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

In re:	)	
MCN Oil and Gas Company	)	UIC Appeal No. 02-03
Permit No. MI-009-2D-165	)	

ORDER DENYING REVIEW

I. *INTRODUCTION*

Petitioner, Shelby Ziegler, a resident of Antrim County, Michigan, filed a petition for review of the U.S. EPA Region V's ("the Region") decision to issue an Underground Injection Control ("UIC")[1] permit to MCN Oil and Gas Company ("MCN") authorizing the construction and operation of a Class II nonhazardous waste injection well[2] in Antrim County. Petitioner generally asserts

[1] UIC is the Underground Injection Control program under Part C of the Safe Drinking Water Act at 42 U.S.C. §§ 300h *et seq.*, and implemented at 40 C.F.R. parts 144-149.

[2] Under 40 C.F.R. § 144.6, injection wells fall into five (continued...)

that the permit decision is based on insufficient information and factual errors, and that the Region failed to adhere to the public notice requirements of 40 C.F.R. § 124.10. *See* Appeal of the U.S. EPA Region 5 Decision to Issue Final Underground Injection Control ("UIC") Permit #MI-009-2D-165, Schroeder #15-10 SWD ("Petition") (Mar. 8, 2002).

For the reasons set forth below, the petition is denied in its entirety.

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[2](...continued)
classes depending on the material being injected into the well. Class II wells, the pertinent class here, are used to inject fluids in connection with natural gas storage operations, conventional oil or natural gas production, oil or natural gas recovery, and storage of hydrocarbons. *See* 40 C.F.R. § 144.6(b).

II. *BACKGROUND*

A. *Statutory and Regulatory Framework*

The regulations governing underground injection wells[3] are found in 40 C.F.R. parts 144 to 149. The standards contained therein were promulgated pursuant to Part C of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h-300h-8, which directed the Administrator to promulgate regulations for state underground injection control programs for the protection of underground sources of drinking water ("USDW").[4] 42 U.S.C. § 300h(a). The

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[3] The regulations define "underground injection" as "well injection." 40 C.F.R. § 144.3. The term "well injection" is defined as "the subsurface emplacement of fluids through a well." *Id*. The regulations further define the term "well" as "[a] bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, a dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or, a surface fluid distribution system." *Id*.

[4] 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 system; and
> (i) Currently supplies drinking water for human consumption; or
> (ii) Contains fewer than 10,000 mg/l total dissolved solids; and

(continued...)

protections established by the SDWA and its implementing regulations focus exclusively on groundwater that is or may be a source of drinking water.[5] Part C, for instance, requires underground injection programs to contain "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b)(1).

EPA administers the program in those states that are not yet authorized to administer their own UIC programs. *See* 42 U.S.C. § 300h-1(c). EPA remains the permitting authority of the UIC program in the State of Michigan. 40 C.F.R. § 147.1151.

The UIC permitting process has been described as narrow in its focus. *In re American Soda, LLP*, UIC Appeal Nos. 00-1 & 00-2, slip op. at 13 (EAB, June 30, 2000), 9 E.A.D. __. The Board

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[4](...continued)

(b)Which is not an exempted aquifer.

40 C.F.R. § 144.3.

[5] More specifically, the SDWA focuses on the protection of *underground water* "that supplies or can reasonably be expected to supply any public water system". 42 U.S.C. § 300h(d)(2). *See In re NE Hub Partners, L.P.*, 7 E.A.D. 561 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999); *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996); *In re Brine Disposal Well*, 4 E.A.D. 736, 742 (EAB 1993).

has stated on several occasions 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. *Id.* at 9; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999); *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996); *In re Brine Disposal Well*, 4 E.A.D. 736, 742 (EAB 1993); *In re Terra Energy Ltd.*, 4 E.A.D. 159 (EAB 1992). As the Board has previously explained:

> The Safe Water Drinking Act and implementing criteria and standards are designed to assure that no contaminant in an underground source of drinking water causes a violation of a primary water regulation or otherwise affects the health of persons. * * * *A permit condition or denial is appropriate only as necessary to implement these statutory and regulatory requirements* * * *.

Envotech, 6 E.A.D. at 264 (emphasis in original); *see also Brine Disposal*, 4 E.A.D. at 742; *Terra Energy*, 4 E.A.D. at 161 n.6. Therefore, the Board is authorized to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable UIC regulations. *See Envotech*, 6 E.A.D. at 264.

When petitioners in other cases have raised concerns outside the scope of the UIC program, the Board has denied review of those petitions. *See, e.g., NE Hub Partners*, 7 E.A.D. at 567.

B. *Factual and Procedural Background*

In August 2001, MCN submitted an application for a UIC permit to construct and operate a nonhazardous waste brine injection well (Class II) in Antrim County. Administrative Record ("A.R.") (Application for UIC Permit dated 8/28/01); Region's Response Exhibit ("Res. Ex.") K. On January 7, 2002, Region V issued a draft permit for MCN's Class II well and issued a public notice of the draft permit providing a 30-day comment period starting on January 14, 2002. Res. Ex. B (Public Notice). Some local property owners, including Petitioner, submitted comments on the draft permit. A.R. (Comments on draft permit: Mr. Shelby J. Ziegler 1/21/01; Ms. Virginia V. Vance 2/11/01; Mr. James Petrie 2/05/01); Res. Ex. K. On February 21, 2002, the Region issued the permit to MCN and served notice of its permit decision along with its response to comments. *See* A.R. (Response to comment letter and notification to commentor of the issuance

of the final permit dated 2/11/01 & 2/21/01); Res. Ex. K. Mr. Shelby J. Ziegler filed a petition dated March 8, 2002, under 40 C.F.R. § 124.19, seeking Board review of the Region's permit decision. The Region filed its response with the Board on May 17, 2002. U.S. EPA's Response to Petition for Review ("Region's Response").

C. *The Petition*

Petitioner's basic contentions on appeal are that the permit decision is based on insufficient information and factual errors, and that the Region failed to adhere to the public notice requirements of 40 C.F.R. section 124.10. In explaining why he believes the permit decision is based on insufficient information and factual errors, Petitioner raises the following arguments: (1) the Region did not adequately consider the impact of the proposed well on the water in the surrounding watershed in light of the fractured nature of the local geology, which poses a risk of contamination of injected fluids into surface water and USDW;[6] (2) MCN failed to address the presence of an inactive oil

[6] Petition at 2.

production well on Petitioner's property as part of its required research on the area of review surrounding the injection zone;[7] and (3) the Region appeared to rely on data supplied solely by the permittee and from previously permitted wells in "contradiction" of 40 C.F.R. section 144.31, which requires that the completeness of a permit application be judged independently of the status of any other permit application or permit for the same facility or activity.[8]

Petitioner also challenges the Region's response to comments by alleging that the Region inappropriately indicated that the Michigan Department of Environmental Quality ("MDEQ"), rather than the Region, was responsible for the surface facility's location and impact on surface water and the watershed in general. Petition at 2-3.

Finally, Petitioner asserts that the Region did not comply with the public notice requirements of 40 C.F.R. section 124.10. *Id.* at 3. According to Petitioner, to the best of his knowledge,

[7] *Id.*

[8] *Id.* at 3.

the Region failed to include participants from past permit proceedings in its mailing list for this particular proceeding, and failed to use the public press to notify the public of its opportunity to be on the mailing list. *Id.* Petitioner also asserts that the Region failed to give notice of the proceeding to the Antrim Conservation District, which, according to Petitioner, is a local government unit with jurisdiction over the area where the underground injection facility is to be located. *Id.* at 3-4.

III. *DISCUSSION*

A. *Standard of Review*

The Board's jurisdiction to review UIC permit decisions is set forth in 40 C.F.R. § 124.19. In appeals under 40 C.F.R. § 124.19(a), the Board will not grant review unless it appears from the petition that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board should review in its discretion. 40

C.F.R. § 124.19(a); *see In re American Soda, LLP*, UIC Appeal Nos. 00-1 & 00-2, slip op. at 10 (EAB, June 30, 2000), 9 E.A.D. __; *In re Puna Geothermal Venture*, UIC Appeal Nos. 99-2, 99-2A, 99-2B, 99-3, 99-4 & 99-5, slip. op. at 5 (EAB, June 27, 2000), 9 E.A.D. __. While the Board has broad power to review decisions under section 124.19, it exercises such authority sparingly, recognizing that Agency policy favors final adjudication of most permits at the Regional level. 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see American Soda,* slip op. at 10, 9 E.A.D. __; *Puna Geothermal*, slip. op. at 5, 9 E.A.D. __; *In re Jett Black, Inc.,* 8 E.A.D. 353, 358 (EAB 1999), *appeal docketed sub nom. Levine v. EPA* (6th Cir. Mar. 9, 2001). On appeal to the Board, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(1)-(2); *see American Soda,* slip op. at 10, 9 E.A.D. __; *Puna Geothermal*, slip. op. at 6, 9 E.A.D. __; *Jett Black,* 8 E.A.D. at 358.

Before addressing the merits of the petition, we need to first determine whether the Petitioner has complied with the threshold procedural requirements of 40 C.F.R. part 124.

B. *Threshold Requirements*

Standing to appeal a final permit determination is limited under 124.19 to those persons who participated in the permit process leading up to the permit decision, either by filing comments on the draft permit or by participating in the public hearing.[9] 40 C.F.R. § 124.19(a). A person who failed to either file comments or participate in the public hearing on the draft permit may appeal only to the extent that there have been changes from the draft to the final permit decision. *Id.* *See In re American Soda, LLP*, UIC Appeal Nos. 00-1 & 00-2, slip op. at 12 (EAB, June 30, 2000), 9 E.A.D. __; *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996); *In re Beckman Prod. Serv.*, 5 E.A.D. 10, 16 (EAB 1994). It is undisputed that Petitioner filed comments on the draft permit and, thus, has standing to pursue an appeal.

This being said, a petitioner with standing may only raise issues that have been preserved for review. That is, a petitioner seeking review must demonstrate to the Board that any issues raised in the petition were raised during the public

[9] No public hearing was held in this case.

comment period except to the extent that the issues were not reasonably ascertainable during the comment period. 40 C.F.R. § 124.19(a); *see In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip. op. at 10 (EAB, July 27, 2001), 10 E.A.D. __; *In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal No. 99-2, slip op. at 14 (EAB, Nov. 1, 2000), 9 E.A.D. __, *appeal dismissed per stipulation*, No. 01-70263 (9th Cir. Mar. 21, 2002).

More particularly, issues raised on appeal must have been presented during the comment period in a manner that conforms to the requirements of section 124.13. *City of Moscow*, slip. op. at 10, 10 E.A.D. __; *City of Phoenix*, slip op. at 15, 9 E.A.D. __. Under 40 C.F.R. § 124.13, "[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period * * *." 40 C.F.R. § 124.13. *See In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999), *appeal docketed sub nom. Levine v. EPA* (6th Cir. Mar. 9, 2001); *In re Envtl. Disposal Sys., Inc.*, 8 E.A.D. 23, 30 n.7 (EAB

1998); *In re Brine Disposal Well,* 4 E.A.D. 736, 740 (EAB 1993). Therefore, only those issues and arguments raised during the comment period can form the basis for an appeal to the Board, except to the extent that issues or arguments were not reasonably ascertainable at the time of the comment period. *In re New England Plating,* NPDES Appeal No. 00-7, slip op. at 8, (EAB, Mar. 29, 2001), 9 E.A.D. __; *Jett Black,* 8 E.A.D. at 358. The Board has consistently declined to review issues or arguments in petitions that fail to satisfy this basic requirement. *City of Phoenix*, slip op. at 15, 9 E.A.D. __; *see In re Rockgen Energy Ctr.*, 8 E.A.D. 536 (EAB 1999).

In addition, in evaluating whether to review an issue on appeal, this Board has frequently emphasized that the issue to be reviewed must have been *specifically raised* during the comment period. *New England Plating,* slip op. at 9, 9 E.A.D. __; *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 95 (EAB, June 22, 2000), 9 E.A.D. __; *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998). On this basis, we have often denied review of

issues raised on appeal that were not raised with the requisite specificity during the public comment period.[10]

Adherence to this principle is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the Agency's longstanding policy that most permit issues should be resolved at the Regional level, and to provide predictability and finality to the permitting process. *New England Plating,* slip op. at 10, 9 E.A.D. __; *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999) ("The intent of these rules is to ensure that

[10] *See, e.g., New England Plating*, slip op. at 9, 9 E.A.D. __ (denying review on the basis that a comment regarding inability to meet permit limitation and request for a lower limit does not encompass request for a delayed effective date); *Maui*, 8 E.A.D. at 9-12 (comments raising general issue of whether particular fuel was obtainable from fuel suppliers were not sufficient to preserve objection on appeal that, in a prior decision, the permit issuer determined this fuel was "available" for purposes of determining the best available control technology under the Clean Air Act new source review program); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995) (denying review on the basis that a comment regarding one aspect of testing sludge was not sufficient to preserve for appeal the question of legal authority to require any sludge testing); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992) (denying review because comments on two aspects of testing requirement in permit were not sufficient to raise, on appeal, general objection to any testing requirement).

the permitting authority * * * has the first opportunity to address any objections to the permit, and the permit process will have some finality."). As we stated in *Encogen*, the 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 Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999).

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

C. *Insufficient Information and Factual Errors*

As previously noted, Petitioner asserts on appeal that the permit decision is based on insufficient information and factual errors. In support of this assertion Petitioner raises three arguments. *See supra* Section II.C. In short, Petitioner asserts that the Region failed to consider important aspects of the local geology, that the permittee failed to address the presence of an inactive oil production well located on Petitioner's property,

and that the Region erred in relying on data supplied by the permit applicant and MDEQ.[11]

Upon review, we find that the specific issue of the permit decision being based on insufficient information and factual error and the supporting arguments Petitioner now raises on appeal were not raised by Petitioner in his comment on the draft permit. We also note that neither Petitioner nor the record before us indicate that these concerns were raised by another commentor during the public comment period.

In the instant case, the only comment raised by Petitioner during the comment period was his concern that the proposed injection well was going to be located too close to certain water sources, jeopardizing wildlife and drinking water. A.R. (Letter dated 1/21/2001, from Mr. Shelby J. Ziegler to Ms. Lisa Perenchio ("Comment on draft permit")); Res. Ex. C. Petitioner's comment letter reads in relevant part:

> I feel this [referring to placement of well at 1300 feet below surface water] will cause alot [sic] of wild

[11] *See supra* Section II.C and accompanying notes 6-8.

> & human life (drinking water) to be jeopardized. This is too close to all this mass amt. of waterway with springs all over bubbling up from the ground. * * *
>
> I feel this kind of well should be put on dry ground so as not to contaminate the water supplies.
>
> * * * *

Id.

The Region responded to Petitioner's concerns by clarifying that the well was going to be located at a total depth of 1535 feet ("ft") below ground surface, as opposed to 1300 ft as believed by Petitioner.[12] The Region also explained the correlation between the proposed injection well and the closest USDW.[13] In addition, the Region explained that the well was to be constructed and operated so as to confine the injected fluids and prevent migration into and between USDWs.[14]

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[12] A.R. (Letter dated 2/2/2001, from Ms. Lisa Perenchio to Mr. Shelby J. Ziegler ("Response to Comment Letter")); Res. Ex. D ("[T]he well will be drilled to a total depth of 1535 feet below ground surface into the Dundee Limestone.").

[13] *Id.* ("The base of the lowest USDW has been identified at a depth of 1100 feet below ground surface and is separated from the top of the Dundee injection zone by approximately 1210 feet of sedimentary rock strata.").

[14] The Region specifically explained:

(continued...)

The Region's response to comments also indicated that the Region consulted with the United States Fish and Wildlife Service ("USFWS") regarding any listed or possible threatened or endangered species in the vicinity of the proposed underground

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[14](...continued)

> All casing strings will be adequately cemented to preclude the movement of fluids into and between USDWs due to injection operations.
>
> As additional protection, injection will take place through tubing which is set within the steel casing. A packer will be set at the bottom of the tubing to seal off the space between the casing and the tubing, which will be filled with a liquid mixture containing a corrosion inhibitor. This will allow the pressure in the space to be monitored. The pressure in the space between the tubing and casing will be monitored and tested initially after the completion of the well to ensure that the well has mechanical integrity. If a well should fail a mechanical integrity demonstration, it will be shut down immediately. Any work performed on the well which requires the moving or removal of the tubing or packer must be followed by a mechanical integrity test before authorization to resume injection will be given. The injection pressure and flow rate will be monitored by MCN & Gas Company and the test data will be submitted to our office for review to ensure safe operation of the well. The injection pressure limitation will ensure that the injection operation does not fracture the formation and allow fluids to possibly move into any drinking water source.

Id. at 2.

injection well,[15] and that the USFWS replied that there are no listed or proposed species occurring within the area of the well. A.R. (Letter dated 2/2/2001, from Ms. Lisa Perenchio to Mr. Shelby J. Ziegler ("Response to Comment Letter")); Res. Ex. D at 2.

On appeal, when explaining his belief that a more detailed technical evaluation is required to assess the impacts on his property and the watershed neighboring the proposed area of injection, Petitioner, in a fairly detailed manner, explains the complexity of the geology of the area, and why he believes the mechanisms and controls to be implemented by MCN will not be sufficient to avoid migration.[16] However, as previously noted,

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[15] The UIC regulations require consideration of other federal laws that may be implicated by a proposed injection well operation. These include: the Wild and Scenic Rivers Act, the National Historic Preservation Act of 1966, the Endangered Species Act, the Coastal Zone Management Act, and the Fish and Wildlife Coordination Act. *See* 40 C.F.R. § 144.4.

[16] Petitioner explains:

> [The proposed well will be located in] an area of the country that has some rather unique geology. The subject well is located near the divide between the Little Traverse Bay and the Grand Traverse Bay Watersheds. Researchers at the Michigan State University have performed extensive geologic studies

(continued...)

this specific argument and the explanations provided on appeal were simply not raised during the public comment period. Rather, during the comment period Petitioner focused generally on the

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[16](...continued)
related to groundwater modeling in several areas, including the Grand Traverse Bay Watersheds. The geologic history of the watershed is described as "rich and complex" in that the last glacial advance carved deep valleys into the shale and limestone bedrock, in which both gas production and UIC wells are located, and deposited enormous sediment accumulations. Sediment characteristics vary widely across the watershed, changing from thick clays to coarse grained moraines within a space of one hundred meters. Bedrock elevation maps also depict wide variations.

While shale is impermeable, it is also prone to fractures, through which fluids can quickly move, even with the controls on UIC wells described in the Region's letter. With the wide variation in bedrock elevations and with the tendency for fracturing in shale, injected fluids could move through fractures to the surface, impacting surface water and/or underground sources of drinking water (USDWs). Injection fluids may also migrate upward through the shale. The limestone layer above the shale is expected to laterally divert the fluids in such a case, but without hydraulic conductivity and hydraulic gradient data, such lateral movement can't be confirmed. Localized confining layers (e.g.[,] clay sediment deposits) can facilitate upward movement of fluids, as in the case with artesian wells. Shale layers above limestone pose the same concern as with regard to fracturing. With this in mind, it is unclear whether gas recovery activities in the Antrim shale have been evaluated to determine hydraulic effects on adjacent formations.

Petition at 1-2.

fact that the projected injection well was too close to certain drinking water sources and wildlife.

Under certain circumstances an issue that was not raised during the comment period may be raised on appeal. As previously explained, if an issue was not reasonably ascertainable at the time of the comment period it can be raised on appeal for the first time. *See* 40 C.F.R. § 124.13.

The record here shows, however, that the issue of the permit allegedly being based on insufficient information and factual errors was reasonably ascertainable during the comment period. Similarly, Petitioner's arguments regarding the Region's purported failure to consider certain aspects of the local geology, MCN's purported failure to address in its application an inactive oil production well located within the area of review surrounding the injection zone, and the Region's reliance on MCN's and MDEQ's data, were all reasonably available upon issuance of the draft permit. The permit application, available during the public comment period, contains a portion that specifically deals with the geology of the confining area where

the injection well is to be located. *See* Res. Ex. F (EPA Permit Application Schroeder #15-10 SWD). Thus, any specific arguments challenging the Region's assumptions regarding the geology of the area should have been raised below. We note in this regard that Petitioner has not suggested that his arguments relating to local geology were based on new information unavailable during the public comment period. In addition, the inactive oil production well, which, according to Petitioner, MCN failed to consider in its analysis, is located on Petitioner's property. Thus, it is appropriate to charge Petitioner with the obligation to provide information relating to the inactive production well during the comment period. *See* 40 C.F.R. § 124.13 (obligation to raise issues and provide information during the public comment period). Also, any concerns about the quality, reliability, or origin of the data considered by the Region should have been raised during the comment period given that such data were available for public scrutiny at the time.

Furthermore, in terms of Petitioner's concern regarding the Region's reliance on applicant data, the standards applicable to Class II wells, at 40 C.F.R. §§ 146.21-.24, require EPA to

specifically consider information submitted by the applicant, which in turn is required to include information of public record.[17] *See* 40 C.F.R. § 146.24 (information to be considered by the Director -- "[o]nly information of public record and pertinent information known to the applicant is required * * *."). Therefore, knowing that UIC permit decisions are, by definition, based in part on data provided by the applicant,[18] it is reasonable to expect that any challenges to the Region's reliance on applicant data be made during the comment period.[19]

In sum, the issue on appeal that the permit decision is based on insufficient information and factual errors and its

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[17] In its response to the Petition, the Region indicates that both the applicant and the Region relied on information provided by MDEQ as part of the public record. Region's Response at 9.

[18] Petitioners are charged with knowledge of the regulations. *In re New England Plating,* NPDES Appeal No. 00-7, slip op. at 15, (EAB, Mar. 29, 2001), 9 E.A.D. __.

[19] Moreover, to the extent that Petitioner's argument could be interpreted as a challenge to the validity of section 146.24, we will not entertain it. A permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them. *In re City of Port St. Joe*, 7 E.A.D. 275, 286-87 (EAB 1997); *accord In re Suckla Farms, Inc.*, 4 E.A.D. 686, 699 (EAB 1993); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991).

supporting arguments cannot be raised on appeal for the first time for the issue was not preserved for review. Petitioner's general comments during the comment period about the proximity of the well to wildlife and drinking water sources are simply not specific enough to preserve for review the more specific issues he seeks to challenge now. As we have stated in other cases, to allow Petitioner to raise this issue at this stage would undermine the important policy of providing for efficiency, predictability, and finality in the permit process achieved by giving the permit issuer the opportunity of being the first to address any objections to the permit. *See, e.g., In re New England Plating,* NPDES Appeal No. 00-7, slip op. at 16, (EAB, Mar. 29, 2001), 9 E.A.D. __; *see also In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999). Therefore, we decline to review this issue.

We note further that Petitioner's assertions on appeal are conclusory and unsupported.[20] Indeed, Petitioner indicates that

[20] In addition to Petitioner's assertions being unsupported, the Region's scope of review under the UIC regulatory program is (continued...)

the concerns about the impact of the proposed well on the surrounding watershed are based on "in-depth knowledge of [his] property, which is adjacent to the property in question, [his] familiarity with the general watershed area, and the quality of the technical review conducted by the Region." Petition at 1. Notably, Petitioner cites no other support to substantiate his assertions. Such support is, nonetheless, necessary to satisfy Petitioner's burden to establish that the Region committed clear error of fact or law.[21]

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[20](...continued)
limited in nature and, as explained below, *see* discussion *infra* Section III.D, does not extend to surface waters.

[21] In this regard, the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are technical in nature. *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 10 (EAB, Feb. 26, 2001), 9 E.A.D. __; *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). Basically, when presented with technical issues, we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. *NE Hub Partners, L.P.*, 7 E.A.D. at 568. If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the Region's position. *Id.* Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the alternative theory is
(continued...)

D. *Region's Response to Comments*

On appeal, Petitioner also challenges the Region's response to comments by alleging that the Region erred in informing Petitioner that any concerns pertaining to the location of the injection well and the potential impact on Petitioner's property and adjacent watersheds were to be addressed with MDEQ. Petition at 2 ("I am * * * concerned about the apparent policy of the

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[21](...continued)
unsubstantiated. *Town of Ashland*, slip op. at 10, 9 E.A.D. __ (citing *NE Hub Partners, L.P.*, 7 E.A.D. at 567).

In the instant case, the Region's response to comments adequately addressed Petitioner's comments by responding to the specific concerns raised by Petitioner during the comment period. Petitioner's comments concerned the location of the injection well and the potential impact on adjacent water sources and wildlife, and the Region's response explained, inter alia, the mechanisms to be implemented by permittee to prevent migration of injected fluids into adjacent water sources, as well as the steps taken by the Region to find out about any possible or threatened endangered species in the vicinity of the proposed area of injection. Petitioner makes no attempt to explain why the Region's response is inadequate, as it is required to do. *See id.* at 11 ("When the Region has responded to objections made by the petitioner, a petitioner must 'demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review.'") (citing *In re Envotech*, L.P., 6 E.A.D. 260, 268 (EAB 1996). *See also, In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997). Absent any evidence in the record that the data on which the Region based its permit decision are erroneous, we are left with a record that is generally supportive of the Region's decision. We therefore would, in any event, decline to second-guess the Region's technical judgment in this matter.

Region to rely on the MDEQ programs to address impacts of injection well surface facilities."). Petitioner raises three arguments in support of his challenge.[22] According to Petitioner, the Region has a role in setting the location of the

[22] Petitioner sets forth his arguments as follows:

- 40 CFR [§] 146.22(a) states "all Class II wells shall be sited in such fashion that they inject into a formation which is separated from any USDW by a confining zone that is free of known open faults or fractures within the area of review." This would suggest U.S. EPA has a role in the siting of surface facilities.

- Information requirements for permit applications (40 CFR [§] 144.31) and information to be considered (40 CFR [§] 146.24) both suggest U.S. EPA consider impacts beyond the actual activities. While the goal of the UIC program is to protect USDWs, it also needs to consider impacts to surface water when those impacts may also affect USDWs. Given the close relationship between shallow USDW's and surface water, impacts to the latter need to be considered. The Environmental Impact Assessment form utilized by [M]DEQ for injection wells is not sufficient to address the required considerations.

- MDEQ's poor environmental track record has become a state and national issue. * * * Given the current state of Michigan's environmental program, I find it disconcerting that Regional representatives would rely on DEQ to address requirements for which U.S. EPA is the responsible entity.

Petition at 3.

proposed well, which derives from 40 C.F.R. § 146.22(a). Petition at 3. Petitioner also claims that by not addressing the impact of the proposed injection well on the neighboring surface waters, the Region ignored the impact of those surface waters on USDWs. *Id.* Finally, in Petitioner's view, the Region should not rely on MDEQ to deal with location and surface water issues because MDEQ allegedly has a "poor environmental track record." *Id.* Petitioner further indicates that he found the Region's response dismissive and greatly disturbing. *Id.*

Upon review, we find that the Region did not clearly err in informing Petitioner that he should contact MDEQ to discuss Petitioner's specific concerns about the location of the well and its potential impact on Petitioner's property and neighboring

watersheds,[23] and conclude that Petitioner's challenge does not warrant review.

As we have previously explained, neither the SDWA nor the UIC regulations authorize EPA to review a permit applicant's decision to use underground injection as a disposal method, or its selection of a proposed well site, except as this decision may affect a well's compliance with the SDWA and applicable UIC regulations. *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996). In this vein, we have further stated that with respect to UIC permit appeals, the Board will only review permit conditions claimed to violate the requirements of the SDWA or of the

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[23] The Region responded as follows:

> Regarding your comments about the location of the proposed injection well, the injection well surface facility is under the jurisdiction of the Michigan Department of Environmental Quality (MDEQ). The USEPA permit for an injection well conveys permission to inject salt water based on USEPA's findings that the construction and operation details of the well are such that injection may be done in an environmentally safe manner. If you should have any question regarding surface facilities, such as the location and the impact of the proposed injection well in reference to the area watershed we suggest that you contact * * * MDEQ * * *.

A.R. Response to Comment Letter at 2; Res. Ex. D.

applicable UIC regulations. *In re Federated Oil & Gas*, 6 E.A.D. 722, 725 (EAB 1997). Generalized concerns that are not related to particular permit terms are not suitable for Board review. *In re American Soda, LLP*, UIC Appeal Nos. 00-1 & 00-2, slip op. at 22 n.17 (EAB, June 30, 2000), 9 E.A.D. __; *In re Envtl. Disposal Sys., Inc.*, 8 E.A.D. 23, 35 (EAB 1998). Nowhere in his petition does Mr. Ziegler identify a permit condition that violates the SWDA or the UIC regulations, nor does he explain how the projected construction or operation of the well will violate the Act and its regulations.

In addition, as previously explained, the applicant's selection of a site is out of the narrow and clearly defined ambit of responsibility of the Region. As we stated in *Envotech*, fundamental issues such as siting of the wells, are a matter of state or local jurisdiction rather than a legitimate inquiry for EPA, except to the extent that a petitioner can show that a well cannot be sited at its proposed location without necessarily resulting in violations of the SDWA or UIC regulations. *Envotech*, 6 E.A.D. at 272. Petitioner here failed to make such showing.

With respect to the specific requirements of section 146.22(a), the Region explains that: "The record information of the geologic structure in this area do not indicate any open faults or fractures in the confining zone to be used for this well in the fixed area of review." Region's Response at 9. Therefore, the Region reasons, "the well location, construction and operation are in accordance with the requirements of 40 C.F.R. part 146, subpart C." *Id.* Petitioner did not provide any evidence to rebut the Region's conclusions. In the absence of such evidence, we will not second-guess the Region's technical judgment.

As to impacts on surface water that might affect USDWs, Petitioner has not alleged with specificity any such impacts here.[24]

Finally, to the extent that Petitioner raises generalized issues about MDEQ's "poor environmental track record", that by itself would not be a basis for appeal absent some showing of the

[24] Further, to the extent that this argument purports to challenge the adequacy of the Region's analysis, this particular argument should have been raised during the public comment period.

inadequacy of specific permit terms. *See, e.g., In re Envtl. Disposal Sys., Inc.*, 8 E.A.D. 23, 35 (EAB 1998); (rejecting argument that Michigan Department of Environmental Quality does not have adequate staff or financial resources to properly oversee an injection well as a basis for appeal on the grounds that that argument "does not challenge the validity of any particular provision" of the permit); *In re Brine Disposal Well*, 4 E.A.D. 736, 746 (EAB 1993) (rejecting argument that EPA's inspection capabilities are inadequate as a basis to review UIC permit decision because argument does not "directly call into question the propriety of any specific permit term").

E. *Notice Requirement*

Petitioner's final challenge is that the Region did not comply with the public notice requirements of 40 C.F.R. § 124.10.[25] More specifically, Petitioner contends that the

[25] We note that one could plausibly argue that this particular issue was reasonably ascertainable during the public comment period. For instance, one can argue that given that the applicable regulations provide for the development of mailing lists to be used for purposes of public notice, and petitioners are charged with knowledge of the regulations, *see supra* note 18, (continued...)

Region failed to comply with the requirements in section 124.10(c)(1)(ix)[26] because the Region did not give notice of the draft permit to participants from past water quality permit proceedings, and the Region failed to use the public press to

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[25](...continued)
any doubts Petitioner might have had about the development and utilization of such lists during the proceedings below should have been raised below. However, we need not make this determination since we find, as discussed below, that Petitioner lacks standing to appeal this issue in any event.

[26] Section 124.10(c)(1)(ix) provides in relevant part:

> Public notice * * * shall be given by the following methods:
>
> (1) By mailing a copy of a notice to the following persons * * *;
>
> * * * *
>
> (ix) Persons on a mailing list developed by:
>
> (A) Including those who request in writing to be on the list;
>
> (B) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and
>
> (C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals.

40 C.F.R. § 124.10(c)(1)(ix).

notify the public of its opportunity to be included in a mailing list that the Region should have developed for purposes of public notice. Petition at 3. Petitioner also claims that the Region failed to comply with section 124.10(c)(1)(x)[27] because it did not give notice to the Antrim Conservation District, which, according to Petitioner, is a local government unit with jurisdiction over the area where the underground injection facility is to be located. *Id.*

The Region, for its part, alleges that it complied with the requirements of section 124.10(c)(1). The Region indicates that it gave notice to (1) all landowners within a 1/4 mile of the proposed well, which included Petitioner Ziegler; (2) two libraries in the area (to serve as repositories of the draft permit); (3) USFWS and the State of Michigan State Historic Preservation Office (to confirm that no historic properties would

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[27] Section 124.10(c)(1)(x) establishes that notice should be given:

> (A) To any unit of local government having jurisdiction over the area where the facility is proposed to be located; and (B) To each State agency having any authority under State law with respect to the construction or operation of such facility.

40 C.F.R. § 124.10(c)(1)(x)(A), (B).

be affected by the proposed well); and (4) the Michigan Coastal Management Program, because Antrim County borders the Great Lakes. Region's Response at 10. The draft permit was also made available through the Internet at the Region's official web page. *Id.* Finally, the Region explains that it does not believe that the Antrim Conservation District is one of the entities to which specific notice is required for it is not a "unit of local government having jurisdiction" within the meaning of 40 C.F.R. § 124.10(c)(1)(x)(A). *Id.* at 10-11.

Upon review, we conclude that Petitioner lacks standing[28] to raise these challenges.

In the past, we have required that any person complaining about the adequacy of notice of a draft permit provided to another person have standing on his or her own to raise these

[28] Standing in this context refers to the right of a petitioner to present a legal issue for judicial resolution. The Black's Law Dictionary defines this concept ("standing to sue") as "a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether litigant is the proper party to fight the lawsuit * * *." Black's Law Dictionary 1405 (6th ed. 1990).

concerns.[29] *See In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31 (EAB 1994). Technical violations of the type alleged here -- violations of the requirements of section 124.10 -- have been deemed harmless when the person complaining about the errors has failed to demonstrate how the alleged errors affected the proceedings during the public comment period, or how the person was in any way harmed or prejudiced by the alleged violations. *Id.* at 79. In *J&L Specialty*, a case involving a very similar issue,[30] the Board declined to remand a permit as a result of notice concerns because the petitioner in that case failed to demonstrate how the Region's alleged technical violations of

[29] This requirement is consistent with the well-settled prudential limitation on standing that requires plaintiffs to assert their own rights and not rest upon the rights of others. *See Region 8 Forest Serv. Timber Purchasers v. Alcock*, 993 F.2d 800, 809 (11th Cir. 1993)(indicating that plaintiffs must assert their own rights and may not rest upon rights of others; courts will deviate from this limitation only when plaintiff seeking to assert the third party's rights has otherwise suffered an injury in fact, the relationship between plaintiff and the third party is such that the plaintiff is nearly as effective proponent of the third party's rights as the third party itself, and there is some obstacle to the third party asserting the right)(citing *Singleton v. Wulff*, 428 U.S. 106, 113-16 (1976); *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

[30] Petitioner in *J&L Specialty* contended that the public notice of the draft permit was defective because it was not mailed to all parties specified in 40 C.F.R. § 124.10. *See J&L Specialty,* 5 E.A.D. at 79.

section 124.10 harmed the petitioner or affected the permit issuance process. *Id.*[31]

In the instant case, Petitioner has failed to explain how these alleged errors have caused him any harm.[32] Petitioner has

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[31] In *J&L Specialty*, the Board stated:

> Assuming that these alleged technical violations of § 124.10 occurred, as J&L maintains, J&L fails to explain how it has been harmed by the Region's error, for example, by discussing how the error relates to any condition of the permit, or how the permit may have been different had the notice been mailed to such parties. Absent any alleged harm to J&L, we fail to see how J&L would have standing to complain about someone else allegedly not being mailed notice of the draft permit. Under these circumstances, we do not feel compelled to remand this entire permit to start all over again at the public notice phase, as J&L suggests. * * * Because J&L has failed to demonstrate how the Region's alleged technical violations of § 124.10 affected these proceedings, or that it was in any way prejudiced by these alleged violations, we conclude that such violations, even if they occurred, were harmless, and do not invalidate the permit issuance.

J&L Specialty, 5 E.A.D. at 79.

[32] We find striking that even though Petitioner intimates that the reason a public hearing was not conducted was the Region's alleged failure to comply with all the requirements in section 124.10, Petitioner himself did not submit a request for a public hearing with his comments on the draft permit. Under section 124.11 "any interested person may request a public hearing, if no hearing has already been scheduled." 40 C.F.R. § 124.11.

also failed to substantiate his allegations about how the proceedings below would have been different if past participants from other water quality proceedings or the Antrim Conservation District had been notified.[33]

In light of the above, we see no reason to deviate from prior Board precedent.[34] We therefore conclude that such violations, even if they occurred, were harmless, and do not invalidate the permit issuance.

[33] We have stated in the past that "mere allegations of error" are not enough to warrant review. *In re Hadson Power 14 Buena Vista*, 4 E.A.D. 258, 294 n.54 (EAB 1992). To warrant review allegations must be specific and *substantiated*. *In re New England Plating,* NPDES Appeal No. 00-7, slip op. at 16, (EAB, Mar. 29, 2001), 9 E.A.D. __ (emphasis added). Petitioner must not only identify disputed issues but demonstrate the specific reasons why review is appropriate. *Id.; Hadson Power*, 4 E.A.D. at 294 n.54; *In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992).

[34] Given Petitioner's lack of standing, we do not find it necessary to determine whether the Antrim Conservation District falls within the meaning of section 124.10(c)(1)(x) -- "unit of local government having jurisdiction over the area where the facility is proposed to be located."

IV. *CONCLUSION*

For all the foregoing reasons Mr. Ziegler's petition for review is hereby denied.

So ordered.[35]

ENVIRONMENTAL APPEALS BOARD

Dated: 09/04/02 By: /s/

Edward E. Reich
Environmental Appeals Judge

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of MCN Oil and Gas Company, UIC Appeal No. 02-03, were sent to the following persons in the manner indicated:

By First Class Mail Postage Prepaid:

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Dated: 09/05/02

/s/
Annette Duncan
Secretary