Region's Resp. Br. at 14. As explained further below, the Board agrees that Petitioner has not met his burden to demonstrate review is warranted and that, in any case, property rights are beyond the scope of EPA UIC permits.

UIC permitting regulations expressly exclude property rights from the scope of EPA UIC permitting authority. Specifically, UIC regulations provide that "[t]he issuance of a permit does not convey any property rights of any sort, or any exclusive privilege," and "[t]he issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations." 40 C.F.R. § 144.35(b), (c). Consistent with permitting regulations, ADM's modified permit specifically includes a provision that mirrors the language of the regulation (as did ADM's original permit). *See* Permit at 2 (Section A: "Effect of Permit") (providing that this permit "does not convey property rights of any sort," and that it does not "authorize any injury to persons or property, any invasion of other private rights, or any infringement of State or local laws or regulations."); *see also* ADM's Resp. Br. at 15 ("No changes were made to the property rights sentence in Section A on page 1 of the Permit.").

In response to Petitioner's comments on the draft permit modification, the Region explained that "property/land ownership rights, mineral rights and pore space ownership are outside the scope of this permit action," as well as outside the scope of "EPA's authority under the Safe Drinking Water Act." Resp. to Comments at 4. In so stating, the Region quoted the relevant provision in the permit and cited UIC permitting regulations as well as Board precedent on this issue. *Id.*

On appeal, Petitioner argues that the Region "cannot absolve itself of responsibility in this matter," which Petitioner views as requiring: (1) "an enforceable permit condition restricting the extent of the subsurface plume" to prevent migration to areas where ADM does not have pore rights; (2) "notification to potentially impacted landowners; (3) negotiated fair compensation to these landowners prior to CO_2 injection; and (4) recordkeeping that documents these transactions." Petition at 9. In his petition, however, Petitioner cites no law authorizing − let alone requiring − the Region to include such permit conditions, or requiring the Region to notify "potentially impacted" landowners, or to "negotiate fair compensation."

In addition to failing to cite any authority for his argument, Petitioner also fails to articulate why the Region's response to his comment on this issue was erroneous in contravention of 40 C.F.R. § 124.19(a)(4)(ii), which requires petitioners to "explain why [the permitting authority's] response to the comment was clearly erroneous or otherwise warrants review." The failure to articulate why the permitting authority's response to comment is clearly erroneous or otherwise warrants review, by itself, constitutes grounds for the Board to deny review of a petition. *See In re Seneca Res. Corp.,* 16 E.A.D. 411, 416 (EAB 2014) (*citing In re*

City of Pittsfield, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010).

In any event, the Region's explanation for why it rejected Petitioner's comments concerning the inclusion of property rights provisions in the permit is reasonable and well supported. It is well-settled that property rights are governed by legal precepts that are outside the scope of UIC permitting authority. *See, e.g.*, *In re Windfall Oil & Gas, Inc.*, 16 E.A.D. 769, 813 (EAB 2015) (denying review of property issues, such as subsurface mineral rights and the effect of the proposed well on property values, as beyond the scope of UIC permitting process); *In re Envtl. Disposal Sys.*, 12 E.A.D. 254, 266-68 (EAB 2005) (rejecting petitioner's arguments about property rights over a subsurface geologic structure as outside the scope of UIC permitting); *In re Envotech, L.P.*, 6 E.A.D. 260, 275 (EAB 1996) (rejecting petitioner's argument that the Board should, as a matter of policy, require the permittee to demonstrate that it has received all State and local permit approvals necessary prior to receiving the permit because the UIC regulations clearly provide no authority to the Board or the Region to consider matters that are exclusively within the State's power to regulate); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 23 (EAB 1994) (determining that the region did not err in issuing the permit prior to the resolution of a separate pending litigation on certain land-use conditions sought to be imposed by township); *In re Brine Disposal Well*, 4 E.A.D. 686, 695 (EAB 1993) (determining that the "resolution of [s]tate property[]law issues * * * is beyond the scope of EPA's role in reviewing an injection well permit and, thus, rejecting petitioner's arguments regarding their rights as neighboring landowners against subsurface trespass as a result of deep well injection); *In re Terra Energy*, 4 E.A.D. 159, 161 n.6 (EAB 1992) (explaining that the adverse effect of an injection well on neighboring property values is outside the scope of the Safe Drinking Water Act and its implementing regulations and, thus, is not a relevant consideration in the UIC permitting process).

As the Board has explained, even where a permittee "has met all federal requirements for issuance of a UIC permit, it is not by virtue of its federal UIC permit shielded from compliance with any valid state or local regulations governing its operations." *Beckman*, 5 E.A.D. at 23. Nor does a federal UIC permit authorize any injury to persons or property or invasion of other private rights. Any available remedy for potentially impacted property rights or neighboring landowners lies elsewhere, and not in a challenge to this permitting decision. *See In re Suckla Farms, Inc.*, 4 E.A.D. 686, 695 (EAB 1993) (explaining that "EPA is simply not the correct forum for litigating contract- or property-law disputes that may happen to arise in the context of waste disposal activity for which a federal permit is

required," noting that "[t]hese disputes properly belong in a court of competent jurisdiction").

In sum, the permit issuer's authority to issue, and the Board's authority to review, UIC permits extends to the boundaries of the UIC permitting program itself. *See In re Envtl. Disposal Sys.*, 12 E.A.D. at 266-68 (EAB 2005); *see also In re Am. Soda LLP*, 9 E.A.D. 280, 289 (EAB 2000) (describing the UIC permitting process as "narrow in its focus," and explaining that the SDWA and the UIC regulations "establish the only criteria a Region may use deciding whether to issue a UIC permit"). The Board denies review of issues that are outside the scope of the UIC program as established by statute and regulation. *See In re N.E. Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998).

Finally, to the extent Petitioner is objecting to the regulation itself, a permit appeal to the Board is not the appropriate forum. *See FutureGen*, 16 E.A.D. at 724 (noting that an appeal to the Board is not the appropriate forum for petitioners dissatisfied with the structure of the UIC regulations or the policy judgments underlying them) (*citing In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001) ("As the Board has repeatedly stated, permit appeals are not appropriate fora for challenging Agency regulations."); *In re City of Port St. Joe and Fla. Coast Paper Co.*, 7 E.A.D. 275, 287 (EAB 1997) ("A permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them.")).

Because Petitioner failed to explain why the permitting authority's response to his comments on this issue is clearly erroneous or otherwise warrants review, Petitioner has not met his burden to demonstrate that review is warranted. And, in any case, the Region has no authority to address, and the Board will not require the Region to include, provisions that are outside the scope of a UIC permit. Thus, review of this issue is denied.

VI. *CONCLUSION*

For all of the foregoing reasons, the Board concludes that the permit modification in this matter takes into account the information gained during well-construction and pre-operational testing, as was intended by the design of the iterative permitting program for Class VI injection wells. Nothing Petitioner has raised in this petition for review demonstrates that review of this permit modification is warranted on any of the grounds presented. The petition for review is denied.

So ordered.