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

In the Matter of:	)	
Sun Pipe Line Company	)	UIC Appeal Nos. 02-01 & 02-02
UIC Permit No. MI-163-1I-0001	)	

ORDER DENYING PETITIONS FOR REVIEW

I. *INTRODUCTION*

In two separate petitions filed with the U.S. Environmental Protection Agency's Environmental Appeals Board (the "Board") on March 22 and March 29, 2002, respectively, Sandra K. Yerman and Jim Rarey seek review of the provisions of an Underground Injection Control ("UIC") permit decision (the "Permit") issued to the Sun Pipe Line Company ("Sun") by the U.S. Environmental Protection Agency Region V ("Region V") on February 26, 2002. *See* Yerman Petition for Review (Mar. 22, 2002) ("Yerman Petition"); Rarey Petition for Review (Mar. 29, 2002) ("Rarey Petition").

On April 17, 2002, Sunoco Partners Marketing & Terminals

L.P. ("Sunoco"), Sun's successor, filed a motion to intervene in the above-captioned matters. *See* Motions to Intervene and For Leave to File Response (Apr. 17, 2002). Sunoco requested a deadline of May 9, 2002, for filing its response to the Yerman and Rarey Petitions, which was granted by the Board on April 22, 2002. *See* Order Granting Sunoco Partners Marketing & Terminals L.P.'s Motion to Intervene and For Leave to File Response (Apr. 22, 2002). Pursuant to the Board's April 22, 2002 Order, Sunoco filed a consolidated response to the Petitions for Review. *See* Sunoco Partners Marketing & Terminals L.P.'s Response to the Petitions for Review of Sun Pipeline Company's Brine Disposal Well Permit No. MI-163-1I-001 Filed by Jim Rarey and Sandra Yerman (May 9, 2002) ("Sunoco's Response to Pet.").

Region V also filed its responses to the Petitions for Review on May 9, 2002. *See* U.S. EPA's Response to Petition for Review of Sandra Yerman (May 9, 2002) ("Region V's Response to Yerman Pet."); U.S. EPA's Response to Petition for Review of Jim Rarey (May 9, 2002) ("Region V's Response to Rarey Pet.").

II. *FACTUAL AND PROCEDURAL BACKGROUND*

On November 1, 1999, Sun submitted an application to Region V for a permit to construct and operate a Class I non-hazardous

liquid waste underground injection disposal well in the Mt. Simon Sandstone Formation.[1/] *See* Ex. D at Fact Sheet at 1. Sun is required to obtain a UIC permit because the company is engaging in underground injection, for which a permit is required in accordance with 40 C.F.R. §§ 144.11 and 144.31. *See infra* Section III.

The disposal well will be located beneath Sun's pipeline terminal facility near Romulus, Michigan, and will be used to dispose of artificial and natural brines produced by Sun during the expansion of its liquified petroleum gas underground storage caverns at the terminal facility. *See* Ex. D at Fact Sheet at 1. The injection zone is the Eau Claire and Mt. Simon members of the Munising Formation and the Precambrian Formation from 3,900 feet to 4,450 feet below the surface. *Id*.

Region V issued the Draft Permit, which would authorize Sun to construct a Class I brine disposal well, on April 6, 2001. On April 26, 2001, Region V issued a public notice providing for a 30-day comment period on the Draft Permit. In addition, on June 20, 2001, Region V issued a public notice stating that a public

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[1/] Class I wells include, in relevant part, "industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water." 40 C.F.R. § 144.6(a)(2).

hearing on the Draft Permit would be held on July 24, 2001, from 7 p.m. until 9 p.m. *See* Ex. B at June, 20, 2001 Public Notice. On July 17, 2001, one week prior to the public hearing, Region V issued a notice in which it stated that an information meeting would be held from 6 p.m. to 7 p.m. on July 24, 2001 (the date of the public hearing) to discuss the proposed permit. *See id*. at July 17, 2001 Public Notice. This July 17, 2001 notice also extended the public comment period to August 20, 2001. *See id*. On February 26, 2002, Region V issued the Permit to Sun, and served notice of its permit decision along with its Response to Comments. *See* Ex. A; Ex. D at Response to Comments.

A. *Yerman Petition*

Petitioner Yerman submitted comments on August 10, 2001, in which she: (1) questioned allegedly conflicting statements made by Region V personnel regarding the distance toxic waste would travel from injection wells owned by the Environmental Disposal Systems ("EDS")[2/]; (2) argued that permits should not be granted to both EDS and Sun, because the proximity of their wells would

[2/] According to Region V, it issued permits to Environmental Disposal Systems, Inc. ("EDS") in 1998 to construct and operate two Class I hazardous waste injection wells, and is currently reviewing a petition from EDS under 40 C.F.R. Part 148 for an exemption to the Resource Conservation and Recovery Act ("RCRA") land disposal restrictions to allow it to inject hazardous wastes into those wells. *See* Region V's Response to Yerman Pet. at 3.

compromise the integrity of EDS's injection zone; and (3) argued that the taxpayers of Michigan should be protected from a possible takings-reverse condemnation lawsuit by Sun. *See* Ex. G.

In its Response to Comments document, Region V noted that comments regarding the EDS wells would be addressed in the context of the EDS application for exemption from RCRA land disposal restrictions,[3/] but asserted that it did not anticipate that the EDS wells would have an impact on the Sun well. *See* Ex. D at Response to Comment 57. Region V also asserted that the impact of the Sun well would be limited in nature. *See id*. at Response to Comments 7, 8, 12, 16, 29, and 54. Notably, according to Region V, it added a condition to the Sun permit that provides that if Sun extracts materials while EDS is injecting hazardous wastes, Sun must monitor for hazardous constituents on a monthly basis. *See* Ex. A at F-2. With respect to Petitioner Yerman's comment regarding a possible takings-reverse condemnation case against the State of Michigan, Region V stated that, as set forth at 40 C.F.R. § 144.35(b) and (c), the Permit's issuance does not convey any property rights of any sort or any exclusive privilege, and does not authorize any injury to person or property or invasion of other private rights, or any infringement of State or local law or regulation. *See* Ex. D at

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[3/] *See supra* note 2.

Response to Comment 22.

On March 22, 2002, Petitioner Yerman filed a petition for review in which she argued that: (1) Sun should be required to perform a chemical analysis for the brine extracted from Mt. Simon on a daily basis, rather than on a monthly basis; (2) the Permit should specifically state that Sun must address written reports of any Permit non-compliance to the Director; (3) Sun should certify to the Director that it "has read and is personally familiar with all terms and (revised) conditions of the Permit"; (4) Region V should not allow the Romulus Public Library to dispose of a copy of the final Permit 90 days after the close of the public comment period; (5) Region V should include permit language that requires Sun to protect the taxpayers of Michigan from a North American Free Trade Agreement ("NAFTA")[4/] Chapter 11 Investment Provision lawsuit; (6) The Permit is invalid due to a typographical error in the version published on the Internet; and (7) a letter dated September 28, 2001, which is referenced in Region V's Response to Comments

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[4/] In 1990 the United States, Mexico, and Canada initiated negotiations with the intention of creating a "free trade zone" through the elimination or reduction of tariffs and other barriers to trade. After two years of negotiations, the leaders of the three countries signed the North American Free Trade Agreement ("NAFTA") on December 17, 1992. Congress approved and implemented NAFTA on December 8, 1993, with the passage of the NAFTA Implementation Act. *See* Pub.L. No. 103-182, 107 Stat.2057 (1993), 19 U.S.C. §§ 3301-3473.

document, should be sent to her pursuant to the Freedom of Information Act ("FOIA").

B. *Rarey Petition*

Petitioner Rarey attended the July 24, 2001 public hearing, and submitted comments in a December 31, 2001 letter – more than four months after the close of the public comment period – in which he sought responses to questions he asserts were raised by him during the public hearing. Specifically, Petitioner Rarey questioned: (1) whether Sun's intent to use the same well for both disposal and recovery would require further permitting action by the Agency; and (2) Sun's decision to not pursue other alternatives to the Mt. Simon Sandstone Formation as a location for the well. *See* Ex. H.

In his petition for review filed on March 29, 2002, Petitioner Rarey raises the following issues: (1) whether the public was improperly denied the opportunity to comment on data Sun added to the record on September 18, 2001, after the comment period closed on July 24, 2001;[5/] (2) whether Sun disclosed to the public that the proposed underground brine injection well

[5/] Although Petitioner Rarey characterizes the issue as such, we note that the comment period actually closed on August 20, 2001. *See* Ex. B at July 17, 2001 Public Notice.

will be used for storage, rather than disposal purposes; (3) whether Region V failed to insure compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C), by permitting Sun to segment the project and erroneously segmenting review, thus preventing a meaningful analysis of the complete project; (4) whether Sun failed to inform the public of its simultaneous application for a brine withdrawal well from the Michigan Department of Environmental Quality ("MDEQ"); (5) whether the allegedly excessive amount of fresh water required for solution mining will have a negative impact on the Great Lakes; (6) whether Sun has failed to demonstrate the technical feasibility of injecting brine at 2,000 gallons per minute ("gpm") without fracturing the formation of Mt. Simon; and (7) whether Sun has failed to demonstrate the technical feasibility of producing brine from Mt. Simon. *See* Rarey Petition at 2-7.

For the reasons discussed below, both the Yerman Petition and the Rarey Petition are denied in their entirety.

III. *STATUTORY AND REGULATORY FRAMEWORK*

Congress granted EPA the authority to regulate Class I non-hazardous waste injection wells in Sections 1421(b) and 1422(c) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h(b) and

300h-1(c). The protections established by the SDWA focus exclusively on groundwater that is or may be a source of drinking water. Accordingly, section 1422(c) of the SDWA requires EPA to issue regulations setting forth "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources," to be implemented by EPA in states that are not yet authorized to administer their own UIC programs. 42 U.S.C. § 300h-1(c). EPA is the permitting authority under the SDWA for Class I wells in Michigan. *See* 40 C.F.R. § 147.1151.

The rules implementing the UIC program are set forth at 40 C.F.R. parts 124, 144, 146, and 147. The Board has consistently stated that "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." *In re American Soda, LLP,* UIC Appeal Nos. 00-1 & 00-2, slip op. at 9 (EAB, June 30, 2000), 9 E.A.D. ___; *In re Envotech, L.P.,* 6 E.A.D. 260, 264 (EAB 1996). *See also In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 567 (EAB 1998), *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 therefore repeatedly been held that parties

objecting to a federally issued UIC permit must base their objections on the criteria set forth in the Safe Drinking Water Act and its implementing regulations”). Accordingly, the SDWA and the UIC regulations authorize the Board to review UIC permitting decisions only with respect to a well’s compliance with the SDWA and applicable UIC regulations. *See American Soda,* slip op. at 9; *Envotech*, 6 E.A.D. at 264. In the past, the Board has denied review of petitions where the issues raised were outside the scope of the UIC program. *See, e.g., In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992)(denying review as beyond the scope of the SDWA and implementing regulations, where petitioner expressed only generalized concerns regarding property values).

IV. *DISCUSSION*

A. *Standard of Review*

The Board’s review of UIC permitting decisions is governed by 40 C.F.R. § 124.19. Pursuant to those regulations, a decision to issue a UIC permit will ordinarily not be reviewed unless the petitioner shows that the permit condition in question is based on: (1) a finding of fact or conclusion of law that is clearly erroneous; or (2) an exercise of discretion or an important

policy consideration that the Board should, in its discretion, review. 40 C.F.R. § 124.19(a); 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). The Board has consistently noted that its power of review should be used sparingly and that most permit conditions should be finally determined at the Regional level. *See American Soda*, slip op. at 10; *NE HUB Partners*, 7 E.A.D. at 567 (quoting *In re Federated Oil & Gas*, 6 E.A.D. 722, 725-26 (EAB 1997); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 392 (EAB 1997); *Envotech*, 6 E.A.D. at 265. The burden of demonstrating that review is warranted rests with the petitioner. *NE HUB Partners,* 7 E.A.D. at 567 (quoting *In re Federated Oil & Gas*, 6 E.A.D. 722, 725-26 (EAB 1997)); *Envotech,* 6 E.A.D. at 265; *In re Beckman Prod. Servs.,* 5 E.A.D. 10, 14 (EAB 1994).

B. *Rarey Petition*

In determining whether to grant a petition for review of a UIC permit, the Board first looks to whether the petition meets the threshold procedural requirements of the permit appeal regulations. *See* 40 C.F.R. § 124.19. One of the fundamental threshold procedural requirements is standing. Because we find that Petitioner Rarey did not have standing to file a petition for review, his petition is denied in its entirety.

In order to have standing to appeal a permit decision, the petitioner must satisfy the requirements set forth in 40 C.F.R. § 124.19(a), which can be summarized as follows:

> [A] petitioner has "standing" to pursue an appeal of the conditions of a final permit that are identical to the conditions of the draft permit only if the petitioner filed timely comments on the draft permit or participated in the public hearing on the draft permit. * * * A petitioner who failed to file timely comments on a draft permit or participate in the public hearing will only have standing to pursue an appeal to the extent that the conditions in the draft permit are changed in the final permit.

Beckman Prod. Servs., 5 E.A.D. at 16; *Envotech*, 6 E.A.D. at 266-67; *In re Avery Lake Prop. Owners Assoc.,* 4 E.A.D. 251, 253 (EAB 1992).

1. *Timing of Submission of Comments*

The regulations at 40 C.F.R. § 124.19(a) require a demonstration that "any issues being raised were raised *during* the public comment period (including any public hearing) to the extent required by these regulations * * * ." *Id*. (emphasis added). Similarly, the regulations at 40 C.F.R. § 124.13 (Obligation to raise issues and provide information during the public comment period) require all persons to "raise all reasonably ascertainable issues and submit all reasonably

available arguments supporting their position by the close of the public comment period." *Id*.

Relying, in part, on the express use of the word "during," in these regulations, the Board has consistently stated that issues must be raised during – not before or after – the period of time set aside for public comment. *See In re City of Phoenix, Ariz. Squaw Peak & Deer Valley*, NPDES Appeal No. 99-2, slip op. at 14 (EAB, Nov. 1, 2000) ("The Board has consistently construed section 124.13 as requiring that all reasonably ascertainable issues and arguments be raised *during* the public comment period to be preserved for review by the Board") (emphasis in original); *see also In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 119-21 (EAB 1997) (holding that petitioner's issue was not preserved for review where petitioner's parent company raised an issue prior to the public comment period, and no comments were received on the issue during the public comment period.).

As this Board has explained, compliance with this requirement is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final. *See In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *In re Envtl. Disposal Sys.*, 8 E.A.D. 23, 30 n.7 (EAB 1998); *Beckman Prod. Servs.*, 5 E.A.D. at 16;

Brine Disposal Well, 4 E.A.D. at 740; *Avery Lake Prop. Owners Assoc.*, 4 E.A.D. at 251; *In re Renkiewicz SWD-18*, 4 E.A.D. 61, 64 (EAB 1992).

2. *Participation in the Public Hearing*

The issue of what constitutes "participation" for purposes of 40 C.F.R. § 124.19(a) is also not a matter of first impression before the Board. As we explained in *Envotech*:

> [M]ere attendance at a public hearing is insufficient to confer standing to appeal. While a previous decision of the Board used the term "attendance" in discussing standing, that term was used in the context of differentiating between providing written comments and participating in a hearing as the two means of gaining standing to appeal. *See Beckman Production Services* at 17 n.11. Simply attending a public hearing, but not participating in the proceedings, does not provide the Region with an opportunity to consider and respond to a petitioner's specific comments on a draft permit, which is the purpose of the standing requirements of 40 C.F.R. § 124.19(a).

6 E.A.D. at 267 n.11.

3. *Petitioner Rarey's Lack of Standing*

Region V and Sunoco assert that Petitioner Rarey's comments on the draft permit were not filed until more than four months

after the close of the public comment period and, as a consequence, were untimely. *See* Region V's Response to Rarey Pet. at 3-4, 7-10; Sunoco's Response to Pet. at 8-9.

As stated previously, the public comment period ended on August 20, 2001. *See* Ex. B at July 17, 2001 Public Notice. However, Petitioner Rarey did not submit his comments on the draft permit until December 31, 2001 – more than four months after the public comment period closed. *See* Ex. H at Letter from Jim Rarey, to Thomas Skinner, Administrator, Region V (Dec. 31, 2001). As the plain language of the regulations establish, for purposes of standing, petitioners must submit comments on the draft permit *during* the public comment period. Thus, Petitioner Rarey failed to file timely comments on the draft permit, as required by 40 C.F.R. §§ 124.19 and 124.13.

Region V and Sunoco also assert that Petitioner Rarey, although present at the public hearing held on July 24, 2001, did not provide comments at that hearing and, consequently, did not "participate" in the public hearing within the meaning of section 124.19(a). *See* Region V's Response to Rarey Pet. at 3; Sunoco's Response to Pet. at 3 n.6, 8-9.

Our review of the relevant portions of the administrative

record for this matter shows that, although the public hearing registration form indicates that Petitioner Rarey was indeed present at the July 24, 2001 public hearing, *see* Ex. J, his name does not appear in the transcript of the hearing, suggesting that he did not make comments at that hearing. *See* Hearing Transcript in the Matter of Public Information Meeting/Hearing Proposed Permit for Sun Pipe Line Company ("Hearing Tr.").[6/] Petitioner Rarey has asserted in a letter to Region V that he made comments regarding (1) Sun's intent to use the same well for both disposal and recovery; and (2) Sun's decision not to pursue other alternatives to the Mt. Simon formation. However, he also states that he may have not identified himself in making these comments.[7/]

Notwithstanding Petitioner Rarey's assertions, the transcript fails to establish that he raised these issues at the public hearing. Specifically, the transcript in this matter identifies ten instances in which an unidentified speaker made

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[6/] We note that at the start of the hearing, the hearing officer specifically stated that those persons wishing to make a statement should "fill in the registration slip available at the hearing assistant's table *so that we may correctly enter your name in the hearing record*." (emphasis added). Hearing Tr. at 6.

[7/] *See* Ex. H at Letter from Jim Rarey, to Harlan Garrish, Region V UIC Section (Feb. 20, 2002) ("I asked several questions at that meeting although I may not have identified myself at the time the questions were asked.").

comments at the public hearing; none of these instances touch on the issues that Petitioner Rarey alleges that he raised at the hearing. *See* Hearing Tr. at 8, 12, 15, 24, 35, 38, 40, 50. In addition, we note that Petitioner Rarey indicated on the public hearing registration form that he did *not* wish to present oral comments at the hearing. *See* Ex. J.

Thus, based on the record, we conclude that Petitioner Rarey neither submitted written comments on the draft permit *during* the public comment period, nor *participated* in the public hearing by offering comments on the record in that forum.

Because Petitioner Rarey failed to file comments during the public comment period, and failed to participate in the public hearing on the draft permit, he may petition for review only to the extent of the changes from the draft permit to the final permit decision. *See* 40 C.F.R. § 124.19(a); *see also Beckman Prod. Servs.,* 5 E.A.D. at 16; *Envotech*, 6 E.A.D. at 266-67; *In re Avery Lake Prop. Owners Assoc.,* 4 E.A.D. 251, 253 (EAB 1992). The only changes from the draft permit to the final permit decision bear on the Waste Analysis Plan ("WAP"). *See* Permit ¶ C.3., Attach. F; Ex. D at Response to Comments at 16. Petitioner does not raise any issues regarding the WAP. Accordingly, we deny review of Mr. Rarey's petition on the

grounds that he lacks standing to pursue an appeal.

C. *Yerman Petition*

1. *Monthly Chemical Analysis*

Petitioner Yerman argues that Sun should be required to perform a chemical analysis for the brine extracted from Mt. Simon on a daily basis, rather than on a monthly basis. *See* Yerman Petition at 1-2. Region V argues that the Board should deny review of this issue because Petitioner Yerman has neither cited to any regulations that require daily analysis, nor demonstrated that the permit condition in question is not sufficiently protective. *See* Region V's Response to Yerman Pet. at 9.

Indeed, Petitioner Yerman provides no discussion whatsoever as to why Region V's response to her objections is erroneous or otherwise warrants review. It is not sufficient for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review. *Envotech*, 6 E.A.D. at 268. Moreover, Petitioner has neither

identified regulations that would require Region V to conduct daily chemical analysis, nor offered a basis for the Board to conclude that monthly chemical analysis is not sufficiently protective. *See American Soda*, slip op. at 31 (denying review where petitioner failed to identify regulations that would require the Region to act as the petitioner urged, and failed to provide compelling justification for the Board to conclude that the permit, as written, was not sufficiently protective).

In any event, as Sunoco points out, the UIC regulations provide EPA with the discretion to determine precisely how much sampling should be required in a specific situation. *See* 40 C.F.R. § 146.13(b); Sunoco's Response to Pet. at 19. Moreover, the Board typically gives deference to the Agency's discretion regarding the amount of sampling necessary to yield "representative data" of injected wastes. *See American Soda*, slip op. at 29; *In re Envtl. Disposal Sys. Inc.*, 8 E.A.D. 23, 30-32 (EAB 1998); NE Hub, 7 E.A.D. at 581-82. Accordingly, the Board denies review of this issue.

2. *Written Reports to the Director of Permit Non-Compliance*

Petitioner Yerman also argues that the Permit should specifically state that Sun must provide written reports of any Permit non-compliance to the Director. Yerman Petition at 2.

Petitioner Yerman's assertion that there is ambiguity with respect to whom written reports of Permit non-compliance must be sent is based on the following provisions of the Permit:

> (1) The permittee shall report to the Director any permit non-compliance which may endanger human health or the environment. * * * Any information shall be provided orally within twenty-four (24) hours from the time the permittee becomes aware of the circumstances.
> * * * *
> (2) A written submission shall also be provided within five (5) working days of the time the permittee becomes aware of the circumstances.

Permit ¶ E.12(d)(1). Because paragraph (1) states that oral reports should be provided to the Director, and paragraph (2) does not contain those same words, Petitioner Yerman suggests that the language, "which should be addressed to the Director," should be added to paragraph (2). We agree that the written report should also be sent to the Director. We think, however, that this is the clear intent of the section and, accordingly, there is no need to revise the permit to achieve that result.

Review of this issue is therefore denied.[8/]

3. *Certification to the Director*

According to Petitioner Yerman, Sun should also be required to certify to the Director that it has read and is personally familiar with all terms and *revised* conditions of the Permit. Yerman Petition at 3-4.

The Permit currently requires Sun to certify to the Director that it "has read and is personally familiar with all terms and conditions of the Permit." *See* Permit ¶ E.12.(D)(2)(g). Therefore, it appears that Petitioner Yerman seeks to have the term "revised" inserted before the phrase "conditions of the Permit." However, since a revised permit condition is, nevertheless, a permit condition to which Sun's obligation to certify applies, Petitioner's suggested language is surplusage and, accordingly, we deny review.

[8/] We note that there are numerous other reporting requirements, and invariably, the Director is designated as the recipient. Thus, Region V's failure to do so here is, at most, a harmless oversight.

4. *NAFTA Chapter 11*

Petitioner Yerman asserts that Region V should include permit language that requires Sun to protect the taxpayers of Michigan from a NAFTA Chapter 11 Investment Provision lawsuit. *See* Yerman Petition at 4-8.[9/] Both Region V and Sunoco argue that (1) matters relating to private property are not a basis for Board review of a UIC permit; and (2) as a matter of law, the issuance of a UIC permit does not implicate property rights. *See* Region V's Response to Yerman Pet. at 10-12; Sunoco's Response to Pet. at 20-21.

As previously stated, the UIC permitting process is limited in its focus: the statute and the UIC regulations establish the

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[9/] Petitioner's concern appears to be that in the event that EDS' well contaminates Sun's well, and Region V revises either of their permits in a manner that imposes a financial burden, either company may initiate a "takings" action or, through an international affiliate, bring a NAFTA Chapter 11 Investment Provision lawsuit against the State of Michigan, alleging that Michigan's actions were "tantamount to expropriation." *See* Yerman Petition at 5-8. NAFTA's Chapter 11 investment provisions require governments to compensate international investors if a governmental action is "tantamount to expropriation" of the company's assets. Chapter 11 does not exempt environmental laws and regulations from its definition of expropriation. *See e.g.*, *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1) (8/30/00) (A NAFTA tribunal ruled that Metalclad must be compensated $16.7 million because of the local Mexican government's refusal to allow the company to build a hazardous waste facility in what Mexican authorities determined is an environmentally sensitive location.).

only criteria a Region may use in deciding whether to issue a UIC permit. *See American Soda*, slip op. at 13. Accordingly, "the Board has denied petitions for review of UIC permits when the concerns raised were outside the scope of the UIC program as established by statute and regulation." *NE Hub,* 7 E.A.D. at 567; *see also Federated Oil & Gas,* 6 E.A.D. at 725-26; *Terra Energy*, 4 E.A.D. at 161 n.6.

The SDWA and the UIC regulations are designed to protect underground sources of drinking water. *See generally* SDWA, 42 U.S.C. § 300f to 300j-26; 40 C.F.R. parts 124, 144, 146, and 147. Neither the statute nor the implementing regulations authorize EPA to regulate property rights. The Board has previously held that matters relating to private property are not a basis for EAB review of a UIC permit. *See* Federated Oil & Gas, 6 E.A.D. at 726 ("Petitioners' arguments based on the terms of [a property lease agreement] are beyond the scope of the UIC permitting process and beyond the limits of this Board's permit review authority."); *Envotech*, 6 E.A.D. at 276 ("Because the regulations make clear that issuance of a UIC permit does not implicate private property rights, these arguments are beyond the scope of the permitting process and Board review."); *Brine Disposal Well*, 4 E.A.D. at 741 ("the Agency has no authority to deny a UIC permit based on an alleged possibility of subsurface trespass under State law");

Suckla Farms, 4 E.A.D. at 695 ("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. These disputes properly belong in a court of competent jurisdiction."). Consistent with these decisions, we find that NAFTA property rights and takings are not within the scope of the SDWA or the implementing regulations and, accordingly, are outside the Board's jurisdiction to review. Accordingly, we deny review of this issue.

5. *Romulus Public Library's Disposal of Permit*

Petitioner Yerman, citing a letter from Region V to the Romulus Public Library, contends that it is error for Region V to advise the Romulus Public Library, which acted as a repository for documents related to the Permit during the public comment period, to dispose of a copy of the final Permit after 90 days. *See* Yerman Petition at 10; Letter from Valerie J. Jones, Chief, U.S. EPA Region V UIC Branch, to Romulus Public Library (Mar. 5, 2002).

Region V and Sunoco argue that the letter providing for the Romulus Public Library's disposal of a copy of the Final Permit

is not integral to a specific permit term and, thus, Petitioner Yerman is not challenging a permit condition, as required by section 124.19. *See* Region V's Response to Yerman Pet. at 13; Sunoco's Response to Pet. at 21 n.25.

The regulations at 40 C.F.R. § 124.19 provide that:

> [A]ny person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision.

Id. Consistent with section 124.19, the Board has stated that a Petitioner's failure to identify a specific term that is claimed to be erroneous is fatal to his or her claim. *See In re Puna Geothermal*, UIC Appeal Nos. 99-2 – 99-5, slip op. at 47 (EAB, June 27, 2000)("[A]s [petitioner's] concern does not challenge the validity of any particular provision of the * * * permit, it fails to satisfy a basic prerequisite for obtaining board review under 40 C.F.R. § 124.19, namely, the identification of a specific term that is claimed to be erroneous."); *Federated Oil & Gas*, 6 E.A.D. at 730. We agree with Region V and Sunoco that this issue does not involve a challenge to a condition of the Permit and, thus, we deny review of this issue.[10/]

[10/] We do not mean to suggest that all matters outside the confines of permit conditions are not reviewable. The Board also has authority to (continued...)

6. *Typographical Error in Internet Version of Permit*

Petitioner Yerman also challenges the Permit on the basis that the version that was posted on the Internet contained an incorrect expiration date. *See* Yerman Petition at 8-9. However, as Region V argues, the Internet publication was not integral to the Permit's terms and, accordingly, the incorrect expiration date on the Internet cannot serve as a basis for Board review. *See* Region V's Response to Yerman Pet. at 13; *see also Envtl. Disposal Sys.*, slip op. at 26, *citing Federated Oil & Gas*, 6 E.A.D. at 730. In addition, this issue is moot because the error was a minor administrative one that has now been corrected. For the foregoing reasons, we deny review of this issue.

7. *FOIA Request*

Finally, Petitioner Yerman requests, pursuant to FOIA, a

[10/](...continued)
review a permit issuer's alleged failure to comply with procedural requirements in part 124. *See e.g., In re RockGen Energy Ctr.*, 8 E.A.D. 536, 557 (EAB 1999) (remanding permit determination to ensure that the permit issuer complies with the requirement to give adequate and timely consideration to public comments); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 693, 710-11 (EAB 1996) (remanding permit determination and requiring that state permit-issuing authority comply with permit decision process under part 124). However, with respect to this issue, Petitioner Yerman does not allege that Region V failed to comply with the procedural requirements found in part 124, nor has she cited any other regulatory basis for her objection.

letter referenced in the Region's Response to Comments Document. *See* Yerman Petition at 8; Ex. D at Response to Comment 53.

At the outset, we note that a permit appeal is not the appropriate vehicle for making a FOIA request. EPA's FOIA regulations at 40 C.F.R. § 2.106 identify the locations and FOIA Officers to whom requests for Agency records should be sent. As section 2.106(b)(5) explains, the Agency cannot assure that a timely or satisfactory response will be given to written requests that are not addressed to the appropriate EPA offices, officers, or employees. Moreover, Petitioner Yerman's FOIA request is not a challenge to a permit condition, as required by section 124.19. *See* 40 C.F.R. § 124.19; *Puna Geothermal*, slip op. at 47; *Federated Oil & Gas*, 6 E.A.D. at 730.

Nevertheless, Region V responded to Petitioner Yerman's FOIA request by sending a copy of the requested letter to her, as well as including a copy of the letter in its Response to her Petition for Review. *See* Region V's Response to Yerman Pet. at 12; Ex. F. Accordingly, we deny review of this issue.

V. *CONCLUSION*

For all the foregoing reasons, the petitions for review of

Sandra K. Yerman and Jim Rarey are hereby denied.

So ordered.[11/]

ENVIRONMENTAL APPEALS BOARD

By: /s/
Edward E. Reich
Environmental Appeals Judge

Dated: July 11, 2002

[11/] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1) (2001).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of Sun Pipe Line Company, UIC Appeal No. 02-01, were sent to the following persons in the manner indicated:

By Certified Mail
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Dated: July 11, 2002

/s/
Mildred T. Johnson
Staff Assistant