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

In re:	)	
Chevron Michigan, LLC of Traverse City, Michigan	)	UIC Appeal No. 13-03
Permit No. MI-009-2D-0217	)	

ORDER DENYING REVIEW

I. *STATEMENT OF THE CASE*

On August 19, 2013, Norma Petrie ("Petitioner") filed a petition with the Environmental Appeals Board ("Board") seeking review of a Class II Underground Injection Control ("UIC") final permit decision that the United States Environmental Protection Agency ("EPA" or "Agency") Region 5 ("Region") issued on July 25, 2013, pursuant to the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26. The permit authorizes Chevron Michigan, LLC of Traverse City, Michigan ("Chevron") to drill and operate an injection well in Antrim County, Michigan. *See* U.S. EPA, UIC Permit: Class II, Permit No. MI-009-2D–0217, Stratton #16-4, at 1 (Administrative Record ("A.R.") 62) [hereinafter Final Permit]. This is the second time the Board has reviewed a challenge to this UIC permit. The initial appeal resulted in a remand to the Region. *See generally In re Chevron Michigan, LLC ("Chevron I")*, UIC Appeal No. 12-01 (EAB Mar. 5, 2013), 16 E.A.D. __ (Remand Order). Petitioner is now challenging the Region's final permit decision following that remand. For the reasons discussed below, the Board denies review of the permit decision.

II. *ISSUES*

Based on Petitioner's assertions, the Region's responses, and the administrative record certified by the Region, the Board must resolve the following issues:

> 1. Has Petitioner raised any issues in her second appeal that are not barred by the Remand Order?
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> 2. With respect to any issues that are not barred by the Remand Order, has the Petitioner demonstrated that those issues were preserved for review or can otherwise be considered in this permit appeal?

III. *PROCEDURAL HISTORY*

On August 20, 2012, the Region issued a final permit decision authorizing Chevron to drill and operate an injection well to be used for noncommercial brine disposal from production wells owned or operated by Chevron. *Chevron I*, slip op. at 4, 16 E.A.D. at __. According to the administrative record, the Region issued a document addressing Ms. Petrie's comments on the draft permit one day after the permit was signed. *Id.* The administrative record also indicated that the Region had issued four other letters responding to different commenters: three were dated August 15, 2012, five days before the date of the final permit, and one was dated the same day as the response to Ms. Petrie's comments, August 21, 2012, one day after the date of the final permit. *Id.* at 5, 16 E.A.D. at __.

Ms. Petrie, who had submitted comments on the draft permit during the public comment period, timely filed a petition seeking review of that final permit decision. *Id.* at 4, 6, 16 E.A.D. at __. The Board, upon consideration of the petition and the administrative record, discovered certain procedural problems with the Region's permitting process and consequently remanded the final permit decision to the Region on March 5, 2013, with instructions for addressing them.

See id. at 9-14, 16-17, 16 E.A.D. at __. One problem the Board identified was that, because of the seriatum issuance of response to comments letters, some before and some after the permit issuance, it was unclear whether the decisionmaker considered the responses to comments at the time of permit issuance. *Id.* at 11, 16 E.A.D. at __. Moreover, the Region had not issued one comprehensive response to comments document and did not appear to have provided all its responses to comments to all commenters, which, the Board noted, could inadvertently limit a commenter's ability to challenge the Region's basis for its permitting decision on appeal. *See id.* at 12 n.8, 16 E.A.D. at __ .

In remanding the decision on procedural grounds, the Board "denie[d] review of all other issues raised by the Petition." *Id.* at 16, 16 E.A.D. at __. In its Remand Order, the Board explicitly required persons dissatisfied with the Region's actions on remand to file a petition seeking Board review in order to exhaust administrative remedies pursuant to 40 C.F.R. § 124.19(f)(1)(iii). *Id.* at 17, 16 E.A.D. at __. The Board further stated that "[a]ny such petitions shall be limited to those issues addressed by the Region on remand or raised by or in connection with the remand procedures. No new issues may be raised that could have been raised, but were not raised, in the present appeal." *Id.* at 17-18, 16 E.A.D. at __.

On remand, the Region reconsidered its final permit decision, ultimately reissuing an identical permit on July 25, 2013. Motion to Deny Review of Petition or, in the Alternative, Motion for Extension of Time ("Motion to Deny Review") at 3; *see also* Final Permit. On that same day, the Region issued one comprehensive response to comments document. Motion to Deny Review at 3; *see also* U.S. EPA Region 5, Response to Comments Regarding UIC Permit #MI-009-2D-0217 (July 25, 2013) (A.R. 61) [hereinafter 2013 RTC]. Ms. Petrie's second

petition for review followed. *See* Petition Seeking Board Review of Underground Injection Control Permit #MI-009-2D-0217 ("Petition") at 1 (Aug. 13, 2013).

The Region, in response to Ms. Petrie's petition, filed a Motion to Deny Review of Petition or, in the Alternative, Motion for Extension of Time. In it, the Region argues that the Board should dismiss Ms. Petrie's petition because she has raised new issues that she could have raised in her original petition but failed to do. Motion to Deny Review at 8. Petitioner filed a response objecting to the Region's motion, contending that the issues she is now raising were based on the Region's comprehensive response to comments document. Response to Region 5 Motions ("Petitioner's Response") at 1.

IV. *PRINCIPLES GUIDING BOARD REVIEW*

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of a UIC permit. In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4).

A. *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*, PSD Appeal Nos. 11-03 through 11-05, slip op. at 14-15 (EAB Aug. 18, 2011), 15 E.A.D. ___ (citing Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)), *appeal docketed sub nom. Sierra Club v. EPA*, No. 11-73342 (9th Cir. Nov. 3, 2011). Ordinarily, the Board will deny review of a permit decision and thus not remand it unless the permit decision either 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); *accord, e.g., In re Prairie State Generating Co.*, 13 E.A.D. 1, 10 (EAB 2006), *aff'd sub. nom Sierra Club v. U.S. EPA*, 499 F.3d 653 (7th Cir. 2007); *see also* Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5,280, 5,281 (Jan. 25, 2013). In considering whether to grant or deny review of a permit decision, the Board is guided by the preamble to the regulations authorizing appeal under part 124, in which the Agency stated that the Board's power to grant review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." 45 Fed. Reg. at 33,412; *see also* 78 Fed. Reg. at 5,281.

B. *Petitioner's Burden on Appeal, Including Threshold Requirements*

In considering a petition filed under 40 C.F.R. § 124.19(a), the Board first evaluates whether the petitioner has met threshold requirements such as timeliness, standing, issue preservation, and specificity. *See* 40 C.F.R. § 124.19; *In re Beeland Group LLC*, UIC Appeal No. 08-02, slip op. at 8 (EAB Oct. 3, 2008), 14 E.A.D. __; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). For example, a petitioner must demonstrate that any issues and arguments it raises on appeal have been preserved for Board review (i.e., were raised during the public comment period or public hearing on the draft permit), unless the issues or arguments were not reasonably ascertainable at the time. 40 C.F.R. §§ 124.13, .19; *see, e.g., In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10, 58-59 (EAB Sept. 15, 2009), 14 E.A.D. __; *In re City of Moscow*, 10 E.A.D. 135, 141, 149-50 (EAB 2001). In this case, Board review is further limited by the language in the Remand Order which specifically stated that "no new issues may be raised

[in a second appeal] that could have been raised, but were not raised, in the [first] appeal." *Chevron I*, slip op. at 18, 16 E.A.D. at __. Assuming that a petitioner satisfies its threshold obligations, the Board then considers the petition to determine if the permit decision warrants review. *Indeck*, 13 E.A.D. at 143; *see also Beeland*, slip op. at 8-9, 14 E.A.D. at __.

When petitions are filed by persons who are unrepresented by legal counsel, like the petition here, the Board endeavors to liberally construe the petitions so as 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. ("EDS")*, 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*, 8 E.A.D. at 687-88; *accord In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995). "The Board also expects the petitions to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted." *Sutter*, 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 still rests with the petitioner challenging the permit decision. *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).

V. *ANALYSIS*

A. Petitioner Has Raised Two Issues in Her Second Appeal That Were Not Barred by the Remand Order

In her current Petition, Ms. Petrie raises five issues. More particularly, she challenges (1) the Region's use of the word "should" in several of its responses to comments; (2) certain scientific statements and conclusions the Region made in Response 4; (3) the Region's statements concerning seismic activity and fault lines in Antrim County in Responses 2 and 5; (4) the "current regulations" and their protectiveness of local water resources; and (5) the alleged lack of laws and/or regulations that regulate surface distance between injection wells and drinking water wells. Petition at 1-2. The Region contends that all of these issues could have been raised in her first petition, and therefore, based on the language of the Board's Remand Order, the issues may not be raised here. Motion to Deny Review at 8. If the Region is correct, review of Ms. Petrie's current petition should be denied under the terms of the Remand Order. Thus, the Board first decides whether Petitioner is raising any issues in her second appeal that she could not have raised in her first appeal because she did not receive the comment to which she is currently objecting. For any issue not barred by the Remand Order, the Board then must evaluate whether such issue nonetheless meets threshold requirements.

Significantly, Responses 12 through 18 in the Region's cumulative 2013 Response to Comments document are the same responses that the Region originally sent to Petitioner in August 2012. *Compare* Letter from U.S. EPA Region 5 to Norma Petrie at 1 (Aug. 21, 2012) (A.R. 43) [hereinafter Letter Responding to Norma Petrie Comments] *with* 2013 RTC at 9-12. These responses address the issues Ms. Petrie raised in her comments on the draft permit:

(1) potential contamination of surrounding drinking water wells and surface waters (Response 12); (2) allowable distance between drinking water wells and injection wells (Response 13); (3) potential link between brine disposal through injection wells and seismic activity (Response 14); (4) history of fluid and/or radiation leakage from injection wells constructed similarly to the one Chevron proposed (Response 15); (5) chemicals present in the brine (Response 16); (6) increased noise and vehicle traffic in the area of the proposed well (Response 17), and (7) request that the Region order Chevron to monitor the water quality at her drinking water well and plant foliage to act as a barrier between her property and the well site (Response 18). *See* 2013 RTC at 12-13. Petitioner, therefore, could have challenged any of the determinations contained in these particular responses in her initial petition. Accordingly, any challenges to Responses 12 through 18 are procedurally barred under the terms of the Board's Remand Order. Petitioner's fifth issue – in which she explicitly challenges Responses 13, 15, 16, and 17 – falls into this category; the Board therefore declines to consider issue 5 on procedural grounds.

Turning to the other four issues that Ms. Petrie raises, the Board concludes that most of them are likewise barred from review. In her first listed issue, Petitioner challenges the Region's use of the term "should" in Responses 1, 4, 7, 9, 10, and 11. Petition at 1. In those responses, the Region had addressed commenters' concerns about potential drinking or surface water contamination from the injection well and had typically concluded that "there *should* be no connection between the injection well and nearby drinking water wells or surface waters."[1]

[1] Because each of the Region's responses had been drafted to respond to concerns about the potential for impacts to different types of nearby water resources, the responses to those comments contain minor variations that are irrelevant to the issue on appeal. For example, Responses 7 and 10

2013 RTC at 4 (Response 4) (emphasis added). Petitioner claims that such terminology inherently "suggests that no final scientific determination has been made" and more study is needed. Petition at 1. Notably, in one of the responses the Region had originally sent to Petitioner in response to her comments on the draft permit, the Region made the identical statement now contained in Response 4. *See* Letter Responding to Norma Petrie Comments at 2. Petitioner, therefore, could have challenged this same issue in her original petition. Because she failed to do so, she may not do so now.

In her second listed issue, Petitioner questions certain scientific statements and conclusions the Region made in Response 4 concerning the environmental safety of injection wells and the permeability of rock layers and requests scientific and geological evidence to support those claims. Petition at 1. The Region made these same statements, or statements nearly identical to them, in its original response to Ms. Petrie's comments.[2] *See* Letter Responding to

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focused solely on commenters' concerns about impacts to drinking water wells. 2013 RTC at 7, 8 ("[T]here should be no connection between the injection well and nearby drinking water wells."). Response 9 added some language addressing comments about the lack of potential impacts to local streams and rivers. *Id.* at 7 (["T]here should be no connection between the injection well and nearby drinking water wells *and local streams and rivers*.") (emphasis added). Response 1 was phrased somewhat differently and focused solely on drinking water wells, but the conclusion was essentially the same: "As a result, there should be no effect on nearby drinking water wells from the operations of this injection well." *Id.* at 3.

[2] Even though the Region did not explicitly mention the "Bell Shale" rock layer in the original response to comments letter that it sent to Petitioner, the Region did discuss the 42 feet of "sedimentary rock strata" that is of "very low permeability and will prevent vertical migration of fluid." *See* Letter Responding to Norma Petrie Comments at 1. Upon a close reading of the two responses, it is apparent that the "sedimentary rock strata" referenced in the Region's original comments is indeed the "Bell Shale" layer mentioned in the Region's 2013 response to comments. *Compare id. with* 2013 RTC at 5. The Region's determinations with respect to this geological formation, therefore, were part of the original response to comments, and thus, Ms. Petrie could have challenged them in her first petition.

Norma Petrie Comments at 1-2. Petitioner, therefore, could have challenged this same issue in her original petition, but failed to do so. She may not do so now.

Ms. Petrie's third issue is a challenge to the Region's Responses 2 and 5. Petition at 1. In those responses, the Region addressed commenters' concerns about (1) recent seismic events in Youngstown, Ohio, which occurred as a result of a Class II injection well, 2013 RTC at 3-4; and (2) the Region's methodology in determining whether "the confining layers are free of known open faults or fractures," *id.* at 5. Ms. Petrie objects to the Region's statements in these responses, citing studies and government statements that allegedly rebut the Region's conclusions. Petition at 1. In its original response to Ms. Petrie's comments, the Region generally addressed the relationship between disposal well injection and seismic activity,[3] but the Region's response did not contain the more particularized statements that Ms. Petrie disputes here, specifically, the Region's discussion of local fault lines and local seismic risk. Because Ms. Petrie could not have objected to the Region's conclusions on these points in her original petition, as a technical matter, she is not barred from raising this issue under the Remand Order. The Board addresses this issue more fully in the next section.

Finally, Ms. Petrie, in her fourth listed issue, while acknowledging that she does not dispute the Region's factual statements in Response 6, questions the protectiveness of existing regulations leading to the Region's conclusions, contending that "the current regulations are irresponsible" and threaten water resources in the area, such as the Jordan River and Lake

[3] Ms. Petrie's comment, which the Region addressed, had generally asked whether "brine disposal through injection wells is linked to seismic activity." *See* Letter Responding to Norma Petrie Comments at 3. Other commenters, however, had more particularly asked about seismic activities in other areas that had been connected to injection wells and about faults and fractures in the local confining layers. *See* 2013 RTC at 3, 5.

Michigan. Petition at 1. In Response 6, the Region stated that, as part of its "standard procedure for reviewing permit applications," it had verified that the proposed injection well "is not within one-quarter mile of a [f]ederally-designated Wild and Scenic River." 2013 RTC at 6; *see also* 40 C.F.R. § 144.4 (requiring consideration of Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287, in issuing UIC permits). The Region also noted that, although the Jordan River – which is located two miles from the proposed injection site – is not federally protected, "the State of Michigan has designated it as a Natural River." 2013 RTC at 6. The Region then summarized Michigan's requirements for rivers it has designated as a "Natural River." *See id.* In light of the Region's Response 6, the Board reads Ms. Petrie's fourth issue[4] to be, in essence, a challenge to either the Agency's UIC regulations in general or the State of Michigan's regulations related to the Jordan River's Natural Rivers designation.

The statements in Response 6 were not similar to any of the responses to comments Ms. Petrie originally received. Arguably therefore, Petitioner is not procedurally barred by the Remand Order from challenging them.[5] The Board therefore considers this issue more fully in the next section.

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[4] *See* Part IV above (discussing the Board's consideration of *pro se* petitions).

[5] The Region contends that because none of the commenters challenged the existing UIC regulations, Ms. Petrie cannot raise that issue in her petition. Motion at 11. The Region further argues that even if the comments could be construed as having raised this issue, then Petitioner should have raised her regulatory challenge in her first petition. *Id.* While there may be some merit to these arguments, because it is clear that Ms. Petrie's challenge to a federal or state regulation should be denied on other grounds, the Board does not analyze this aspect of the issue.

B. Petitioner Has Not Demonstrated That the Two Issues Not Barred by the Remand Order Have Been Preserved for Review or Otherwise Can Be Considered in This Permit Appeal

1. *Petitioner Has Not Demonstrated That Her Third Issue Was Preserved for Review*

As already noted, in her third listed issue, Ms. Petrie questions the Region's determinations in Responses 2 and 5 that address concerns about local fault lines and local seismic risk. Petition at 1. In particular, the Region had stated that "there are no documented cases of seismic activity in Antrim County" and that there are "no * * * open faults in Antrim County," statements that essentially underlie the Region's ultimate decision to issue the final permit.[6] 2013 RTC at 4-5. In rebutting these statements, Ms. Petrie cites to research of James Wood and William Harrison dated December 2002, which, according to her, identifies a fault line in the county.[7] Petition at 1.

Before reaching the merits of this issue, the Board must first consider whether this issue was properly preserved. As indicated in Part IV, to obtain Board review of a UIC permit, a

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[6] As the Board explained in *In re Stonehaven Energy Management, LLC*, UIC Appeal No. 12-02 (EAB Mar. 28, 2013), 16 E.A.D. __, a permit issuer is required to consider whether the area's geological conditions constitute an endangerment to underground sources of drinking water. Slip op. at 15, 16 E.A.D. at __; *accord* 40 C.F.R. § 146.22 (requiring a Class II well be sited so that it injects into a formation "which is separated from any [underground drinking water source] by a confining zone that is free of known open faults or fractures within the area of review"); *see also id.* § 146.24(a)(2), (5) (requiring consideration of "appropriate geological data on the injection zone" and a map prepared by the applicant that may show known or suspected faults). The Region's responses to comments addressing known faults, therefore, support the Region's conclusion that the permitted injection well meets the requirement that the well be sited so that it will inject into a formation that is separated from any underground drinking water source by a confining zone free of known open faults or fractures. *See* 2013 RTC at 4-5; *see also* U.S. EPA, Statement of Basis for Issuance of Underground Injection Control (UIC) Permit, Permit Number MI-009-2D-0217, at 2 (A.R. 29).

[7] Ms. Petrie also argues that "the U.S. Geological Survey [has] recommend[ed] an 'assessment of the absence or presence of faults' to reduce risk of leaks from underground wells." *Id.* She does not indicate from what source she obtained the U.S. Geological Survey statement. This does not matter because the Agency's UIC regulations require the very analysis the U.S. Geological Survey recommends, *see supra* note 6, and the Region addressed this issue. Thus this argument does not actually rebut the Region's analysis, and the Board need not consider it further.

petitioner must satisfy the threshold requirement of issue preservation. The regulations require any person who believes that a permit condition is inappropriate to raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [petitioner's] position" during the comment period on the draft permit. 40 C.F.R. § 124.13. That requirement is made a prerequisite to appeal by 40 C.F.R. § 124.19(a), which requires any petitioner to "demonstrate, by providing specific citation to the administrative record * * * that each issue being raised in the petition was raised during the public comment period * * * to the extent required[.]"[8] *In re ConocoPhillips Co.*, 13 E.A.D. 768, 800-01 (EAB 2008); *see also, e.g., In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 457 (EAB 2008); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 394 n.55 (EAB 2007).

As the Board has often explained, "[t]he regulatory requirement that a petitioner must raise issues during the public comment period 'is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather it serves an important function related to the efficiency and integrity of the overall administrative scheme.'" *Christian County*, 13 E.A.D. at 459 (quoting *In re BP Cherry Point,* 12 E.A.D. 209, 219 (EAB 2005)). "The purpose of such a provision is to 'ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the longstanding policy that most permit decisions should be decided at the regional level, and to provide predictability and finality to the permitting process.'" *Shell Offshore*, 13 E.A.D. at 394

[8] The Board has also emphasized that petitioners must raise issues with a reasonable degree of specificity and clarity during the comment period in order for the issue to be preserved for review. *E.g.*, *ConocoPhillips*, 13 E.A.D. at 801; *Shell Offshore,* 13 E.A.D. at 394 n.55; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (EAB 2000).

n.55 (quoting *In re New Eng. Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001)); *accord ConocoPhillips*, 13 E.A.D. at 800. The Board and the Administrator have further explained that the part 124 permitting process "requires a specific time for public comment so that issues may be raised and 'the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary.'" *Christian County*, 13 E.A.D. at 459 (quoting *In re Union Cnty. Res. Recovery Facility*, 3 E.A.D. 455, 456 (Adm'r 1990)); *accord In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999).[9] The requirement to raise all reasonably ascertainable issues and reasonably available arguments during the public comment period, therefore, plays an important role in establishing the proper staging of the permit decision process. As the Board has explained:

> If an issue is not raised during the notice and comment process, * * * the permitting authority is provided no opportunity to address the issue specifically prior to permit issuance. In such instances, if the Board were to exercise jurisdiction, it would become the first-level decisionmaker as to such newly raised issues, contrary to the expectation that "'most permit conditions should be finally determined at the [permit authority] level.'" *Knauf I,* 8 E.A.D. at 127 (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). Alternatively, the Board might remand such issues back to the permitting authority for initial determination at that level, potentially resulting in an unnecessarily protracted permitting process, where each time a final permit is issued and a new issue is raised on review, the permit must be sent back to the permit issuer for further consideration. Such an approach would undermine the efficiency, predictability, and finality of the permitting process.

BP Cherry Point, 12 E.A.D. at 219-20.

The Board has frequently rejected appeals where issues and/or arguments that were reasonably ascertainable during the comment period were not raised at that time but instead were

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[9] The rules barring litigants from raising an issue for the first time before the federal circuit courts of appeal serve a similar purpose. *See Bailey v. Int'l Bhd. of Boilermakers,* 175 F.3d 526, 530 (7th Cir. 1999).

presented for the first time on appeal. *See, e.g., In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 through 10-05, slip op. at 43-44 (EAB Nov. 18, 2010) (declining to consider issue where specific argument was not raised by any commenter; another commenter had merely raised general arguments), 15 E.A.D. __; *see also id.* at 55 (declining to consider argument not raised during comment period), 15 E.A.D. at __; *Indeck*, 13 E.A.D. at 165-69 (declining to consider arguments raised on appeal that were "distinctly different" from the arguments commenters raised); *BP Cherry Point*, 12 E.A.D. at 218-20 (declining to consider an issue that neither the petitioner nor any other party raised during the comment period and that was reasonably ascertainable). Of particular relevance here, the Board has declined to consider issues and/or arguments where a petitioner challenged a permit issuer's determinations based on documents that had existed at the time of the public comment period and whose applicability could have been raised in timely comments. *See, e.g., Russell City*, slip op. at 45 n.35 (declining to review to extent petitioner was arguing about the applicability of a certain workbook to the permit issuer's decision; such argument was reasonably ascertainable during the comment period), 57 n.46 (declining to review where petitioner rebutted a permit issuer's response by citing a press release that had been available at the time of the public comment period); *In re Kendall New Century Dev.*, 11 E.A.D. 40, 54-55 (EAB 2003) (declining to review an argument that relied on a published report and a copy of testimony; both documents could have been, but were not, submitted during the public comment period for the permit in question); *see also In re Bear Lake Props., LLC*, UIC Appeal No. 11-03, slip op. at 22 (EAB June 28, 2012) (declining to consider documents on appeal that were not part of the administrative record).

In this permitting proceeding, the draft permit and statement of basis were issued in May 2012. *Chevron I*, slip op. at 4, 16 E.A.D. at __. At that time, the Region had determined that the proposed injection well met the requirements of the UIC regulations, including the requirement that the well be sited so that it will inject into a formation that is separated from any underground drinking water source by a confining zone free of known open faults or fractures. *See* Statement of Basis at 2 (referring to 40 C.F.R. § 146.22); *see also* note 6 above. Several commenters, including Ms. Petrie, questioned the Region's conclusions concerning open faults in the area and seismic risks. *See* 2013 RTC at 3, 5, 10. Thus, at that time, when challenging the Region's conclusions on this point, Ms. Petrie or any other commenter could have cited the 2002 study. Ms. Petrie does not suggest that she or any commenter raised the applicability of this study to this permitting proceeding and that the Region failed to respond to it.[10] *See* Petition at 1. Accordingly, Petitioner has not demonstrated that this issue was preserved for review.

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[10] In a recent UIC case, the Board considered extra-record information cited by a petitioner to rebut the permit issuer's responses to comments as part of a challenge to a permit decision. *See Stonehaven*, slip op. at 20-21, 16 E.A.D. at __. The facts and circumstances of the present case, however, differ markedly from *Stonehaven*. In *Stonehaven*, the Region had explicitly promised during the public hearing to provide more information about the local geology and fault lines in the area, slip op. at 16, 19-20, 16 E.A.D. at __, but the Region's response to comments document merely contained conclusory statements that there was "no evidence" of seismic activity and failed to "disclose what records or information [the Region] searched or what data [the Region] relied on to document the lack of seismic activity in the well location." *Id.* at 19-20, 16 E.A.D. at __. The Board, moreover, could not find any documentation in the administrative record that supported the Region's conclusions. *Id.* at 20, 22, 16 E.A.D. at __. Because the petitioner had submitted the press articles specifically to rebut statements in the response to comments document that had not been made previously, the Board considered the articles to the extent that they demonstrated what "was in the realm of public knowledge at that time." *Id.* Unlike *Stonehaven*, the Region here, in its response to comments document, cites to specific record evidence to support its conclusions, stating that "[d]riller logs and formation records from nearby wells and the Hydrogeologic Atlas of Michigan were used to review geologic data from both the confining zone and the injection zone." 2013 RTC at 5. The Region also noted that it considered "[d]ata gathered from the wells that have been permitted by [the Region], together with technical studies of the geology of Michigan." *Id.*

2. *Petitioner's Fourth Issue is Barred From Board Consideration on Jurisdictional and Other Grounds*

As explained above, the Board has interpreted Ms. Petrie's fourth issue to be a challenge to either the Agency's UIC regulations in general or the State of Michigan's regulations related to the Jordan River's Natural Rivers designation. Even though Petitioner arguably is not procedurally barred by the Remand Order from raising this issue, such a challenge is barred nonetheless from Board consideration for several other reasons.

The Board on numerous occasions has explained that its authority to review final UIC permit decisions "extends to the boundaries of the UIC permitting program itself, with its SDWA-directed focus on the protection of [underground drinking water sources], and no farther." *EDS*, 12 E.A.D. 254, 266 (EAB 2005) (*citing In re Am. Soda, LLP*, 9 E.A.D. 280, 286 (EAB 2000) ("[T]he SDWA and the UIC regulations authorize the Board to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable UIC regulations.")); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567 (EAB 1998) ("[P]rotection of interests outside of the UIC program [is] beyond our authority to review in the context of [a UIC] case."), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999); *In re Federated Oil & Gas*, 6 E.A.D. 722, 725-26 (EAB 1997)). Consequently, "the Board's jurisdiction historically has been limited to evaluation of specific UIC permit terms and the permit issuer's compliance with the SDWA and UIC permit regulations." *EDS*, 12 E.A.D. at 267; *see also, e.g.*, *In re Puna Geothermal Venture*, 9 E.A.D. 243, 258-59, 274 (EAB 2000); *In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 & n.6 (EAB 1992). When petitioners have raised issues under other statutes or under another federal agency's or state's regulatory authority, the Board typically has denied their

requests for UIC permit review on the ground that the Board lacks the authority to adjudicate such issues. *E.g., EDS*, 12 E.A.D. at 279 ("As a procedural matter, the questions of whether and how injection wells must comply with RCRA requirements generally fall outside of Board jurisdiction in a UIC permit proceeding."), 295 (declining to consider claims "flow[ing] from decisions made at the state or local levels pursuant to state or local laws, and not from requirements of the SDWA UIC program"); *Am. Soda*, 9 E.A.D. at 289-90 (concluding that the Board lacked jurisdiction to review alleged deficiencies in another agency's National Environmental Policy Act process); *In re Envotech, L.P.*, 6 E.A.D. 260, 275-76 (EAB 1996) ("[T]he Board does not have the authority to consider issues raised by petitioners concerning matters that are exclusively within the State's power to regulate."); *see also In re Sunrise Powerlink*, PSD Appeal No. 10-14, at 1-2 & n.2 (EAB Nov. 29, 2010) (Order Dismissing Appeal) (concluding that Board lacked authority to consider permit case arising under authority of a State and other federal agencies). For this reason, the Board may not entertain a challenge to the State of Michigan's regulations or the State's implementation of its regulations.

The Board also declines to consider Ms. Petrie's challenge to EPA's UIC regulations. The Board has explained on a number of occasions that it generally will not entertain challenges to final Agency regulations in the context of permit appeals. *E.g., In re USGen New Eng., Inc.*, 11 E.A.D. 525, 555 (EAB 2004), *dismissed appeal for lack of juris.*, 443 F.3d 12 (1st Cir. 2006); *In re City of Irving*, 10 E.A.D. 111, 123-25 (EAB 2001), *petition for review denied sub nom. City of Abilene v. U.S. EPA*, 325 F.3d 657 (5th Cir. 2003); *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001); *In re City of Port St. Joe*, 7 E.A.D. 275, 286 (EAB 1997); *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 694-98, 699 (EAB 1993); *see also In re Ford Motor Co.*, 3 E.A.D. 677, 682

n.2 (Adm'r 1991). More specifically, the Board has stated that it "is not an appropriate forum in which to challenge the validity of the UIC regulations or the policy judgments underlying the structure of the UIC program." *Suckla Farms*, 4 E.A.D. at 699; *see also In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 35 (EAB June 7, 2010), 14 E.A.D. __ (applying same principle to NPDES permit appeal); *Port St. Joe*, 7 E.A.D. at 286 (same). This conclusion is due, in part, to the fact that the regulations governing the Board's review of permits "authorize the Board to review *conditions* of the permit decision, not the statutes or regulations that are the predicates for such conditions." *Circle T*, slip op. at 35, 14 E.A.D. at __; *accord* 40 C.F.R. § 124.19(a); *see also USGen*, 11 E.A.D. at 555; *City of Irving*, 10 E.A.D. at 124; *Ford Motor*, 3 E.A.D. at 682 n.2. Consequently, because the Board declines to consider Petitioner's challenge to EPA regulations and because the Board may not entertain her challenge to Michigan's regulations, the Board does not consider Petitioner's fourth issue further.

VI. *CONCLUSION AND ORDER*

The Board denies review of the permit decision for the reasons described above.

So ordered.[11]

ENVIRONMENTAL APPEALS BOARD

Date: November 7, 2013

Kathie A. Stein
Environmental Appeals Judge

[11] The three-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Chevron Michigan, LLC of Traverse City, Michigan, UIC Appeal No. 13-03, were sent to the following persons in the manner indicated:

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Dated: 11/7/2013

Annette Duncan
Secretary