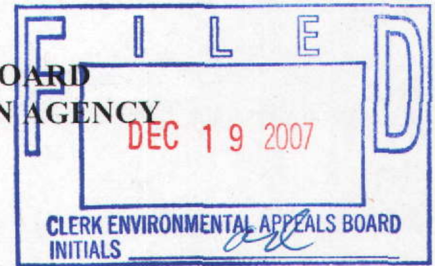

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
Core Energy, LLC	)	UIC Appeal No. 07-02
	)	
Permit No. MI-137-5X25-0001	)	
	)	

ORDER DENYING REVIEW

I. *INTRODUCTION*

On September 21, 2007, Mr. Robert B. LeBlanc, on behalf of himself and his wife, Joan S. LeBlanc ("Petitioners"), filed a petition for review from U.S. EPA Region 5' s ("the Region") decision to issue an Underground Injection Control ("UIC") permit to Core Energy, LLC ("Core Energy"). Letter from Robert B. LeBlanc, to the Clerk of the Environmental Appeals Board (Sept. 14, 2007) (hereinafter referred to as "the Petition" or "Petition for Review").[1] The permit, issued pursuant to the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h to 300h-8, and EPA's implementing regulations at 40 C.F.R. parts 124, 144, and 146-48, authorizes the conversion of an existing test well in Otsego County, Michigan, to a Class V injection well[2] for the permanent storage, or "sequestration," of carbon dioxide ("CO_2"). *See* Fact Sheet for Underground Injection Control (UIC) Program Permit MI-137-5X25-0001 at 1; Response to

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[1] Although the Petition for Review is dated September 14, 2007, documents are not considered "filed" with the Board until they are *received*. The Board received the Petition for Review in this matter on September 21, 2007.

[2] The UIC program's implementing regulations establish a classification system for injection wells depending on the material being injected into the well. *See* 40 C.F.R. § 144.6. Class V wells include wells using experimental technologies. *See id.* § 144.81.

Petition for Review ("Region's Response") at 3.[3] Petitioners raise two arguments in support of review by this Board. First, the Petition expresses concern about who might be liable for any damages that might result from operation of the injection well. Petition for Review at 1-2. Second, although not entirely clear from the Petition, it appears Petitioners are arguing that the permit violated property rights of adjacent landowners under whose land the injection will occur and that a permit should not have been issued absent proof that the permittee actually owned all subsurface rights on this land. *Id.* at 1-3.

For the reasons set forth below, the Petition for Review is denied in its entirety.

II. *BACKGROUND*

A. *Statutory and Regulatory Framework*

The regulations governing underground injection wells are found in 40 C.F.R. part 144 to 149.[4] The standards contained therein were promulgated pursuant to Part C of the SDWA, 42 U.S.C. §§ 300h-300h-8, which directs the Administrator to promulgate regulations for state underground injection control programs for the protection of underground sources of drinking water ("USDWs").[5] 42 U.S.C. § 300h(a). The protections established by the SDWA and its

[3] As the Region states in its Response, sequestration of CO_2 is one of several possible mechanisms proposed for stabilizing levels of greenhouse gases in the atmosphere and thereby mitigating climate change. Region's Response at 4.

[4] The purpose and scope of 40 C.F.R. parts 144 through 149 are as follows: part 144 (minimum requirements for the UIC program); part 145 (procedures for approving, revising, and withdrawing state programs); part 146 (UIC program criteria and standards); part 147 (applicable UIC programs for states, territories, and possessions); part 148 (hazardous waste injection restrictions); and part 149 (sole source aquifers).

[5] Specifically, the SDWA requires the Administrator to promulgate regulations establishing

(continued...)

implementing regulations focus exclusively on groundwater that is or may be a source of drinking water.[6]

The UIC permitting process has been described as narrow in its focus. *See In re Envtl. Disposal Sys., Inc. ("EDS")*, 12 E.A.D. 254, 266 (EAB 2005); *In re Am. Soda, LLP*, 9 E.A.D. 280, 286 (EAB 2000). As the Board has made clear on prior occasions, review of UIC permit decisions extends only to the boundaries of the UIC permitting program itself, with its SWDA-directed focus on the protection of USDWs, and no farther. *EDS*, 12 E.A.D. at 266; *Am. Soda*, 9 E.A.D. at 286 ("the SDWA * * * and the UIC regulations * * * establish the only criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit, and in establishing the conditions under which deep well injection is authorized.") (quoting *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996)); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998) ("protection of interests outside of the UIC program [is] beyond our authority to

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[5](...continued)
"minimum requirements for effective programs to prevent underground injection which endangers drinking water sources." SDWA § 1421(b)(1), 42 U.S.C.A. § 300h(b)(1). The term USDW is defined as:

> [A]n aquifer or its portion:
> (a)(1) Which supplies any public water system; or
> (2) Which contains a sufficient quantity of ground water to supply a public water supply; and
> (i) Currently supplies drinking water for human consumption; or
> (ii) Contains fewer than 10,000 mg/l total dissolved solids; and
> (b) Which is not an exempt aquifer.

40 C.F.R. § 144.3.

[6] EPA administers the UIC program in states that are not yet authorized to administer their own UIC programs. *See* 40 C.F.R. § 144.1(e). EPA remains the permitting authority of the UIC program in the State of Michigan. *See id.* at § 147.1151.

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 Brine Disposal Well,* 4 E.A.D. 736, 742 (EAB 1993) ("It has * * * repeatedly been held that parties objecting to a federally issued UIC permit must base their objections on the criteria set forth in the [SDWA] and its implementing regulations."). Thus, the Board is only authorized to review UIC permit conditions to the extent that they affect a well's compliance with the SDWA and applicable UIC regulations. Accordingly, where petitioners raise concerns outside the scope of the UIC program, the Board will deny review. *See, e.g., NE Hub*, 7 E.A.D. at 567; *In re Federated Oil & Gas*, 6 E.A.D. 722, 725-26 (EAB 1997).

B. *Factual and Procedural Background*

In April of 2007, Core Energy, Inc. submitted an application seeking a UIC permit for the conversion of an existing test well in Otsego County, Michigan to a Class V injection well for the sequestration of CO_2. The well at issue would be used to conduct research on the behavior of CO_2 injected into deep saline rock formations. *See* Executive Summary, Core Energy Permit Application (Appendix 1 to Region's Response). Core Energy estimates that the injection phase of this project will likely last 60 to 90 days and result in the injection of up to 10,000 metric tons of CO_2. *Id.* The Region issued a draft permit on July 11, 2007, and initiated a public comment period during which Mr. LeBlanc submitted comments. *See* "Written comments, Objections, and Request for Public Hearing as to Public Notice Dated: July 23, 2007 for proposed underground injection for MI-137-5X25-0001 for the Charlton # 4-30 well in Otsego County, Michigan" (Aug. 14, 2007) ("Petitioners' Comments").

On August 23, 2007, after responding to Petitioners' Comments and determining that the draft permit complied with the SDWA and the applicable regulations, the Region issued a final permit. As stated above, the Board received the Petition for Review on September 21, 2007, in which Petitioners raise concerns regarding liability for any damages arising out of the permitting activity as well as the property rights of adjacent land owners. Petition for Review at 1-3. The Region filed its Response on November 1, 2007. On November 6, 2007, Petitioners filed a reply to the Region's Response. *See* The LeBlancs' Objections to Region 5' s Response Dated 10/31/07 ("Petitioners' Reply") (Nov. 6, 2007).

III. *DISCUSSION*

A. *Standard of Review*

Under the 40 C.F.R. part 124 rules that govern this permit proceeding, the Board will not grant review unless it appears from the petition that the permit is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion that warrants Board review. 40 C.F.R. § 124.19(a); *EDS*, 12 E.A.D. at 263; *Am. Soda*, 9 E.A.D. at 286. The Board's analysis of UIC permits is guided by the preamble to the part 124 rules, which states that the Board's power of review "should only be sparingly exercised" and that most permit conditions should be finally determined at the Regional level. 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *EDS*, 12 E.A.D. at 263-64; *In re Puna Geothermal Venture*, 9 E.A.D. 243, 246 (EAB 2000). On appeal to the Board, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a); *Am. Soda*, 9 E.A.D. at 286; *NE Hub*, 7 E.A.D. at 567.

In addition, in order to preserve an issue for appeal, the regulations require any petitioner who believes that a permit condition is inappropriate to demonstrate that it or any other commenter raised "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, .19(a); *In re BP Cherry Point*, 12 E.A.D. 209, 216 (EAB 2005); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999). 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." *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999) . The burden of demonstrating that an issue has been raised during the comment period rests with the petitioner, and "it is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below." *Encogen*, 8 E.A.D. at 250 n.10.

Finally, in order to obtain review by the Board, a petitioner must demonstrate why the Region's response to comments on the draft permit were clearly erroneous or otherwise warrant review. A petitioner may not simply repeat objections made during the comment period but "must demonstrate why the [permit issuer's] response to these objections (the [permit issuer's] basis for its decision) is clearly erroneous or otherwise warrants review." *In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429, 472 (EAB 2005) (quoting *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001)).

With these considerations as background, we will now proceed to analyze the issues and arguments on appeal.

B. *Liability for Damages*

The Petitioners express concern regarding the alleged absence of a clear policy addressing potential liability for any damages that might result from the permitted activity. Petition for Review at 1. According to the Petitioners, "[t]he key issue appears to be the matter of liability (i.e., no adequate policy exists defining the roles and financial responsibilities of the industry and government.)." *Id.* The Region argues that this issue was not raised during the comment period on the draft permit and thus was not preserved for review. We agree.

Upon review of the comments submitted during the comment period,[7] we find no reference to the issue of liability for potential damages resulting from operation of the injection well. Rather, the only issues Petitioners raised during the comment period concerned the property rights of adjacent landowners. *See* Petitioners' Comments at 4-5. Although, in their Reply to the Region's Response, Petitioners assert that the issue was raised, they fail to cite to any portion of the comments addressing this issue. The only citation provided is to the second page of Petitioners' comments in which Petitioners suggested that the permit presents safety and

[7] Other than the permittee in this matter, Petitioners were the only parties to submit comments on the draft permit. *See* Region's Response at 4. In its comments, Petitioners sought a public hearing in this matter. Under 40 C.F.R. § 124.12, a public hearing shall be held if the Region determines that there is a significant degree of public interest in the draft permit. In this instance, the Region determined that there was not a significant degree of public interest and therefore declined to hold a public hearing. *See* Letter from Lisa Perenchio, Region 5, to Robert B. and Joan S. LeBlanc, responding to public comments (Aug. 23, 2007). Petitioners have not appealed the Region's determination in this regard, nor do we see anything erroneous in this determination.

storage issues "among other things." Petitioners' Reply at 2 (citing Petitioners' Comments at 2). This was insufficient to put the Region on notice of the issue now presented.[8] Because the issue of liability was reasonably ascertainable but was not raised during the comment period on the draft permit, this issue was not preserved for review with the Board.[9] *See In re Shell Offshore, Inc.*, OCS Appeal Nos. 07-01 & 07-02, slip op. at 52-53 (EAB Sept. 14, 2007), 13 E.A.D. ___; *In re BP Cherry Point*, 12 E.A.D. 209, 218-20 (EAB 2005).

[8] As the Board has emphasized, petitioners must raise issues with a reasonable degree of specificity and clarity during the comment period in order for the issue to be considered by the Board on appeal. *In re New England Plating*, 9 E.A.D. 726, 732 (EAB 2001); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (EAB 2000); *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998). The Board has often denied review of issues raised on appeal that were not raised with the requisite specificity during the public comment period. *See, e.g., New England Plating*, 9 E.A.D. at 732-35; *Maui*, 8 E.A.D. at 9-12; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995).

[9] The requirement that an issue must have been raised during the public comment period in order to preserve it for review is not an arbitrary hurdle placed in the path of potential petitioners. *See In re City of Marlborough*, 12 E.A.D. 235, 244 n.13 (EAB 2005); *BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005). Rather, the requirement serves an important function related to the efficiency and integrity of the overall administrative permitting scheme. *Marlborough*, 12 E.A.D. at 244 n.13. The intent of the rule is to ensure that the permitting authority first has the opportunity to address permit objections, and to give some finality to the permitting process. *Id.*; *In re Sutter Power Plant,* 8 E.A.D. 680, 687 (EAB 1999). As we have explained, "[t]he effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *In re Teck Cominco*, 11 E.A.D. 457, 481 (EAB 2004) (quoting *In re Encogen cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999). "In this manner, 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." *In re Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994).

C. *Property Rights of Adjacent Landowners*

Petitioners next argue that the permit potentially violates the rights of adjacent property owners. In particular, Petitioners argue that property owners should be protected from "sub-surface trespasses" resulting from operation of the injection well. Petition for Review at 2-3.

In response to comments on this issue, the Region stated, in part:

> The UIC program does not have authority to determine surface, mineral, or storage rights when issuing permit decisions. Issues relating to property ownership or lessee rights are legal issues between the permittee and property owners. Under federal UIC regulation, a permittee is not required to demonstrate ownership or legal access to all properties, only that the operation of the well will not allow contaminants into a USDW. Issuance of a permit neither confers the right to trespass nor conveys property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other private rights, or any infringement of State or local law or regulations. This is the case with respect to all classes of wells, including those which inject CO_2 for permanent sequestration in an underground formation.

Response to Comments at 1.

Because Petitioners have failed to demonstrate why the Region's response in this regard was clearly erroneous or otherwise warrants review, review is denied on this issue. *Shell Offshore*, slip op. at 64, 13 E.A.D. ___; *In re Newmont Nev. Energy Inv., L.L.C.,* 12 E.A.D. 429, 472 (EAB 2005).

We recognize that Petitioners are not represented by legal counsel and, as in previous cases, we have therefore endeavored to construe their objections liberally so as to identify the substance of their arguments. *E.g., In re Sutter Power Plant,* 8 E.A.D. 680, 687 (EAB 1999) (citing cases). However, "[w]hile the Board does not expect or demand that [*pro se*] petitions will necessarily conform to exacting and technical pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason

why the [permit issuer] erred in its permit decision in order for the petitioner's concerns to be meaningfully addressed by the Board." *EDS*, 12 E.A.D. at 292 n.26 (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994)). Petitioners have failed in this regard.

IV. *CONCLUSION*

For the forgoing reasons, the Petition for Review is hereby denied.[10]

So ordered.[11]

Dated: December 20, 2007

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

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[10] In their Reply, Petitioners assert that the Region has failed to enforce 40 C.F.R. §§ 144.35(b)-(c) and 144.51(g), both of which indicate that the issuance of UIC permit does not create any property rights. However, as this issue was not mentioned in the Petition for Review, it was not preserved for review with the Board. *See In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 126 n.9 (EAB 1999) (new issues raised in reply briefs are equivalent to late-filed appeals and must be denied as untimely). For the Board to consider new issues raised in reply briefs would effectively permit a petitioner to amend an otherwise inadequate petition. *See In re Dominion Energy Brayton Point, LLC*, NPDES Appeal No. 07-01, slip op. at 42 (EAB Sept. 27, 2007), 13 E.A.D. ___.

[11] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of Core Energy, LLC, UIC Appeal No. 07-02, were sent to the following persons in the manner indicated:

By Certified Mail
Return Receipt Requested:

Robert B. LeBlanc
9300 Island Drive
Grosse Ile, MI 48138

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Dated: DEC 19 2007

Annette Duncan
Secretary